SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

MARCH 20, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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KA 14-00465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY GILLARD, DEFENDANT-APPELLANT.

JERRY GILLARD, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL 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 Onondaga County Court (Thomas J. Miller, J.), dated February 25, 2014. The order denied defendant's motion pursuant to CPL 440.10 and 440.20 to, among other things, vacate the judgment convicting defendant of attempted criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.10 and 440.20 seeking to vacate the judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [former (4)]) or to set aside the sentence imposed thereon. County Court properly concluded that defendant should have been sentenced as a second felony offender to a period of five years' postrelease supervision rather than a period of one and a half years (*see People v Hawkins*, 45 AD3d 989, 992, *lv denied* 9 NY3d 1034; *People v Jordan*, 21 AD3d 907, 908, *lv denied* 5 NY3d 883). The court properly declined to vacate the judgment or set aside the sentence, however, inasmuch as defendant completed serving his sentence of incarceration and postrelease supervision and the Double Jeopardy clause precluded a resentence adding to the period of postrelease supervision (*see People v Williams*, 14 NY3d 198, 217, *cert denied* ___US ___, 131 S Ct 125). Further, inasmuch as defendant is subject to "lifetime parole supervision, the imposition of postrelease supervision following his imprisonment for [attempted criminal possession of a weapon] is duplicative and does not deprive him of the benefit of his plea

bargain" (*People v Haynes*, 14 AD3d 789, 791, *lv denied* 4 NY3d 831).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 13-00410

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN P. BRAHNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

RYAN P. BRAHNEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 25, 2012. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree (two counts), burglary in the first degree (two counts), criminal possession of a weapon in the fourth degree and criminal contempt in the first degree (two counts).

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

Same memorandum as in *People v Brahney* ([appeal No. 2] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 13-01456

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN P. BRAHNEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

RYAN P. BRAHNEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Cayuga County Court (Thomas G. Leone, J.), rendered December 3, 2012. Defendant was resentenced as a second felony offender.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a bench trial of, inter alia, two counts each of murder in the second degree (Penal Law § 125.25 [1], [3] [intentional and felony murder]), burglary in the first degree (§ 140.30 [2], [3]), and criminal contempt in the first degree (§ 215.51 [b] [v], [vi]). In appeal No. 2, defendant appeals from a resentence based upon County Court's failure to sentence him as a second felony offender (*see generally* CPL 400.21 [4]). According to the evidence presented at trial, defendant unlawfully entered the home of his former girlfriend and their three-year-old son, while they were asleep, and stabbed his former girlfriend 38 times, causing her death.

Contrary to defendant's contention in appeal No. 1, the verdict of guilty of intentional murder is not against the weight of the evidence inasmuch as he failed to prove by a preponderance of the evidence that he "acted under the influence of extreme emotional distress for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in [his] situation under the circumstances as [he] believed them to be" (Penal Law § 125.25 [1] [a]; *see* § 25.00 [2]). The evidence established that defendant was very angry when he observed a man, who had recently been released from prison for a drug-related conviction, at the home of his former girlfriend earlier in the

evening. Defendant returned to her home a few hours later, at which time he broke a window, entered the apartment, and dragged the victim downstairs and killed her. Following his arrest, defendant made several statements justifying his behavior on the alleged ground that his former girlfriend had exposed his son to drugs and to "drug dealers."

Defendant presented the testimony of his expert psychologist who opined that defendant had an underlying and undiagnosed condition of bipolar disorder that was at the root of his inability to control his rage with respect to his perception that the victim was exposing his son to drug use. Defendant's expert stated that defendant engaged in a "frenzied attack" and that he had a "spotty" memory regarding the attack. The People presented the testimony of their expert psychiatrist who disagreed that defendant had bipolar disorder and opined that defendant displayed the classic traits of antisocial personality disorder. The People's expert further testified that defendant "is a violent man," as evidenced by his criminal history of violent crimes, and he opined that defendant's concern for his son was reasonable, but that his actions in response to that concern were not. The People also presented evidence that defendant stated in a recorded jail telephone call approximately three months prior to the murder that he "was going to . . . murder her" and that he was going "take [his] jack knife and carve her . . . neck out." Defendant did not mention that he was concerned about his son's welfare during that conversation.

It is well established that "a brutal assault would not itself suffice to demonstrate extreme emotional disturbance" (*People v McKenzie*, 19 NY3d 463, 467; *see People v Roche*, 98 NY2d 70, 77-78; *People v Mohamud*, 115 AD3d 1227, 1228-1229, *lv denied* 23 NY3d 965). Although the Legislature recognized that "some homicides are worthy of mitigation because they 'result from an understandable human response deserving of mercy' " (*Roche*, 98 NY2d at 75; *see People v Harris*, 95 NY2d 316, 318; *People v Casassa*, 49 NY2d 668, 680-681, *cert denied* 449 US 842), that is not the case here.

Defendant further contends in appeal No. 1 that the court failed to comply with CPL 710.60 inasmuch as the court granted his pretrial motion seeking a *Huntley* hearing but failed to conduct one. We conclude that, by failing to object to the testimony of the arresting officer and the three witnesses who heard defendant make inculpatory statements during a standard suicide risk assessment during the booking process, defendant waived his right to a *Huntley* hearing with respect to those inculpatory statements (*see People v Wilson*, 90 AD3d 1155, 1155, *lv denied* 18 NY3d 963). Although defense counsel objected to references in the prosecutor's opening statement to inculpatory statements made by defendant during recorded telephone calls with family members, those statements are not subject to a CPL 710.30 notice or a *Huntley* hearing inasmuch as they were not made to a "public servant" (CPL 710.30 [1]). We conclude that defendant did not waive a *Huntley* hearing with respect to an inculpatory statement he made to an officer while in a holding cell because he objected to the

testimony at trial, and the objection was overruled following an off-the-record discussion. We therefore conclude that the court erred in permitting the testimony without conducting a *Huntley* hearing, or stating on the record its determination of that part of defendant's motion seeking to suppress that statement (*see* CPL 710.60 [6]; *see generally People v Pallagi*, 91 AD3d 1266, 1267-1268). We nevertheless conclude that the error is harmless. We note that the record establishes that the statement was spontaneous and not " 'the product of an interrogation environment [or] the result of express questioning or its functional equivalent' " (*People v Sierra*, 85 AD3d 1659, 1660, *lv denied* 17 NY3d 905). The evidence of defendant's guilt is overwhelming, and we conclude that there is no reasonable possibility that the error contributed to the conviction (*see generally People v Crimmins*, 36 NY2d 230, 237).

Defendant failed to preserve for our review his contention in appeal No. 2 that the court punished him for exercising his right to a trial by imposing a sentence more severe than that offered as part of the plea agreement (*see People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). In any event, we conclude that defendant's contention is without merit. "[T]here is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*id.*).

We reject defendant's further contention in appeal No. 2 that the court erred in directing that the sentences on the two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]), which run concurrently with each other, shall run consecutively to the sentence imposed on the count of intentional murder (§ 125.25 [1]). Defendant was convicted of burglary for unlawfully entering the victim's dwelling, with the aggravating factors of causing physical injury to the victim (§ 140.30 [2]), and using or threatening the immediate use of a dangerous instrument (§ 140.30 [3]), i.e., a butcher knife. Defendant was charged with intentionally causing the victim's death by repeatedly stabbing her with a butcher knife. It is well established that, in considering whether sentences must run concurrently under Penal Law § 70.25 (2), "the court must determine whether the [actus reus] element is, by definition, the same for both offenses (under the first prong of the statute), or if the [actus reus] for one offense is, by definition, a material element of the second offense (under the second prong)" (*People v Laureano*, 87 NY2d 640, 643). "[W]hen the actus reus is a *single inseparable act* that violates more than one statute, single punishment must be imposed" (*People v Frazier*, 16 NY3d 36, 41 [internal quotation marks omitted]; *see People v Parks*, 95 NY2d 811, 814; *Laureano*, 87 NY2d at 645). Although the actus reus elements of the burglary counts and the murder count overlap under the facts presented here, we nevertheless conclude that the People "establish[ed] the legality of consecutive sentencing by showing that the 'acts or omissions' committed by defendant were separate and distinct acts" (*Laureano*, 87 NY2d at 643). The evidence established that, after defendant entered the apartment through a window that he smashed with a cinder block, he dragged the victim from her bed and

down the stairs to the living room, where he killed her.

We agree with our dissenting colleagues that the blood evidence located on the wall of the upstairs hallway and on the stairs establishes that defendant caused physical injury to the victim while she was still upstairs. We note, however, that the photographic evidence demonstrates that there was a small blood smear on the wall of the upstairs hallway and drops of blood on the stairs. By contrast, there was a tremendous amount of blood evidence in the downstairs of the dwelling where the victim died. Furthermore, in a recorded telephone conversation to his mother, defendant stated that he "dragged [the victim] down the stairs and murdered her." We conclude that the location and amount of blood evidence in the upstairs and in the downstairs of the dwelling confirm this statement. We therefore conclude that the People established that there were separate offenses, i.e., that the burglary was completed while the victim was still upstairs and that the murder occurred downstairs (*see People v Yong Yun Lee*, 92 NY2d 987, 988-989; *cf. People v Wright*, 19 NY3d 359, 366-367; *Laureano*, 87 NY2d at 645). Thus, we conclude that the burglary and the murder offenses were "committed through separate acts, though they are part of a single transaction" (*People v Brown*, 80 NY2d 361, 364; *see People v Brathwaite*, 63 NY2d 839, 843; *People v Walker*, 117 AD3d 886, 887, *lv denied* 24 NY3d 965). Also contrary to defendant's contention in appeal No. 2, the resentence is not unduly harsh and severe.

Defendant contends in his pro se supplemental brief with respect to appeal No. 1 that he was denied his right to due process because he did not give a knowing and voluntary consent to the stipulation that he caused the victim's death; he was denied his right to be present at sidebar conferences; he was not adequately advised of his right to testify; and he was denied effective assistance of counsel. The record establishes that defendant's consent to the stipulation, which he signed and which was reviewed on the record, was knowing and voluntary. The record also establishes that the sidebar conferences involved legal issues, and not " 'factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the People's position' " (*People v Spotford*, 85 NY2d 593, 596), and thus he did not have a right to be present. Based upon remarks that defendant made during the prosecutor's summation, we conclude that he understood that he had the right to testify. To the extent that defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel involves matters that appear on the record, we conclude that they are without merit and that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that his contentions involve matters outside the record, they must be raised by a motion pursuant to CPL article 440 (*see People v Washington*, 122 AD3d 1406, 1406).

All concur except CENTRA and LINDLEY, JJ., who dissent and vote to modify in accordance with the following memorandum: We respectfully dissent inasmuch as we agree with defendant that County Court erred in directing that the sentences on the two counts of burglary in the

first degree (Penal Law § 140.30 [2], [3]), which run concurrently with each other, shall run consecutively to the sentence imposed on the count of intentional murder in the second degree (§ 125.25 [1]). In our view, the consecutive sentences are illegal under the facts of this case.

Pursuant to the two prongs set forth in Penal Law § 70.25 (2), the court is required to impose concurrent sentences where a single act constitutes two different offenses, or a single act constitutes both one of the offenses charged and a material element of the other (*see People v Parks*, 95 NY2d 811, 814-815; *People v Laureano*, 87 NY2d 640, 643). Where separate acts are committed in the course of a criminal transaction, or where one act does not constitute a material element of a charged crime, the court may, in its discretion, impose consecutive sentences (*see People v Bryant*, 92 NY2d 216, 230-231; *People v Brown*, 80 NY2d 361, 363-364). Whether a court has the discretion to impose consecutive sentences thus depends on an analysis of the statutory definition of the actus reus for each offense (*see Laureano*, 87 NY2d at 643; *People v Day*, 73 NY2d 208, 211).

Here, the People failed to meet their burden of establishing that the burglary and murder offenses were committed by separate and distinct acts (*see Laureano*, 87 NY2d at 643; *see generally People v Rosas*, 8 NY3d 493, 496). Defendant was convicted of murdering the victim by stabbing her repeatedly with a knife (*see* Penal Law § 125.25 [1]), and was convicted of burglarizing the victim's residence by entering her dwelling with the intent to commit a crime therein and causing physical injury to her (§ 140.30 [2]) and using or threatening the immediate use of a knife (§ 140.30 [3]). Contrary to the People's contention, the burglary was not complete as soon as defendant entered the victim's dwelling. This would be true if defendant had been charged and convicted of burglary in the second degree (*see* § 140.25 [2]; *People v Frazier*, 16 NY3d 36, 41). Defendant, however, was charged and convicted of two counts of burglary in the first degree, which required the People to establish that, in addition to entering and remaining unlawfully in a dwelling with the intent to commit a crime therein, defendant caused physical injury to the victim and used or threatened the immediate use of a dangerous instrument (§ 140.30 [2], [3]).

To show that the burglary and murder offenses were committed through separate and distinct acts, the People must point to "identifiable facts" in the record (*People v Ramirez*, 89 NY2d 444, 451; *see Laureano*, 87 NY2d at 644). At trial, a recorded phone call from defendant while he was in jail to his mother was played to the court, in which defendant stated that he went inside the victim's residence, dragged her down the stairs and murdered her. A police officer testified at trial that he found the victim with multiple stab wounds in the downstairs of the residence. There were signs of a struggle in the master bedroom upstairs, and the victim had defensive wounds. There was blood "all over the place" downstairs, and there was also some blood on the wall outside the master bedroom, on the landing, on the wall next to the staircase, and on the stairs. The parties stipulated that the forensic analysis showed that it was the

victim's blood on the wall upstairs and on the staircase. The Medical Examiner testified that the victim sustained 38 knife wounds. He did not specify which of the wounds sustained by the victim was fatal, but rather testified that she died as a result of multiple stab wounds to the neck, chest, and back.

The majority concludes that the burglary was completed while the victim was still upstairs, and that she was not murdered until after she was dragged downstairs, and thus that the burglary and murder offenses were committed through separate acts. In our view, we cannot determine that the burglary and murder offenses were separate and distinct because it is possible that the act of causing physical injury to the victim and using the knife was also the act that caused her death. Considering the fact that the victim's blood was found upstairs and on the staircase, it is apparent that defendant stabbed the victim at least once while they were upstairs, which would complete the burglary offenses. Unlike the majority, however, we conclude that the murder offense may also have occurred through that same act. In other words, the wound or wounds that the victim sustained while upstairs may have ultimately caused her death. Where, as here, the People failed to meet their burden, concurrent sentences are required (*see People v Amato*, 1 AD3d 713, 716-717, *lv denied* 1 NY3d 594). We would therefore modify the resentence by directing that the sentences imposed for the counts of burglary in the first degree shall run concurrently with the sentence imposed for intentional murder in the second degree.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 13-00189

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ODELL WILKENS, ALSO KNOWN AS ODELL WILKINS,
DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

ODELL WILKENS, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO 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 (Thomas P. Franczyk, J.), dated December 11, 2012. The order denied the motion of defendant pursuant to CPL 440.10 (1).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum:

Defendant appeals from an order denying his pro se motion pursuant to CPL article 440 seeking to vacate that part of a judgment convicting him, following a jury trial, of depraved indifference murder (Penal Law § 125.25 [2]). In his motion, defendant contended that he was convicted of that crime in violation of his right to due process under the state and federal constitutions (*see* CPL 440.10 [1] [h]), inasmuch as the evidence at trial was legally insufficient to establish that he acted with the requisite mens rea for depraved indifference murder. Although defendant challenged the sufficiency of the evidence on direct appeal and we affirmed (*People v Wilkens*, 8 AD3d 1074, *lv denied* 3 NY3d 683), defendant asserted in his motion that the common law definition of “depraved indifference” was thereafter changed in his favor by the Court of Appeals before his judgment became final. County Court denied defendant’s motion without a hearing, concluding that the law regarding depraved indifference murder did not change until *People v Feingold* (7 NY3d 288), which was decided after defendant’s judgment became final. We do not agree with the court’s determination in that regard, and we therefore remit the matter to County Court for a ruling on the merits of defendant’s

motion.

On July 31, 2001, defendant shot and killed the victim at a recreation center in Buffalo. The shooting occurred after defendant argued with the victim over whose team would play the next game of basketball. Following the argument, defendant left the recreation center and then returned approximately 10 minutes later with a loaded handgun, which he used to shoot the victim once in the torso from close range. The bullet passed through the victim's kidney, liver, diaphragm and aorta, causing his death. No other shots were fired. Defendant was thereafter arrested and charged with intentional murder, depraved indifference murder, and criminal possession of a weapon in the second degree. At trial, defendant testified that the shooting was accidental, and that the gun somehow discharged while he was struggling with the victim. The jury acquitted defendant of intentional murder but convicted him of depraved indifference murder and the weapons offense.

On appeal, we concluded that, because defendant made only a general motion for a trial order of dismissal, his challenge to the sufficiency of the evidence was not preserved for our review (*Wilkens*, 8 AD3d at 1074-1075). We further concluded that, in any event, defendant's contention lacked merit. We wrote in relevant part: "We reject defendant's contention that the evidence supports only a theory of intentional murder and not depraved indifference murder (*see e.g. People v Gonzalez*, 1 NY3d 464 [2004]). Although the evidence at trial could support the conclusion that defendant intended to kill the victim, it also could support the conclusion that, under circumstances evincing a depraved indifference to human life, defendant recklessly engaged in conduct that created a grave risk of death to another person (*see* Penal Law § 125.25 [2])" (*id.* at 1075). On August 4, 2004, the Court of Appeals denied defendant's application for leave to appeal, meaning that the judgment became final 90 days later, on November 2, 2004 (*see Policano v Herbert*, 7 NY3d 588, 593).

At the time of defendant's trial, in 2002, the elements of depraved indifference murder were defined by *People v Register* (60 NY2d 270, *cert denied* 466 US 953), which held that the statutory language "under circumstances evincing a depraved indifference to human life" did not identify a culpable mental state, or mens rea; instead, the "depraved indifference" language stated "a definition of the factual setting in which the risk creating conduct must occur" (*id.* at 276). In other words, recklessness was the mens rea for depraved indifference murder (*see Policano*, 7 NY3d at 597). Beginning in 2003, however, the Court decided a series of cases — including *People v Hafeez* (100 NY2d 253), *People v Payne* (3 NY3d 266, *rearg denied* 3 NY3d 767) and *People v Suarez* (6 NY3d 202) — that culminated in 2006 with *People v Feingold* (7 NY3d 288), which explicitly overruled *Register* and held that "depraved indifference to human life is a culpable mental state" (*id*. at 294). Defendant's judgment became final after *Hafeez* and *Payne* but before *Suarez* and *Feingold*.

As noted, the motion court determined that the law regarding depraved indifference murder did not change until *Feingold*, and that

defendant is therefore not entitled to any benefit under the new law. We agree with the Third Department, however, that "the law changed on October 19, 2004, when the Court decided *People v Payne*" (*People v Baptiste*, 51 AD3d 184, 185, *lv denied* 10 NY3d 932; *see generally Epps v Poole*, 687 F3d 46, 55, *cert denied* ___ US ___, 133 S Ct 1499; *Baptiste v Ercole*, 766 F Supp 2d 339, 353-355). Indeed, it was in *Payne* that the Court of Appeals first held that, absent unusual circumstances, "a one-on-one shooting or knifing (or similar killing) can almost never qualify as depraved indifference murder" (3 NY3d at 272). Although the new law on depraved indifference murder does not apply retroactively to judgments that became final prior to the change (*see Policano*, 7 NY3d at 603-604), defendant's judgment of conviction did not become final until after *Payne* was decided.

We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on the merits of defendant's motion.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00976

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered April 3, 2013. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the complaint insofar as the first cause of action alleges that defendant breached its duty to protect plaintiff from foreseeable harm caused to him by other inmates at the Erie County Correctional Facility, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of having been sexually assaulted twice by another inmate at the Erie County Correctional Facility, a county jail maintained by defendant (*see* County Law § 217) and operated by the Erie County Sheriff, who has been sued by plaintiff in a separate action (*see Villar v Howard*, ___ AD3d ___ [Mar. 20, 2015]), decided herewith. By the order in appeal No. 1, Supreme Court granted defendant's motion to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]), on various alternative grounds. By the order in appeal No. 2, the court denied plaintiff's motion for leave to amend the complaint to assert a cause of action pursuant to 42 USC § 1983. We note at the outset that we affirm the order in appeal No. 2 for the reasons set forth in our decision in the companion case (*see Villar*, ___ AD3d at ___).

We agree with plaintiff in appeal No. 1 that the court erred in granting defendant's motion and dismissing the complaint in its entirety on the ground that it owed no duty of care to plaintiff, who was being held in jail on a pending criminal charge at the time of the

assaults. It is well settled that "[a] municipality owes a duty to inmates in correctional facilities to safeguard them from foreseeable assaults [by] other inmates" (*Brown v City of New York*, 95 AD3d 1051, 1052; *see Smith v County of Albany*, 12 AD3d 912, 913; *see generally Sanchez v State of New York*, 99 NY2d 247, 252-253). "[T]his duty does not render the municipality an insurer of inmate safety, and negligence cannot be established by the mere occurrence of an inmate assault . . . Rather, 'the scope of the [municipality's] duty to protect inmates is limited to risks of harm that are reasonably foreseeable' " (*Barnette v City of New York*, 96 AD3d 700, 701, quoting *Sanchez*, 99 NY2d at 253). We therefore modify the order in appeal No. 1 by denying defendant's motion in part and reinstating that part of the first cause of action alleging that defendant breached the duty it owed to plaintiff to protect him from foreseeable assaults committed by other inmates.

We further conclude, for the reasons set forth in the companion case, that the court erred at this juncture in determining as a matter of law that defendant is immune from liability because its alleged negligence arises from discretionary acts for which it is entitled to governmental immunity (*see Villar*, ___ AD3d at ___).

The court, however, properly granted those parts of defendant's motion to dismiss the second cause of action and that part of the first cause of action seeking to hold defendant vicariously liable for the negligence of the Sheriff or the Sheriff's deputies. Defendant "may not be held responsible for the negligent acts of the Sheriff and his deputies on the theory of respondeat superior, in the absence of a local law assuming such responsibility" (*Marashian v City of Utica*, 214 AD2d 1034, 1034; *see Trisvan v County of Monroe*, 26 AD3d 875, 876, *lv dismissed* 6 NY3d 891), and here there is no such local law (*see Mosey v County of Erie*, 117 AD3d 1381, 1385; *cf. Barr v County of Albany*, 50 NY2d 247, 255-257). Finally, the court properly granted that part of defendant's motion to dismiss the complaint insofar as it seeks an award of punitive damages, which are not recoverable against the State or its political subdivisions (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 386; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1142).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00977

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered April 3, 2013. The order denied the motion of plaintiff for leave to amend his complaint.

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

Same memorandum as in *Villar v County of Erie* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00978

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF ERIE, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 21, 2013. The order denied the motion of plaintiff for leave to reargue.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00979

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered April 3, 2013. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion in part and reinstating the complaint except to the extent that it alleges that defendant is vicariously liable for the negligence of his deputy sheriffs, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a result of having been sexually assaulted twice by another inmate at the Erie County Correctional Facility, which is operated by defendant. The assaults occurred on consecutive days in the same shower stall, while plaintiff was being held in custody on a pending criminal charge. In the first cause of action, plaintiff alleged that defendant breached his duty to protect him from foreseeable harm resulting from assaults committed by other inmates, and that defendant had actual knowledge of the dangerous propensities of the person who assaulted him. Plaintiff further alleged in the first cause of action that defendant is vicariously liable for the negligence of deputy sheriffs and other employees who worked in the jail. In the second cause of action, plaintiff alleged that defendant negligently trained and supervised the deputy sheriffs who worked in the jail.

By the order in appeal No. 1, Supreme Court granted defendant's motion to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]). The court agreed with defendant that plaintiff failed to serve a timely notice of claim, as required by

General Municipal Law § 50-e. In addition, the court agreed with defendant that, in any event, he owed no duty of care to plaintiff, any negligence that could be attributed to him involved discretionary acts for which he had governmental immunity, and he cannot be held vicariously liable for the negligence of his deputies. By the order in appeal No. 2, the court denied plaintiff's subsequent motion for leave to amend the complaint to assert a cause of action pursuant to 42 USC § 1983 and, by the order in appeal No. 3, the court denied plaintiff's motion for leave, inter alia, to renew both defendant's motion to dismiss and his motion for leave to amend the complaint. These appeals ensued.

We agree with plaintiff in appeal No. 1 that the court erred in granting defendant's motion based on plaintiff's failure to serve a timely notice of claim. Service of a notice of claim upon a public corporation is not required for an action against a county officer, appointee, or employee unless the county "has a statutory obligation to indemnify such person under [the General Municipal Law] or any other provision of law" (General Municipal Law § 50-e [1] [b]) and, here, Erie County has no statutory obligation to indemnify defendant. Plaintiff "was not required to file a notice of claim naming [defendant] in his official capacity prior to commencing" an action against defendant (*Mosey v County of Erie*, 117 AD3d 1381, 1386).

We further conclude that the court erred in determining that defendant owed no duty of care to plaintiff. Pursuant to Correction Law § 500-c, a sheriff has a "duty to 'receive and safely keep' prisoners in the jail over which he has custody" (*Freeland v Erie County*, 122 AD3d 1348, 1350; *see Kemp v Waldron*, 115 AD2d 869, 870-871), and plaintiff's first cause of action is based on an alleged violation of that duty to him. A sheriff may also be held liable for negligent training and supervision of the deputy sheriffs who worked in the jail (*see Mosey*, 117 AD3d at 1386; *Bardi v Warren County Sheriff's Dept.*, 194 AD2d 21, 24), which forms the basis of plaintiff's second cause of action.

We reject defendant's contention that the court properly determined that he is immune from liability because his alleged negligence arises from discretionary acts for which he is entitled to governmental immunity. In the context of this CPLR 3211 motion, the issue whether defendant's alleged acts of negligence "were discretionary and thus immune from liability 'is a factual question which cannot be determined at the pleading stage' " (*Mosey*, 117 AD3d at 1384, quoting *CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286). We further conclude, however, that the court properly granted defendant's motion to the extent that plaintiff alleges that defendant is vicariously liable for the negligence of his deputies (*see Barr v County of Erie*, 50 NY2d 247, 257; *Trisvan v County of Monroe*, 26 AD3d 875, 876). We therefore modify the order in appeal No. 1 by denying defendant's motion in part and reinstating the complaint except to the extent that it alleges that defendant is vicariously liable for the negligence of his deputies.

We conclude with respect to the order in appeal No. 2 that the

court did not abuse its discretion in denying plaintiff's motion for leave to amend the complaint to assert a cause of action under 42 USC § 1983, inasmuch as plaintiff has asserted such a claim against defendant in an action pending in federal court (*see generally Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959; *Davis v Wyeth Pharms., Inc.*, 86 AD3d 907, 908). Finally, we dismiss as abandoned the appeal from the order in appeal No. 3 because plaintiff has not raised any contentions on appeal with respect thereto (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00980

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered April 3, 2013. The order denied the motion of plaintiff for leave to amend his complaint.

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

Same memorandum as in *Villar v Howard* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00981

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

ADAM VILLAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

CONNORS & VILARDO, LLP, BUFFALO (PAUL A. WOODARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KENNETH R. KIRBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 21, 2013. The order denied the motion of plaintiff seeking leave to renew.

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

Same memorandum as in *Villar v Howard* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CA 14-01274

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

BRIAN SCHNEIDER AND SHELLEY SCHNEIDER,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

GREG E. BOBERG, INDIVIDUALLY AND DOING
BUSINESS AS GREG BOBERG CONSTRUCTION,
DEFENDANT-RESPONDENT-APPELLANT.

BROWN CHIARI LLP, LANCASTER (NELSON E. SCHULE, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered March 21, 2014. The order denied the motion of plaintiffs for partial summary judgment, and granted in part and denied in part the cross motion of defendant for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 9, 2015,

It is hereby ORDERED that said appeal and cross appeal are dismissed without costs upon stipulation.

All concur except FAHEY, J., who is not participating.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 09-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIMMY W. GIBSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 25, 2008. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), defendant contends that Supreme Court abused its discretion in denying his request for assignment of new counsel. We agree, and we therefore reverse the judgment and grant a new trial.

Defendant requested new counsel in a letter he sent to the court approximately one month prior to trial, and two weeks later defense counsel himself moved to withdraw as assigned counsel. Defense counsel stated in his letter-motion that he was "unable to communicate effectively" with defendant and that he could therefore no longer represent him. At the next court appearance, which was ten days before trial, defendant specifically outlined his grievances against defense counsel and stated that he could not communicate with him. The court then turned to defense counsel, who stated that his most recent meeting with defendant was "rather antagonistic" and that he too believed that there had been an irreparable breakdown in the attorney-client relationship. Defense counsel described his motion to withdraw as a "drastic measure," noting that he had never before made such a request. In denying defendant's request for new counsel and defense counsel's motion to be relieved of the assignment, the court stated, inter alia, that a lack of communication between a defendant and his attorney does not constitute good cause for appointment of

substitute counsel, "[e]specially when there may be some indication that lack of communication was initiated or promoted by the defendant as opposed to defense counsel."

The determination "[w]hether counsel is substituted is within the discretion and responsibility of the trial judge . . . , and a court's duty to consider such a motion is invoked only where a defendant makes a seemingly serious request[]" (*People v Porto*, 16 NY3d 93, 99-100 [internal quotation marks omitted]; *see People v Sides*, 75 NY2d 822, 824; *People v Medina*, 44 NY2d 199, 207). Thus, where a defendant makes "specific factual allegations" against defense counsel (*Porto*, 16 NY3d at 100), the court must make at least "some minimal inquiry" to determine whether the defendant's claims are meritorious (*Sides*, 75 NY2d at 825; *see People v Smith*, 18 NY3d 588, 592-593). Upon conducting that inquiry, "counsel may be substituted only where 'good cause' is shown" (*Porto*, 16 NY3d at 100; *see People v Linares*, 2 NY3d 507, 510).

Here, the court erred in determining that a breakdown in communication between attorney and client cannot constitute good cause for substitution of counsel. Although the mere complaint by a defendant that communications have broken down between him and his lawyer is not, by itself, good cause for a change in counsel (*see People v Faeth*, 107 AD3d 1426, 1427, *lv denied* 21 NY3d 1073), where a complete breakdown has been established, substitution is required (*see Sides*, 75 NY2d at 824-825; *People v White*, 288 AD2d 839, 839, *lv denied* 97 NY2d 689). Here, both defendant and defense counsel agreed that they were unable to communicate, and nothing said by either of them during the court's lengthy inquiry indicated otherwise.

