SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 12, 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

286

CA 14-01113

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

ALTSHULER SHAHAM PROVIDENT FUNDS, LTD.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GML TOWER LLC, ET AL., DEFENDANTS,
THE PIKE COMPANY, INC., L.A. PAINTING, INC.,
THE HAYNER HOYT CORPORATION, SYRACUSE MERIT
ELECTRIC, A DIVISION OF O'CONNELL ELECTRIC CO.,
INC., AND TAG MECHANICAL SYSTEMS, INC.,
DEFENDANTS-RESPONDENTS.

SYMPHONY TOWER LLC, RESPONDENT.

D'AGOSTINO, LEVINE, LANDESMAN & LEDERMAN, LLP, NEW YORK CITY (BRUCE H. LEDERMAN OF COUNSEL), AND HANCOCK & ESTABROOK, LLP, SYRACUSE, FOR PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR DEFENDANT-RESPONDENT THE PIKE COMPANY, INC.

HAHN LOESER & PARKS LLP, SARATOGA SPRINGS (ANDREW AGATI OF COUNSEL), AND GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE, FOR DEFENDANT-RESPONDENT THE HAYNER HOYT CORPORATION.

BYRNE, COSTELLO & PICKARD, P.C., SYRACUSE (JORDAN R. PAVLUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SYRACUSE MERIT ELECTRIC, A DIVISION OF O'CONNELL ELECTRIC CO., INC. AND TAG MECHANICAL SYSTEMS, INC.

GOLDBERG SEGALLA LLP, BUFFALO (MARC W. BROWN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 18, 2014. The order denied plaintiff's motion seeking, inter alia, to modify the judgment of foreclosure and sale.

It is hereby ORDERED that the order so appealed from is reversed in the exercise of discretion without costs and plaintiff's motion is granted, the judgment of foreclosure and sale is modified by granting plaintiff priority in the amount of $5,500,000, plus interest from March 29, 2007, the order confirming the Referee's report of sale is vacated, the Referee's deed is set aside and a new foreclosure sale

for 101-131 Onondaga Street, Syracuse, New York is ordered.

Memorandum: Plaintiff, formerly known as Perfect Provident Fund Ltd., commenced this mortgage foreclosure action against defendants related to several properties that, together, make up the Hotel Syracuse complex in downtown Syracuse. The parties disputed the priorities of their respective claims to the proceeds of the impending foreclosure sales. Following extensive litigation, a judgment of foreclosure, a foreclosure sale and, ultimately, a remittitur from the Court of Appeals (*Altshuler Shaham Provident Funds, Ltd. v GML Tower, LLC*, 21 NY3d 352, 357, *rearg denied* 21 NY3d 1047), plaintiff filed the motion that is the subject of this appeal seeking, inter alia, to modify the judgment of foreclosure and sale, to vacate the order of Supreme Court confirming the Referee's report of sale of the property known as 101-131 Onondaga Street, Syracuse NY, to set aside the Referee's deed for that property and to order a new foreclosure sale of that property. That motion was denied, and we now reverse.

In 2005 defendants GML Tower LLC, GML Syracuse, LLC and GML Addis LLC (GML defendants) purchased three properties: a hotel with garage, a 15-story tower addition to the hotel, and a building that once housed a department store. The purchase was financed by a duly recorded mortgage held by a "now-defunct Illinois-based bank" (*id.*). In 2007, plaintiff loaned approximately $10 million to defendant Ameris Holdings, Inc. and one of its subsidiaries, defendant GML Tower LLC, for the purposes of repaying the bank for the outstanding principal ($5.5 million) and financing the construction of improvements to the property known as the tower building ($4.5 million) (*see id.* at 357-358). Plaintiff did not, however, file the 2007 loan agreement or the 2008 amendment to that agreement in the county clerks' office, as required by Lien Law § 22. In December 2008, plaintiff commenced this mortgage foreclosure action against defendants, some of whom had mechanic's liens on the properties. Plaintiff also filed a notice of pendency on the properties pursuant to CPLR 6501. Following motions and cross motions for summary judgment, the court determined that, although some of plaintiff's mortgage was for the purpose of acquiring the property, the entirety of plaintiff's $10 million mortgage was subject to the subordination penalty of Lien Law § 22 and was therefore subordinate to the mechanic's liens (*Altshuler Shaham Provident Funds, Ltd.*, 28 Misc 3d 475). We affirmed Supreme Court's order for reasons stated (*Altshuler Shaham Provident Funds, Ltd.*, 83 AD3d 1563).