We conclude that the court also erred in suggesting that any breakdown in communication was "initiated or promoted by the defendant as opposed to defense counsel." That conclusion is not supported by the record, which shows that the breakdown in communication resulted from legitimate concerns defendant had about defense counsel's performance. For instance, it is undisputed that defendant, who was facing a maximum sentence of 25 years in prison, had not been informed by defense counsel whether there were any plea offers in his case, notwithstanding that the trial was impending. In addition, defense counsel met with defendant only sporadically and had not yet discussed with him what defense strategy he intended to pursue against the charges. Defendant also informed the court without contradiction that defense counsel refused to return or take phone calls from defendant's wife and failed to provide him with a copy of certain motion papers that defendant had repeatedly requested. Under the circumstances, we cannot conclude that the breakdown in the attorney-client relationship was initiated by unreasonable demands or unrealistic expectations from defendant.

Finally, with respect to our dissenting colleague's assertion that a defendant's complaints of infrequent contact with his or her attorney do not constitute good cause for substitution, we note that the cases cited for authority refer to "vague" (*People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, *reconsideration denied* 11 NY3d

790) and "conclusory" (*People v Benson*, 265 AD2d 814, 814, *lv denied* 94 NY2d 860, *cert denied* 529 US 1076), assertions of infrequent contact. Here, in contrast, defendant's complaints of infrequent contact were specific and supported by the record. In any event, defendant's request for substitution of counsel was not based solely on complaints of infrequent contact with his attorney; as noted, the motion was based primarily on the undisputed breakdown in communication between defendant and his attorney.

All concur except DeJoseph, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. In my view, Supreme Court did not abuse its discretion in denying defendant's request for substitution of defense counsel inasmuch as there was no good cause for substitution (*see People v Porto*, 16 NY3d 93, 99-100; *People v Linares*, 2 NY3d 507, 510; *People v Sides*, 75 NY2d 822, 824). Therefore, I would affirm.

At the outset, I note that the court conducted an extensive inquiry into defendant's allegations (*see People v Smith*, 18 NY3d 588, 592-593; *cf. Sides*, 75 NY2d at 825), which went beyond its "minimal inquiry" obligation (*Sides*, 75 NY2d at 825; *see People v Faeth*, 107 AD3d 1426, 1427, *lv denied* 21 NY3d 1073).

Defendant based his allegation of a breakdown in communication with defense counsel largely on complaints of infrequent contact. Such complaints, however, do not constitute good cause for substitution (*see People v MacLean*, 48 AD3d 1215, 1217, *lv denied* 10 NY3d 866, *reconsideration denied* 11 NY3d 790; *People v Benson*, 265 AD2d 814, 814-815, *lv denied* 94 NY2d 860, *cert denied* 529 US 1076). Defendant also asserted that there had been a breakdown in communication inasmuch as defense counsel had failed to provide him with motion papers or to inform him whether any plea offers had been made. Based on my examination of the record, I conclude that defendant's assertions " 'do not suggest a serious possibility of good cause for substitution' " (*People v Moore*, 41 AD3d 1149, 1150, *lv denied* 9 NY3d 879, *reconsideration denied* 9 NY3d 992; *see generally People v Torres*, 14 AD3d 801, 803, *lv denied* 4 NY3d 836). Defendant's remaining assertions concerning the alleged breakdown in communication were conclusory and, thus, insufficient to establish good cause (*see People v Thagard*, 28 AD3d 1097, 1098, *lv denied* 7 NY3d 795).

Overall, in my view, even when defense counsel has moved for substitution indicating that he is "unable to communicate effectively with [defendant]," the court does not abuse its discretion in denying substitution where the breakdown in communication was owing to defendant's uncooperative attitude and defense counsel has conducted an otherwise effective defense (*see People v Jessup*, 266 AD2d 313, 313-314, *lv denied* 94 NY2d 921; *see generally People v Johnson*, 292 AD2d 871, 871-872, *lv denied* 98 NY2d 652).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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KA 13-00543

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. WILLIAMS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 10, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the police improperly stopped the vehicle in which he was a passenger, and that Supreme Court therefore erred in refusing to suppress a handgun seized from the vehicle after the stop. We reject that contention. Here, an unidentified man called 911 and reported that, near a specific location, there were "[s]ome guys in a white car and they look[ed] like they [were] about to fight and one of the guys pulled out a gun." Two police officers on routine patrol in the area had just left that location and had observed a white vehicle parked on the wrong side of the road. Two men were standing outside the vehicle, and a group of about 15 people were in the general vicinity. The police pulled over, and asked one of the two men standing closest to the vehicle to move it because it was illegally parked. The two individuals entered the white vehicle and drove away. After the officers received the 911 dispatch, they located the white vehicle a few blocks away. After following the vehicle for a short period of time, the police executed a traffic stop and removed the driver and defendant, the front seat passenger. A subsequent search of the vehicle yielded a handgun underneath the front passenger seat.

We conclude that the police had reasonable suspicion to stop the vehicle based upon the contents of the 911 call and the confirmatory

observations of the police (*see People v Argyris*, ___ NY3d ___, ___ [Nov. 25, 2014]; *People v Moss*, 89 AD3d 1526, 1527, *lv denied* 18 NY3d 885; *see also Navarette v California*, ___ US ___, ___, 134 S Ct 1683, 1692). Here, unlike in *Florida v J.L.* (529 US 266), "the report of the 911 caller was based on the contemporaneous observation of conduct that was not concealed" (*People v Jeffery*, 2 AD3d 1271, 1272; *see Navarette*, ___ US at ___, 134 S Ct at 1688-1689; *People v Argyris*, 99 AD3d 808, 809, *affd* ___ NY3d ___; *People v Herold*, 282 AD2d 1, 7, *lv denied* 97 NY2d 682), and the caller's statements were corroborated in part by the observations of the police (*see Jeffery*, 2 AD3d at 1272; *cf. J.L.*, 529 US at 270; *People v William II*, 98 NY2d 93, 99). Moreover, there are other "indicia of the 911 caller's reliability" in this case (*Navarette*, ___ US at ___, 134 S Ct at 1692; *see People v Rivera*, 84 AD3d 636, 636, *lv denied* 17 NY3d 904). After reporting the presence of a man with a gun, the caller told the 911 operator that he was "about to get off the phone [be]cause [he] did[n't] want [any]body to know [he was] doing this," and "I have to hurry up and get out of here." Thus, the record reflects that the call was made contemporaneously with the caller's observations and while he was still "under the stress of excitement" that such observations caused (*Navarette*, ___ US at ___, 134 S Ct at 1689; *see Rivera*, 84 AD3d at 636).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

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CAF 14-00650

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

IN THE MATTER OF EDWARD R. FROST, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SCOTT WISNIEWSKI, RESPONDENT-RESPONDENT.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR PETITIONER-APPELLANT.

ROSEMARIE RICHARDS, ATTORNEY FOR THE CHILD, SOUTH NEW BERLIN.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered September 19, 2013. The order dismissed the cross petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the cross petition is reinstated, and the matter is remitted to Family Court, Oswego County, for a hearing in accordance with the following memorandum: Petitioner appeals from an order dismissing his cross petition seeking a determination that he is the biological father of the subject child. Respondent signed an acknowledgment of paternity with respect to the child when the child was born in 2000. DNA testing, however, later established that petitioner was in fact the child's biological father. In 2011, petitioner filed a custody petition and, by default order, Family Court, inter alia, awarded petitioner custody of the child. Respondent subsequently filed a petition pursuant to Family Court Act article 6 seeking a modification of that order to permit visitation of the child with respondent and the half brother of the child, and petitioner filed a cross petition seeking an order vacating respondent's acknowledgment of paternity, determining that petitioner is the child's biological father, and directing that an amended birth certificate be filed (*see generally* Family Ct Act § 516-a). The court dismissed the cross petition with prejudice on the ground of res judicata. The record before us does not indicate the court's disposition of the petition.

Petitioner contends that the best interests of the child, "the need for finality, stability, and consistency in family determinations," and respondent's nonopposition to the cross petition militate against the result reached by the court. We agree and conclude that the court erred in applying the doctrine of res judicata to petitioner's claims in the cross petition (*see Matter of Cleophous*

P. v Latrice M.R., 299 AD2d 936, 936). In matters concerning filiation, " 'it is the child's best interests which are of paramount concern' " (*Matter of Darcie T. v Robert M.L.*, 255 AD2d 955, 955; *see generally Matter of Martin G.D. v Lucille A.F.*, 35 AD3d 1280, 1281). Under the circumstances of this case, we conclude that it is in the child's best interests to permit petitioner to be heard on his claims in the cross petition. We note that petitioner has been the child's legal, full-time caregiver and provider since October 2011, and that respondent also recognizes petitioner as the child's biological father (*see generally Matter of Westchester County Dept. of Social Servs. v Robert W.R.*, 25 AD3d 62, 71; *Cleophous P.*, 299 AD2d at 936). We therefore reverse the order, reinstate the cross petition, and remit the matter to Family Court for a hearing on the cross petition before a different judge (*see Matter of James T.H. v Danielle M. K-R.*, 48 AD3d 683, 683-684).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

85

CA 14-01215

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

BRADY LITZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLINTON CENTRAL SCHOOL DISTRICT, JOHN HUGHES, IN HIS CAPACITY AS HEAD HOCKEY COACH OF THE CLINTON HIGH SCHOOL HOCKEY TEAM, ROB HAMELINE, IN HIS CAPACITY AS ASSISTANT HOCKEY COACH OF THE CLINTON HIGH SCHOOL HOCKEY TEAM, MICHAEL MARTINI, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

DAVID R. DIODATI, NEW HARTFORD, FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CLINTON CENTRAL SCHOOL DISTRICT, JOHN HUGHES, IN HIS CAPACITY AS HEAD HOCKEY COACH OF THE CLINTON HIGH SCHOOL HOCKEY TEAM AND ROB HAMELINE, IN HIS CAPACITY AS ASSISTANT HOCKEY COACH OF THE CLINTON HIGH SCHOOL HOCKEY TEAM.

SANTACROSE & FRARY, ALBANY (AMANDA GEARY OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL MARTINI.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 21, 2013. The order granted the motions of defendants Clinton Central School District, John Hughes, in his capacity as Head Hockey Coach of the Clinton High School Hockey Team, Rob Hameline, in his capacity as Assistant Hockey Coach of the Clinton High School Hockey Team and Michael Martini for summary judgment and dismissed the complaint against those defendants.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a locker room following hockey practice. Plaintiff was walking barefoot toward the shower area when defendant Michael Martini, one of plaintiff's teammates, stepped backwards onto plaintiff's right foot. Martini was still wearing his hockey skates at the time of the accident. Defendants Clinton Central School District, John Hughes, and Rob Hameline (collectively, school district defendants), and Martini separately moved for summary judgment dismissing the complaint on the ground that plaintiff had assumed the risks associated with the sport of hockey. Supreme Court granted the

motions, and we affirm.

"The assumption of risk doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356, quoting *Morgan v State of New York*, 90 NY2d 471, 484; *see Custodi v Town of Amherst*, 20 NY3d 83, 88). By engaging in such an activity, a participant "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan*, 90 NY2d at 484). "The question of whether the consent was an informed one includes consideration of the participant's knowledge and experience in the activity generally" (*Turcotte v Fell*, 68 NY2d 432, 440; *see Morgan*, 90 NY2d 485-486).

Initially, we reject plaintiff's contention that assumption of the risk does not apply because he was no longer playing hockey at the time of his injury. It is undisputed that the accident "occurred in a designated athletic or recreational venue" and that the activity at issue "was sponsored or otherwise supported by the [school district] defendant[s]" (*Custodi*, 20 NY3d at 88). On the date of the accident, plaintiff was practicing with his high school hockey team at the Clinton Arena, a municipal athletic and recreational facility. The accident took place immediately following practice in one of the arena's locker rooms, which was designated for the exclusive use of the high school hockey team (*cf. id.* at 86, 89). Contrary to the contention of plaintiff, we conclude that he was still "involved" (*id.* at 88), or "participating" (*Hawkes v Catatonk Golf Club*, 288 AD2d 528, 529), in the sport of hockey at the time of his injury. "[T]he assumption [of risk] doctrine applies to any facet of the activity inherent in it" (*Maddox v City of New York*, 66 NY2d 270, 277 [internal quotation marks omitted]). Here, plaintiff and his teammates stored their hockey equipment, including their skates, in the arena locker room. Plaintiff described his routine as follows: "[G]et there before practice, get ready and get on the ice before you're supposed to be on the ice, get off, . . . , get undressed, shower and make sure your stuff is hanging up." Once practice had concluded on the night of the accident, plaintiff and his teammates "all got off the ice as a team" and proceeded into the locker room to change out of their equipment. Martini and another teammate remained on the ice to pick up the nets and pucks, which took less than 10 minutes. The two players then headed into the locker room, put away the pucks, and began getting undressed. Martini was in the process of removing his equipment when the blade of his skate came into contact with plaintiff's foot.

We conclude that it would be inconsistent with the purpose of the assumption of the risk doctrine to isolate the moment of injury and ignore the context of the accident (*see generally Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882). The policy underlying the assumption of the risk doctrine is to encourage free and vigorous participation in athletic and recreational pursuits by "shielding co-participants, activity sponsors or venue owners from 'potentially crushing liability' " (*Custodi*, 20 NY3d at 88, quoting *Bukowski*, 19

NY3d at 358; *see Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 395). Here, the school district defendants, "solely by reason of having sponsored or otherwise supported some risk-laden but socially valuable voluntary activity[,] ha[ve] been called to account in damages" (*Trupia*, 14 NY3d at 396). We therefore conclude that there is a "suitably compelling policy justification . . . to permit an assertion of assumption of risk in the present circumstances" (*id.*).

The question thus becomes whether plaintiff assumed the risk of the injury-causing acts at issue. "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte*, 68 NY2d at 439; *see Custodi*, 20 NY3d at 88). "[A]wareness of risk is not to be determined in a vacuum [but] . . . is, rather, to be assessed against the background of the skill and experience of the particular plaintiff" (*Maddox*, 66 NY2d at 278; *see Turcotte*, 68 NY2d at 440). "[I]t is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results" (*Maddox*, 66 NY2d at 278).

Here, we agree with the school district defendants and Martini that they met their burden of establishing that the risk of being injured by a skate blade is "inherent in the sport" of hockey and that plaintiff was aware of, appreciated the nature of, and voluntarily assumed that risk (*Turcotte*, 68 NY2d at 441; *see Bukowski*, 19 NY3d at 356; *Morales v Beacon City Sch. Dist.*, 44 AD3d 724, 726), and that plaintiff failed to raise an issue of fact with respect thereto (*see Zuckerman v City of New York*, 49 NY2d 557, 562). At the time of the accident, plaintiff had been a member of his high school's varsity hockey team for three years and had been playing organized hockey for over a decade. Plaintiff acknowledged that the use of skates with very sharp edges is part of the sport of hockey, and he testified at his deposition that he was aware of the need to be careful around people wearing hockey skates. Notably, plaintiff testified that he was "always worried" about the possibility of "being stepped on or something with a hockey skate, just getting cut by the skate"—the precise mechanism of injury in this case—and he acknowledged that such a possibility was "part of the sport" of hockey. Although plaintiff was not aware of any similar incidents at the Clinton Arena, he testified that "there's been other injuries with skates in the [National Hockey League and] other leagues." Plaintiff further testified that he was aware that hockey players often wear their skates into the locker room: "I've always known since I was little, since I started—you know—*after practice or a game, you walk in on skates*" (emphasis added). Indeed, the floor of the arena locker room was rubberized for that very purpose. Plaintiff testified that he "always" walked around the locker room with bare feet when he did not have his skates on, and he acknowledged that he was "aware of the need to be careful walking with people still having skates on in the locker room." Defendants therefore established as a matter of law that being

injured by a wayward blade in the locker room before, during, or immediately after a game or practice is "within the known, apparent and foreseeable dangers of the sport" of hockey (*Turcotte*, 68 NY2d at 441).

In opposition to the motion, plaintiff failed to raise an issue of fact with respect to whether defendants "unreasonably increased the plaintiff's risk of injury" (*Morales*, 44 AD3d at 726; *see Duffy v Suffolk County High Sch. Hockey League*, 289 AD2d 368, 369). Plaintiff contends that the risk of injury was unreasonably increased by the layout of the locker room. Although a participant does not assume "concealed or unreasonably increased risks" or "unique and . . . dangerous condition[s] over and above the usual dangers that are inherent in the sport" (*Morgan*, 90 NY2d at 485 [internal quotation marks omitted]), the assumption of risk doctrine extends to "risks engendered by less than optimal conditions, provided that those conditions are open and obvious and that the consequently arising risks are readily appreciable" (*Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246, 248, *affd* 10 NY3d 889; *see Bukowski*, 19 NY3d at 356; *Martin v State of New York*, 64 AD3d 62, 64, *lv denied* 13 NY3d 706). Here, the condition of the locker room, while perhaps not ideal, was open and obvious, and any risks were readily appreciable (*see Roberts*, 51 AD3d at 248). Thus, the school district defendants "fulfilled their duty of making the 'conditions as safe as they appear[ed] to be' " (*Bukowski*, 19 NY3d at 357, quoting *Morgan*, 90 NY2d at 484).

With respect to Martini, plaintiff "failed to present evidence that [Martini]'s conduct was reckless or intentional" (*Wollruch v Jaekel*, 103 AD3d 524, 524). Indeed, plaintiff acknowledged that Martini was not engaged in horseplay or any other improper conduct at the time of the accident. Martini did not know that plaintiff was behind him when he stepped backwards, and plaintiff did nothing to alert Martini of his presence. As Martini testified at his deposition, he merely "took the wrong step at the wrong time."

In sum, we conclude that plaintiff's injuries were "simply the result of a 'luckless accident' " arising from his voluntary participation in a school-sponsored athletic activity (*Bukowski*, 19 NY3d at 358, quoting *Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 659), and thus that the court properly dismissed the complaint against the school district defendants and Martini based on assumption of the risk.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

86

CA 14-00022

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

IN THE MATTER OF HOGANWILLIG, PLLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY,
NEW YORK STATE NURSES ASSOCIATION, COUNTY OF
ERIE AND ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PETITIONER-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE LIEBNER OF COUNSEL), FOR RESPONDENT-RESPONDENT KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 22, 2013. The order, inter alia, dismissed the petition.

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

Memorandum: Petitioner law firm commenced this proceeding seeking to enforce a charging lien and a contingency fee agreement with respect to proceeds of an arbitration award obtained by Karen Hendel (respondent), for whom one of petitioner's attorneys, Steven M. Cohen, Esq., performed legal services. In appeal No. 1, petitioner appeals from an order that, inter alia, dismissed the petition and scheduled a hearing to determine the fair market value of the legal services rendered by Cohen. The parties thereafter agreed that Supreme Court would decide petitioner's quantum meruit application based solely on the papers submitted by the parties, which included, inter alia, petitioner's billing records, an affirmation from Cohen, and an affidavit from respondent's counsel. In appeal No. 2, petitioner appeals from an order and judgment in which the court, based on its review of the papers, awarded petitioner $19,294.95 in attorney's fees. In appeal No. 3, petitioner appeals from an amended order and judgment issued by the court to clarify that the amount previously awarded to petitioner included $544.95 in disbursements.

As a preliminary matter, we note that petitioner's appeal from

the order and judgment in appeal No. 2 must be dismissed because that document was superseded by the amended order and judgment in appeal No. 3 (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051). With respect to appeal No. 1, we conclude that the court properly denied the petition insofar as it sought a charging lien. It is well settled that only the attorney of record in a particular action is entitled to a charging lien pursuant to Judiciary Law § 475 (*see Rodriguez v City of New York*, 66 NY2d 825, 827; *Case v Case*, 108 AD3d 1169, 1171-1172). Thus, before an attorney may be granted a charging lien, "he or she must have appeared for the client by participating in a legal proceeding on the client's behalf or by having his [or her] name affixed to the pleadings, motions, records, briefs, or other papers submitted in the matter" (*Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574, 574, *lv dismissed* 88 NY2d 1017, *lv denied* 89 NY2d 811 [internal quotation marks omitted]; *see Ebert v New York City Health & Hosps. Corp.*, 210 AD2d 292, 292-293, *lv denied* 85 NY2d 806). Here, neither Cohen nor any other lawyer associated with petitioner was respondent's attorney of record in the arbitration proceeding or the proceeding in Supreme Court to confirm the arbitration award. Although Cohen filed a motion to confirm the arbitration award on respondent's behalf, that motion was dismissed by the court because an identical motion had been filed by respondent's attorney of record. The mere fact that Cohen may have acted as an advisor to respondent or her attorney of record, or served in an "of counsel" capacity, is not sufficient to create a charging lien (*see Stinnett v Sears Roebuck & Co.*, 201 AD2d 362, 364; *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442, 452).

We further conclude that the court properly denied the petition insofar as it sought to enforce the contingency fee agreement that respondent negotiated with petitioner. As the Court of Appeals recently noted, case law in New York "clearly provides that circumstances arising after contract formation can render a contingent fee agreement—not unconscionable when entered into—unenforceable where the amount of the fee, combined with the large percentage of the recovery it represents, seems disproportionate to the value of the services rendered" (*Lawrence v Graubard Miller*, 11 NY3d 588, 596; *see King v Fox*, 7 NY3d 181, 191). Here, respondent was awarded $1.23 million from her arbitration claim and, if the contingency fee agreement is enforced, petitioner would be entitled to more than $400,000 in attorney's fees. Considering the amount of legal work performed by petitioner on respondent's behalf, and the minimal risk that petitioner faced of not being paid for its services, we conclude that the amount sought by petitioner under the contingency fee agreement is " 'out of all proportion to the value of the professional services rendered' " (*King*, 7 NY3d at 191, quoting *Gair v Peck*, 6 NY2d 97, 106), and that the agreement therefore should not be enforced.

Finally, based on our review of the limited record in appeal No. 3, we see no basis to conclude that the court abused its discretion in awarding $19,294.95 to petitioner on its application for quantum meruit attorney's fees. Although respondent requests that we reduce the award significantly, we note that her contention is not properly before us because she did not cross-appeal (*see Matijiw v New York*

Cent. Mut. Fire Ins. Co., 292 AD2d 865, 866).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

87

CA 14-00628

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

IN THE MATTER OF HOGANWILLIG, PLLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY,
NEW YORK STATE NURSES ASSOCIATION, COUNTY OF
ERIE AND ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PETITIONER-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE LIEBNER OF COUNSEL), FOR RESPONDENT-RESPONDENT KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered December 16, 2013. The order and judgment, among other things, awarded petitioner attorney's fees.

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

Same memorandum as in *Matter of HoganWillig, PLLC v Hendel* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

88

CA 14-00629

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

IN THE MATTER OF HOGANWILLIG, PLLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY,
NEW YORK STATE NURSES ASSOCIATION, COUNTY OF
ERIE AND ERIE COUNTY MEDICAL CENTER CORPORATION,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 3.)

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PETITIONER-APPELLANT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (KATHERINE LIEBNER OF COUNSEL), FOR RESPONDENT-RESPONDENT KAREN HENDEL, FORMERLY KNOWN AS KAREN REILLY.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Erie County (John A. Michalek, J.), entered January 8, 2014. The amended order and judgment, among other things, amended the order and judgment of the court entered December 16, 2013 to specify that it was awarding petitioner $544.95 for reimbursement of expenses, with a total award amounting to $19,294.95.

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

Same memorandum as in *Matter of HoganWillig, PLLC v Hendel* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

106

CAF 13-01785

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

IN THE MATTER OF DAKOTA H.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIELLE F. AND JAMES H.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT JAMES H.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (BENJAMIN M. YAUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 24, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights and transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: In appeal No. 1, respondent parents appeal from an order that, inter alia, terminated their parental rights with respect to their daughter and, in appeal No. 2, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to her two sons. We affirm.

With respect to the mother's contentions in both appeals, we agree that petitioner met its burden of proving " 'by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship' " between the mother and her children (*Matter of Justain R. [Juan F.]*, 93 AD3d 1174, 1174), i.e., "reasonable attempts . . . to assist, develop and encourage a meaningful relationship between the parent and child[ren]" (Social Services Law § 384-b [7] [f]; *see Matter of Sheila G.*, 61 NY2d 368, 384). Here, petitioner developed a service plan for the mother that included parenting classes, supervised visitation, assistance by a

parent aide, domestic violence counseling, couples counseling, mental health counseling and several home visits. Contrary to the mother's contention, petitioner engaged in meaningful efforts with respect to her unstable housing situation, but she was not receptive. Indeed, she continued to move in and out of the father's house, which was unsuitable for the children because of its overall filth and the presence of several large, aggressive dogs. Petitioner also engaged in meaningful efforts with respect to supervised visitation, but the mother failed to progress to unsupervised visits.

Also contrary to the mother's contention, petitioner demonstrated by clear and convincing evidence that she failed to plan adequately for the future of her children, "although physically and financially able to do so" (Social Services Law § 384-b [7] [a]); *see Matter of Star Leslie W.*, 63 NY2d 136, 142-143). Although the mother completed two domestic violence programs, she admitted that she continued to engage in acts of domestic violence against the father. She also participated in other counseling services, but failed to make progress. She conceded that her living arrangements were unstable, and that she moved in and out of the father's house about "fifty times," despite its unsuitability for her children. Contrary to her contention that she was unable to afford adequate housing, the evidence showed that she had some income and was given the opportunity to apply for additional financial support. Finally, although the mother completed a parenting class and regularly attended her supervised visits with her children, those visits had to be reduced from two 90-minute visits per week to a single, hour-long visit per week, and yet she continued to be overwhelmed by her three children, resulting in at least one instance of physical violence against one of the children.

The mother failed to preserve for our review her contention that the court abused its discretion in failing to impose a suspended judgment (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343, *lv denied* 19 NY3d 801). In any event, a suspended judgment was not warranted under the circumstances inasmuch as "any 'progress made by [the mother] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Donovan W.*, 56 AD3d 1279, 1279, *lv denied* 11 NY3d 716).

Turning to the father's contentions with respect to appeal No. 1, we note that he failed to preserve for our review his contention that the court violated his due process rights by conducting the fact-finding and dispositional hearings in his absence (*see Atreyu G.*, 91 AD3d at 1342). In any event, that contention is without merit. "[A] parent's right to be present for fact-finding and dispositional hearings in termination cases is not absolute" (*id.* [internal quotation marks omitted]). " 'Absent unusual, justifiable circumstances, [a parent's] rights should not be terminated without his [or her] presence at the hearing' " (*Matter of Laticia B.*, 156 AD2d 681, 682; *see Matter of Dominique L.B.*, 231 AD2d 948, 949). Nevertheless, "[t]he child whose guardianship and custody is at stake also has a fundamental right to a prompt and permanent adjudication"

(*Matter of James Carton K.*, 245 AD2d 374, 377, *lv denied* 91 NY2d 809). "Thus, when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed" (*id.*). Here, the father had been made aware of the scheduled fact-finding hearing but failed to appear, despite an explicit warning from the court that the hearing would proceed in his absence. Although he told his attorney and a caseworker that he did not appear because he had a flat tire, he told his mother that he did not appear because he had overslept. We note in any event that the father's attorney fully represented his interests at the fact-finding hearing and thus the father has failed to demonstrate that he suffered any prejudice as a result of his absence (*see Matter of Eric L.*, 51 AD3d 1400, 1401-1402, *lv denied* 10 NY3d 716; *Matter of Keyanna AA.*, 35 AD3d 1079, 1080). The father also failed to appear, without excuse, for the scheduled dispositional hearing, despite having been made aware of the date and time of the hearing multiple times by his lawyer. In any event, the father's attorney represented his interests at the dispositional hearing and the father has failed to demonstrate that he suffered any prejudice as a result of his absence (*see Eric L.*, 51 AD3d at 1401-1402).

Contrary to the father's contention, petitioner met its burden of proving by " 'clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship' " between the father and his child (*Justain R. [Juan F.]*, 93 AD3d at 1174). The evidence at the hearing established that petitioner gave the father the name and address of his child's primary care physician, as well as a schedule of future medical appointments. Moreover, despite petitioner's efforts, the father failed to participate meaningfully in counseling, failed to attend service plan review meetings, rarely used his full visitation time, and, although he made some alterations to his home, failed to make it suitable for children.

We also reject the father's contention that petitioner failed to demonstrate by clear and convincing evidence that he failed to plan adequately for the future of his child (*see Star Leslie W.*, 63 NY2d at 142-143). The father refused to attend individual counseling sessions, requested that his weekly visits with his child be reduced to biweekly visits because he was "too busy" and, ultimately, he attended only 5 of 24 scheduled visits. He also failed to contact his child's daycare for progress reports or attend service plan review meetings, among other things. Finally, despite no apparent physical or financial limitations, the father failed to remedy the unsuitable living conditions of his home.

Finally, we reject the father's contention that he was denied effective assistance of counsel "inasmuch as he did not demonstrate the absence of strategic or other legitimate shortcomings" (*Matter of Brown v Gandy*, ___ AD3d ___, ___ [Feb. 6, 2015] [internal quotation

marks omitted]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

107

CAF 13-01834

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

IN THE MATTER OF JONATHAN M. AND
JOSHUA V.-F.-H.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

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

MEMORANDUM AND ORDER

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (BENJAMIN M. YAUS OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered September 24, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights and transferred guardianship and custody of the subject children to petitioner.

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

Same memorandum as in *Matter of Dakota H.* (___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

109

CA 14-00923

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

IN THE MATTER OF COUNTY OF CHAUTAUQUA,
PETITIONER-PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., AS COMMISSIONER
OF NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 1.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS-RESPONDENTS.

WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered January 27, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, annulled the determination of respondents-defendants and directed respondents-defendants to allow petitioner-plaintiff's claims for reimbursement.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition-complaint in its entirety and granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional,

and as modified the judgment is affirmed without costs.

Memorandum: The petitioner-plaintiff in appeal No. 1 (hereafter, Chautauqua County) commenced a hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to compel respondents-defendants (respondents) to reimburse it for certain Medicaid expenditures known as overburden expenditures (*see Matter of County of Herkimer v Daines*, 60 AD3d 1456, 1456-1457, *lv denied* 13 NY3d 707 [*County of Herkimer I*]). The petitioner-plaintiff in appeal

No. 2 (hereafter, Jefferson County; collectively with Chautauqua County, petitioners) commenced a nearly identical proceeding-action seeking reimbursement for its overburden expenditures. The petitions/complaints allege that respondent-defendant New York State Department of Health (DOH) improperly billed petitioners for those expenditures prior to 2006, and that respondents have a continuing duty to reimburse petitioners for them.