While plaintiff attempted to appeal to the Court of Appeals, the parties consented to entry of a final order for judgment of foreclosure, which was stayed pending certain action of the Court of Appeals or further order of the court. Meanwhile, plaintiff's notice of pendency expired by its terms, and plaintiff did not seek to extend it (*see* CPLR 6513). Ultimately, the Court of Appeals dismissed plaintiff's motion for leave to appeal "upon the ground that the order sought to be appealed from d[id] not finally determine the action within the meaning of the Constitution" (*Altshuler Shaham Provident Funds, Ltd.*, 18 NY3d 892, *rearg denied* 19 NY3d 837).

Following the Court of Appeals' determination, defendant The Hayner Hoyt Corporation (Hayner Hoyt) moved to vacate the stay of the foreclosure judgment. With the consent of all parties, the court vacated the stay and, on June 6, 2012, the tower building was sold to Hayner Hoyt at a public auction. Twelve days later, Hayner Hoyt sold the property to respondent, Symphony Tower LLC (Symphony), which is a domestic limited liability company that lists Gary V. Thurston as its registered agent. Thurston is the chairman and chief executive officer (CEO) of Hayner Hoyt, and Symphony's initial Department of State filing was on May 24, 2012.

An order confirming the Referee's report of sale was entered on July 13, 2012, and plaintiff thereafter again sought leave to appeal this Court's decision to the Court of Appeals. On June 11, 2013, the Court of Appeals modified our decision by concluding that the $5.5 million used by plaintiff to pay off the existing mortgage "was not subject to the subordination penalty" of Lien Law § 22 and that plaintiff was entitled to priority for that amount (*Altshuler Shaham Provident Funds, Ltd.*, 21 NY3d at 368). In its remittitur, the Court of Appeals ordered that the order of the Appellate Division be "modified, without costs, . . . and, as so modified, . . . affirmed." The Court further ordered that "this record of the proceedings in this Court be remitted to Supreme Court, Onondaga County, there to be proceeded upon according to law."

Plaintiff thereafter filed a "Successive Notice of Pendency in Foreclosure Action" (*see* CPLR 6516 [a]; RPAPL 1331), and moved in the Court of Appeals for clarification of the remittitur to determine whether the Court of Appeals was "precluding the Supreme Court from potentially exercising its inherent equitable discretion to vacate its judgment [of foreclosure] and order a new foreclosure sale." In the alternative, plaintiff sought to modify the decretal portion of the Court of Appeals' decision "to specifically provide that the judgment confirming the [R]eferee's report of sale . . . is remanded for further proceedings." Plaintiff's motion "for clarification or reargument" was denied with costs (*Altshuler Shaham Provident Funds, Ltd.*, 21 NY3d 1047).

Relying on the "well-established equitable power of the Court to modify foreclosure orders and vacate referee's deeds where a mistake and/or change in the law 'casts doubt upon the fairness of the sale,' " plaintiff moved to vacate the order confirming the Referee's report of sale and the Referee's deed and to direct a new foreclosure sale. The court denied the motion, determining that there was no "oppression, injustice or fundamental unfairness" to justify the court's exercise of its discretionary equitable powers to undo the foreclosure sale or otherwise modify the judgment of foreclosure (*Altshuler Shaham Provident Funds, Ltd.*, 42 Misc 3d 1232[A], 2014 NY Slip Op 50311[U], *3).

It is well settled that, even after a judicial sale to a good faith purchaser, "[a] court may exercise its inherent equitable power over a sale made pursuant to its judgment or decree to ensure that it is not made the instrument of injustice . . . Although this power

should be exercised sparingly and with great caution, a court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve [a party] of oppressive or unfair conduct" (*Guardian Loan Co. v Early*, 47 NY2d 515, 520-521; *see Fleet Fin. v Gillerson*, 277 AD2d 279, 280). Generally, such discretion, "which is separate and distinct from any statutory authority" (*Wayman v Zmyewski*, 218 AD2d 843, 844), is exercised where fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion "casts suspicion on the fairness of the sale" (*Fleet Fin.*, 277 AD2d at 280; *see Guardian Loan Co.*, 47 NY2d at 521; *Wells Fargo Bank, N.A. v IPA Asset Mgt. III, LLC*, 111 AD3d 820, 821-822). It may also be exercised where "the price is so inadequate as to shock the court's conscience" (*Polish Natl. Alliance of Brooklyn v White Eagle Hall Co.*, 98 AD2d 400, 407; *see Wells Fargo Bank, N.A.*, 111 AD3d at 822; *Harbert Offset Corp. v Bowery Sav. Bank*, 174 AD2d 650, 651) or where the judicial sale has been "made the instrument of injustice" (*Guardian Loan Co.*, 47 NY2d at 520).