The history of the legislation and prior litigation regarding these expenditures is fully set forth in our recent decision in *Matter of County of Niagara v Shah* (122 AD3d 1240, 1240-1242 [*Niagara III*]). In brief, several counties throughout the State have submitted numerous claims to the DOH over the last several years, seeking reimbursement for overburden expenditures that the counties made prior to 2006. When the DOH refused to pay those claims, the counties commenced litigation similar to the cases on appeal, asking the courts to direct respondents to pay those claims (*see e.g. Matter of County of Herkimer v Daines*, 83 AD3d 1510; *Matter of County of Niagara v Daines*, 79 AD3d 1702, *lv denied* 17 NY3d 703 [*Niagara I*]). First, in *County of Herkimer I* (60 AD3d at 1457), we rejected respondents' contentions that the claims were extinguished by the enactment of the Medicaid Cap Statute ([Cap Statute] L 2005, ch 58, § 1, part C, § 9, as amended by L 2006, ch 57, § 1, part A, § 60). We later rejected respondents' contention that the claims "were time-barred pursuant to 18 NYCRR 601.3 (c)" (*Niagara I*, 79 AD3d at 1705), and, in *Matter of County of Niagara v Daines* (91 AD3d 1288, 1289 [*Niagara II*]), we rejected respondents' further contention that the Legislature intended to extinguish those claims by enacting a 2010 amendment to the Cap Statute (*see* L 2010, ch 109, § 1, part B, § 24). In making these determinations, we relied on, among other things, the lack of any indication in the statutes or the applicable legislative history that the Legislature intended to extinguish the counties' right to reimbursement for overburden expenditures made prior to the enactment of the Cap Statute.

The situation changed, however, when the Legislature inserted a provision in the 2012-2013 State budget stating that, "[n]otwithstanding the provisions of section 368-a of the social services law or any other contrary provision of law, no reimbursement shall be made for [counties'] claims submitted on and after the effective date of this paragraph, for district expenditures incurred prior to January 1, 2006, including, but not limited to," overburden expenditures (L 2012, ch 56, § 1, part D, § 61 [hereafter, section 61]). In addition, the memorandum in support of the 2012-2013 executive budget stated that section 61 had been proposed "to clarify that [counties] cannot claim for overburden expenses incurred prior to January 1, 2006, when the [Cap Statute] took effect. This is necessary to address adverse court decisions that have resulted in State costs paid to [counties] for pre-cap periods, which conflict with the original intent of the" Cap Statute. Consequently, we concluded in *Niagara III* (122 AD3d at 1242) that "[s]ection 61 clearly states that no further claims for reimbursement of overburden expenditures will be paid, notwithstanding Social Services Law § 368-a. Thus, the unequivocal wording of section 61 retroactively

extinguishes [a county's] right to submit claims for reimbursement of overburden expenditures made prior to 2006."

After the effective date of section 61, petitioners submitted the claims at issue in these appeals, which the DOH denied on the ground that they were barred by section 61. In appeal No. 1, Supreme Court, Chautauqua County, issued a judgment in which it, inter alia, declared section 61 unconstitutional, annulled respondents' determination to deny those claims, and directed respondents to pay the claims. The court also denied Chautauqua County's request for relief in the nature of mandamus, directing the DOH to search its records for all other payments made by Chautauqua County for overburden expenses, and to reimburse that County for those expenses. In appeal No. 2, Supreme Court, Jefferson County, issued a judgment in which it annulled the DOH's denial of that County's claims for reimbursement, directed respondents to pay the claims at issue, and declared section 61 unconstitutional. The court, unlike the judgment in appeal No. 1, granted relief in the nature of mandamus, directing the DOH to search its records and reimburse Jefferson County for all unpaid overburden expenditures that had been made by Jefferson County. These appeals by respondents and cross appeals by petitioners ensued.

Respondents contend in both appeals that the court erred in declaring section 61 unconstitutional under the federal and state constitutions because petitioners have no due process rights against the State. Specifically, respondents contend that petitioners are not persons within the meaning of the due process guarantees of the state and federal constitutions, and thus petitioners have no ability to raise claims for violation of those provisions. Petitioners contend that respondents are actually attempting to raise a capacity defense, which they waived by failing to assert it as an affirmative defense in their answer or by motion. We agree with respondents that petitioners are not persons within the meaning of the state and federal constitutions and thus may not raise a due process argument against the State.

We note at the outset the well-settled principle that "municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation. This general incapacity to sue flows from judicial recognition of the juridical as well as political relationship between those entities and the State" (*City of New York v State of New York*, 86 NY2d 286, 289). We agree with petitioners, however, that "[t]he issue of lack of capacity to sue does not go to the jurisdiction of the court, as is the case when the [petitioners] lack standing. Rather, lack of capacity to sue is a ground for dismissal which must be raised by motion and is otherwise waived" (*id.* at 292; *see Niagara III*, 122 AD3d at 1244). Here, it is clear that respondents did not raise the defense of capacity in their answer or a pre-answer motion, and thus it is waived. Nevertheless, respondents' waiver of their capacity defense does not afford petitioners the right to the relief sought. In other words, the issue of " 'capacity concerns [petitioners'] power to appear and bring [their] grievance before the court' " (*Matter of Graziano v County of*

Albany, 3 NY3d 475, 478-479), but petitioners must then establish their constitutional claim.

Here, petitioners contend that respondents' enactment of section 61 impermissibly deprived them of vested rights to repayment under Social Services Law § 368-a, in violation of their rights under the due process clauses of the federal and state constitutions. The Fourteenth Amendment of the United States Constitution provides in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." Similarly, article I, § 6 of the New York State Constitution provides in relevant part that "[n]o person shall be deprived of life, liberty or property without due process of law." Thus, the constitutional provisions share a common link, i.e., they protect a "person" (*id.*; *see* US Const, 14th Amend, § 1).

Contrary to petitioners' contentions, we conclude that they are not persons within the meaning of the constitutional due process provisions. This principle was stated clearly by the United States Court of Appeals for the Seventh Circuit, which concluded that "[m]unicipalities cannot challenge state action on federal constitutional grounds because they are not 'persons' within the meaning of the Due Process Clause" (*City of East St. Louis v Circuit Court for Twentieth Judicial Circuit, St. Clair County, Ill.*, 986 F2d 1142, 1144). Other decisions, without using the term "person," also support the conclusion that a municipal body may not use the due process clause to challenge legislation of the municipality's creating state. Thus, "[i]t has long been the case that a municipality may not invoke the protections of the Fourteenth Amendment against its own state . . . A municipality is thus prevented from attacking state legislation on the grounds that the law violates the municipality's own rights . . . Moreover, while municipalities or other state political subdivisions may challenge the constitutionality of state legislation on certain grounds and in certain circumstances, these do not include challenges brought under the Due Process . . . Clause[] of the Fourteenth Amendment . . . This is because 'a municipal corporation, in its own right, receives no protection from the . . . Due Process Clause[] vis-a-vis its creating state' " (*City of New Rochelle v Town of Mamaroneck*, 111 F Supp 2d 353, 364 [citations omitted] [SD NY]; *see City of S. Lake Tahoe v California Tahoe Regional Planning Agency*, 625 F2d 231, 233-234, *cert denied* 449 US 1039; *cf. Township of River Vale v Town of Orangetown*, 403 F2d 684, 686 [2d Cir] [a municipality may raise a constitutional due process challenge to the actions of a different state]). Indeed, the Supreme Court wrote in 1933 that a "municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator" (*Williams v Mayor & City Council of Baltimore*, 289 US 36, 40). The Court of Appeals has concluded that the same principle applies equally under the due process clause of the New York State Constitution, stating that, although "under the due process . . . clauses of our State and Federal Constitutions . . .[,

petitioners] have procedural standing to participate in the present litigation (and thus to be heard, for instance, on questions of statutory interpretation), they do not have the substantive right to raise these constitutional challenges" (*Matter of Jeter v Ellenville Cent. Sch. Dist.*, 41 NY2d 283, 287). Inasmuch as petitioners are not persons who may raise a due process challenge to state legislation, they are not entitled to the relief they seek, including a declaration that the legislation is unconstitutional. We therefore modify the judgments in both appeals by denying in its entirety the relief sought in the petitions/complaints and by granting judgment in favor of respondents declaring that section 61 has not been shown to be unconstitutional.

Petitioners' contentions that they are entitled to relief in the nature of mandamus, directing respondents to search their records, locate all unreimbursed claims for overburden expenditures made by petitioners, and reimburse petitioners for those expenditures, are without merit (*see Niagara III*, 122 AD3d at 1243-1244). Finally, for reasons stated in the decision at Supreme Court, Jefferson County, that County's contentions on its cross appeal with respect to its tort claims are without merit.

Frances E. Cafarell

Entered: March 20, 2015

Clerk of the Court

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

114

CA 14-00926

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

IN THE MATTER OF COUNTY OF JEFFERSON,
PETITIONER-PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., M.P.H., COMMISSIONER,
NEW YORK STATE DEPARTMENT OF HEALTH AND
NEW YORK STATE DEPARTMENT OF HEALTH,
RESPONDENTS-DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 2.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS-RESPONDENTS.

WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), AND NANCY ROSE STORMER, P.C., UTICA, FOR PETITIONER-PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order and judgment) of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered February 27, 2014 in a CPLR article 78 proceeding and declaratory judgment action. The judgment, among other things, annulled the determination of respondents-defendants and directed respondents-defendants to allow petitioner-plaintiff's claims for reimbursement.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition-complaint in its entirety, and by granting judgment in favor of respondents-defendants as follows:

> It is ADJUDGED and DECLARED that section 61 of part D of section 1 of chapter 56 of the Laws of 2012 has not been shown to be unconstitutional,

and as modified the judgment is affirmed without costs.

Same memorandum as in *Matter of County of Chautauqua v Shah* (___ AD3d ____ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

115

CA 14-01114

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

KATHLEEN BENEDETTI, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ERIC SMITH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

RICOTTA & VISCO, BUFFALO (FRANK C. CALLOCCHIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (RANDY MALLABER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 30, 2013. The order granted the motion of defendant Erie County Medical Center Corporation to dismiss the complaint against it.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action, and Erie County Medical Center Corporation (defendant) subsequently moved to dismiss the complaint on two grounds, i.e., plaintiff's failure to comply with conditions precedent to the filing of this lawsuit (*see* Public Authorities Law § 3641 [1]), and Supreme Court's lack of personal jurisdiction over it (*see* CPLR 306-b). The court granted the motion only on the ground that plaintiff failed to comply with conditions precedent to this lawsuit, and in its written decision did not address the alternative ground for the motion. Defendant contends on appeal that the court should have granted the motion on the alternative ground as well, i.e., lack of personal jurisdiction, but we conclude that defendant's appeal from the order must be dismissed. A "party [that] has successfully obtained a[n] . . . order in [its] favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (*Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544; *see* CPLR 5511). Indeed, "the concept of aggrievement is about whether relief was granted or withheld, and not about the reasons therefor" (*Mixon v TBV, Inc.*, 76 AD3d 144, 149; *see Hodge v Baptiste*, 114 AD3d 830, 831). In other words, if the appellant "received all the relief it

requested, [it is] not aggrieved, even though the court may have made some finding of fact or ruling of law with which [the appellant is] dissatisfied" (*Mixon*, 76 AD3d at 148-149). Here, defendant received all the relief it requested, which was dismissal of the complaint against it (*see e.g. Ullmannglass v Oneida, Ltd.*, 121 AD3d 1371, 1372 n 2; *Ford v Rifenburg*, 94 AD3d 1285, 1285 n 1; *Gross v Kurk*, 224 AD2d 582, 583).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

116

CA 14-01342

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

WILLIAM J. BLEIER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY J. MULVEY AND MULVEY CONSTRUCTION, INC., DEFENDANTS-APPELLANTS.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, ROCHESTER (ALISON K.L. MOYER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BRENNA, BRENNA & BOYCE, PLLC, ROCHESTER (ROBERT L. BRENNA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 6, 2014. The amended order, insofar as appealed from, denied in part defendants' motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the amended order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when a vehicle he was operating was rear-ended by a vehicle owned by defendant Mulvey Construction, Inc. and operated by defendant Gregory J. Mulvey. Defendants moved for summary judgment on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) and Supreme Court granted their motion only in part, denying the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury. We agree with defendants that the court should have granted their motion in its entirety. Defendants met their burden with respect to those two categories by submitting the affirmed reports of a physician who examined plaintiff on their behalf and reviewed plaintiff's medical records. The physician concluded that plaintiff had sustained only a minor cervical strain in the accident, that the injury had resolved, that the limitations he measured in plaintiff's range of motion were evidenced solely by subjective complaints of pain, and that there was no objective evidence of any injury causally related to the accident (*see Griffo v Colby*, 118 AD3d 1421, 1422; *Wilson v Colosimo*, 101 AD3d 1765, 1766). The evidence submitted by plaintiff in opposition to the motion does not provide "either a quantitative or qualitative assessment to differentiate serious injuries from mild or moderate

ones" (*Clements v Lasher*, 15 AD3d 712, 713, citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350; *see Malesa v Burg*, 105 AD3d 1410, 1410-1411), and is therefore insufficient to raise an issue of fact with respect to either category (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

122

KA 12-01731

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAMELL BURTON, DEFENDANT-APPELLANT.

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

TRAMELL BURTON, DEFENDANT-APPELLANT PRO SE.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MISHA A. COULSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 12, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), robbery in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]). The charges arose from defendant striking the victim on the head with a handgun, and defendant and codefendant taking several of the victim's possessions.

We reject defendant's contention that, because there is only circumstantial evidence supporting the fact that he was a perpetrator, the evidence is legally insufficient to support the conviction. Viewing the circumstantial evidence in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678), we conclude that there is a valid line of reasoning and permissible inferences that could lead a reasonable jury to conclude that defendant struck the victim on the head with a handgun, and took the victim's possessions (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that "the jury could properly have inferred that defendant was one of the perpetrators" (*People v Goree*, 309 AD2d 1204, 1204; *see generally People v Dukes*, 160 AD2d 332, 332, *lv denied* 76 NY2d 847; *People v*

Ngor Yip, 118 AD2d 472, 474). Defendant was found in both spatial and temporal proximity to the crime scene, and in possession of the items stolen from the victim (*see Goree*, 309 AD2d at 1204). We therefore conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contentions that the People deprived him of his right to present a defense by failing to secure a purported surveillance video from the bar outside of which the robbery occurred, and that County Court erred in denying his request for an adverse inference instruction with respect to that failure. We note that defendant failed to preserve for our review his contention that he was denied the right to present a defense because "[he] did not raise th[at] constitutional claim[] in the trial court" (*People v Lane*, 7 NY3d 888, 889; *see People v Norcutt*, 115 AD3d 1306, 1309, *lv denied* 23 NY3d 966), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the court properly denied defendant's request for an adverse inference instruction with respect to the purported surveillance video. Although the People would have a duty to protect such a video from being destroyed if it were in their possession (*see generally People v Handy*, 20 NY3d 663, 668-669), the record fails to establish that either the police or the People had possession of any such video (*see generally People v Nelson*, 90 AD3d 954, 954, *lv denied* 18 NY3d 996). Moreover, the People have no duty to seek evidence for defendant's benefit or to protect evidence prior to their possession of it (*see People v Hayes*, 17 NY3d 46, 51, *cert denied* ___ US ___, 132 S Ct 844; *People v James*, 93 NY2d 620, 644; *People v Hernandez*, 107 AD3d 504, 505, *lv denied* 22 NY3d 1199).

We reject defendant's further contention in his pro se supplemental brief that the court erred in denying his request for a missing witness charge with respect to the People's failure to call the codefendant in this case. Defendant made a prima facie showing that he was entitled to a missing witness charge (*see generally People v Hall*, 18 NY3d 122, 131; *People v Savinon*, 100 NY2d 192, 196-197; *People v Gonzalez*, 68 NY2d 424, 427). The burden then shifted to the People to show that the charge was inappropriate, and we conclude that they met that burden (*see generally People v Keen*, 94 NY2d 533, 539). Although the codefendant was available to the People inasmuch as he pleaded guilty in connection with this case and entered into a cooperation agreement with the People to assist in other unrelated criminal matters, the People established that he was not in their control for purposes of defendant's prosecution (*see generally Gonzalez*, 68 NY2d at 428-429; *People v Onyia*, 70 AD3d 1202, 1205; *People v Hilts*, 191 AD2d 779, 780-781, *lv denied* 81 NY2d 1074). Moreover, there is no guarantee that the codefendant would have provided testimony favorable to the People and, indeed, we conclude that the codefendant's testimony would have been "presumptively suspect . . . or subject to impeachment detrimental to the People's case" (*People v Parton*, 26 AD3d 868, 869, *lv denied* 7 NY3d 760 [internal quotation marks omitted]; *see People v McLaurin*, 27 AD3d

1117, 1118, *lv denied* 7 NY3d 759).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

123

KA 13-00675

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL H. JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DIANE S. MELDRIM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered March 19, 2013. The judgment convicted defendant, after a nonjury trial, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of grand larceny in the fourth degree (Penal Law § 155.30 [4]) in connection with the theft of a credit card from the victim's purse, which the victim left in her car in the parking lot of a business while she was in the building. Contrary to defendant's contention, Supreme Court properly denied that part of his omnibus motion seeking to suppress his inculpatory statement to the police. Defendant's statement was spontaneous, i.e., it was not "triggered by police conduct which should reasonably have been anticipated to evoke a declaration from the defendant" (*People v Lynes*, 49 NY2d 286, 295; *see People v Witherspoon*, 66 AD3d 1456, 1458, *lv denied* 13 NY3d 942; *cf. People v Lanahan*, 55 NY2d 711, 713). We further conclude that the photo array shown to three eyewitnesses was not unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335). The court properly determined that the subjects depicted therein were sufficiently similar in appearance so that the viewer's attention was not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection (*see People v Alston*, 101 AD3d 1672, 1673; *People v Weston*, 83 AD3d 1511, 1511, *lv denied* 17 NY3d 823).

Contrary to the contention of defendant, the evidence is legally sufficient to establish that he stole a credit card. Defendant was observed in the victim's vehicle by two witnesses, and the victim

testified that the reloadable VISA card had approximately $100 of credit, that it was not in her wallet that was in the vehicle after defendant exited the vehicle, and that the credit card was cancelled that day (*see People v Howard*, 167 AD2d 922, 922, *lv denied* 77 NY2d 961; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the court did not fail to give the evidence the weight it should be accorded and, thus, we further conclude that the verdict is not against the weight of the evidence (*see People v Lane*, 7 NY3d 888, 890; *Bleakley*, 69 NY2d at 495).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

124

KA 13-00885

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY KELLY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered April 24, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Niagara County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [12]), defendant contends that County Court erred in imposing an enhanced sentence without affording him an opportunity to withdraw his plea. We agree. Initially, we note that defendant waived his right to appeal, but we conclude that the waiver of the right to appeal does not encompass his allegation that the court improperly enhanced his sentence (*see People v Joyner*, 19 AD3d 1129, 1129; *People v Lighthall*, 6 AD3d 1170, 1171, *lv denied* 3 NY3d 643). Although defendant failed to preserve his contention for our review by failing to object to the enhanced sentence or by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Fortner*, 23 AD3d 1058, 1058; *People v Sundown*, 305 AD2d 1075, 1076), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). As part of the plea, the court stated that it would sentence defendant to, inter alia, a determinate term of incarceration of between one and three years. There is no indication that defendant violated any condition of the plea (*cf. People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801). Consequently, we agree with defendant that the court erred in enhancing the sentence by imposing a determinate term of incarceration that exceeded the

promised sentencing range (*see People v Smith*, 101 AD3d 1677, 1677, *lv denied* 20 NY3d 1104; *People v Rhodes*, 91 AD3d 1280, 1282). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose a sentence within the promised sentencing range or to afford defendant the opportunity to withdraw his plea.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

127

CA 14-00358

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

LAURA SHELTERS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF DUNKIRK HOUSING AUTHORITY,
DEFENDANT-APPELLANT.

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

CAMPBELL & SHELTON, LLP, EDEN (ERIC M. SHELTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered October 23, 2013 in a personal injury action. The interlocutory judgment, among other things, adjudged that defendant was negligent.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell on ice on a sidewalk on defendant's premises. The matter proceeded to trial and, at the close of proof, defendant moved for a directed verdict pursuant to CPLR 4401 on the issue of notice, i.e., whether it had an opportunity to remedy the alleged dangerous ice condition. Supreme Court denied the motion, and the jury returned a verdict finding that defendant was negligent. We affirm.

A directed verdict pursuant to CPLR 4401 is "appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*id*.).

Here, the court properly denied defendant's motion for a directed verdict. On defendant's premises is a residential facility that is open 24 hours per day. Defendant's witnesses testified that residents entered and exited the premises at all hours of the day, and that residents could have visitors, including medical personnel, prior to

8:00 a.m. and after 4:30 p.m. Defendant's maintenance staff, however, did not provide any routine snow or ice removal after 4:30 p.m. or before 8:00 a.m. Plaintiff fell at approximately 8:00 a.m., and the record supported an 8-to-12-hour time period between the time of ice formation and plaintiff's fall. Thus, defendant failed to establish "that the ice formed so close in time to the accident that [it] could not reasonably have been expected to notice and remedy the condition" (*Piersielak v Amyell Dev. Corp.*, 57 AD3d 1422, 1423 [internal quotation marks omitted]).

Defendant failed to preserve for our review its remaining contentions inasmuch as it "did not move for a directed verdict on the [additional] ground[s] now raised on appeal" (*Tomaszewski v Seewaldt*, 11 AD3d 995, 995; *see Givens v Rochester City Sch. Dist.*, 294 AD2d 898, 899).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

129

CA 13-01694

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF PETER SYLVESTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 15, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner filed a grievance against prison authorities contesting, inter alia, their denial of his request for a special diet on "high feast days" as required by his religion, Odinism. Petitioner commenced this CPLR article 78 proceeding challenging the denial of his grievance by respondent's Central Office Review Committee (Committee), and he now appeals from a judgment dismissing the petition. We affirm.

The Court of Appeals has stated that, in reviewing a determination by an administrative agency such as the Committee, "[i]f we conclude 'that the determination is supported by a rational basis, [we] must sustain the determination even if [this C]ourt concludes that it would have reached a different result than the one reached by the agency' " (*Matter of Wooley v New York State Dept. of Corr. Servs.*, 15 NY3d 275, 280, *rearg denied* 15 NY3d 841). Thus, in order to prevail, "petitioner must demonstrate that the . . . Committee's determination was arbitrary and capricious or without a rational basis" (*Matter of Patel v Fischer*, 67 AD3d 1193, 1193, *lv denied* 14 NY3d 703).

Here, we conclude that petitioner failed to make such a demonstration and, thus, Supreme Court properly dismissed the

petition. "Preliminarily, the record is bereft of any evidence to support petitioner's conclusory claims of religious discrimination" (*Matter of Keesh v Smith*, 59 AD3d 798, 798). In addition, the evidence in the record provides a rational basis to support the conclusion that the Committee properly denied petitioner's grievance after consulting "recognized religious authorities in the outside community" as mandated by Department of Corrections and Community Supervision Directive No. 4202 (II). We take judicial notice of that regulation as a public record of the State of New York (*see Matter of Siwek v Mahoney*, 39 NY2d 159, 163 n 2). Contrary to petitioner's final contention, he is not such an authority because, inter alia, he is not in the outside community.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

131

CA 14-01007

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

STEVE BROOM, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RUBIN & YATES, LLC, DEFENDANT-RESPONDENT.

POPE LAW FIRM, PLLC, WILLIAMSVILLE (PAUL T. BUERGER, JR., OF COUNSEL), AND THE SCHULMAN LAW FIRM, PC, DALLAS, TEXAS, FOR PLAINTIFF-APPELLANT.

RAYMOND C. STILWELL, WILLIAMSVILLE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered August 9, 2013. The order granted plaintiff's motion for leave to reargue and renew his prior motion for summary judgment in lieu of complaint and upon reargument and renewal, adhered to a prior order denying the motion for summary judgment in lieu of complaint.

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

Memorandum: By motion for summary judgment in lieu of complaint pursuant to CPLR 3213, plaintiff commenced this action to enforce a judgment entered in Texas upon the default of defendant. Supreme Court denied the motion on the ground that the copy of the judgment submitted with plaintiff's moving papers was not properly authenticated. Plaintiff now appeals from an order granting his motion for leave to renew and reargue and, upon renewal and reargument, adhering to the prior decision denying plaintiff's motion. We affirm. Contrary to plaintiff's contention, the judgment was not properly authenticated because it was not accompanied by the certification required by CPLR 4540 (c) (*see Waingort v Waingort*, 203 AD2d 453, 453-454; *see generally Anderson v House of Good Samaritan Hosp.*, 44 AD3d 135, 144; *Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 283 AD2d 322, 323)

In light of our determination, we do not address plaintiff's remaining contention.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

132

CA 14-00017

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

DOG DAY'S, INC., DOING BUSINESS AS DOG DAYS OF BUFFALO, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HARTFORD FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (FALLYN CAVALIERI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 10, 2013. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff insured filed a claim on its fire insurance policy with defendant insurer after plaintiff suffered a fire loss on its property. As relevant to this appeal, defendant paid plaintiff pursuant to the policy a certain sum of money as the actual cash value for the losses at the property and eight monthly payments for business interruption. Plaintiff commenced this action asserting causes of action for breach of contract and breach of duty of good faith and fair dealing after defendant suspended the payments for business interruption. We conclude that Supreme Court properly granted defendant's motion for summary judgment.

Plaintiff contends that the court erred in granting the motion inasmuch as defendant failed to meet its burden of proof with respect to the actual cash value of the losses at the property. We reject that contention. Defendant complied with the " 'broad rule of evidence' " applicable herein by submitting such information as the purchase price of the property, the cost of improvements to the property, the assessed value of the property, and the amount it expended to repair and restore the property after the loss (*Mazzocki v State Farm Fire & Cas. Corp.*, 1 AD3d 9, 12; *see Incardona v Home Indem. Co.*, 60 AD2d 749, 749-750). In opposition, plaintiff failed to challenge defendant's actual cash value figure and therefore failed to

raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to plaintiff's further contention, defendant met its burden of establishing that it fulfilled its contractual obligations to plaintiff with respect to the business interruption payments. Defendant established that the business interruption coverage under the policy applied only "during . . . period[s] of restoration," but that during the eight months that business interruption payments were made, plaintiff made no effort to rebuild or repair the premises, or to resume business operations, despite receiving an actual cash value payment for the property within 3½ months of the loss (*cf. Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 195-196). We conclude that plaintiff likewise failed to raise an issue of fact that it was entitled to further business interruption payments (*see generally Zuckerman*, 49 NY2d at 562).

Finally, we agree with defendant that the court properly granted it summary judgment with respect to the cause of action for breach of the implied covenant of good faith and fair dealing inasmuch as defendant established as a matter of law that it did not act in bad faith or unfairly in dealing with plaintiff, and plaintiff failed to raise an issue of fact (*see id.*; *Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274, 274).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

133

CA 14-01201

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

MARTHA IRAKOZE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENNARO SAMBUCO, ALSO KNOWN AS JIM SAMBUCO,
DEFENDANT-APPELLANT.

LAW OFFICES OF MICHAEL J. HUGHES, PLLC, AMHERST (MICHAEL J. HUGHES OF COUNSEL), FOR DEFENDANT-APPELLANT.

STEINER & BLOTNIK, BUFFALO (M. KREAG FERULLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered March 10, 2014. The order denied the motion of defendant to eject plaintiff from certain real property and granted the cross motion of plaintiff for summary judgment compelling specific performance.

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

Memorandum: Plaintiff and defendant entered into an agreement, dated November 15, 2011, which provided that plaintiff was to purchase property from defendant in "as is" condition for $35,000. Plaintiff paid defendant the $35,000 and took possession of the premises in June 2012, although title had not yet been transferred. In January 2013, defendant advised plaintiff that adjustments would be made at closing for rents that plaintiff had collected and for extensive renovations and improvements that defendant had made to the property at plaintiff's request. Plaintiff thereafter commenced this action for breach of contract seeking, inter alia, specific performance of the agreement.

Defendant brought by order to show cause a motion seeking to eject plaintiff from the premises, and plaintiff cross-moved for partial summary judgment on her cause of action for specific performance. We conclude that Supreme Court erred in granting the cross motion, and we therefore modify the order accordingly. Although plaintiff established her entitlement to judgment as a matter of law by showing that the parties agreed to the sale of the property for $35,000, and that any modification of the agreement must be in writing (*see* General Obligations Law § 15-301 [1]; *American Credit Servs. v*

R.V. & Mar. Corp., 248 AD2d 1007, 1007), we nevertheless conclude that defendant raised an issue of fact whether, under the circumstances presented here, the agreement was modified by an oral agreement between the parties. Specifically, defendant established, with objective evidence, that he completed extensive renovations and improvements to the property after the parties entered into the purchase agreement for the sale of the property in "as is" condition in November 2011 (*see Rose v Spa Realty Assocs.*, 42 NY2d 338, 343*; cf. Klein v Klein*, 79 NY2d 876, 878; *Nassau Beekman LLC v Ann/Nassau Realty LLC*, 105 AD3d 33, 39). Furthermore, we note that the record establishes that the receipt for $35,000 in June 2012, which both parties signed, stated that the funds were paid "towards" the purchase of the property, which implies that the amount was not the entire purchase price. We therefore conclude that defendant raised an issue of fact whether the renovations and improvements are "unequivocally referable to [a] modification" of the agreement to purchase the premises in "as is" condition for $35,000 (*Rose*, 42 NY2d at 343).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

134

CA 14-00832

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF PEOPLE, INC. AND S SPOTH, LLC,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF TONAWANDA ZONING BOARD OF APPEALS,
RESPONDENT-APPELLANT.

FRANCIS C. AMENDOLA, BUFFALO, FOR RESPONDENT-APPELLANT.

HOPKINS & SORGI, PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 21, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted the petition.

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

Memorandum: Respondent appeals from a judgment that, inter alia, granted the CPLR article 78 petition and annulled the determination of respondent denying petitioners' application for two area variances. We agree with respondent that Supreme Court erred in granting the petition, and we therefore reverse.

It is well settled that the determination whether to grant or deny an application for an area variance is committed to the broad discretion of the applicable local zoning board (*see Matter of Ifrah v Utschig*, 98 NY2d 304, 308; *Matter of Shokrian v Zoning Bd. of Appeals of City of Long Beach*, 32 AD3d 961, 961). Consequently, when reviewing the denial of an application for an area variance, "[j]udicial review [of such a determination] is . . . limited to the issue 'whether the action taken by the [board] was illegal, arbitrary, or an abuse of discretion' . . . [, and the b]oard's determination should therefore be sustained so long as it 'has a rational basis and is supported by substantial evidence' " (*Matter of Dietrich v Planning Bd. of Town of W. Seneca*, 118 AD3d 1419, 1420; *see Matter of Pecoraro v Board of Appeals of Town of Hempstead*, 2 NY3d 608, 613). A reviewing court may not substitute its judgment for that of a local zoning board (*see Matter of Goldberg v Zoning Bd. of Appeals of City of Long Beach*, 79 AD3d 874, 877), "even if there is substantial

evidence supporting a contrary determination" (*Matter of Conway v Town of Irondequoit Zoning Bd. of Appeals*, 38 AD3d 1279, 1280).

Here, the record establishes that respondent reviewed the appropriate statutory factors in making its determination (*see* General City Law § 81-b [4] [b]), and concluded that the application should be denied because, inter alia, the variances would cause an undesirable change to the character of the neighborhood, the variances are substantial, and petitioners' hardship is self-created (*see* § 81-b [4] [b] [i], [iii], [v]). Specifically, there is substantial evidence in the record supporting respondent's conclusion that granting the variances would cause increased population density from the presence of an apartment building in a neighborhood comprised of single-family homes (*see Matter of Bivona v Town of Plattekill Zoning Bd. of Appeals*, 268 AD2d 877, 879-880), that the variances necessary to accommodate an apartment building would be substantial (*see Pecoraro*, 2 NY3d at 614), and that the petitioners' difficulty was self-created because they were aware of the property's zoning classification when they purchased the property (*see Ifrah*, 98 NY2d at 309; *cf. Matter of Swan v Depew*, 167 AD2d 835, 836). Inasmuch as respondent "rendered its determination after considering the appropriate factors and properly weighing the benefit to petitioner[s] against the detriment to the health, safety and welfare of the neighborhood or community if the variances were granted" (*Matter of DeGroote v Town of Greece Bd. of Zoning Appeals*, 35 AD3d 1177, 1178; *see Matter of Concerned Citizens of Perinton v Town of Perinton*, 261 AD2d 880, 880, *appeal dismissed* 93 NY2d 1040, *cert denied* 529 US 1111), we agree with respondent that the court erred in granting the petition.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

151

CA 14-01124

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

IN THE MATTER OF CROUSE HEALTH SYSTEM, INC.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, DAVID CLIFFORD, COMMISSIONER OF ASSESSMENT FOR CITY OF SYRACUSE, CITY OF SYRACUSE BOARD OF ASSESSMENT REVIEW, COUNTY OF ONONDAGA AND CITY OF SYRACUSE SCHOOL DISTRICT,
RESPONDENTS-APPELLANTS.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (SHANNON M. JONES OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (MEGAN K. DORRITIE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered February 3, 2014 in a proceeding pursuant to CPLR article 78 and RPTL article 7. The order and judgment granted petitioner's motion for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, and the petition is dismissed insofar as it seeks relief pursuant to CPLR article 78.

Memorandum: In this proceeding pursuant to, inter alia, RPTL article 7, petitioner challenges the tax assessments on three parcels of property that contain a garage and office space. Petitioner sought full exemptions for the subject parcels pursuant to RPTL 420-a, and respondent Commissioner of Assessment granted a 75% exemption for the garage parcels, but denied the remainder of the request. Petitioner commenced this proceeding challenging that determination, and respondents appeal from an order and judgment granting petitioner's motion for summary judgment. We agree with respondents that Supreme Court erred in granting the motion. We also note at the outset that the petition must be dismissed insofar as it seeks relief pursuant to CPLR article 78, because the proper vehicle for seeking the instant relief is a certiorari proceeding pursuant to RPTL article 7 (*see Matter of ViaHealth of Wayne v VanPatten*, 90 AD3d 1700, 1701).

It is well settled that, pursuant to the RPTL, "[r]eal property owned by a corporation or association organized or conducted

exclusively for . . . hospital . . . purposes . . . and used exclusively for carrying out thereupon . . . such purpose[] . . . shall be exempt from taxation" (RPTL 420-a [1] [a]). Here, respondents concede that petitioner is organized for an exempt purpose, as a hospital, and thus only the second prong of the statute is at issue. "[T]he test of entitlement to tax exemption under the used exclusively clause of [RPTL 420-a (1) (a)] is whether the particular use is reasonably incident[al] to the [primary or] major purpose of the [corporation] . . . Put differently, the determination of whether the property is used exclusively for the statutory purposes depends upon whether its primary use is in furtherance of the permitted purposes" (*Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn*, 104 AD3d 1294, 1296, *affd* 24 NY3d 362 [internal quotation marks omitted]). "The burden of establishing that the property is entitled to a tax exemption rests with the taxpayer" (*Merry-Go-Round Playhouse, Inc.*, 24 NY3d at 367, citing *Matter of Lackawanna Community Dev. Corp. v Krakowski*, 12 NY3d 578, 581). Additionally, when a taxpayer in a tax certiorari proceeding seeks summary judgment, "it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor . . . , and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [internal quotation marks omitted]; *see e.g. ViaHealth of Wayne*, 90 AD3d at 1701-1702; *Fusco v Assessor of City of Utica*, 178 AD2d 995, 995).

Here, we agree with respondents that petitioner failed to establish that the primary use of the subject parcels is for exempt purposes, and thus it failed to meet its burden on the motion. Indeed, the evidence submitted by petitioner in support of the motion established that an undetermined portion of the people who used the garage did so for purposes associated with nonexempt uses such as the adjacent private physicians' offices. Inasmuch "[a]s the private practice of medicine by a hospital's attending physicians is primarily a commercial enterprise, and such physicians' offices are not entitled to a tax exemption under RPTL 420-a . . . , the parking spaces subleased to those offices cannot be said to so further the hospital's purposes as to create an entitlement to an exemption" (*Matter of St. Francis Hosp. v Taber*, 76 AD3d 635, 640; *see Matter of Genesee Hosp. v Wagner*, 47 AD2d 37, 43-45, *affd* 39 NY2d 863). Petitioner also established that 6.3 to 8.2% of the yearly revenue for the entire garage was gained from people attending sporting and entertainment events at nearby venues, which petitioner concedes is not an exempt use. Finally, the evidence submitted by petitioner established that approximately 10% of one of the office buildings and 20% of the other was used for nonexempt purposes, but failed to establish conclusively what part of the remaining office space was actually used by petitioner, and for what specific purpose. Thus, because petitioner failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Zuckerman*, 49 NY2d at 562), the court should have denied the motion, "regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Contrary to petitioner's further contention, we conclude that the court abused its discretion in deeming respondents to have admitted all the information in petitioner's "Statement of Undisputed Material Facts" submitted pursuant to Rule 19-a of the Rules of the Commercial Division of the Supreme Court ([hereafter, 19-a Statement] *see* 22 NYCRR 202.70 [g] [Rule 19-a (a)]). The 19-a Statement was merely an almost verbatim repetition of an affidavit submitted by one of petitioner's employees in support of the motion, and respondents clearly disputed the content of the information in it. Further, petitioner failed to submit sufficient evidence in admissible form in support of the 19-a Statement, as required by the Rule (*see* 22 NYCRR 202.70 [g] [Rule 19-a (d)]; *cf. EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 220, *lv granted* 19 NY3d 810). Although "the rule gives a motion court the discretion to deem facts admitted, the court is not required to do so" (*Abreu v Barkin & Assoc. Realty, Inc*., 69 AD3d 420, 421). Consequently, although "it would have been better for [respondents] to submit a paragraph-by-paragraph response to [petitioner's] statement" as required by the regulation (*Al Sari v Alishaev Bros., Inc*., 121 AD3d 506, 506-507; *see* 22 NYCRR 202.70 [g] [Rule 19-a (b)]), under the circumstances the court abused its discretion in deeming the entire statement admitted. The evidence submitted in support of petitioner's motion failed to eliminate all "triable issues of fact and the court was not compelled to grant summary judgment solely on the basis of blind adherence to the procedure set forth in Rule 19-a" (*Abreu*, 69 AD3d at 421; *see Slattery Skanska Inc. v American Home Assur. Co*., 67 AD3d 1, 12).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

157

CAF 14-00143

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
APRIL S. MATTESON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BARRY R. MATTESON, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

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

Memorandum: Petitioner commenced this proceeding seeking to modify an order of support. The Support Magistrate issued an order determining that neither parent had available health insurance benefits for the child, that each parent "shall provide health insurance coverage if it ever becomes available through employment for the child at a reasonable cost," and that each parent "shall advise the Chautauqua County Support Collection Unit of any change respecting the availability of medical coverage for the child." The order further provided that, "if health insurance benefits for the child become available to either party in the future, the Department of Social Services or a party may file a modification petition seeking a Court Order obligating a party to provide health insurance benefits for the child; a Medical Income Execution shall not [be issued] without such Court Order." Petitioner filed an objection to the order, requesting that the order be modified to delete the language "a Medical Income Execution shall not [be issued] without such Court Order." Family Court dismissed the objection and affirmed the order of the Support Magistrate, and we now affirm.

Family Court Act § 416 (c) requires child support orders to include a provision that, if a parent currently or in the future has health insurance benefits available that may be extended or obtained to cover the child, the parent is required to exercise the option of additional coverage in favor of the child. The term " '[a]vailable

health insurance benefits' " is defined as health insurance benefits that are "reasonable in cost," which in turn is defined as costs that do not exceed five percent of the combined parental gross income (§ 416 [d] [2], [3]). A court, however, may also find that the cost is not reasonable considering "the circumstances of the case" (§ 416 [d] [3]). Moreover, the benefits are not "reasonable" in cost if the "parent's share of the cost of extending such coverage would reduce the income of that parent below the self-support reserve" (§ 416 [d] [3]). In short, Family Court Act § 416 (c) and (d) "implicate[] judicial involvement" in determining the issue "whether health insurance benefits are 'available' " (*Matter of Chemung County Commr. of Social Servs. v Beard*, 101 AD3d 33, 35).

CPLR 5241 (b) (2) (i) provides in relevant part that, where the court "orders the [parent] to provide health insurance benefits for specified dependents, an execution for medical support enforcement may . . . be issued by the support collection unit." CPLR 5241 (b) (2) (ii) provides in relevant part that, where a child support order requires the parent "to provide health insurance benefits for specified dependents, and where the [parent] provides such coverage and then changes employment, and the new employer provides health care coverage, an amended execution for medical support enforcement may be issued by the support collection unit . . . without any return to court."

Petitioner contends that, pursuant to CPLR 5241 (b) (2) (ii), it may issue a medical income execution to a new employer of the parent without going to court, and it was therefore error for the Support Magistrate to include the provision that a medical income execution "shall not [be issued] without such Court Order." We conclude that petitioner's reliance on CPLR 5241 (b) (2) (ii) is misplaced. A plain reading of that statute shows that it is not applicable here because neither parent provided health insurance coverage for the child at the time the Support Magistrate issued the order. The statute specifically provides that, "*where* the [parent] provides such coverage *and then* changes employment," an amended medical income execution may be issued by petitioner without returning to court (*id.* [emphasis added]). Inasmuch as there was no medical income execution that was issued in this case, there was nothing to "amend." Contrary to petitioner's further contention, a medical income execution can be issued only where a court has ordered a parent to provide health insurance benefits, and that has not occurred yet inasmuch as the Support Magistrate determined that such benefits are not available (*see* CPLR 5241 [b] [2] [i]; *Matter of Oneida County Dept. of Social Servs. v Paul S.*, 41 AD3d 1189, 1190-1191, *lv denied* 9 NY3d 810).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

158

CAF 14-00144

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
CHERISH M. WEATHERS, PETITIONER-APPELLANT,

V ORDER

MICHAEL A. WEATHERS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

159

CAF 14-00145

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

IN THE MATTER OF RAECHEL S. CONNELL,
PETITIONER-RESPONDENT,

V ORDER

ALAN PETTEYS, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES, APPELLANT.
(APPEAL NO. 3.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

160

CAF 14-00146

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

IN THE MATTER OF JENA R. RAHR,
PETITIONER-RESPONDENT,

V ORDER

JESSIE A. BENSON, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.
(APPEAL NO. 4.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

161

CAF 14-00147

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

IN THE MATTER GERALD F. FRIES, JR.,
PETITIONER-RESPONDENT,

V ORDER

NICOLE V. HUMMEL, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.
(APPEAL NO. 5.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

162

CAF 14-00148

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
ERICA L. HINSON, PETITIONER-APPELLANT,

V ORDER

MICHAEL J. PATTERSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 6.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

163

CAF 14-00149

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
PHAEDRA AKILI, PETITIONER-APPELLANT,

V ORDER

GARETH PUDWELL, RESPONDENT-RESPONDENT.
(APPEAL NO. 7.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

164

CAF 14-00152

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
MICHAEL SEEKINS, PETITIONER-APPELLANT,

V ORDER

KATHRYNE TAMEZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 9.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

165

CAF 14-00153

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

IN THE MATTER OF ERIN B. FISCHER,
PETITIONER-RESPONDENT,

V ORDER

MATTHEW J. BAGGIANO, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.
(APPEAL NO. 10.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

166

CAF 14-00154

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
VICTORIA E. WOODARD, PETITIONER-APPELLANT,

V ORDER

AUDREY A. MEADOWS, RESPONDENT-RESPONDENT.
(APPEAL NO. 11.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

167

CAF 14-00155

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
DESIREE R. BOSLEY, PETITIONER-APPELLANT,

V ORDER

TONYA R. BOSLEY, RESPONDENT-RESPONDENT.
(APPEAL NO. 12.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

168

CAF 14-00156

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

IN THE MATTER OF LIDIA E. CORTEZ,
PETITIONER-RESPONDENT,

V ORDER

MIGUEL A. CORREA, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.
(APPEAL NO. 13.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

169

CAF 14-00157

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
JESSICA N. MATTESON, PETITIONER-APPELLANT,

V ORDER

BARRY R. MATTESON, RESPONDENT-RESPONDENT.
(APPEAL NO. 14.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

170

CAF 14-00158

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
JESSICA N. MATTESON, PETITIONER-APPELLANT,

V ORDER

APRIL S. MATTESON, RESPONDENT-RESPONDENT.
(APPEAL NO. 15.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

171

CAF 14-00159

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
JODIE L. SUBER, PETITIONER-APPELLANT,

V ORDER

WALTER J. MORSE, RESPONDENT-RESPONDENT.
(APPEAL NO. 16.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

172

CAF 14-00160

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
DIANE M. DEBOSE, PETITIONER-APPELLANT,

V ORDER

JERMAINE L. HOLLOMAN, RESPONDENT-RESPONDENT.
(APPEAL NO. 17.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

173

CAF 14-00161

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
CORA J. DOUGLAS, PETITIONER-APPELLANT,

V ORDER

MICHAEL I. ADAMSON, RESPONDENT-RESPONDENT.
(APPEAL NO. 18.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

174

CAF 14-00162

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
CAILEY A. RUSSO, PETITIONER-APPELLANT,

V ORDER

PAUL A. RUSSO, RESPONDENT-RESPONDENT.
(APPEAL NO. 19.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

175

CAF 14-00163

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
AMANDA J. WILLIAMS, PETITIONER-APPELLANT,

V ORDER

JULIE N. SWARTZ, RESPONDENT-RESPONDENT.
(APPEAL NO. 20.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

176

CAF 14-00164

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
BENJAMIN S. DAHLIN, PETITIONER-APPELLANT,

V ORDER

LINDSAY R. DAHLIN, RESPONDENT-RESPONDENT.
(APPEAL NO. 21.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

177

CAF 14-00165

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
SARAH M. SHORT, PETITIONER-APPELLANT,

V ORDER

JAMES F. CHASE, RESPONDENT-RESPONDENT.
(APPEAL NO. 22.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

178

CAF 14-00166

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
CASSANDRA M. RAYMOND, PETITIONER-APPELLANT,

V ORDER

ANGELO VILLA, RESPONDENT-RESPONDENT.
(APPEAL NO. 23.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

179

CAF 14-00167

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

IN THE MATTER OF SEAN G. TRASK,
PETITIONER-RESPONDENT,

V ORDER

SUZANNE G. BUCK, RESPONDENT-RESPONDENT.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, APPELLANT.
(APPEAL NO. 24.)

JULIE B. HEWITT, MAYVILLE, FOR APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

180

CAF 14-00168

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
VALERIE A. BROOKS, PETITIONER-APPELLANT,

V ORDER

JERAD M. DAVIS, RESPONDENT-RESPONDENT.
(APPEAL NO. 25.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

181

CAF 14-00169

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

IN THE MATTER OF CHAUTAUQUA COUNTY DEPARTMENT
OF HEALTH AND HUMAN SERVICES, ON BEHALF OF
AMANDA L. WEILER, PETITIONER-APPELLANT,

V ORDER

KEVIN C. BROWN, RESPONDENT-RESPONDENT.
(APPEAL NO. 26.)

JULIE B. HEWITT, MAYVILLE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered October 17, 2013 in a proceeding pursuant to Family Court Act article 4. The order dismissed the objection of the Chautauqua County Department of Health and Human Services and affirmed the order of the Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see Matter of Chautauqua County Dept. of Health & Human Servs. v Matteson*, ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

184

KA 14-00721

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS SCZERBANIEWICZ, DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Onondaga County Court (Joseph E. Fahey, J.), entered April 9, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). The Board of Examiners of Sex Offenders (Board) recommended that defendant be adjudicated a level one risk based on a score of 20 points on the risk assessment instrument, but it applied an override from that presumptive risk level based on the fact that defendant had been diagnosed with a "psychological abnormality" that decreased his ability to control "impulsive sexual behavior." Consequently, the Board recommended that defendant be adjudicated a level three risk. County Court did not apply the override, but determined that an upward departure from the presumptive risk level was warranted and adjudicated defendant a level three risk. We affirm.

An upward departure is warranted where the People have established by clear and convincing evidence that there exist aggravating circumstances of a kind or to a degree not adequately taken into account by the risk assessment guidelines (*see People v Gillotti*, 23 NY3d 841, 861; *People v Moore*, 115 AD3d 1360, 1360-1361; *People v Vaillancourt*, 112 AD3d 1375, 1376, *lv denied* 22 NY3d 864), and we conclude that the People have met that burden in this case. Here, defendant's case summary establishes that defendant was arrested in connection with an investigation into a child pornography ring involving the production and sale of child pornography among individuals in 28 countries, after attempting to purchase from an

undercover U.S. Postal Inspector pornographic videos depicting a 12-year-old girl. At the time of his arrest, defendant possessed over 1,500 images of child pornography, which included images of children involved in sadistic, masochistic, and otherwise violent acts, as well as approximately 2,000 images of child erotica. He admitted to collecting the images over approximately 13 years before his arrest and to paying for some of the images. He also admitted to masturbating to sexual fantasies of children while in prison, even after he had undergone sex offender treatment. "[Those] facts contained in defendant's case summary, which were not disputed by defendant, constitute clear and convincing evidence in support of his classification as a level [three] offender" (*People v Girup*, 9 AD3d 913, 913-914).

Defendant further contends that the court erred in failing to grant a downward departure from risk level three based on mitigating factors. We reject that contention. The factors cited by defendant, primarily the conclusions of treating social workers that he presented a "low to moderate risk" to reoffend, were outweighed by the aggravating factors detailed above (*see People v Quinones*, 123 AD3d 460, 460; *People v Van Allen*, 287 AD2d 400, 400, *lv denied* 97 NY2d 709).

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

185

KA 14-00194

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA M. HENRY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.). rendered July 12, 2013. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [2]). The record establishes that defendant knowingly, voluntarily and intelligently waived her right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses her challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

186

KA 13-02053

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH MARTINEZ, JR., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), dated November 1, 2013. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, and the matter is remitted to Supreme Court, Monroe County, for a hearing pursuant to CPL 440.30 (5) in accordance with the following memorandum: Defendant appeals from an order that denied, without a hearing, his motion pursuant to CPL 440.10 to vacate a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Defendant's motion was based on an affidavit of his daughter, the victim, in which she recanted her accusations against him, and a claim of ineffective assistance of trial counsel. We conclude that Supreme Court erred in denying without a hearing that part of defendant's motion based on the victim's recantation, and we therefore reverse the order and remit the matter to Supreme Court to hold a hearing thereon.

In her affidavit, the victim, who was the sole witness to give testimony at trial with respect to the crimes, averred that she wanted to live with her maternal grandmother. In order to effectuate that move, her maternal grandmother advised her to accuse defendant of having sexually assaulted her. The victim averred that she did not care about defendant at the time and, therefore, she agreed to accuse defendant of sexually assaulting her. She further averred that, since the trial, she had reconnected with her paternal grandmother and had seen how the latter was suffering because defendant was in prison. Witnessing that suffering resolved her to tell the truth. Although the court found the victim's recantation to be inherently unbelievable or unreliable, we conclude that, based on the totality of the circumstances, such a finding was unwarranted in the absence of a

hearing (*see People v Jenkins*, 84 AD3d 1403, 1407, *lv denied* 19 NY3d 1026; *see generally People v Lane*, 100 AD3d 1540, 1541, *lv denied* 20 NY3d 1063).

The victim's trial testimony that defendant had sexually assaulted her was crucial to the prosecution's case. Her subsequent averments that she was encouraged by her maternal grandmother to accuse defendant of crimes so that she could live with her maternal grandmother indicate that she had a motive to lie at trial. We therefore conclude that the victim's trial testimony, if false, was extremely prejudicial to defendant inasmuch as, without that testimony, there would have been no basis for the jury to convict defendant (*see generally Lane*, 100 AD3d at 1541). Under those circumstances, the court's denial without a hearing of that branch of defendant's motion based on the victim's recantation was an improvident exercise of discretion (*see Jenkins*, 84 AD3d at 1408).

We reject defendant's contention that he is entitled to a hearing on his claim of ineffective assistance of trial counsel. Rather, we conclude that the court properly determined defendant's claim based on the trial record and defendant's submissions on the motion (*see People v Satterfield*, 66 NY2d 796, 799). We agree with the court that the evidence, the law and the circumstances of the case, viewed together and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

189

CAF 13-01436

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

IN THE MATTER OF APRIL K. DEJESUS,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

RODNEY N. HAYMES, RESPONDENT-PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Frank S. Cook, J.H.O.), entered July 25, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, found that petitioner-respondent had willfully violated a prior court order.

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

Memorandum: Petitioner-respondent mother and respondent-petitioner father are the parents of four children. The parties stipulated to an order of custody that, among other things, granted the father visitation with the children during the first three weekends of each month. The mother allegedly denied the father access to the children in the fall of 2012 and winter of 2013. In December 2012, the father filed a petition for enforcement of the order of custody and, in January 2013, a petition for the violation thereof. Family Court found that the mother had willfully violated the order of custody. We affirm.

We reject the mother's contention that the court erred in finding that her violation of the order was willful. The mother presented evidence at trial that the children did not want to visit the father because they were afraid of him owing to fist fights with his girlfriend, his physical aggression toward them, and his drug use. According to the mother, her violation of the order was not willful inasmuch as she was justified in not subjecting the children to such an environment. The father, however, presented evidence that, after conducting an investigation, caseworkers from the Oneida County Department of Social Services found his home to be safe for the children. The father testified that what the children thought to be an illegal drug in his home was actually flavored tobacco from the smoke shop he owned. The father also provided evidence that the domestic violence to which the mother referred was actually just one incident in 2009 during which he had an argument with his girlfriend and that, contrary to the mother's testimony, it was her own house

that was unfit for the children because of her history of drug use.

Given the conflicting nature of the evidence, whether the mother's violation was willful with respect to her denial of the father's custodial access to the children "distills to a credibility determination" (*Matter of Cobane v Cobane*, 57 AD3d 1320, 1323, *lv denied* 12 NY3d 706). "Given the court's unique opportunity to assess the credibility of the witnesses and observe their demeanor . . . , [its findings] are entitled to great deference and will not be disturbed where, as here, there is a sound and substantial basis in the record for those findings" (*Matter of Wojcik v Newton* [appeal No. 2], 11 AD3d 1011, 1012 [internal quotation marks omitted]; *see Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1580-1581, *lv denied* 20 NY3d 855).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

191

CAF 13-01660

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

IN THE MATTER OF AIJIANNA L.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANNETTE S., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

BARBARA E. MOSHER, ATTORNEY FOR THE CHILD, MANLIUS.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered August 14, 2013 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Memorandum: Respondent mother appeals from an order adjudicating the subject child to be neglected based on her failure to supply the child with adequate education (*see* Family Ct Act § 1012 [f] [i] [A]). Contrary to the mother's contention, petitioner met its burden of establishing educational neglect by a preponderance of the evidence (*see Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). " 'Proof that a minor child is not attending a public or parochial school in the district where the parent[] reside[s] makes out a prima facie case of educational neglect pursuant to section 3212 (2) (d) of the Education Law' " (*Matter of Matthew B.*, 24 AD3d 1183, 1184). Here, petitioner presented unrebutted evidence from the Syracuse City School District that, inter alia, the child did not attend a single day of school during the 2011-2012 and 2012-2013 school years (*see Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431, *lv denied* 24 NY3d 905, *lv dismissed* 24 NY3d 951), and "Family Court could reasonably conclude that the mental condition of the child was in imminent danger of becoming impaired based upon the evidence of excessive absences" (*Matter of Patrick S.*, 52 AD3d 837, 837; *see Matter of Evan F.*, 48 AD3d 811, 811, *lv denied* 11 NY3d 715). The mother "failed to present 'evidence that the [child is] attending

school and receiving the required instruction in another place' or to establish a reasonable justification for the child['s] absences and thus failed to rebut the prima facie evidence of educational neglect" (*Cunntrel A.*, 70 AD3d at 1308).

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

192

CA 14-01391

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

MICHELLE CASHION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER T. BAJOREK AND JUDITH BAJOREK,
DEFENDANTS-APPELLANTS.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (BRITTANY A. NASRADINAJ OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

NICHOLAS, PEROT, SMITH, BERNHARDT & ZOSH, P.C., AKRON (MICHAELANGELO J. CIERI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered October 29, 2013 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she slipped and fell from outdoor steps at the home she rented from defendants. Supreme Court denied defendants' motion for summary judgment dismissing the complaint. We affirm.

Contrary to defendants' contentions, we conclude that there are several triable issues of fact precluding summary judgment. First, there is an issue of fact whether they maintained the premises at issue in a reasonably safe condition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We note that the allegedly open and obvious condition of the steps does not absolve defendants of their duty to keep the stairs in a safe condition but, instead, bears only on plaintiff's comparative fault (*see Landahl v City of Buffalo*, 103 AD3d 1129, 1131; *Verel v Ferguson Elec. Constr. Co., Inc.*, 41 AD3d 1154, 1156). Second, there is an issue of fact whether any breach of that duty "was a substantial cause of the events which produced the injury" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315, *rearg denied* 52 NY2d 784; *see Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548; *Prystajko v Western N.Y. Pub. Broadcasting Assn.*, 57 AD3d 1401, 1403). Finally, there are issues of fact whether defendants created the allegedly dangerous condition (*cf. Navetta v Onondaga Galleries LLC*, 106 AD3d 1468, 1469; *see generally Ohanessian v Chase Manhattan Realty*

Leasing Corp., 193 AD2d 567, 567), and whether defendants had constructive notice of that condition (*see generally Zuckerman*, 49 NY2d at 562; *Wilson v 100 Carlson Park, LLC*, 113 AD3d 1118, 1119).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

197

CA 14-00716

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

GLADYS LAVERDI AND FRANCIS M. LAVERDI,
PLAINTIFFS-APPELLANTS,

V ORDER

ARONA S. BAKER AND PATRICK L. EMMERLING,
EXECUTOR OF THE ESTATE OF BERNICE E. BAKER,
DECEASED, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF WAYNE C. FELLE, P.C., WILLIAMSVILLE (ELIZABETH A. BRUCE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 13, 2013 in a personal injury action. The order granted the motion of defendants for an open commission and letters rogatory for the deposition of Kathryn R. Wilkins, M.D., a nonparty witness.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

199

CA 14-00350

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

LYNN RIVERA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL L. RIVERA, DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (LAURA EMERSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Shirley Troutman, J.), entered August 2, 2013 in a divorce action. The judgment, among other things, equitably distributed the marital property.

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

Memorandum: Defendant husband appeals from a judgment of divorce that, inter alia, directed him to pay maintenance and distributed the marital assets. We reject defendant's contention that the parties had ceased functioning as an economic partnership by the end of 2004, and that Supreme Court therefore erred in awarding plaintiff wife any interest in defendant's pension earned thereafter. Although defendant's employment resulted in the parties residing separately, there is no dispute that defendant remained plaintiff's sole source of financial support, that the parties shared joint bank accounts, and that they continued to file joint tax returns through the 2011 tax year. Indeed, in 2008, the parties made a down payment on a new marital home to be constructed in Virginia. It is well settled that " '[e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion' " (*Prasinos v Prasinos*, 283 AD2d 913, 913; *see also Oliver v Oliver*, 70 AD3d 1428, 1428-1429). We perceive no reason on this record to disturb the court's determination (*see generally Gasiorowski v Gasiorowski*, 267 AD2d 557, 557-558, *lv denied* 94 NY2d 762). We note that inasmuch as plaintiff did not appeal from the judgment, her contention that the court erred in awarding her a diminished share in defendant's pension after 2007 is not properly before us (*see Hecht v City of New York*, 60 NY2d 57, 63).

Contrary to defendant's contention, plaintiff's separate property, in the form of a single family home she owned in Louisiana

prior to marriage, was not transmuted into marital property when she used it to assist in funding the purchase of a series of marital residences. "It is well settled that a spouse is entitled to a credit for his or her contribution of separate property toward the purchase of the marital residence . . . , including any contributions that are directly traceable to separate property" (*Juhasz v Juhasz*, 59 AD3d 1023, 1024, *lv dismissed* 12 NY3d 848; *see also Salvato v Salvato*, 89 AD3d 1509, 1510, *lv denied* 18 NY3d 811). We reject defendant's contention that he was entitled to a credit for roofing improvements made to plaintiff's Louisiana residence, which were allegedly paid for out of his income. Defendant failed to establish that the funds spent on the roof "added value to the residence apart from the appreciation in value resulting from market forces over the period of ownership and, if so, the amount by which the value of the property was increased" (*Juhasz*, 59 AD3d at 1024-1025).

We reject defendant's further contention that the court abused its discretion in setting the amount of maintenance. "The record establishes that the court appropriately considered [plaintiff's] 'reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors' set forth in Domestic Relations Law § 236 (B) (6) (a)" (*Frost v Frost*, 49 AD3d 1150, 1151, quoting *Hartog v Hartog*, 85 NY2d 36, 52).

Finally, contrary to defendant's contention, we conclude that the award of counsel fees to plaintiff is reasonable and does not constitute an abuse or improvident exercise of the court's discretion (*see Gelia v Gelia*, 114 AD3d 1263, 1264).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

208

KA 11-01020

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN VICKERS, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered September 18, 2009. The judgment convicted defendant, upon a jury verdict, of unlawful dissection of the body of a human being (seven counts), opening graves (seven counts), body stealing (seven counts) and falsifying business records in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, seven counts each of body stealing (Public Health Law § 4216), opening graves (§ 4218), and unlawful dissection of the body of a human being (§ 4210-a). Defendant contends that the evidence is legally insufficient to support the conviction of body stealing and opening graves because the People failed to prove that body parts were removed from bodies that were "buried" (§ 4216) or "awaiting burial" (*id.*; § 4218). As defendant correctly concedes, his contentions are unpreserved for our review inasmuch as he failed to raise those contentions in his motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In any event, defendant's contentions lack merit (*see People v Gano*, 81 AD3d 1378, 1379, *lv denied* 17 NY3d 952; *People v Batjer*, 77 AD3d 1279, 1279, *lv denied* 17 NY3d 951; *see generally People v Danielson*, 9 NY3d 342, 349). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 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 contention that he received ineffective assistance of counsel. Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the

representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have reviewed defendant's remaining contention and conclude that it does not require reversal or modification of the judgment.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

212

CAF 13-02243

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

IN THE MATTER OF RICARDO SUAREZ AND LAURA SUAREZ, PETITIONERS-RESPONDENTS,

V OPINION AND ORDER

MELISSA WILLIAMS, RESPONDENT-APPELLANT, AND ERNESTO SUAREZ, RESPONDENT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (CHRISTOPHER M. JUDGE OF COUNSEL), FOR RESPONDENT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONERS-RESPONDENTS.

PATRICK J. HABER, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered March 26, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioners Laura Suarez and Ricardo Suarez and respondent Ernesto Suarez joint legal custody of the subject child.

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

Opinion by CENTRA, J.P.:

The issue raised in this case is whether petitioners, the grandparents of the child who is the subject of this proceeding, established extraordinary circumstances to deprive respondent mother of custody of the child. We conclude that they did not, and we therefore conclude that the order should be reversed and the petition dismissed.

Facts and Procedural History

The mother and respondent father are the parents of the child, who was born in August 2002. The mother has two daughters from a previous relationship who have always lived with her and who were approximately six and nine years old, respectively, when the child was born. Petitioners are the paternal grandparents of the child who have had a very close relationship with the child since his birth and have helped raise him. The testimony at the hearing was conflicting regarding the extent to which the child has lived with petitioners.

Family Court found that petitioners' version of where the child lived was substantiated by their witnesses, whereas it found that the testimony of the mother's witnesses lacked credibility. We perceive no reason to disturb the court's credibility determinations (*see Matter of Terry L.G.*, 6 AD3d 1144, 1145; *Matter of Pamela S.S. v Charles E.*, 280 AD2d 999, 1000), and we therefore summarize the facts as presented primarily by petitioners and their witnesses.

Within days after the child was born, petitioners took the child into their home to live and enrolled him in daycare. At the time, petitioners lived in Barneveld and the mother lived 12 miles away in Utica, working full-time for an insurance company. The mother, who had a close relationship with petitioners, saw the child several times a week. Two years later, the father moved to Massachusetts, where he still resides. In 2006, petitioners paid a deposit for a trailer across the street from them in which the mother and her daughters could live, thereby enabling the mother to see the child more often. That same year, petitioners obtained jobs in the Syracuse City School District (SCSD), and they moved to Syracuse the following year with the child. They enrolled the child in an elementary school in the SCSD. Although the child lived with petitioners and attended school in the SCSD, he continued to see the mother during the week and stayed with her on the weekends. In 2006 the mother's parents became ill, and she spent time caring for them and saw the child less frequently until late 2008, when petitioners moved the mother's trailer to Liverpool and she began visiting with the child more frequently.

In May 2012, the mother told petitioners that she intended to enroll the child in the school district where she lived and have him live with her. In June 2012, petitioners filed the instant petition seeking custody of the child. Up until that time, the child continued attending the same SCSD school he had attended since kindergarten, and he visited with the mother several times a week, including overnight visits. Although petitioners enrolled the child in various after school activities, they always discussed those activities with the mother before doing so. The grandmother spoke to the mother daily about the child, including his schooling and activities. On three occasions, the mother gave petitioners written permission to make educational and medical decisions on the child's behalf.

At the conclusion of the hearing and after a *Lincoln* hearing, the court granted the petition and awarded petitioners joint legal custody of the child with the father, who had consented to the relief requested by petitioners. Petitioners were awarded primary physical custody, with visitation with the mother and the father. We now reverse.

Analysis

As the Court of Appeals held in the seminal case of *Matter of Bennett v Jeffreys* (40 NY2d 543, 544), "[t]he State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances." The Court thereafter held that, "[s]o long as the

parental rights have not been forfeited by gross misconduct . . . or other behavior evincing utter indifference and irresponsibility . . . , the natural parent may not be supplanted" (*Matter of Male Infant L.*, 61 NY2d 420, 427). "The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Matter of Michael G.B. v Angela L.B.*, 219 AD2d 289, 291; *see Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1126).

Based on the facts as presented above, the arrangement between petitioners and the mother since shortly after the child's birth and for 10 years thereafter was akin to a joint custody arrangement with petitioners having primary physical custody of the child and the mother visitation. Petitioners established that they took on the bulk of the responsibility for the child's financial support and education. There was no showing by petitioners, however, that the mother was unfit or that she surrendered or abandoned her child (*see Michael G.B.*, 219 AD2d at 292). The question then is whether they established "other equivalent but rare extraordinary circumstance[s] which would drastically affect the welfare of the child" (*Bennett*, 40 NY2d at 549).

As we have held, "[w]hat proof is sufficient to establish such equivalent but rare extraordinary circumstances cannot be precisely measured" (*Michael G.B.*, 219 AD2d at 292). "[T]he fact that [a] parent agreed that a nonparent should have physical custody of the child or placed the child in the custody of a nonparent is not sufficient, by itself, to deprive the parent of custody" (*id.* at 292-293). Here, while the mother allowed petitioners to have primary physical custody of the child for a prolonged period, there were no other factors to show the existence of extraordinary circumstances (*cf. Bennett*, 40 NY2d at 550). The record establishes that the child is psychologically attached to both petitioners and the mother, and there was no evidence that removing the child from petitioners' primary custody would result in "psychological trauma . . . grave enough to threaten destruction of the child" (*id.*). The evidence at the hearing showed that the child exhibited some signs of stress after May 2012, but the record as a whole, including the *Lincoln* hearing, supports the conclusion that the child was stressed because of the family conflict, and would not suffer if the mother had custody of the child.

The court, relying upon Domestic Relations Law § 72 (2), found the existence of extraordinary circumstances in this case because there was an extended disruption of custody. Domestic Relations Law § 72 was amended in 2003 to add subdivision (2) "to provide guidance regarding the ability of grandparents to obtain standing in custody proceedings involving their grandchildren" (L 2003, ch 657, § 1). Domestic Relations Law § 72 (2) (a) allows a grandparent who "can demonstrate to the satisfaction of the court the existence of extraordinary circumstances" to apply to a court for custody of a child. That subdivision further states that "[a]n extended disruption of custody . . . shall constitute an extraordinary circumstance"

(*id.*). Domestic Relations Law § 72 (2) (b) provides that " 'extended disruption of custody' shall include, but not be limited to, a prolonged separation of the respondent parent and the child for at least twenty-four continuous months during which the parent voluntarily relinquished care and control of the child and the child resided in the household of the petitioner grandparent or grandparents."

Petitioners and the Attorney for the Child (AFC) contend that the statute does not require a showing that the parent relinquished "all" care and control of the child, and the AFC further contends that we should not rely on cases that predate the 2003 amendments to Domestic Relations Law § 72. In our view, however, the standard of extraordinary circumstances remains as it was set forth in *Bennett*. That standard is rooted in constitutional rights, and "the courts and the law . . . under existing constitutional principles . . . [are] powerless to supplant parents except for grievous cause or necessity" (*Bennett*, 40 NY2d at 548, citing *Stanley v Illinois*, 405 US 645, 651 [listing the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Ninth Amendment]). As the Court stated in *Bennett*, "neither decisional rule *nor statute* can displace a fit parent because someone else could do a 'better job' of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance" (*id.* [emphasis added]). We therefore reject the AFC's implicit assertion that Domestic Relations Law § 72 (2) (b) in any way eases a grandparent's burden of showing extraordinary circumstances, and we conclude that *Bennett* and cases decided thereafter remain good law.

In light of the high standard, and in view of the mother's consistent contact with the child and petitioners' constant communication with the mother and reliance on her permission to make decisions about the child, we cannot conclude that petitioners have demonstrated extraordinary circumstances sufficient to deprive the mother of custody of her child. As we have explained, "[a] finding of extraordinary circumstances is rare, and the circumstances must be such that they 'drastically affect the welfare of the child' " (*Matter of Jenny L.S. v Nicole M.*, 39 AD3d 1215, 1215, *lv denied* 9 NY3d 801, quoting *Bennett*, 40 NY2d at 549). In our view, petitioners failed to meet this high bar, where their own witnesses testified that the mother maintained a presence in the child's life consistently, even while he was living primarily with petitioners (*see id.* at 1216; *Matter of Woodhouse v Carpenter*, 134 AD2d 924, 924-925).

Conclusion

Accordingly, we conclude that the order should be reversed and the petition dismissed. In light of our determination, the remaining

issues raised by the mother on appeal are academic.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

213

CAF 13-01367

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

IN THE MATTER OF VINCENT DONEGAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAMARI TORRES, RESPONDENT-APPELLANT.

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

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

BETH A. LOCKHART, ATTORNEY FOR THE CHILD, CANASTOTA.

Appeal from an amended order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 11, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, granted sole legal and physical custody of the parties' child to petitioner and granted supervised visitation to respondent.

It is hereby ORDERED that said appeal insofar as it concerns custody and visitation is unanimously dismissed, and the amended order is otherwise affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, among other things, awarded petitioner father sole legal and physical custody of the parties' child. We note at the outset that the order from which the mother appeals was superseded by an amended order, from which no appeal was taken. In the exercise of our discretion, however, we treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see* CPLR 5520 [c]; *Matter of Dante P.*, 81 AD3d 1267, 1267-1268).

We reject the contention of the Attorney for the Child that the mother's appeal is moot in its entirety because, while this appeal was pending, a new custody proceeding was held and the paternal grandfather was awarded sole legal and physical custody of the subject child. In conducting its best interests analysis, Family Court found that the mother's judgment was impaired to a degree that made her unfit to be a custodian of the child, a finding that "may have 'enduring consequences' for the parties" (*Matter of Van Dyke v Cole*, 121 AD3d 1584, 1585, quoting *Matter of New York State Commn. on*

Judicial Conduct v Rubenstein, 23 NY3d 570, 576). We therefore conclude that the mother's challenge to the court's determination with respect to her fitness to act as a custodial parent is not moot.

We nevertheless reject the mother's challenge on the merits. The evidence at the custody hearing established that the mother suffered from bipolar disorder and schizophrenia with psychosis, that she received Social Security disability income, and that her mental health hospitalization required her relatives to travel to Puerto Rico to prevent the child from being placed in protective custody. Although the mother acknowledged her mental health condition, she testified that she stopped obtaining treatment through psychiatric services and medication because, in her view, such treatment was more hurtful than helpful (*see Matter of Booth v Booth*, 8 AD3d 1104, 1105, *lv denied* 3 NY3d 607). Without treatment for her condition, there was no basis for the court to conclude that a relapse or further hospitalization would be unlikely (*see id.*). We therefore conclude that there is a sound and substantial basis in the record for the court's determination that, in light of her untreated mental health condition, the mother was unfit to act as a custodial parent (*see Matter of Miller v Orbaker*, 17 AD3d 1145, 1146, *lv denied* 5 NY3d 714; *see generally Matter of Cool v Malone*, 66 AD3d 1171, 1173; *Matter of Pamela S.S. v Charles E.*, 280 AD2d 999, 1000). We further conclude that the court properly considered the mother's willingness to reside with the father of her other children as a factor weighing against her fitness to act as a custodial parent (*see generally Matter of Weekley v Weekley*, 109 AD3d 1177, 1179; *Matter of James A.-S. v Cassandra A.-S.*, 107 AD3d 703, 705-706; *Matter of Richard C.T. v Helen R.G.*, 37 AD3d 1118, 1118-1119). The evidence established that the father of the other children had pleaded guilty to a charge stemming from his sexual abuse of their oldest daughter and was the subject of an indicated Child Protective Services report for inadequate guardianship because he had attempted to touch his younger daughter inappropriately.

The mother's appeal insofar as it concerns her remaining contentions is moot (*see Van Dyke*, 121 AD3d at 1586).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

225

KA 14-00033

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER VANVLEET, DEFENDANT-APPELLANT.

STEVEN J. GETMAN, OVID, FOR DEFENDANT-APPELLANT.

ALEXANDER VANVLEET, DEFENDANT-APPELLANT PRO SE.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered July 1, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal mischief in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal mischief in the second degree (Penal Law § 145.10). Contrary to defendant's contention in his main and pro se supplemental briefs, County Court did not err in failing, sua sponte, to inquire at sentencing whether defendant wished to withdraw his plea based upon the failure of the People to provide certain discovery and a response to a demand for a bill of particulars. To the extent that defendant's contention may be construed as a challenge to the voluntariness of his plea, he failed to preserve that contention for our review because he did not move to withdraw his plea or vacate the judgment of conviction (*see People v Laney*, 117 AD3d 1481, 1482). In any event, his contention lacks merit in that respect because " 'nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea' " (*id.*). Defendant's valid waiver of the right to appeal encompasses his contentions in his pro se supplemental brief that he was denied due process of law based upon the failure of the People to comply with his discovery demand and demand for a bill of particulars (*see People v Oliveri*, 49 AD3d 1208, 1209); that the arrest warrant was invalid (*see People v Garland*, 69 AD3d 1122, 1123, *lv denied* 14 NY3d 887); and that he was denied the right to counsel following his arrest (*see generally People v Wilkins*, 1 AD3d 962, 963, *lv denied* 1 NY3d 603). Defendant's remaining contentions in his pro se supplemental brief that he was not given notice of the grand jury proceeding and that the grand jury proceeding was untimely were forfeited by his guilty plea (*see People*

v Hansen, 95 NY2d 227, 230-231; *see generally People v Watkins*, 77 AD3d 1403, 1404, *lv denied* 15 NY3d 956).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

226

KA 13-01936

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL T.C., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO 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 September 18, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by adjudicating defendant a youthful offender and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]). We reject defendant's contention that his waiver of the right to appeal is invalid. Defendant waived that right "both orally and in writing before pleading guilty, and [County C]ourt conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v McGrew*, 118 AD3d 1490, 1490-1491, *lv denied* 23 NY3d 1065 [internal quotation marks omitted]). We conclude, however, that the waiver does not encompass defendant's contention regarding the denial of his request for youthful offender status, inasmuch as "[n]o mention of youthful offender status was made before defendant waived his right to appeal during the plea colloquy" (*People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991).

We agree with defendant that he should have been afforded youthful offender status. Defendant was 16 years old at the time of the offense and committed the offense when he and his two friends were walking to a park, saw a vehicle with the keys in the ignition, and wondered what it would be like to steal the vehicle. Defendant expressed remorse for his actions, which we conclude were the actions of an impulsive youth rather than a hardened criminal (*see People v*

Drayton, 39 NY2d 580, 584, *rearg denied* 39 NY2d 1058). Thus, under the circumstances, we modify the judgment as a matter of discretion in the interest of justice by adjudicating defendant a youthful offender (*see* CPL 470.15 [3] [c]; *People v William S.*, 26 AD3d 867, 868).

Finally, defendant's waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

229

KA 12-00550

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN T. O'NEIL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of, inter alia, grand larceny in the third degree (§ 155.35 [1]) and criminal possession of stolen property in the third degree (§ 165.50). The conviction of grand larceny in the third degree in appeal No. 2 served as the predicate felony relied upon by County Court when it sentenced defendant as a second felony offender in appeal No. 1.

Addressing appeal No. 2 first, we note that defendant failed to preserve for our review his challenges to the voluntariness and factual sufficiency of his plea because he failed to move to withdraw his plea or vacate the judgment of conviction (*see People v Lawrence*, 118 AD3d 1501, 1501; *cf. People v Frysinger*, 111 AD3d 1397, 1398). Contrary to defendant's contention, the narrow exception to the preservation requirement does not apply, inasmuch as "[t]his is not one of those rare cases 'where the defendant's recitation of the facts underlying the crime[s] pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea[]' to obviate the preservation requirement" (*People v Rodriguez*, 17 AD3d 1127, 1129, *lv denied* 5 NY3d 768, quoting *People v Lopez*, 71 NY2d 662, 666).

Contrary to defendant's contention in appeal No. 1, defense counsel's failure to challenge the validity of the conviction in appeal No. 2 before defendant accepted the plea bargain in appeal No. 1 does not constitute ineffective assistance of counsel because that challenge would have had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152; *People v Rincon*, 62 AD3d 574, 575-576, *lv denied* 13 NY3d 748).

As defendant correctly concedes, his contention in appeal No. 1 that he was not properly adjudicated to be a second felony offender due to the invalidity of his plea in appeal No. 2 is without merit where, as here, we are affirming the judgment in appeal No. 2.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

230

KA 12-00111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GARROW, 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 June 2, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child, rape in the first degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, following a jury trial, of predatory sexual assault against a child (Penal Law § 130.96), two counts of rape in the first degree (§ 130.35 [3], [4]) and one count of endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that County Court committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict (*see People v Silva*, 24 NY3d 294, 299-300; *People v O'Rama*, 78 NY2d 270, 277-278). Defendant's contention does not require preservation inasmuch as it involves a mode of proceedings error (*see Silva*, 24 NY3d at 299-300; *People v Walston*, 23 NY3d 986, 989). We therefore reverse the judgment and grant a new trial on counts one through four of the superseding indictment.

We reject defendant's further contention that the court erred in permitting the four-year-old victim's mother to testify with respect to the substance of the victim's disclosure under the prompt outcry exception to the hearsay rule (*see People v McDaniel*, 81 NY2d 10, 16-17). The testimony revealed the complaint, i.e., that defendant hurt the victim's vagina with his penis, without "its accompanying details" (*id.* at 17; *see People v Stalter*, 77 AD3d 776, 777, *lv denied* 15 NY3d

956).

Defendant failed to preserve for our review his contention that the court's refusal to permit evidence regarding the victim's disclosure of sexual abuse by another individual to her mother, defendant and a police witness, violated his constitutional rights to present a defense and to cross-examine witnesses (*see People v Simmons*, 106 AD3d 1115, 1116, *lv denied* 22 NY3d 1043), 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]). Inasmuch as we are granting a new trial, however, we note that, to the extent that the court determined that evidence of a prior victimization was not admissible because it is prohibited by CPL 60.42, i.e., the rape shield law, we conclude that the court failed to exercise its discretion to determine whether, under the circumstances presented here, the evidence may "be relevant and admissible in the interests of justice" (CPL 60.42 [5]*; cf. People v Halter*, 19 NY3d 1046, 1049-1050; *see generally People v Williams*, 81 NY2d 303, 311-314).

Defendant also failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during cross-examination and summation (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We nevertheless note our strong disapproval of the prosecutor's tactics during summation in appealing to the sympathy of the jury by stating, inter alia, that it should "tell [the victim] that her suffering has not been in vain, to tell her that justice is coming"; in denigrating both the defense strategy and the defense attorney personally; and in mischaracterizing the DNA evidence, stating that it "matched [defendant]."

In light of our determination to reverse the judgment and grant a new trial, we need not address defendant's remaining contentions.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

231

KA 12-00793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE MEJIA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered March 19, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree, criminal possession of a weapon in the second degree and criminal possession of stolen property 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 a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of robbery in the first degree (§ 160.15 [2]). We reversed defendant's prior judgment of conviction on the ground that his statements to the police should have been suppressed (*People v Mejia*, 64 AD3d 1144, 1145-1146, *lv denied* 13 NY3d 861). On this appeal following the retrial, defendant contends that Supreme Court erred in admitting in evidence the codefendant's testimony from the first trial. We reject defendant's contention that the admission of the prior testimony violated his right of confrontation or CPL 670.10 (1) (*see People v Knowles*, 79 AD3d 16, 24, *lv denied* 16 NY3d 896). The codefendant refused to testify based on his belief that his plea agreement with the People did not require him to testify twice, and his refusal to testify constituted incapacity inasmuch as the court threatened to hold the codefendant in contempt, and indeed did hold him in contempt, for his refusal to testify (*see Knowles*, 79 AD3d at 24-25; *People v Barber*, 2 AD3d 1290, 1291, *lv denied* 2 NY3d 761). Contrary to defendant's further contention, the court did not abuse its discretion in not allowing the codefendant to be called to the stand and refuse to testify in front of the jury (*see generally People v Thomas*, 51 NY2d 466, 472; *People v Dixon*, 149 AD2d 613, 613, *lv denied* 76 NY2d 733),

and in not charging the jury that the witness refused to testify (*see generally People v Tatro*, 53 AD3d 781, 786-787, *lv denied* 11 NY3d 835; *People v Zanghi*, 256 AD2d 1120, 1121, *lv denied* 93 NY2d 881). We have considered defendant's remaining contention regarding the admission of the codefendant's prior testimony in evidence and conclude that it is without merit.

As we held in the prior appeal, the court "properly admitted the trial testimony of a witness concerning an admission by silence by defendant" (*Mejia*, 64 AD3d at 1145). Defendant's contention that a proper foundation was not laid for that testimony is not preserved for our review (*see* CPL 470.05 [2]), and is without merit in any event inasmuch as "[t]he record supports the conclusion that defendant heard another person's statement accusing him of the crime" (*People v Frias*, 250 AD2d 495, 496, *lv denied* 92 NY2d 982). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that he was denied a fair trial based on a comment made by the prosecutor during summation. That comment, however, was a fair response to defense counsel's summation (*see People v Ross*, 118 AD3d 1413, 1417, *lv denied* 24 NY3d 964; *People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954). In any event, that single remark was "isolated and not so . . . egregious as to warrant a reversal" (*People v Walker*, 259 AD2d 1026, 1027, *lv denied* 93 NY2d 1029). The sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

234

KA 11-00678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN T. O'NEIL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 13, 2010. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the third degree, grand larceny in the fourth degree, criminal possession of stolen property 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.

Same memorandum as in *People v O'Neil* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

235

KA 11-01537

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIAN JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 7, 2011. Defendant was resentenced by imposing a period of five years of postrelease supervision upon his conviction of sodomy in the first degree.

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

Memorandum: Defendant appeals from a resentence that corrected a *Sparber* error (*People v Sparber*, 10 NY3d 457, 472). Contrary to defendant's contention, Supreme Court did not abuse its discretion in denying his request for an adjournment to retrieve legal research he had prepared with respect to "his sentence and conviction generally" (*see People v Carter*, 50 AD3d 1518, 1518). The record established that defendant sought to withdraw his plea based upon the alleged involuntariness of his plea. Inasmuch as the resentencing proceeding is limited to correcting a procedural error by "mak[ing] the required pronouncement" of the appropriate sentence (*Sparber*, 10 NY3d at 471; *see People v Lingle*, 16 NY3d 621, 635), the court could not have considered any information defendant had prepared with respect to whether he should be permitted to withdraw his plea.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

236

KA 14-01564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD C. MIRABELLA, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 6, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts), criminal sexual act in the first degree, and sexual abuse in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [4]), one count of criminal sexual act in the first degree (§ 130.50 [4]), and two counts of sexual abuse in the third degree (§ 130.55). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we perceive no reason to disturb the jury's resolution of those questions in this case.

We reject defendant's contention that he received ineffective assistance of counsel. Defendant contends that defense counsel should have objected when a physician who examined one of the complainants testified that the complainant had told him that there was "digital/genital contact as well as oral/genital" contact. Defendant contends that this constituted impermissible bolstering. We conclude that the testimony was permissible as an exception to the hearsay rule for statements relevant to diagnosis and treatment (*see People v*

Spicola, 16 NY3d 441, 451-453, *cert denied* ___ US ___, 132 S Ct 400). In addition, the physician's testimony served the nonhearsay purpose of "round[ing] out the narrative of the immediate aftermath of the . . . disclosure" (*id.* at 453; *see People v Ludwig*, 24 NY3d 221, 231-232). Inasmuch as the testimony was proper, defense counsel was not ineffective for failing to object to it (*see People v Caban*, 5 NY3d 143, 152; *People v Goley*, 113 AD3d 1083, 1085; *People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945).

Defense counsel also was not ineffective for failing to seek a missing witness charge with respect to two witnesses, because "[t]here was no indication that the witness[es] would have provided noncumulative testimony favorable to the People" (*People v Smith*, 118 AD3d 1492, 1493; *see People v Myers*, 87 AD3d 826, 828, *lv denied* 17 NY3d 954). Defendant has failed to demonstrate " 'the absence of strategic or other legitimate explanations' " for defense counsel's failure to object to testimony that violated defendant's right of confrontation inasmuch as that testimony was favorable to defendant (*Caban*, 5 NY3d at 152; *see People v Reid*, 71 AD3d 699, 700, *lv denied* 15 NY3d 756). The prosecutor's "statements that the complainant[s] had no motive to lie constituted a fair response to defense counsel's summation, which attacked the complainant[s'] credibility," and thus defense counsel was not ineffective for failing to object to those remarks on summation (*People v Marcus*, 112 AD3d 652, 653, *lv denied* 22 NY3d 1140; *see People v Hill*, 82 AD3d 1715, 1716, *lv denied* 17 NY3d 806). We have considered defendant's remaining instances of alleged ineffective assistance of counsel and conclude that they are without merit. Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's further contention that the court erred in denying his request for the complainants' school and therapy records without first conducting an in camera review of those records. Defendant had the burden of showing that those records "are relevant and material to facts at issue" (*People v Kozlowski*, 11 NY3d 223, 242, *rearg denied* 11 NY3d 904, *cert denied* 556 US 1282). "The relevant and material facts in a criminal trial are those bearing upon 'the unreliability of either the criminal charge or of a witness upon whose testimony it depends' " (*id.*). Here, defendant failed to meet his burden. He failed to "point to specific facts demonstrating a reasonable likelihood that such material may be disclosed" and instead was merely "engaged in a fishing expedition" (*id.*; *see People v Gissendanner*, 48 NY2d 543, 549-550). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

241

CA 14-01621

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

JASON RUPP, PLAINTIFF-APPELLANT,

V ORDER

JEREMY BURGER, DEFENDANT-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (SHARI JO REICH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (GEFFREY GISMONDI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 28, 2014. The order, insofar as appealed from, granted the motion of defendant to dismiss the complaint.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

247

KA 14-00853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIQUE T. WIGGINS, DEFENDANT-APPELLANT.

ANN M. NICHOLS, BUFFALO, AND E. EARL KEY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered April 3, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress the handgun seized from his person because he was subject to a de facto arrest for which the police did not have probable cause. Defendant failed to preserve that contention for our review (*see People v Andrews*, 57 AD3d 1428, 1429, *lv denied* 12 NY3d 850) and, in any event, the contention lacks merit.

The evidence from the suppression hearing establishes that, after the officers stopped defendant's vehicle, defendant was unable to produce his license and registration when asked for them, and that he made repeated furtive movements toward one of his jacket pockets while in his vehicle. After he was directed to exit the vehicle, defendant refused to obey the officers' further directives that he keep his hands up, thereby preventing the officers from frisking him for weapons. In response, the officers handcuffed defendant and attempted to place him in a patrol vehicle while they continued their investigation. Defendant again resisted, however, and continued to attempt to reach toward his jacket pocket until additional officers arrived and assisted the initial officers in frisking defendant. The handgun defendant sought to suppress was found during that frisk.

"It is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159, *lv denied*

19 NY3d 1102; *see People v Hicks*, 68 NY2d 234, 239), and that officers may handcuff a detainee out of concern for officer safety (*see People v Allen*, 73 NY2d 378, 379-380). Furthermore, a "corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he [or she] is in danger of physical injury by virtue of the detainee being armed" (*People v De Bour*, 40 NY2d 210, 223; *see People v Curry*, 81 AD3d 1315, 1315-1316, *lv denied* 16 NY3d 858). Here, contrary to defendant's contention, we conclude that "he was not subjected to a de facto arrest when he was briefly detained . . . for the officer[s'] safety" (*Drake*, 93 AD3d at 1159; *see Allen*, 73 NY2d at 379-380). Consequently, we further conclude that the police had probable cause to arrest him when they discovered a loaded handgun in his pocket (*see People v Madrid*, 52 AD3d 530, 531, *lv denied* 11 NY3d 790; *People v McCoy*, 46 AD3d 1348, 1349, *lv denied* 10 NY3d 813).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

249

KA 12-01877

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRON S. MORRIS, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 17, 2012. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree, criminal use of a firearm in the first degree, and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We reject defendant's contention that County Court erred in failing, sua sponte, to conduct a competency hearing pursuant to CPL 730.30 (2). The institution in which defendant was confined determined that he was no longer an incapacitated person (*see* CPL 730.60 [2]) and, thereafter, neither defendant nor the District Attorney made a motion for a competency hearing. Thus, the determination whether to order a hearing on its own motion was within the court's discretion (*see* CPL 730.30 [2]; *People v Tortorici*, 92 NY2d 757, 766, *cert denied* 528 US 834). "Considering the evidence before [the c]ourt regarding defendant's competence, we conclude that the court did not abuse its discretion in failing, on its own, to order a hearing" (*Tortorici*, 92 NY2d at 766; *see People v Carrion*, 65 AD3d 693, 693-694, *lv denied* 13 NY3d 858; *People v Gaines*, 26 AD3d 269, 270, *lv denied* 6 NY3d 847).

Defendant failed to preserve for our review his further contention that the court erred in allowing the People to present evidence concerning prior uncharged crimes (*see People v Reed*, 78 AD3d 1481, 1482, *lv denied* 16 NY3d 745), 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]). By making only a general motion to dismiss the charges of attempted murder and assault in the first degree after the People rested their case (*see People v Gray*, 86 NY2d 10, 19), and by failing to renew that part of the motion at the close of his case (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678), defendant failed to preserve his contention that his conviction of those charges is not supported by legally sufficient evidence (*see People v Bausano*, 122 AD3d 1341, 1341-1342). Although defendant made specific challenges to the legal sufficiency of the evidence supporting the remaining charges after the People rested their case, he failed to renew that part of his motion at the close of his case and thus failed to preserve those challenges for our review (*see Hines*, 97 NY2d at 61). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the record as a whole, we conclude that trial counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147). Defendant failed to preserve for our review his further contention that he was punished for asserting his right to a trial when the court imposed the maximum terms of incarceration (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude, moreover, that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

251

KA 11-02122

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY N. OTT, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 28, 2011. Defendant was resentenced upon his conviction of murder in the second degree.

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

Memorandum: In 2006, defendant was convicted upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and assault in the first degree (§ 120.10 [1]). We vacated the sentence imposed on the murder count and remitted the matter to County Court for resentencing on that count " '[b]ecause of the discrepancy between the sentencing minutes and the certificate of conviction' with respect to that count" (*People v Ott*, 83 AD3d 1495, 1497, *lv denied* 17 NY3d 808). Following our remittal, the matter was transferred from County Court to Supreme Court, and defendant was resentenced. Defendant now appeals from the resentence.

Contrary to defendant's contention, Supreme Court did not err in failing to conduct a new sentencing proceeding on the murder count. Although, in general, a defendant upon being resentenced is entitled to a new sentencing proceeding at which the defendant and his attorney have the right to be present and to be heard regarding resentencing (*see generally People v Green*, 54 NY2d 878, 880; *People v Bibbs*, 17 AD3d 170, 170), the resentencing here concerned only a single count of the indictment, and its purpose was to correct a purely clerical error that had occurred when the minimum period of incarceration on that count was misrecorded in the certificate of conviction (*see People v Reed*, 85 AD3d 824, 824, *lv denied* 17 NY3d 861; *see generally People v Sparber*, 10 NY3d 457, 472). Thus, the "resentencing [wa]s limited to remedying this specific [clerical] error" (*People v Lingle*, 16 NY3d

621, 635).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

253

KA 13-01572

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYMUNDO NIEVES-ROJAS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 20, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and burglary in the third degree (§ 140.20) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of two counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]).

Defendant’s contention in each appeal that he was denied effective assistance of counsel is foreclosed by his plea of guilty because he failed to allege that the plea bargaining process “ ‘was infected by [the] allegedly ineffective assistance or that [he] 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 Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773).

We agree with defendant, however, that he was improperly sentenced as a second violent felony offender in each appeal inasmuch as the predicate conviction, i.e., the New Jersey crime of burglary in the third degree, is not the equivalent of a New York felony (*see People v Muniz*, 74 NY2d 464, 467; *People v Williams*, 49 AD3d 1183, 1184). Defendant raises this contention for the first time on appeal

but, even assuming, arguendo, that he was required to preserve it for our review (*see People v Samms*, 95 NY2d 52, 57-58), we conclude that this case "presents a proper basis for exercising our interest-of-justice jurisdiction" (*People v Assadourian*, 19 AD3d 207, 208, *lv denied* 5 NY3d 785; *see People v Marrero*, 2 AD3d 107, 107, *affd* 3 NY3d 762). We therefore modify the judgment in each appeal by vacating the sentence and remit the matter to Supreme Court to resentence defendant (*see Williams*, 49 AD3d at 1184).

The remaining contention in each appeal regarding the severity of the sentence is moot (*see People v Clayton*, 38 AD3d 1131, 1131-1132, *lv denied* 9 NY3d 841).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

254

KA 13-01573

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REYMUNDO NIEVES-ROJAS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 20, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the same memorandum as in *People v Nieves-Rojas* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

255

KA 13-01868

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE M. BRADFORD, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 25, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [6]). We note at the outset that, as the People correctly concede, defendant did not waive his right to appeal.

Defendant failed to preserve for our review his contention that County Court erred in sentencing him without the benefit of an adequate presentence report (*see People v Frazier*, 91 AD3d 1319, 1319, *lv denied* 18 NY3d 994; *People v Goodbody*, 249 AD2d 977, 977), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We reject defendant's further contention that he was denied effective assistance of counsel. "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel . . . , and that is the case here" (*People v Bonavito*, 121 AD3d 1499, 1500 [internal quotation marks omitted]). To the extent that defendant contends that defense counsel was ineffective in failing to investigate or explore potential defenses, his contention is not properly before us because it involves matters outside the record on appeal and, thus, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Smith*, 122 AD3d 1300, 1301; *People v Sylvan*, 107 AD3d 1044, 1045-1046, *lv denied* 22 NY3d 1141). Contrary to defendant's further contention, we conclude that the court did not coerce him into pleading guilty by advising him of the potential terms of incarceration in the event he

was convicted following a trial (*see People v Hamilton*, 45 AD3d 1396, 1396, *lv denied* 10 NY3d 765). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

257

KA 14-00226

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. BLAKE, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered July 30, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree (two counts), criminal sale of a controlled substance in the fifth degree (two counts), and criminal possession of a controlled substance in the fifth degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, two counts of criminal sale of a controlled substance in the fourth degree (Penal Law § 220.34 [1]), defendant contends that County Court erred in imposing an enhanced sentence, based on his failure to appear at sentencing, without affording him an opportunity to withdraw his plea. "That contention is not preserved for our review because defendant did not object to the enhanced sentence, nor did he move to withdraw the plea or to vacate the judgment of conviction" on that ground (*People v Sprague*, 82 AD3d 1649, 1649, *lv denied* 17 NY3d 801; *see People v Mills*, 90 AD3d 1518, 1518, *lv denied* 18 NY3d 960; *People v Perkins*, 291 AD2d 925, 926, *lv denied* 98 NY2d 654). In any event, defendant's contention lacks merit. The record establishes that the court informed defendant during the plea proceeding that it could impose an enhanced sentence in the event that he failed to appear at sentencing. "By failing to appear at the scheduled sentencing, defendant violated the terms of the plea agreement and [the c]ourt was no longer bound by the agreed-upon sentence . . . Notwithstanding defendant's proffered excuse for his absence, we [conclude] that the court was justified in imposing the enhanced sentence" (*People v Goodman*, 79 AD3d 1285, 1286; *see People v Goldstein*, 12 NY3d 295, 301; *Perkins*, 291 AD2d at 926). Furthermore, the court was not required to conduct further inquiry into the reason for defendant's absence from the scheduled sentencing

proceeding because, "had there been any plausible . . . reason for defendant's failure to appear on the . . . scheduled sentencing date[], it is to be expected that defendant would have been prepared at [the rescheduled] sentencing with some supporting documentation, particularly after a warrant had been issued to secure his appearance" (*Goldstein*, 12 NY3d at 301; *see People v Winters*, 82 AD3d 1691, 1691, *lv denied* 17 NY3d 810).

The sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

262

CA 14-01008

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

LOUIS PATERNOSTRO AND DEBORAH PATERNOSTRO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ADVANCE SANITATION, INC. AND DORITEX CORP.,
DEFENDANTS-RESPONDENTS.

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

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered August 22, 2013. The order granted defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Louis Paternostro (plaintiff) sustained when he tripped and fell on a floor mat in a building in which defendants were responsible for those mats. Defendants moved for summary judgment dismissing the complaint, contending that plaintiffs were unable to establish that defendants' actions were a proximate cause of the injuries, and plaintiffs appeal from an order granting that motion. We agree with plaintiffs that Supreme Court erred in granting the motion, and we therefore reverse.

It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). It is equally well settled that, in seeking summary judgment, "[a] moving party must affirmatively [demonstrate] the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD2d 979, 980; *see Brown v Smith*, 85 AD3d 1648, 1649). Here, defendants sought summary judgment based on their contention that plaintiffs were unable to identify what caused plaintiff to fall " 'without engaging in speculation' " (*Smart v Zambito*, 85 AD3d 1721,

1721). In support of their motion, however, defendants submitted, inter alia, plaintiff's deposition testimony, in which plaintiff testified that he tripped when he caught his foot in a ripple or raised area of a floor mat. We conclude that such testimony is sufficient to render any other possible cause of his fall "sufficiently remote or technical to enable [a] jury to reach [a] verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (*Artessa v City of Utica*, 23 AD3d 1148, 1148 [internal quotation marks omitted]). Contrary to the contention of defendants, plaintiff's deposition testimony that he does not specifically recall seeing a defect in the mat prior to falling is insufficient to establish their entitlement to judgment as a matter of law (*see Dodge v City of Hornell Indus. Dev. Agency*, 286 AD2d 902, 903; *cf. McGill v United Parcel Serv., Inc.*, 53 AD3d 1077, 1077; *Hunley v University of Rochester Strong Mem. Hosp.*, 294 AD2d 923, 923).

Defendants' failure to meet their burden on the motion "requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

267

KA 10-01640

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD M.M., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered May 27, 2010. The appeal was held by this Court by order entered May 9, 2014, decision was reserved and the matter was remitted to Monroe County Court for further proceedings. The proceedings were held and completed.

It is hereby ORDERED that said appeal is unanimously dismissed as moot.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

268

KA 11-00291

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES TUCKER, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 29, 2010. The appeal was held by this Court by order entered May 9, 2014, decision was reserved and the matter was remitted to Supreme Court, Onondaga County, for further proceedings (117 AD3d 1581).

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

Memorandum: We previously determined on defendant's appeal from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]) that the verdict is not against the weight of the evidence (*People v Tucker*, 117 AD3d 1581, 1582). Aside from determining that issue, we held the case, reserved decision, and remitted the matter to Supreme Court to conduct a hearing on defendant's CPL 330.30 motion to set aside the verdict on the ground of alleged juror misconduct (*id.*). On remittal, however, defendant withdrew his CPL 330.30 motion. Thus, the only issue remaining for us to address is the severity of the sentence and, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

269

KA 07-00713

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARVIS LASSALLE, DEFENDANT-APPELLANT.

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

JARVIS LASSALLE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Shirley Troutman, J.), rendered February 26, 2007. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant was convicted upon a plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). On a prior appeal, we affirmed the judgment of conviction (*People v Lassalle*, 55 AD3d 1286, *lv denied* 11 NY3d 926), but we subsequently granted defendant's second motion for a writ of error coram nobis (*People v Lassalle*, 114 AD3d 1226). Upon reviewing the appeal de novo, we agree with defendant that the judgment of conviction must be reversed and his plea vacated "because County Court failed to advise [him] prior to his entry of the plea[] that his sentence[] would include [a] period[] of postrelease supervision" (*People v Burns*, 70 AD3d 1301, 1302, citing *People v Catu*, 4 NY3d 242, 245).

Contrary to the contention of the People, the mere fact that the court informed defendant that a period of postrelease supervision could have been imposed as part of a maximum sentence does not establish that defendant "was aware that the terms of the court's promised sentence included a period of [postrelease supervision]" (*People v Cornell*, 16 NY3d 801, 802). Moreover, as we noted in the codefendant's appeal, we may address the merits of defendant's contention notwithstanding a valid waiver of the right to appeal or the absence of a postallocution motion (*see Burns*, 70 AD3d at 1302).

In view of our decision, we do not address defendant's remaining contentions raised in his pro se supplemental brief.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

270

KA 13-00966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. SALOIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 1, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [3]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

272

KA 13-01070

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CAMERON S. RIVES, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered August 13, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, robbery in the second degree, burglary in the first degree, burglary in the second degree, assault in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him upon his guilty plea of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that reversal is required because County Court failed to advise him at the time of his plea that his sentence would include a period of postrelease supervision (PRS). At an appearance prior to his plea, PRS was mentioned without specification of the term thereof, and specific terms of PRS were mentioned at two subsequent appearances. At the time of defendant's plea, PRS was not mentioned, and it was not until the conclusion of the sentencing hearing that County Court informed defendant of the term of PRS.

We agree with defendant that reversal is required. Contrary to the People's contention, defendant was not required to preserve for our review his challenge to the imposition of PRS under these circumstances. "A defendant cannot be expected to object to a constitutional deprivation of which [he] is unaware . . . [W]here the defendant was only notified of the PRS term at the end of the sentencing hearing, the defendant 'can hardly be expected to move to withdraw [the] plea on a ground of which [he or she] has no knowledge' . . . And, in that circumstance, the failure to seek to withdraw the plea or to vacate the judgment does not preclude appellate review of

the due process claim" (*People v Turner*, 24 NY3d 254, 258). Furthermore, "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the [PRS] component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction" (*People v Catu*, 4 NY3d 242, 245). "[T]he record does not make clear, as required by *Catu*, that at the time defendant took his plea, he was aware that the terms of the court's promised sentence included a period of PRS" because only the term of incarceration of 20 years was stated on the record (*People v Cornell*, 16 NY3d 801, 802). While a term of PRS was mentioned earlier in the plea negotiations, it is undisputed that there was no mention of PRS at the plea proceeding and, based on our review of the record, we conclude that defendant was not "advised of what the sentence would be, including its PRS term, at the outset of the sentencing proceeding" (*People v Murray*, 15 NY3d 725, 727). We therefore reverse the judgment, vacate the plea, and remit the matter to County Court for further proceedings on the indictment. In light of our determination, we do not reach defendant's remaining contention.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

273

KA 12-01593

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH M. FOWLER, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered November 30, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts) and unlawful imprisonment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]) and one count of unlawful imprisonment in the first degree (§ 135.10). We reject defendant's contention that the conviction of robbery is not supported by legally sufficient evidence. Viewing the evidence in the light most favorable to the People (*see generally People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to establish defendant's liability as an accessory in causing the victim's injuries and forcibly stealing the victim's property, and to establish that he was aided by another person (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Lucas*, 291 AD2d 890, 891). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although we agree with defendant that County Court abused its discretion in its *Sandoval* ruling in allowing the prosecutor to question him concerning a juvenile delinquency adjudication (*see People v Gray*, 84 NY2d 709, 712), we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242). We otherwise reject defendant's contention that the court's *Sandoval* ruling was an abuse of discretion (*see generally People v Reid*, 34 AD3d 1273, 1274, *lv denied* 8 NY3d 884). We also reject defendant's

contention that he was deprived of a fair trial based on prosecutorial misconduct (*see People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038; *People v Koonce*, 111 AD3d 1277, 1279). Defendant failed to preserve for our review his contention that he was penalized for asserting his right to a trial, and that contention lacks merit in any event (*see People v Miller*, 115 AD3d 1302, 1305-1306, *lv denied* 23 NY3d 1040). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

274

KA 11-02404

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALLACE DRAKE, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 19, 2011. Defendant was resentenced by imposing periods of postrelease supervision upon his convictions of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant was convicted in 2002 upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [2]). At sentencing, County Court failed to impose a period of postrelease supervision (PRS) upon each count, as required by Penal Law § 70.45 (1). While defendant was serving his sentence, the court resentenced him pursuant to Correction Law § 601-d, to add the requisite periods of PRS. Defendant now contends that the resentencing violates his constitutional double jeopardy and due process rights. Even assuming, arguendo, that defendant's contentions do not require preservation (*cf. People v Woods*, 122 AD3d 1400, 1401; *People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141; *see generally People v Williams*, 14 NY3d 198, 220-221, *cert denied* ___ US ___, 131 S Ct 125), we nevertheless conclude that they lack merit.

Inasmuch as "defendant had not yet completed his originally imposed sentence of imprisonment when he was resentenced, his resentencing to a term including the statutorily required period of postrelease supervision did not violate the double jeopardy or due process clauses of the United States Constitution" (*People v Fox*, 104 AD3d 789, 789-790, *lv denied* 21 NY3d 943; *see People v Lingle*, 16 NY3d 621, 630-633; *People v Ralph*, 91 AD3d 796, 796-797, *lv denied* 20 NY3d

1064; *cf. Williams*, 14 NY3d at 217). Defendant's reliance on cases rejected by the Court of Appeals in *Lingle* is misplaced (*see Lingle*, 16 NY3d at 632).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

275

KA 14-00545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELUID CALDERON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered January 31, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court's upward departure from his presumptive classification as a level one risk to a level two risk is not supported by clear and convincing evidence. Contrary to defendant's contention, we conclude that the People presented "the requisite clear and convincing evidence 'that there exists an aggravating . . . factor of a kind, or to a degree, not otherwise adequately taken into account by the [risk assessment] guidelines' " (*People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]). It is undisputed that, at the time of his plea of guilty to criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant also pleaded guilty to an unrelated charge of assault in the second degree (§ 120.05 [2]). Defendant was not assessed any points under the risk assessment instrument for a prior violent felony. A concurrent conviction may provide the basis for an upward departure if it is "indicative that the offender poses an increased risk to public safety" (Risk Assessment Guidelines and Commentary, at 14; *see People v Becker*, 120 AD3d 846, 847, *lv denied* 24 NY3d 908; *People v Ryan*, 96 AD3d 1692, 1693, *lv dismissed* 20 NY3d 929), and, under the circumstances presented, we conclude that the court did not err in granting the People's request for an upward departure from a level one risk to a

level two risk (*see generally Ryan*, 96 AD3d at 1693; *People v Lowery*, 93 AD3d 1269, 1271, *lv denied* 19 NY3d 807).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

278

CAF 13-01168

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

IN THE MATTER OF DOREAN G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SHAWNTAI M., ALSO KNOWN AS TRUTH G.,
RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-APPELLANT.

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

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 6, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order terminating her parental rights to the subject child on the ground of mental illness. We reject the mother's contention that Family Court erred in determining that petitioner established by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [her] child" (§ 384-b [4] [c]; *see Matter of Joseph E.K. [Lithia K.]*, 122 AD3d 1373, 1373). The testimony of petitioner's witnesses, including a court-appointed psychologist, "established that the [mother] was so disturbed in [her] behavior, feeling, thinking and judgment that, if [her child] were returned to [her] custody, [her child] would be in danger of becoming a neglected child" (*Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188; *see* § 384-b [6] [a]; *Matter of Delia S.*, 122 AD3d 1449, 1449). We further note that the mother's testimony substantiates the psychologist's opinion that the mother's condition would not improve in the foreseeable future (*see generally Matter of Bryant S.*, 188 AD2d 1078,

1078-1079).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

279

CAF 13-01533

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

IN THE MATTER OF DOREAN G., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

SHAWNTAI M., ALSO KNOWN AS TRUTH G.,
RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-APPELLANT.

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

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 19, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred the guardianship and custody of the subject child to petitioner.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of April C.*, 31 AD3d 1200, 1201).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

280

CAF 13-00986

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

IN THE MATTER OF MILDRED PEREA,
PETITIONER-RESPONDENT,

V ORDER

BRAUNA SANCHEZ, RESPONDENT-RESPONDENT.

SHEILA S. DICKINSON, ESQ., ON BEHALF OF SAMED S.,
ATTORNEY FOR THE CHILD, APPELLANT.

IN THE MATTER OF MILDRED PEREA,
PETITIONER-RESPONDENT,

V

SALEH ABDULLA, RESPONDENT-RESPONDENT.

SHEILA S. DICKINSON, ESQ., ON BEHALF OF SAMED S.,
ATTORNEY FOR THE CHILD, APPELLANT.

IN THE MATTER OF SHEILA S. DICKINSON, ESQ., ON
BEHALF OF SAMED S., ATTORNEY FOR THE CHILD,
PETITIONER-APPELLANT,

V

BRAUNA SANCHEZ, RESPONDENT-RESPONDENT.

IN THE MATTER OF SHEILA S. DICKINSON, ESQ., ON
BEHALF OF SAMED S., ATTORNEY FOR THE CHILD,
PETITIONER-APPELLANT,

V

MILDRED PEREA, RESPONDENT-RESPONDENT.

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILD, BUFFALO, APPELLANT PRO SE.

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT MILDRED PEREA.

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-RESPONDENT SALEH ABDULLA.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

281

CAF 13-01406

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

IN THE MATTER OF KYLA E. AND TYLER E.

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

STEPHANIE F., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILDREN, MINOA.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered July 29, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject children on the ground of permanent neglect. We affirm. Although the mother correctly contends that Family Court erred in admitting hearsay testimony from one of petitioner's witnesses (*see* Family Ct Act § 624; *Matter of Nicholas C. [Erika H.—Robert C.]*, 105 AD3d 1402, 1402; *see generally Matter of Leon RR*, 48 NY2d 117, 121), we nevertheless conclude that "[a]ny error in the admission of [those] statement[s] is harmless because the result reached herein would have been the same even had such [statements] been excluded" (*Matter of Tyler W. [Stacey S.]*, 121 AD3d 1572, 1572-1573 [internal quotation marks omitted]; *see Matter of Marino S.*, 100 NY2d 361, 372, *cert denied* 540 US 1059). Moreover, "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Merle C.C.*, 222 AD2d 1061, 1062, *lv denied* 88 NY2d 802).

Contrary to the mother's further contention, petitioner established "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the

mother] and the child[ren]" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* Social Services Law § 384-b [3] [g] [i]; [7] [a]) and that, despite her participation in some of the services afforded her, the mother "did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren]'s safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see* § 384-b [7] [a]; *Ja-Nathan F.*, 309 AD2d at 1152; *Matter of Shanika F.*, 265 AD2d 870, 870).

Finally, the mother did not request a suspended judgment at the dispositional hearing and thus failed to preserve for our review her contention that the court erred in failing to grant that relief (*see Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343, *lv denied* 19 NY3d 801). In any event, "the record of the dispositional hearing establishes that . . . any progress that [the mother] made 'was not sufficient to warrant any further prolongation of the child[ren's] unsettled familial status' " (*Matter of Jose R.*, 32 AD3d 1284, 1285, *lv denied* 7 NY3d 718).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

282

CAF 14-00330

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

IN THE MATTER OF TAMARA SLOAN,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL BRUYERE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered February 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of petitioner for summary judgment.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

283

CAF 14-00331

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

IN THE MATTER OF TAMARA SLOAN,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL BRUYERE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered February 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the subject child to petitioner.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

287

CA 14-01491

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

TIGE C. FENDT, PLAINTIFF-RESPONDENT,

V ORDER

GENERAL ELECTRIC COMPANY, GE CONSUMER & INDUSTRIAL, GE APPLIANCES & LIGHTING, HOME DEPOT U.S.A., INC., RELIABLE APPLIANCE INSTALLATION, INC., AND ANTWAN S. CAMPBELL, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (CHRISTOPHER D. D'AMATO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered November 8, 2013. The order granted the motion of plaintiff to compel examinations before trial.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on March 10, 2015,

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

292

TP 14-01720

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

IN THE MATTER OF LAWRENCE PEREZ, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (DAVID W. BENTIVEGNA OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered September 22, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted, the penalty is vacated, and respondent is directed to expunge from petitioner's institutional record all references to the violation of inmate rule 105.14 (7 NYCRR 270.2 [B] [6] [v]).

Memorandum: In this CPLR article 78 proceeding, petitioner seeks review of a tier III hearing determination finding him guilty of violating inmate rule 105.14 (7 NYCRR 270.2 [B] [6] [v] [unauthorized organizations]). We agree with petitioner that the determination is not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). The evidence at the disciplinary hearing established that petitioner had possession of printed material related to an unauthorized organization, but there was no evidence that the "material advocates either expressly or by clear implication, violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the institution" (7 NYCRR 270.2 [B] [6] [v]; *see Matter of Kimbrough v Fischer*, 96 AD3d 1251, 1252).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

293

KA 13-00835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CLIFFORD C. ANDERSON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 19, 2012. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

295

KA 13-01211

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KELVIN VIERA-MORALES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 27, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [1]). We agree with defendant that his waiver of the right to appeal is invalid inasmuch as the perfunctory inquiry by Supreme 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 Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

296

KA 13-01889

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHN E. LAUTNER, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 6, 2013. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated, driving while intoxicated, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

297

KA 12-02296

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAHNSEAH T. BOLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 27, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of assault in the third degree (Penal Law § 120.00 [1]), defendant contends that one count of assault in the third degree is against the weight of the evidence because he did not intend to harm the victim, and the victim did not sustain a physical injury within the meaning of Penal Law § 10.00 (9). Viewing the evidence in light of the elements of that crime as charged to the jury, we reject defendant's contention (*see People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495). The injured victim testified that defendant forced open a bathroom door and thereby pushed her into the window, which shattered. She further testified that defendant punched her in the face repeatedly, and she sustained swelling and bruising on her face, a black eye, a cut lip, and cuts on her knees and back. She received medical treatment and testified that it took a month for the bruising and swelling on her face to subside, that she missed two days of work after the assault, and that she still has scars on her back. The victim's testimony was corroborated by testimony of police officers and medical personnel, and photographs of her injuries.

"A defendant may be presumed to intend the natural and probable consequences of his actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused" (*People v Mahoney*, 6 AD3d 1104, 1104, *lv denied* 3 NY3d 660 [internal quotation marks omitted]).

Defendant's version of the events "involved credibility issues that were resolved by the jury, and we accord great deference to the jury's credibility determinations" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925). With respect to the elements of intent and physical injury, we conclude that it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *People v Cooper*, 50 AD3d 1570, 1571, *lv denied* 10 NY3d 957).

We dismiss the appeal to the extent that defendant contends that the sentence is harsh and excessive inasmuch as defendant has completed serving his sentence and, thus, that part of the appeal is moot (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

299

CAF 13-00635

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

IN THE MATTER OF SHAMECKIA L. BLUE,
PETITIONER-RESPONDENT,

V ORDER

DARRYL F. CALDWELL AND LOVANA E. BYRD-MCGUIRE,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT DARRYL F. CALDWELL.

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-APPELLANT LOVANA E. BYRD-MCGUIRE.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeals from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered February 22, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner sole custody of the subject children.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

300

CAF 14-00449

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

IN THE MATTER OF SHAMECKIA L. BLUE,
PETITIONER-RESPONDENT,

V ORDER

DARRYL F. CALDWELL, RESPONDENT-APPELLANT,
AND LOVANA E. BYRD-MCGUIRE, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

KELLY M. CORBETT, FAYETTEVILLE, FOR RESPONDENT-RESPONDENT.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered February 27, 2014 in a proceeding pursuant to Family Court Act article 6. The order settled the record on appeal.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

301

CAF 13-00620

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

IN THE MATTER OF WENDY R. FISHER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN C. HOFERT, RESPONDENT-APPELLANT.

ANNA JOST, TONAWANDA, FOR RESPONDENT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR PETITIONER-RESPONDENT.

JEFFREY D. OSHLAG, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 13, 2013 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to observe certain conditions of behavior.

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

Memorandum: Respondent father appeals from an order of protection entered upon a finding that he committed the family offense of aggravated harassment in the second degree against petitioner mother (*see* Penal Law § 240.30 [1] [a]; *see also* Family Ct Act § 812 [1]). We note at the outset that the order of protection has expired but, "given the totality of the enduring legal and reputational consequences of the contested order of protection, respondent's appeal from that order is not moot" (*Matter of Veronica P. v Radcliff A.*, 24 NY3d 668, ___).

The Court of Appeals has determined that Penal Law § 240.30 (1), which proscribes communications made "in a manner likely to cause annoyance or alarm," is unconstitutionally vague and overbroad (*see People v Golb*, 23 NY3d 455, 467, *rearg denied* 24 NY3d 932). Thus, the statute cannot serve as the basis for a finding that respondent committed a family offense (*see generally Matter of Kakwani v Kakwani*, 124 AD3d 658, 659; *Matter of Lystra Fatimah N. v Rafael M.*, 122 AD3d 499, 499). Inasmuch as Family Court concluded that petitioner failed to establish by a preponderance of the evidence that respondent had committed either of two other family offenses alleged in the petition,

we reverse the order and dismiss the petition.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

306

CA 14-01091

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

NICOLE MANLEY AND DWAYNE MANLEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RASPBERRIES CAFÉ & CREAMERY, INC.,
DEFENDANT-APPELLANT.

COSTELLO COONEY & FEARON, PLLC, CAMILLUS (TERANCE V. WALSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (ANTHONY A. MURAD OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered November 20, 2013. The order, insofar as appealed from, granted those parts of the motion of plaintiffs seeking preclusion and an adverse inference charge.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Nicole Manley when she was struck in the head and face by a large umbrella from the patio seating area of defendant's restaurant. Defendant disposed of the umbrella and was unable to locate the umbrella base, and plaintiffs moved for spoliation sanctions. We conclude that Supreme Court properly granted those parts of plaintiffs' motion seeking an order precluding defendant from presenting evidence concerning the condition of the umbrella and base, as well as an adverse inference charge (*see generally Ortega v City of New York*, 9 NY3d 69, 76). Contrary to defendant's contention, the court properly considered the extent that the spoliation of the evidence prejudiced plaintiffs (*see Puccia v Farley*, 261 AD2d 83, 85), and "[t]he sanction herein was 'appropriately tailored to achieve a fair result' " (*Gogos v Modell's Sporting Goods, Inc.*, 87 AD3d 248, 255).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

308

CA 14-00988

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

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

V MEMORANDUM AND ORDER

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

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

V

JOSEPH JERRY, ESQ. AND MADELYNE JERRY, THIRD-PARTY DEFENDANTS-RESPONDENTS.

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

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

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

GALE, GALE & HUNT, LLC, SYRACUSE (CATHERINE A. GALE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT JOSEPH JERRY, ESQ.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), dated January 9, 2014. The order, among other things, granted plaintiffs' motions for summary judgment on their first cause of action and granted the motions of third-party defendants to dismiss the third-party action.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

309

CA 13-02204

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

IN THE MATTER OF KHYRI OLIVER,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI 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 October 31, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

310

CA 14-01598

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

MICHAEL STEBICK, RONALD R. ANASTASIA AND JEFFREY R. ANASTASIA, PLAINTIFFS-RESPONDENTS,

V ORDER

RITA MCGEE, KATHLEEN HOWARD, PATRICIA L. HUSTED, SANDRA L. KIBODEAUX AND SHARON E. PAULY, DEFENDANTS-APPELLANTS.

COLLIGAN LAW LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered June 30, 2014. The order granted the motion of defendants for leave to file an interlocutory appeal.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

316

TP 14-01667

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

IN THE MATTER OF BARBARA J. ARSENEAU, PETITIONER,

V ORDER

HOWARD ZUCKER, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH AND KRISTIN M. PROUD, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, RESPONDENTS.

MANNION & COPANI, SYRACUSE (ANTHONY F. COPANI OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Onondaga County [Anthony J. Paris, J.], entered September 9, 2014) to review a determination of respondent New York State Office of Temporary and Disability Assistance. The determination, among other things, adjudged that petitioner was not eligible under Medical Assistance for coverage of her nursing home expenses because she transferred assets for less than the fair market value.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 3 and 6, 2015,

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

319

KA 14-00516

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CODY MILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered January 10, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated and vehicular assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, vehicular assault in the first degree (Penal Law § 120.04 [1]). Contrary to defendant's contentions, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

321

KA 13-02061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE W. LOOMIS, DEFENDANT-APPELLANT.

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered October 1, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts) and sexual abuse 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 a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [3]), and one count of sexual abuse in the second degree (§ 130.60 [2]), defendant contends that he was denied effective assistance of counsel because his attorney failed to object at trial to the introduction of his written statements to the police on the ground that he could not read or write, and to certain questioning by the prosecutor of a prosecution witness. We reject that contention. With respect to defendant's contention concerning his written statements, it is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Furthermore, in order "[t]o prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims" (*People v Garcia*, 75 NY2d 973, 974, quoting *People v Rivera*, 71 NY2d 705, 709; *see People v Carver*, 124 AD3d 1276, 1279). In addition, a "single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*Caban*, 5 NY3d at 152; *see People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040).

Here, an objection to the introduction of defendant's written statements had virtually no chance of success (*see e.g. People v Maerling*, 46 NY2d 289, 294, 303; *People v Bray*, 295 AD2d 996, 997, *lv denied* 98 NY2d 694), defendant failed to establish that counsel did not have tactical or other valid reasons for failing to object (*see Garcia*, 75 NY2d at 974), and he failed to demonstrate any prejudice from this alleged error (*see Caban*, 5 NY3d at 152). Consequently, with respect to that contention and to the remaining ground that defendant raises in support of his contention of ineffective assistance of counsel, we conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147; *see People v Hall*, 106 AD3d 1513, 1514, *lv denied* 22 NY3d 956).

The sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

324

KA 10-01374

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY D. STRASSNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered May 10, 2010. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury trial, of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). Defendant contends that Supreme Court erred in denying his challenges for cause to three prospective jurors whose statements during voir dire cast doubt on their ability to be impartial. We agree.

It is well established that "[p]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused" (*People v Arnold*, 96 NY2d 358, 363; *see People v Nicholas*, 98 NY2d 749, 750; *People v Chambers*, 97 NY2d 417, 419). While no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*Arnold*, 96 NY2d at 362). During voir dire, the statements of three prospective jurors with respect to the credibility of the testimony of police officers or bias in favor of the police cast serious doubt on their ability to render an impartial verdict (*see Nicholas*, 98 NY2d at 751-752; *People v Lewis*, 71 AD3d 1582, 1583-1584; *People v Givans*, 45 AD3d 1460, 1461; *People v Mateo*, 21 AD3d 1392, 1392-1393), and those prospective jurors failed to provide "unequivocal assurance that they [could] set aside any bias and render an impartial verdict based on

the evidence" (*People v Johnson*, 94 NY2d 600, 614). Contrary to the court's conclusion, we conclude that the nodding by these three prospective jurors as part of a group of prospective jurors who were "all nodding affirmatively in regard to the statement [of another prospective juror]" was "insufficient to constitute such an unequivocal declaration" (*People v Bludson*, 97 NY2d 644, 646; *see Lewis*, 71 AD3d at 1583). Inasmuch as defendant had exhausted all of his peremptory challenges before the completion of jury selection, the denial of defendant's challenges for cause constitutes reversible error (*see* CPL 270.20 [2]; *People v Harris*, 23 AD3d 1038, 1038).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

326

CAF 13-01641

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

IN THE MATTER OF ANTHONY C.S., DOMINIC V.S. AND NOAH E.S.

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

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

JOSHUA S., SR., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (COURTNEY S. RADICK OF COUNSEL), PRO BONO APPEALS PROGRAM, OSWEGO, FOR RESPONDENT-APPELLANT.

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

FARES A. RUMI, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from a second amended order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered September 5, 2013 in a proceeding pursuant to Social Services Law § 384-b. The second amended order, inter alia, terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from a second amended order that, inter alia, terminated his parental rights with respect to the subject children on the ground of abandonment. Contrary to the father's contention, petitioner established abandonment by the requisite clear and convincing evidence, by establishing that the father "evince[d] an intent to forego his . . . parental rights and obligations" for the six-month period before the filing of the instant petition (Social Services Law § 384-b [5] [a]; *see* § 384-b [4] [b]; *Matter of Annette B.*, 4 NY3d 509, 514, *rearg denied* 5 NY3d 783; *Matter of Julius P.*, 63 NY2d 477, 481). "The record reflects that, among other things, [the father] did not make any visits to the children during the [first five months of the] six-month period prior to commencement of the abandonment proceeding despite having a right to weekly visitation. During such time frame, he availed himself of other travel and vacations, but elected not to see his children" (*Matter of Jasper QQ.*, 64 AD3d 1017, 1020, *lv denied* 13 NY3d 706), and failed to communicate with them. Furthermore, although the father was incarcerated for the final month of the six-month period and "of course [was] not able to

visit the child[ren at that time], he . . . is still presumed able to communicate absent proof to the contrary" (*Annette B.*, 4 NY3d at 514), and petitioner established that the father did not communicate with the children or their foster parents during the final month of the six-month period. Insofar as the father contends that he contacted the children's caseworker and requested visitation while he was incarcerated during the final month of the six-month period, we note that "[t]he conflicting testimony of the father and the caseworker presented a credibility issue for [Family C]ourt to resolve, and its resolution of credibility issues is entitled to great weight" (*Matter of Jasmine J.*, 43 AD3d 1444, 1445). Contrary to the father's contention, the evidence establishing that he engaged in " 'minimal, sporadic or insubstantial contacts [is not] sufficient to defeat [the] otherwise viable claim of abandonment' " (*Matter of Maddison B. [Kelly L.]*, 74 AD3d 1856, 1856-1857; *see Matter of Miranda J. [Jeromy J.]*, 118 AD3d 1469, 1470; *Matter of Joseph E.*, 16 AD3d 1148, 1149). Similarly, his single payment of partial child support arrears "under the circumstances of this case . . . does not constitute communication with the child[ren] or petitioner sufficient 'to defeat an otherwise viable claim of abandonment' " (*Matter of Melerina M. [Andrew A.]*, 118 AD3d 1505, 1507, *lv denied* 24 NY3d 905).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

330

CA 14-01449

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

LAURIE R. MILLER AND GEORGE K. MILLER, DOING BUSINESS AS PINE HILL STABLES, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DORIS LUDWIG, ET AL., DEFENDANTS, AND MARY MORRISON, DEFENDANT-APPELLANT.

LAW OFFICE OF TONIE M. FRANZESE, P.C., NORTHVILLE, MICHIGAN (TONIE M. FRANZESE, OF THE MICHIGAN AND CALIFORNIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHRISTOPHER C. SHAMBO, BALLSTON SPA (ALEXANDER PHENGSIAROUN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), dated March 28, 2014. The order, in essence, denied the motion of defendant Mary Morrison for leave to reargue a prior motion to dismiss.

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

Memorandum: Although defendant-appellant purports to appeal from an order denying a motion to dismiss, the record establishes that she is actually appealing from an order denying a motion for leave to reargue a prior motion to dismiss. It is well settled that no appeal lies from an order denying a motion for leave to reargue (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575; *Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

339

KA 11-01981

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWAN DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 4, 2011. Defendant was resentenced upon his conviction of murder in the second degree, robbery in the first degree, robbery in the second degree, assault in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant was convicted in 2001 upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]), robbery in the first degree (§ 160.15 [2]), robbery in the second degree (§ 160.10 [2] [a]), assault in the second degree (§ 120.05 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [2]). Supreme Court failed to impose periods of postrelease supervision (PRS) on those counts for which a determinate sentence was imposed, as required by Penal Law § 70.45 (1). While defendant was serving his sentence, the court resentenced him pursuant to Correction Law § 601-d, to add the requisite periods of PRS. Defendant now contends that the resentencing violates his constitutional double jeopardy and due process rights. Even assuming, arguendo, that defendant's contentions do not require preservation (*cf. People v Woods*, 122 AD3d 1400, 1401; *People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141; *see generally People v Williams*, 14 NY3d 198, 220-221, *cert denied* ___ US ___, 131 S Ct 125), we nevertheless conclude that they lack merit.

Inasmuch as "defendant had not yet completed his originally imposed sentence of imprisonment when he was resentenced, his resentencing to a term including the statutorily required period of postrelease supervision did not violate the double jeopardy or due

process clauses of the United States Constitution" (*People v Fox*, 104 AD3d 789, 789-790, *lv denied* 21 NY3d 943; *see People v Lingle*, 16 NY3d 621, 630-633; *People v Ralph*, 91 AD3d 796, 796-797, *lv denied* 20 NY3d 1064; *cf. Williams*, 14 NY3d at 217). Defendant's reliance on cases rejected by the Court of Appeals in *Lingle* is misplaced (*see Lingle*, 16 NY3d at 632).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

340

KA 13-00834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRY J. PETTY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 20, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

341

KA 10-01926

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN GRAYSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered July 26, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid because the perfunctory inquiry made by Supreme 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 Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Hamilton*, 49 AD3d 1163, 1164), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

342

KA 13-00722

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD GASTON, DEFENDANT-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered April 1, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (*see* Penal Law §§ 110.00, 120.05 [7]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665). After defendant made statements at the plea proceeding casting doubt upon his guilt, County Court did not accept the plea until it inquired further into defendant's possible justification defense. "Thus, the court fulfilled its duty to make further inquiry to ensure that defendant's plea was knowingly, voluntarily and intelligently entered . . . , and this case does not come within the narrow exception to the preservation requirement" (*People v Simmons*, 294 AD2d 928, 929, *lv denied* 98 NY2d 702; *see People v Castanea*, 265 AD2d 906, 906-907). Defendant's contention that he was denied effective assistance of counsel does not survive the plea because 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 Gleen*, 73 AD3d 1443, 1444, *lv denied* 15 NY3d 773 [internal quotation marks omitted]). Defendant further contends that the indictment should be dismissed because he appeared before the grand jury in shackles and handcuffs. While that contention survives the guilty plea, defendant abandoned it by pleading guilty before the court decided that part of his motion seeking to dismiss the indictment on

that ground (*see People v Williams*, 90 AD3d 1514, 1515, *lv denied* 18 NY3d 999). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

346

KA 13-00555

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MARTIN L. WOODWARD, DEFENDANT-APPELLANT.

SETH M. AZRIA, SYRACUSE, FOR DEFENDANT-APPELLANT.

MARTIN L. WOODWARD, DEFENDANT-APPELLANT PRO SE.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered January 4, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

347

KA 11-00938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS DURYEE, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (James J. Piampiano, J.), rendered March 10, 2011. Defendant was resentenced upon his conviction of burglary in the second degree.

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

Memorandum: Defendant appeals from a resentence imposing a period of postrelease supervision that had been omitted from the original sentence imposed upon his conviction of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that the resentence violated the constitutional prohibition against double jeopardy. Defendant had not completed serving his original sentence at the time of resentencing, and thus "the Double Jeopardy Clause did not bar County Court from resentencing him to impose the required period of postrelease supervision" (*People v Nunes*, 89 AD3d 1559, 1560, *lv denied* 18 NY3d 885; *see People v Williams*, 14 NY3d 198, 217, *cert denied* 562 US ___, 131 S Ct 125).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

350

KA 13-00199

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER M. LAURENDI, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY 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 (Christopher J. Burns, J.), rendered October 9, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), defendant contends that Supreme Court erred in enhancing his sentence without affording him the opportunity to withdraw his plea (*see generally People v Outley*, 80 NY2d 702, 712-713, *cert denied* 519 US 964). Defendant failed to preserve that contention for our review, however, because "he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground" (*People v Epps*, 109 AD3d 1104, 1105; *see People v Wachtel*, 117 AD3d 1203, 1203, *lv denied* 23 NY3d 1044). Defendant also failed to preserve for our review his contention that the court failed to conduct a sufficient inquiry into his violation of the conditions of the plea agreement before imposing an enhanced sentence (*see People v Hassett*, 119 AD3d 1443, 1444, *lv denied* 24 NY3d 961; *People v Anderson*, 99 AD3d 1239, 1239, *lv denied* 20 NY3d 1059). 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]).

To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the

apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). The sentence, as imposed, is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

353

CA 14-01494

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

LASHAUN MCCLANEY, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO AND SEAN P. COOLEY,
DEFENDANTS-RESPONDENTS.

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

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), dated October 8, 2013. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

355

CA 14-01688

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

WILLIAM M. EDDY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID ANTANAVIGE, DEFENDANT-RESPONDENT.

MURRAY JS KIRSHTEIN, UTICA, FOR PLAINTIFF-APPELLANT.

LONGERETTA LAW FIRM, UTICA (DAVID A. LONGERETTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a decision of the Supreme Court, Oneida County (David A. Murad, J.), dated August 28, 2013. The decision, among other things, determined that plaintiff is entitled to interest from June 14, 2013.

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

Memorandum: Following a bench trial by Supreme Court in this breach of contract action, plaintiff purports to appeal from a decision stating that he is entitled to a judgment of $25,000 and interest thereon, and directing defendant's attorney to submit a proposed judgment in accordance with the terms of the decision. The appeal must be dismissed inasmuch as "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967; *see* CPLR 5512 [a]; *Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1266), and there is no judgment in the record on appeal (*see Bruno v Vernon Park Realty*, 2 AD2d 770, 771; *see also* CPLR 5526; 22 NYCRR 1000.4 [a] [2]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

359

CA 14-01454

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

RONALD BEASOCK, PLAINTIFF,

V MEMORANDUM AND ORDER

CANISIUS COLLEGE, DEFENDANT.

CANISIUS COLLEGE, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

ACTIVE WORKFORCE, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA, LLC, BUFFALO (ERIC S. BERNHARDT OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 8, 2013. The order granted the motion of third-party plaintiff for partial summary judgment against third-party defendant and denied the cross motion of third-party defendant for summary judgment.

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

Memorandum: Plaintiff commenced this common-law negligence and Labor Law action against defendant-third-party plaintiff, Canisius College (Canisius). Canisius in turn commenced a third-party action against third-party defendant Active Workforce, Inc. (Active), asserting, inter alia, a cause of action for contractual indemnification based on a contract between Active and Lehigh Construction Group. Canisius moved for partial summary judgment on that cause of action, and Active cross-moved for summary judgment dismissing the third-party complaint. Contrary to Active's contention, we conclude that Supreme Court properly granted the motion and denied the cross motion.

Active's contention that Canisius is not an intended third-party beneficiary of the contract between Active and Lehigh Construction Group is without merit. In support of its motion, Canisius established " '(1) the existence of a valid and binding contract

between other parties, (2) that the contract was intended for [Canisius's] benefit and (3) that the benefit to [Canisius] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [Canisius] if the benefit is lost' " (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786, quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336; *see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435), and Active failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Active contends that there is an issue of fact whether the second prong of the *Burns Jackson* test was met here, because the contract at issue merely refers to "the Owner" rather than referring to Canisius by name. That contention is without merit. "The performance by [Active] 'was manifestly to be to the direct benefit of the owner of the development. It is almost inconceivable that [Active, which] render[s its] services in connection with a major construction project[,] would not contemplate that the performance of [its] contractual obligations would ultimately benefit the owner of that development' " (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 319; *see generally Logan-Baldwin v L.S.M. Gen. Contrs., Inc.*, 94 AD3d 1466, 1468; *Brownell Steel, Inc. v Great Am. Ins. Co.*, 28 AD3d 842, 843).

Active's contention that it owes no contractual duty to Canisius because Active and Canisius signed contracts with different entities is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Active's contention that the indemnification agreement at issue violates General Obligations Law § 5-322.1 is also raised for the first time on appeal and thus is also not properly before us (*see Ciesinski*, 202 AD2d at 985). We have considered Active's remaining contentions and conclude that they are without merit.

Frances E. Cafarell

Entered: March 20, 2015

Clerk of the Court

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

360

KA 11-00686

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIJAH W. ADAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 24, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from three judgments rendered by County Court on the same day. In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his pleas of guilty of, respectively, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). In appeal No. 3, defendant appeals from a judgment entered upon his admission that he violated the terms and conditions of his probation, revoking his probation, and sentencing him to concurrent terms of incarceration of 2⅓ to 7 years on the underlying conviction of assault in the second degree (§ 120.05 [3]), attempted assault in the second degree (§§ 110.00, 120.05 [2]), and reckless endangerment in the first degree (§ 120.25).

We reject defendant's contention in appeal Nos. 1 and 2 that the search by the probation officers of his home and a safe located therein was unlawful. Although probationers and parolees have a constitutional right to be free from unreasonable searches and seizures (*see People v Hale*, 93 NY2d 454, 459; *People v Johnson*, 94 AD3d 1529, 1531, *lv denied* 19 NY3d 974), " 'what may be unreasonable with respect to an individual who is not on parole [or probation] may be reasonable with respect to one who is' " (*Johnson*, 94 AD3d at 1531, quoting *People v Huntley*, 43 NY2d 175, 181). The conditions of

defendant's probation regarding drug and alcohol use and prohibiting his ownership of firearms were a proper basis for the probation officers' search of his home and property therein (*see Hale*, 93 NY2d at 462; *People v Wheeler*, 99 AD3d 1168, 1170, *lv denied* 20 NY3d 989). The search was carried out as part of the probation officers' duties as probation officers, and "the assistance of police officers at the scene did not render the search a police operation" (*People v Johnson*, 54 AD3d 969, 970; *see Johnson*, 94 AD3d at 1532; *People v Scott*, 93 AD3d 1193, 1194, *lv denied* 19 NY3d 967, *reconsideration denied* 19 NY3d 1001).

Defendant contends that we must reverse the judgment in appeal No. 3 in the event that we reverse the judgments in appeal Nos. 1 and 2 (*see generally People v Pichardo*, 1 NY3d 126, 129). We reject defendant's contention, inasmuch as we are affirming the judgments in appeal Nos. 1 and 2. We conclude, however, that the sentence in appeal No. 3 must be vacated. Assault in the second degree is a class D violent felony for which an indeterminate sentence is not authorized (*see* Penal Law § 70.02 [1] [c]; [2] [b]; *People v Delorenzo*, 34 AD3d 868, 869; *see generally People v Endresz*, 1 AD3d 888, 888-889). In addition, the indeterminate term of 2⅓ to 7 years' imprisonment exceeded the authorized sentence for the class E nonviolent felony of attempted assault in the second degree (*see* § 70.00 [2] [e]; [3] [b]; [4]). " 'Although this issue was not raised before the [sentencing] court or on appeal, we cannot allow an [illegal] sentence to stand' " (*People v Davis*, 37 AD3d 1179, 1180, *lv denied* 8 NY3d 983). We therefore modify the judgment in appeal No. 3 by vacating the sentence, and we remit the matter to County Court "to afford defendant the opportunity to accept an amended lawful sentence or to withdraw his admission to the violation of probation" (*People v Jones*, 118 AD3d 1361, 1362).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

365

KA 11-00685

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIJAH W. ADAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 24, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Same memorandum as in *People v Adams* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

366

KA 10-02193

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KARRON MACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered October 1, 2010. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]) and sexual abuse in the first degree (§ 130.65 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Issues of credibility and the weight to be accorded to the evidence presented are primarily to be determined by the jury (*see generally People v Woolson*, 122 AD3d 1353, 1355), and we perceive no reason to disturb the jury's resolution of those issues. We also conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

370

KA 11-00687

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIJAH ADAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 24, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the same memorandum as in *People v Adams* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

371

KA 10-00599

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMON RELEFORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 3, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). We reject defendant's contention that he was denied effective assistance of counsel. Defendant's reliance on *People v Nesbitt* (20 NY3d 1080, 1081-1082) is misplaced, inasmuch as the record establishes that, on summation, defense counsel contested the proof of the identification of defendant as the assailant as well as the proof of intent. Next, defense counsel's remarks at sentencing, while brief, did not constitute ineffective assistance (*see generally People v Maryon*, 20 AD3d 911, 913, *lv denied* 5 NY3d 854). Although defense counsel failed to object to the admission of the victim's medical records that contained inadmissible hearsay concerning the victim's identification of her assailant and failed to introduce into evidence certain 911 tape recordings, it cannot be said that defense counsel's errors with regard to those evidentiary submissions were sufficiently egregious and prejudicial as to deny defendant a fair trial (*see People v Sinclair*, 90 AD3d 1518, 1518, *lv denied* 18 NY3d 962; *see generally People v Ortega*, 15 NY3d 610, 619-620). Defendant's remaining allegations of ineffective assistance of counsel are without merit, and we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Contrary to defendant's further contention, County Court properly denied his request to charge reckless assault in the second degree as

a lesser included offense of assault in the first degree, inasmuch as there is no reasonable view of the evidence that defendant acted recklessly rather than intentionally (*see People v Flinn*, 98 AD3d 1262, 1263, *affd* 22 NY3d 599, *rearg denied* 23 NY3d 940). Finally, the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

376

CA 14-00548

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

JUDY L. GUYETTE AND RANDY GUYETTE,
PLAINTIFFS-APPELLANTS,

V ORDER

ONEIDA FINANCIAL CORP., DEFENDANT-RESPONDENT.

ALEXANDER & CATALANO, LLC, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 31, 2013. The order granted defendant's motion for summary judgment dismissing plaintiffs' complaint.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

383

KA 12-02111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAMELL S. MITCHELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 19, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

384

KA 11-00056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN S. GIBBS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 20, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law §§ 130.50 [4]; 130.96). We agree with defendant that County Court committed reversible error by admitting evidence of prior bad acts of sexual abuse against the victim's mother and another woman. With the assistance of the police, the victim's mother recorded a telephone conversation between herself and defendant, and she made repeated references to the prior bad acts throughout the conversation in her attempt to have defendant admit to sexually abusing the victim. We conclude that the court erred in determining that the references to the prior bad acts were admissible because they were inextricably interwoven with the allegations against the victim. In the context of a recorded call, when references to prior bad acts in the conversation are "inextricably interwoven with the crime charged in the indictment," the entire conversation "may be received in evidence . . . where . . . the value of the evidence clearly outweighs any possible prejudice" (*People v Vails*, 43 NY2d 364, 368-369). " 'To be inextricably interwoven . . . the evidence must be explanatory of the acts done or words used in the otherwise admissible part of the evidence' " (*People v Swanson*, 103 AD2d 1024, 1024, quoting *People v Ventimiglia*, 52 NY2d 350, 361). Here, we conclude that the disputed references were not explanatory of the rest of the conversation. The statements regarding defendant's prior bad acts were numerous, but

they could have been redacted from the transcript of the recorded call without making the statements regarding the victim incomprehensible (*see Swanson*, 103 AD2d at 1024). In other words, the statements concerning the victim are "clearly understandable" by themselves and are "not dependent upon" the statements concerning defendant's prior bad acts (*id.*). We further conclude that the prejudicial effect of those numerous references to the prior bad acts outweighed any probative value, and the references therefore should have been redacted (*see People v Resek*, 3 NY3d 385, 389).

We further agree with defendant that the court abused its discretion in its *Sandoval* ruling. The court ruled that defendant could be cross-examined with respect to a prior offense if he were to testify because that evidence was already admitted through the recorded telephone call. In so ruling, the court failed to balance the probative value of the evidence with the prejudicial effect (*see People v Williams*, 56 NY2d 236, 238-239; *People v Clark*, 42 AD3d 957, 959, *lv denied* 9 NY3d 960). We agree with defendant that the above errors are not harmless inasmuch as the proof against defendant was not overwhelming (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

391

KA 11-02159

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JIMMY L. HARRIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 25, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

393

KA 13-00487

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LINCOLN C. ABLACK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 2, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon a plea of guilty of, inter alia, assault in the first degree (§ 120.10 [4]). We note at the outset that the certificate of conviction in appeal No. 2 contains a clerical error, i.e., it incorrectly recites that defendant was convicted of assault in the second degree, and it must therefore be amended to reflect that he was convicted of assault in the first degree (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Defendant contends in each appeal that his respective pleas were involuntary because he was misinformed with respect to his maximum sentencing exposure. Defendant's contention that his pleas were involuntary survives his waiver of the right to appeal (*see People v Halsey*, 108 AD3d 1123, 1124). By failing to move to withdraw the respective pleas or to vacate the respective judgments of conviction on that ground, however, defendant failed to preserve his contention for our review (*see People v Morrison*, 78 AD3d 1615, 1616, *lv denied* 16 NY3d 834). 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]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

394

KA 13-00488

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LINCOLN C. ABLACK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 2, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree, assault in the first degree, and tampering with a witness in the first degree.

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

Same memorandum as in *People v Ablack* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

395

CA 13-02089

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF THE ESTATE OF LULA BAITY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED, GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, TIFFANY MATTHEWS AND PHILLIP J. RADOS, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LOUIS ROSADO, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE AND BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILLIP J. RADOS, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL AND TIFFANY MATTHEWS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 19, 2013. The order denied the motion of plaintiff to vacate, inter alia, an order granting defendants' respective motions for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff appeals from an order denying her motion pursuant to CPLR 5015 (a) (1) seeking to vacate, inter alia, an order granting defendants' respective motions for summary judgment dismissing the complaint. We reject plaintiff's contention that there is a reasonable excuse for default, i.e., excusable law office failure. It is undisputed that plaintiff's attorney failed to respond

to the summary judgment motions and failed to appear at the return date for those motions. Instead, on the day before the return date, he filed a motion, returnable three weeks later, seeking, inter alia, a "stay" of the summary judgment motions pending the appeal from an order granting defendants' respective motions to amend their answers or, in the alternative, an extension of time to respond to the summary judgment motions. The record establishes that Supreme Court had not reviewed plaintiff's motion before the return date for the summary judgment motions, and that plaintiff's attorney was advised that defendants intended to appear at the return date for their respective summary judgment motions. The court advised defendants' respective attorneys on the record that plaintiff's attorney had contacted the court and stated that he would not be appearing. "Whether an excuse is reasonable is a determination within the sound discretion of the [court]" (*Walker v Mohammed*, 90 AD3d 1034, 1034), and we conclude that the court did not abuse its discretion in rejecting plaintiff's excuse. Indeed, plaintiff's "own submissions establish that the default was intentional and thus not excusable" (*Double Diamond Equity, Inc. v Valerie*, 23 AD3d 1103, 1104; *see Fremming v Niedzialowski*, 93 AD3d 1336, 1336-1337). Because plaintiff failed to establish a reasonable excuse for the default, we need not determine whether she had a potentially meritorious opposition to the motion (*see Fremming*, 93 AD3d at 1336-1337).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

396

CA 13-02040

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

IN THE MATTER OF MICHAEL NEGRON,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 29, 2013 pursuant to a CPLR article 78 proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

397

CA 13-02203

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

IN THE MATTER OF CHRISTOPHER HYNES,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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 November 22, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

400

CA 14-00180

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

CARMEN BRITT AND CARMEN BRITT, AS EXECUTOR OF THE ESTATE OF LULA BAITY, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE, BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED, GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL, TIFFANY MATTHEWS AND PHILLIP J. RADOS, M.D., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LOUIS ROSADO, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (ELIZABETH G. ADYMY OF COUNSEL), FOR DEFENDANT-RESPONDENT PHILLIP J. RADOS, M.D.

FELDMAN KIEFFER, LLP, BUFFALO (ADAM C. FERRANDINO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS GRACE MANOR HEALTH CARE FACILITY, INC., DAVID J. GENTNER, MARY STEPHAN, KATHY RANDALL AND TIFFANY MATTHEWS.

COLUCCI & GALLAHER, P.C., BUFFALO (JOHN J. MARCHESE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BUFFALO MUNICIPAL HOUSING AUTHORITY, ELAINE GARBE AND BISILOLA F. JACKSON, ADMINISTRATOR OF THE ESTATE OF JERELENE ELIZABETH GIWA, DECEASED.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 6, 2013. The order denied the motion of plaintiff for recusal.

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

Memorandum: Plaintiff contends on appeal that Supreme Court erred in denying her recusal motion. It is well established that, "[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . A court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406). Contrary to plaintiff's contention, we conclude that the court did not abuse its discretion in

denying the motion (*cf. People v Warren*, 100 AD3d 1399, 1400). Plaintiff's allegations that the court exhibited bias in favor of defendants and prejudice against her are contradicted by the record.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

404.1

KA 13-01600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA M. LANDO, DEFENDANT-APPELLANT.

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 6, 2013. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). We reject defendant's contention that her waiver of the right to appeal was invalid. County Court "made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was 'separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920, quoting *People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal encompasses defendant's further contention that the sentence is unduly harsh and severe (*see People v Rodman*, 104 AD3d 1186, 1188, *lv denied* 22 NY3d 1202; *see generally Lopez*, 6 NY3d at 255-256).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

423

CA 13-02101

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

IN THE MATTER OF RICKY HART,
PETITIONER-APPELLANT,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered October 29, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Velez v Evans*, 101 AD3d 1642).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1063/14

CA 14-00775

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

M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCGRAW-HILL COMPANIES, INC., DOING BUSINESS AS STANDARD AND POOR'S RATINGS SERVICES, STANDARD & POOR'S FINANCIAL SERVICES LLC, AND MOODY'S INVESTORS SERVICES, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

CAHILL GORDON & REINDEL LLP, NEW YORK CITY (FLOYD ADAMS OF COUNSEL), AND CONNORS & VILARDO LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS MCGRAW-HILL COMPANIES, INC., DOING BUSINESS AS STANDARD AND POOR'S RATINGS SERVICES, AND STANDARD & POOR'S FINANCIAL SERVICES LLC.

SATTERLEE STEPHENS BURKE & BURKE LLP, NEW YORK CITY (JAMES J. COSTER OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, FOR DEFENDANT-APPELLANT MOODY'S INVESTORS SERVICES, INC.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 30, 2014. The order denied the motions of defendants to dismiss the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 19, 2015, and filed in the Erie County Clerk's Office on February 20, 2015,

It is hereby ORDERED that said appeal taken by defendants McGraw-Hill Companies, Inc., doing business as Standard and Poor's Ratings Services, and Standard & Poor's Financial Services LLC is unanimously dismissed upon stipulation and the order is modified on the law by granting that part of the motion of defendant Moody's Investors Services, Inc. seeking dismissal of the second cause of action against it and dismissing that cause of action against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced these actions against the credit agency Moody's Investors Services, Inc. (defendant) seeking to recover approximately $77 million it lost from its investment in structured finance securities. In early 2007, plaintiff invested in notes that were part of a collateralized debt obligation (CDO) known as Gemstone

CDO VII (hereafter, Gemstone CDO) and Cairn Mezz ABS CDO III (hereafter, Cairn CDO). The Gemstone and Cairn CDOs were collateralized in part by residential mortgage backed securities (RMBS), which were bonds backed by pools of residential mortgage loans. A substantial portion of the Gemstone and Cairn CDOs were comprised of subprime RMBS. Each class of notes, or "tranche," purchased by plaintiff received a rating from defendant, a nationally-recognized investment ratings agency. Defendant was paid by the issuers of the CDOs to provide its opinion on the creditworthiness of the notes. Defendant gave the Gemstone and Cairn CDO tranches purchased by plaintiff its highest and second-highest ratings. However, commencing in July 2007, the Gemstone and Cairn CDOs suffered multiple downgrades by defendant and, by April 2008, the CDOs defaulted and wiped out almost all of plaintiff's investment.

In a prior action, plaintiff sued various entities involved in the issuance of the tranches of Gemstone CDO (*M&T Bank Corp. v Gemstone CDO VII, Ltd.*, 68 AD3d 1747). In its present complaints, plaintiff alleged fraud and negligent misrepresentation causes of action against defendant based on its credit ratings with respect to the Gemstone CDO (action in appeal No. 1) and the Cairn CDO (action in appeal No. 2), and Supreme Court denied defendant's motion to dismiss the complaints against it for failure to state a cause of action.

Supreme Court properly denied that part of defendant's motion seeking to dismiss the fraud causes of action against it. In their complaints, plaintiff alleged, inter alia, that defendant's ratings of the notes were false and misleading and that defendant knew that its ratings were false and misleading. Plaintiff further alleged that defendant "represented to the public, including [plaintiff], that [its] ratings of the Gemstone [and Cairn] notes were independent, were not affected by conflicts of interest, and were current and accurate, all of which was false and known to be false by [defendant]."

Although statements of opinion generally are not actionable in a fraud cause of action (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179; *Foot Locker Stores, Inc. v Pyramid Mgt. Group, Inc.*, 45 AD3d 1447, 1448; *Scott v Young Life*, 273 AD2d 922, 923), defendant correctly recognizes that statements of opinion may nevertheless be actionable as fraud if the plaintiff can plead and prove that the holder of the opinion did not subjectively believe the opinion at the time it was made and made the statement with the intent to deceive (*see Rice v Heilbronner*, 272 AD2d 957, 957; *Tolin v Standard & Poor's Fin. Servs., LLC*, 950 F Supp 2d 714, 722; *see generally CPC Intl. v McKesson Corp.*, 70 NY2d 268, 286). As one court has explained, a fraud claim based on an expression of opinion "is actionable in an appropriate case not because the opinion is 'objectively' wrong. Rather, in an appropriate case it is actionable because the speaker either did not in fact hold the opinion stated or because the speaker subjectively was aware that there was no reasonable basis for it . . . In the first instance, the speaker will have lied as to his or her subjective mental state. In the second, he or she implicitly would have represented that there was a reasonable basis for the statement

of opinion, knowing that the implicit representation was false" (*IKB Intl. S.A. v Bank of Am.*, 2014 WL 1377801, at *1 [SD NY]; *see Banner v Lyon & Healy, Inc.*, 249 App Div 569, 571, *affd* 277 NY 570). Here, we agree with defendant that its credit ratings were statements of opinion, not fact (*see e.g. Matter of Lehman Bros. Mtge.-Backed Sec. Litig.*, 650 F3d 167, 183; *Tolin*, 950 F Supp 2d at 722; *Matter of Bear Stearns Mtge. Pass-Through Certificates Litig.*, 851 F Supp 2d 746, 770-771; *see also ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398), but we conclude that plaintiff adequately pleaded that defendant did not believe its opinions when it issued the ratings. Plaintiff set forth in detail the reasons why defendant was aware that the ratings were inflated, including its allegation that defendant failed to follow its own policies and procedures in determining the ratings.

To the extent that plaintiff made allegations regarding defendant's conduct with respect to RMBS and CDOs in general rather than making specific allegations concerning the Gemstone and Cairn CDOs at issue here, we conclude that any further specificity regarding defendant's knowledge of the falsity of its ratings is within the knowledge of defendant and cannot be adequately stated at this juncture of the litigation (*see Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492). The complaint adequately sets forth allegations upon which there is a "reasonable inference" of fraudulent conduct by defendant in issuing ratings that it did not believe were true (*id.* at 492).

We reject defendant's further contention that plaintiff did not adequately plead justifiable reliance (*see Steinhardt Group v Citicorp*, 272 AD2d 255, 257; *see generally Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559). Plaintiff alleged that investors in the notes, including itself, would receive and rely on defendant's ratings and ratings communications, and that plaintiff did justifiably rely on those ratings when it purchased the notes. Plaintiff alleged that it relied on the credit ratings because it did not have access to the same data as defendant nor the capacity or analytical ability to assess the securities.

We agree with defendant, however, that the court erred in denying that part of its motion seeking dismissal of the negligent misrepresentation causes of action against it, and we therefore modify the order in each appeal accordingly. To establish a claim for negligent misrepresentation based on the allegedly inaccurate credit ratings, plaintiff must allege that "(1) the [defendant] must have been aware that the [ratings] were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party . . . was intended to rely; and (3) there must have been some conduct on the part of the [defendant] linking [it] to that party . . . , which evinces the [defendant's] understanding of that party['s] . . . reliance" (*Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d 536, 551, *mot to amend remittitur granted* 66 NY2d 812; *see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384, *rearg denied* 81 NY2d 955). "The indicia, while distinct, are interrelated and collectively require a third party claiming harm to

demonstrate a relationship or bond with the once-removed [defendant] 'sufficiently approaching privity' based on 'some conduct on the part of the [defendant]' " (*Security Pac. Bus. Credit v Peat Marwick Main & Co.*, 79 NY2d 695, 702-703, *rearg denied* 80 NY2d 918).

The complaints here failed to plead that a special or privity-like relationship existed between plaintiff and defendant (*see M&T Bank Corp.*, 68 AD3d at 1750; *Anschutz Corp. v Merrill Lynch & Co., Inc.*, 690 F3d 98, 114-115). We reject plaintiff's contention that it was a "known party" under the *Credit Alliance Corp.* test because of the small number of investors purchasing the Gemstone and Cairn CDOs. "The words 'known party . . .' in the *Credit Alliance* test mean what they say," and if defendant "did not know 'the identity of the specific nonprivy party who would be relying' [upon the credit reports], the complaint falls short of satisfying the *Credit Alliance* test" (*Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370, 373-374). Here, plaintiff merely alleged that defendant knew that the CDOs would be marketed to a small group of potential investors that *could* include plaintiff, but failed to allege that defendant knew that plaintiff *would* be one of those investors.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1064/14

CA 14-00776

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

M&T BANK CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCGRAW-HILL COMPANIES, INC., DOING BUSINESS AS STANDARD AND POOR'S RATINGS SERVICES, STANDARD & POOR'S FINANCIAL SERVICES LLC, AND MOODY'S INVESTORS SERVICES, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

CAHILL GORDON & REINDEL LLP, NEW YORK CITY (FLOYD ADAMS OF COUNSEL), AND CONNORS & VILARDO LLP, BUFFALO, FOR DEFENDANTS-APPELLANTS MCGRAW-HILL COMPANIES, INC., DOING BUSINESS AS STANDARD AND POOR'S RATINGS SERVICES, AND STANDARD & POOR'S FINANCIAL SERVICES LLC.

SATTERLEE STEPHENS BURKE & BURKE LLP, NEW YORK CITY (JAMES J. COSTER OF COUNSEL), AND ZDARSKY, SAWICKI & AGOSTINELLI LLP, BUFFALO, FOR DEFENDANT-APPELLANT MOODY'S INVESTORS SERVICES, INC.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 30, 2014. The order denied the motions of defendants to dismiss the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 19, 2015, and filed in the Erie County Clerk's Office on February 20, 2015,

It is hereby ORDERED that said appeal taken by defendants McGraw-Hill Companies, Inc., doing business as Standard and Poor's Ratings Services, and Standard & Poor's Financial Services LLC is unanimously dismissed upon stipulation and the order is modified on the law by granting that part of the motion of defendant Moody's Investors Services, Inc. seeking dismissal of the second cause of action against it and dismissing that cause of action against it and as modified the order is affirmed without costs.

Same Memorandum as in *M&T Bank Corp. v McGraw-Hill Cos., Inc.* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1184/14

KA 11-00696

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MCKINLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 26, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). We agree with defendant that his waiver of the right to appeal is invalid because it is not clear from the record that County Court ensured " 'that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Johnson*, 109 AD3d 1191, 1191, *lv denied* 22 NY3d 997). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1292/14

KA 10-01387

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP COUSER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Dennis M. Kehoe, A.J.), rendered April 8, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree, criminal possession of a weapon in the second degree (two counts), attempted robbery in the first degree (three counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the sentences imposed on the fifth through seventh counts run concurrently with each other and consecutively to the sentence imposed on the second count, and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]) and three counts of attempted robbery in the first degree (§§ 110.00, 160.15 [4]). In appeal No. 2, defendant appeals from a judgment convicting him upon his *Alford* plea of attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [vii]). The charges arose from defendant's display of a gun and threats to a group of five people in a park, the theft of a purse from a female victim in the group, the firing of a shot from that gun, which grazed the head of a male victim in the group, and the recovery of a different gun from defendant's residence at a later date.

In appeal No. 1, defendant contends that he was denied a fair trial by Supreme Court's (Kehoe, A. J.) *Molineux* ruling and, alternatively, by the court's failure to give a limiting instruction with respect to the *Molineux* evidence. Defendant did not preserve his alternative contention for our review, and we decline to exercise our power to review it as a matter of discretion in the interest of

justice (*see People v Williams*, 107 AD3d 1516, 1516, *lv denied* 21 NY3d 1047; *see also* CPL 470.15 [6] [a]). We conclude that the court properly ruled that the People could present *Molineux* evidence that defendant was on probation at the time of the crimes herein inasmuch as such evidence was "necessary in order to 'complete the narrative of the crime[s] charged' " (*People v Copeland*, 43 AD3d 1436, 1437, *lv denied* 9 NY3d 1032).

In any event, we conclude that any error in the admission of *Molineux* evidence is harmless. The evidence at trial included the testimony of four of the five victims from the park, who testified that defendant was the man who pointed a gun at them, ordered the group to the ground on threat of killing someone, directed another person to grab a purse from a victim, and put the gun to the back of the head of one of the victims and fired a shot, which grazed the back of the head of that victim. The evidence at trial also included defendant's statements to the police, in which he admitted to participating in the gunpoint robbery and possessing the gun found at his residence. Thus, the evidence of guilt is overwhelming (*see People v Kelly*, 71 AD3d 1520, 1521, *lv denied* 15 NY3d 775; *People v Baker*, 21 AD3d 1435, 1436, *lv denied* 6 NY3d 773), and we conclude that there is no significant probability that "the jury would have acquitted defendant if the allegedly improper *Molineux* evidence had been excluded" (*People v Casado*, 99 AD3d 1208, 1212, *lv denied* 20 NY3d 985; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention in appeal No. 1, we conclude that he received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). "Under the circumstances, and in light of the People's case, . . . [defense] counsel pursued a logical defense strategy and successfully" avoided a conviction at trial on the highest count of the indictment (*People v Hall*, 68 AD3d 1133, 1133, *lv denied* 14 NY3d 800; *see generally People v Benevento*, 91 NY2d 708, 712-713).

Defendant further contends in appeal No. 1 that the court's imposition of four consecutive sentences on the second count, for robbery in the first degree, and the fifth through seventh counts, for attempted robbery in the first degree, is illegal pursuant to Penal Law § 70.25 (2) because those counts are based upon a single act, i.e., the display of a gun to the group. We agree in part with defendant and conclude that the actus reus of the fifth through seventh counts was a single act constituting one offense, and thus the sentences on those counts must run concurrently with each other (*see generally People v Wright*, 19 NY3d 359, 363-364). We therefore modify the sentence in appeal No. 1 accordingly. The effect of the modification is a reduction of the aggregate sentence to a total of 33 years of imprisonment, i.e., 18 years of imprisonment for the second count plus 15 years of imprisonment for the fifth through seventh counts.

We further conclude, however, that the court properly ordered the sentence on the second count to run consecutively to the sentences on

counts five through seven. "When more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently" (Penal Law § 70.25 [2]). "It is well settled that 'sentences imposed for two or more offenses may not run consecutively: (1) where a single act constitutes two offenses, or (2) where a single act constitutes one of the offenses and a material element of the other' " (*People v Jackson*, 56 AD3d 1295, 1296, quoting *People v Laureano*, 87 NY2d 640, 643; *see People v Wright*, 19 NY3d 359, 363; § 70.25 [2]). "If the statutory elements . . . overlap under either prong of [section 70.25], the People may yet establish the legality of consecutive sentencing by showing that the 'acts or omissions' committed by defendant were separate and distinct acts" (*Laureano*, 87 NY2d at 643). It is equally well settled, however, that "trial courts retain consecutive sentence discretion when separate offenses are committed through separate acts, though they are part of a single transaction" (*People v Brown*, 80 NY2d 361, 364). Here, the second count included an additional act, i.e, the taking of the purse, which allowed the court to impose a consecutive sentence thereon.

In appeal No. 2, defendant contends that his plea must be vacated if, in appeal No. 1, the conviction is reversed or the aggregate sentence is reduced. After defendant was sentenced in appeal No. 1, the court (Affronti, J.) accepted defendant's *Alford* plea to attempted murder in the first degree and sentenced him in accordance with a plea offer to the minimum sentence, i.e., 15 years to life imprisonment, to run concurrently with the sentence in appeal No. 1. Inasmuch as we are not reversing his conviction in appeal No. 1, "[t]he critical question is whether the . . . reduction of the preexisting sentence nullifie[s] a benefit that was *expressly promised* and was a material inducement to the [*Alford*] plea" (*People v Rowland*, 8 NY3d 342, 345 [emphasis added]). We conclude that the modification of the aggregate sentence in appeal No. 1 to 33 years does not nullify a benefit that was expressly promised and was not a material inducement to defendant's plea, and defendant is therefore not entitled to vacatur of the plea (*see id.*; *see generally People v Pichardo*, 1 NY3d 126, 129).

In appeal No. 2, defendant further contends that his plea must be vacated because he was denied effective assistance of counsel based on defense counsel's failure to recognize that defendant was not subject to a consecutive sentence for the attempted murder count. To the extent that defendant's contention concerning ineffective assistance of counsel survives his *Alford* plea (*see People v Thompson*, 4 AD3d 785, 785-786, *lv denied* 2 NY3d 808), we reject that contention. The record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404). In any event, contrary to defendant's contention, we conclude that a concurrent sentence was not required for the attempted murder count in appeal No. 2 because the shooting of the male victim was an act separate and distinct from the criminal acts in appeal No. 1. The sentence in appeal No. 2 was

therefore "not subject to the strictures of Penal Law § 70.25 (2)" (*People v Rodriquez*, 79 AD3d 644, 645, *affd* 18 NY3d 667; *see generally People v Battles*, 16 NY3d 54, 58-59). "Where, as here, separate acts are committed against different victims during the same criminal transaction, the court may properly impose consecutive sentences in the exercise of its discretion" (*People v Lemon*, 38 AD3d 1298, 1299, *lv denied* 9 NY3d 846, *reconsideration denied* 9 NY3d 962). We have reviewed defendant's remaining contention in appeal No. 2 and conclude that it lacks merit.

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1293/14

KA 14-00347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP COUSER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 22, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the first degree.

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

Same Memorandum as in *People v Couser* ([appeal No. 1] ___ AD3d ___ [Mar. 20, 2015]).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

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

1302/14

CA 14-00783

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

KURT T. JURGENSEN, AS PARENT AND NATURAL GUARDIAN OF JAYNA R. JURGENSEN, AN INFANT, AND KURT T. JURGENSEN, INDIVIDUALLY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WEBSTER CENTRAL SCHOOL DISTRICT, DEFENDANT-APPELLANT.

CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE PALMIERE LAW FIRM, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 5, 2013. The order denied defendant's motion for summary judgment dismissing plaintiff's amended complaint.

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

Memorandum: Plaintiff, individually and as parent and natural guardian of his daughter, commenced this action seeking damages for injuries sustained by his daughter at high school during a varsity cheerleading practice. Plaintiff's daughter (hereafter, daughter) was injured while working with her teammates on a choreographed stunt that involved two cheerleaders, referred to as "bases," throwing plaintiff's daughter, the "flyer," into the air and then catching her as she came down in a horizontal position. On the day in question, the daughter and her teammates successfully completed the stunt without incident on their first attempt. During the second attempt, however, the daughter felt intense pain in her knee when the bases threw her into the air. The daughter curled herself into a ball while airborne, whereupon the two bases caught her and placed her on the mat. It was later determined that the daughter sustained a torn anterior cruciate ligament in her knee. According to the daughter, the injury occurred because one of the bases, i.e., another teammate, was practicing that day with a sprained ankle, which somehow caused the teammate to hold on to the daughter's foot for too long before throwing the daughter into the air.

In his amended complaint, plaintiff alleges that defendant school district was negligent in allowing the teammate to participate in practice. Following joinder of issue and discovery, defendant moved for summary judgment dismissing the amended complaint, contending that the action is barred by the doctrine of assumption of risk. We conclude that Supreme Court erred in denying the motion. It is well settled that, "by engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks [that] are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484; *see Larson v Cuba Rushford Cent. Sch. Dist.*, 78 AD3d 1687, 1687-1688). We have previously held that cheerleading is the type of athletic endeavor to which the doctrine of assumption of the risk applies (*see e.g. Williams v Clinton Cent. Sch. Dist.*, 59 AD3d 938, 938; *Sheehan v Hicksville Union Free Sch. Dist.*, 229 AD2d 1026, 1026). That doctrine does not, however, shield defendants from liability for exposing participants to unreasonably increased risks of injury (*see Sheehan*, 229 AD2d at 1026).

Here, although plaintiff acknowledges that his daughter voluntarily assumed the risks inherent in participating in cheerleading, he contends that defendant, by negligently allowing the teammate to practice with an injured ankle, increased the risk of injury to his daughter, and that his daughter did not voluntarily assume that concealed risk. The record establishes, however, that the daughter admittedly was aware that the teammate had injured her ankle and that she had not been cleared to practice by the trainer. Moreover, the daughter testified that she practiced the stunt with the teammate on the day in question before she tore her ACL, and that she noticed that the base—anchored partially by the teammate—felt "a little more shaky" than usual. As a result of the "shaky" base, the daughter asked the teammate if the teammate should continue to practice on the injured ankle. The daughter further testified that, although she believed that the teammate was injured and that the teammate's ankle made the base shaky, she continued to practice with the teammate because she "didn't think it was that big of a deal."

We agree with defendant that the daughter's practicing with the teammate while knowing that the teammate had an injured ankle is analogous to a cheerleader practicing without a mat (*see Williams*, 59 AD3d at 938), or to an athlete playing on a field that is in less than perfect condition (*see Stadelmaier v Town of Tonawanda*, 2 AD3d 1369, 1370; *see also Trevett v City of Little Falls*, 24 AD3d 1197, 1198, *affd* 6 NY3d 884, *rearg denied* 7 NY3d 845). We therefore conclude that defendant established as a matter of law that this action is barred by the doctrine of assumption of risk, and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: March 20, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1896/89) KA 05-02532. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEVIN J. JOHNSON, DEFENDANT-APPELLANT. –- Motion for reargument denied. PRESENT: CENTRA, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1576/90) KA 90-01576. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (484/97) KA 04-00304. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1095/97) KA 15-00058. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LAMARR SCOTT, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1078/99) KA 97-00568. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK D’ANTUONO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (849/00) KA 99-01550. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY MULDROW, DEFENDANT-APPELLANT. –- Motion for reargument or, in the alternative, a writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (632/01) KA 98-05621. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES PEARCE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (994/01) KA 98-05472. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARL GEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (626/02) KA 00-03001. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY YOUNGBLOOD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (802/03) KA 01-00914. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHARROWL DAVIS, ALSO KNOWN AS SHARROD DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, CARNI, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (467/05) KA 02-00776. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY A. RIMMEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (925/11) KA 08-01253. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RABAH E. MORAN, ALSO KNOWN AS TERRY MCKEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1327/12) KA 10-01107. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISIAH WILLIAMS, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (35/14) CA 13-00639. -- SVETLANA BALUK AND MARK OSILOVSKIY, PLAINTIFFS-APPELLANTS, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, DEFENDANT-RESPONDENT. -- Motion insofar as it seeks in the alternative leave to appeal to the Court of Appeals denied and the motion insofar as it seeks leave to reargue, deemed a motion seeking leave to renew (*see* CPLR 2221 [e] [2]; *Karlin v Bridges*, 172 AD2d 644, 645), is granted in part and, upon renewal, the memorandum and order entered February 7, 2014 (114 AD3d 1151) is amended by deleting the ordering paragraph and substituting the following ordering paragraph:

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant's motion and reinstating the complaint, and as modified the order is affirmed without costs.

The memorandum and order is further amended by deleting the memorandum and substituting the following memorandum:

Plaintiffs commenced this action alleging that defendant breached its obligations under their homeowner's policy when it failed to reimburse them fully for sums they expended to repair or replace damage resulting from "puff-back" from their malfunctioning furnace. We conclude that Supreme Court erred in granting defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7), and we therefore modify the order by denying that motion and reinstating the complaint.

> The loss settlement provision of the policy states that defendant will pay the cost to repair or replace an insured building, "but not more than the least of the following amounts: (1) [t]he limit of liability under [the] policy that applies to the building; (2) [t]he replacement cost of that part of the building damaged with material of like kind and quality and for like use; or (3) [t]he necessary amount actually spent to repair or replace the damaged building." That provision further states that defendant "will pay no more than the actual cash value of the damage until actual repair or replacement is complete." Another provision in the policy states that "[n]o action can be brought against [defendant] unless there has been full compliance with all of the terms under [the Conditions] Section . . . of

[the] policy and the action is started within two years after the date of loss." Defendant made payments to plaintiffs for the actual cash value of the damage, but refused to pay the full cost of their repairs, including recoverable depreciation, which were not completed within two years after the date of loss. Thus, the contractual limitation period expired before defendant's alleged breach.

"[T]here is nothing inherently unreasonable about a two-year period of limitation," and agreements that modify the statute of limitations by specifying a shorter period for commencing an action are generally enforced (*Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518; *see Blitman Constr. Corp. v Insurance Co. of N. Am.*, 66 NY2d 820). In certain circumstances, however, as in *Executive Plaza*, "[i]t is neither fair nor reasonable to require a suit within two years from the date of the loss, while imposing a condition precedent to the suit—in this case, completion of [repair or] replacement of the property—that cannot be met within that two-year period" (*id.* at 518). Here, the record fails to establish whether plaintiffs were able to satisfy the condition precedent in the loss settlement provision of their policy prior to commencing this action, i.e., completion of repairs within two years after the loss. Thus, an issue remains "whether the plaintiff[s] had a reasonable opportunity to commence [their] action within the period of limitation" (*id*. at 519 [internal quotation marks omitted]), and that issue must be resolved before it is determined whether the contractual limitation period is

enforceable in this case.

We further conclude that the court properly denied plaintiffs' cross motion seeking, inter alia, summary judgment declaring that the remainder of their loss is covered under the policy.

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

(Filed Mar. 20, 2015.)

MOTION NO. (879/14) CA 14-00370. -- DENISE D. SIMONEIT, PLAINTIFF-APPELLANT-RESPONDENT, V MARK CERRONE, INC. AND JAMES A. FREEMAN, DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered November 14, 2014 (122 AD3d 1246) is amended by deleting the ordering paragraph and substituting the following ordering paragraph:

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion for partial summary judgment on the issue of defendants' negligence, denying that part of the motion seeking to dismiss the affirmative defense of plaintiff's culpable conduct and reinstating that defense, and striking the affirmative defenses based upon alleged brake failure, and as so modified the order is affirmed without costs.

The memorandum is further amended by deleting the first three sentences of the second paragraph and replacing those sentences with the following:

Contrary to the contention of plaintiff, we conclude that Supreme Court did not abuse its discretion in granting defendants' cross motion. "While a delay in seeking to amend a pleading may be considered by the trial court, it does not bar that court from exercising its discretion in favor of permitting the amendment where[, as here,] there is no prejudice" (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 413-414). We agree with plaintiff, however, that preclusion of the affirmative defenses based on brake failure is warranted as a sanction for spoliation (*see Simmons v Pierce*, 39 AD3d 1252, 1253), and we therefore modify the order accordingly.

The memorandum is further amended by deleting the last sentence of the second paragraph and replacing it with the following:

Because the calipers were "a crucial piece of evidence" with respect to any affirmative defenses based upon brake failure, we conclude that striking such affirmative defenses is the appropriate sanction for their disposal of the brakes (*Simmons*, 39 AD3d at 1253 [internal quotation marks omitted]; *see Cutroneo v Dryer*, 12 AD3d 811, 813).

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND LINDLEY, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (957/14) KA 13-00409. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JON N. ROBLEE, DEFENDANT-APPELLANT. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered November 14, 2014 (122 AD3d 1261), is amended by deleting the second sentence of the fourth paragraph of the memorandum and substituting the following:

> We reject that contention. Addressing first defendant's claims concerning the number of grand jurors, we note that, pursuant to Criminal Procedure Law, a grand jury proceeding must be conducted before at least 16 grand jurors, 12 of whom must concur in the finding of the indictment (*see* CPL 210.35 [2], [3]; *see also* CPL 190.25 [1]; *People v Grimes*, 115 AD3d 1194, 1195, *lv denied* 24 NY3d 1084; *People v Eun Sil Jang*, 17 AD3d 693, 694). Here, the grand jury minutes establish that 19 grand jurors voted to indict defendant, and 1 voted not to indict him. We therefore perceive no violation of the above statutes.
>
> With respect to defendant's claim concerning the grand jury instructions, it is well established that "[a] grand jury 'need not be instructed with the same degree of precision that is required when a petit jury is instructed on the law' " (*People v Burch*, 108 AD3d 679, 680, *lv denied* 22 NY3d 1087). Furthermore, "[d]ismissal of an indictment under CPL 210.35 (5) is an exceptional remedy that should . . . be limited to those instances where prosecutorial wrongdoing, fraudulent conduct or errors potentially prejudice the ultimate decision reached by the

[g]rand [j]ury" (*id*. [internal quotation marks omitted]). Here, we conclude that the prosecutor provided the grand jurors " 'with enough information to enable [them] intelligently to decide whether a crime ha[d] been committed and to determine whether there exist[ed] legally sufficient evidence to establish the material elements of the crime' " (*People v Wooten*, 283 AD2d 931, 932, *lv denied* 96 NY2d 943).

PRESENT: SMITH, J.P., LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1144/14) CA 14-00590. -- MANUFACTURERS AND TRADERS TRUST COMPANY, PLAINTIFF-RESPONDENT-APPELLANT, V NIAGARA FALLS MALL, INC., DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., SCONIERS, WHALEN, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1264/14) KA 14-00036. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDREW J. JOHNSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1275/14) CA 14-00902. -- SADE WATSON, PLAINTIFF-APPELLANT, V KIBLER ENTERPRISES, ARTHUR BECKER, JR., MICHAEL BECKER, MARK BECKER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1280/14) CA 14-00948. -- RAYMOND PINK AND MICHELLE PINK, PLAINTIFFS-RESPONDENTS, V MATTHEW RICCI, DEFENDANT-RESPONDENT, MARK WILBUR, CHRISTIN WILBUR, ROME YOUTH HOCKEY ASSOCIATION, INC., WHITESTOWN YOUTH HOCKEY ASSOCIATION, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1281/14) CA 14-00221. -- THOMAS D. AYERS, PLAINTIFF-RESPONDENT-APPELLANT, V SNYDER CORP., DEFENDANT-APPELLANT-RESPONDENT. (ACTION NO. 1.) THOMAS D. AYERS, PLAINTIFF-RESPONDENT-APPELLANT, V CENTER FOR TRANSPORTATION EXCELLENCE, LLC AND SNYDER CORP., DEFENDANTS-APPELLANTS-RESPONDENTS. (ACTION NO. 2.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1300/14) CA 14-00357. -- IN THE MATTER OF THE NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF KIKO, PETITIONER-APPELLANT, V CARMEN PRESTI, INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE PRIMATE SANCTUARY, INC., CHRISTIE E. PRESTI, INDIVIDUALLY AND AS AN OFFICER AND DIRECTOR OF THE PRIMATE SANCTUARY, INC. AND THE PRIMATE SANCTUARY, INC., RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1384/14) KA 12-02110. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARNEST HUGHES, DEFENDANT-APPELLANT. -- Motion for reargument

of the appeal is granted to the extent that, upon reargument, the memorandum and order entered January 2, 2015 (124 AD3d 1380) is amended by deleting the second paragraph of the memorandum and substituting the following paragraph:

Even assuming, arguendo, that the People committed a *Brady* violation by failing to produce the recording of the victim's 911 call prior to the suppression hearing, we conclude that the content of that call "was probative of the weight to be accorded to the witness[es'] identification, not to the suggestiveness of the showup procedure and, therefore, [the call] could not have impacted the decision to suppress the identification" (*People v Whitted*, 117 AD3d 1179, 1182, *lv denied* 23 NY3d 1026). Defendant's contention that the People committed a *Rosario* violation by failing to preserve a police officer's notes is unpreserved for our review because defendant did not object to the destruction of the notes or seek a sanction (*see People v Rogelio*, 79 NY2d 843, 844; *People v Sanzotta*, 191 AD2d 1032, 1032-1033). 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]).

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1458/14) KAH 13-02106. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. ADAM A. JAMISON, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)

MOTION NO. (1464/14) CA 14-00993. -- JODI HAUSRATH, AS ADMINISTRATRIX FOR THE ESTATE OF ANTOINETTE ADIMEY, DECEASED, AND ANTHONY ADIMEY, PLAINTIFFS-RESPONDENTS, V PHILLIP MORRIS USA, INC., ET AL., DEFENDANTS, LIGGETT GROUP, INC., NOW KNOWN AS BROOKE GROUP, LTD., AND LIGGETT & MYERS TOBACCO COMPANY, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed Mar. 21, 2015.)

KA 12-01657. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TERRY L. HOLMES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment of Supreme Court, Monroe County, Francis A. Affronti, J. - Criminal Possession of a Weapon, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, CARNI, SCONIERS, AND WHALEN, JJ. (Filed Mar. 20, 2015.)