While we agree with defendants that there has been no showing of fraud, mistake, exploitive overreaching, misconduct, irregularity or collusion, and the price is not so inadequate as to shock the conscience, we agree with plaintiff that, under the circumstances of this case, the judicial sale has been made the instrument of injustice.

There can be no dispute that plaintiff's failures have contributed to its current predicament. First, plaintiff failed to file the loan documents pursuant to Lien Law § 22 and, second, plaintiff failed to protect its rights by, inter alia, failing to extend the notice of pendency pursuant to CPLR 6513. Inasmuch as equitable relief should be invoked to " 'aid[] the vigilant and not those who slumber on their rights' " (*Kansas v Colorado*, 514 US 673, 687), defendants' contention that equity should not intervene is not without merit (*see Da Silva v Musso*, 76 NY2d 436, 439). Had those failures not occurred, plaintiff would have had an absolute legal right to relief and would not need to rely on equity's intervention.

Despite plaintiff's failings, we conclude that a balancing of the equities in this case favors plaintiff. The Court of Appeals declined to review this Court's order until after the foreclosure sale and order confirming the Referee's report of sale. Had plaintiff been able to appeal this Court's order initially, as in *Da Silva* (76 NY2d at 439), the priorities would have been established before any judicial sale occurred, and there would have been no need for subsequent litigation to set aside the sale. Moreover, Hayner Hoyt and Symphony, through its agent, had actual notice of the ongoing litigation and the potential risks in buying the property. While defendants correctly contend that actual knowledge of a pending appeal is "not legally significant and that, in the absence of an outstanding valid notice of pendency, the owner's ability to transfer clear title to the disputed property remains unimpaired" (*id.* at 438; *see Aubrey Equities v Goldberg*, 247 AD2d 253, 253, *lv denied* 92 NY2d 802), we nevertheless conclude that such knowledge may be considered when balancing the equities in this case. Symphony's agent is Hayner

Hoyt's chairman and CEO, and Symphony's initial filing with the Department of State was less than one month before the judicial sale. Hayner Hoyt transferred title to the property to Symphony only 12 days after purchasing it at the judicial sale. We thus conclude that the prejudice sustained by Symphony does not outweigh the prejudice sustained by plaintiff (*cf. Da Silva*, 76 NY2d at 438; *Aubrey Equities,* 247 AD2d at 253). Here, the judicial sale has been "made the instrument of injustice" and must be set aside (*Guardian Loan Co.*, 47 NY2d at 520).

All concur except DEJOSEPH, J., who dissents and votes to affirm in the following memorandum: I respectfully dissent. In my view, Supreme Court properly exercised its discretion in denying plaintiff's motion to set aside the underlying foreclosure sale.

It is well established that "[a] court has the inherent equitable power to ensure that a sale conducted pursuant to a judgment of foreclosure 'is not made the instrument of injustice' " (*Alkaifi v Celestial Church of Christ Calvary Parish*, 24 AD3d 476, 477), and "a court of equity may set aside its own judicial sale upon grounds otherwise insufficient to confer an absolute legal right to a resale in order to relieve [a party] of oppressive or unfair conduct" (*Guardian Loan Co. v Early*, 47 NY2d 515, 520-521). As the majority properly notes, however, this power "should be exercised sparingly and with great caution" (*id.* at 520).

The majority acknowledges that plaintiff's failures have contributed to its current predicament, but ultimately concludes that, "under the circumstances of this case, the judicial sale has been made the instrument of injustice." In my view, the majority has failed to explain how this sale, under these circumstances, has been made the instrument of injustice and, in any event, I cannot agree with that conclusion. As Supreme Court observed, plaintiff "failed to avail itself of the most basic step in preserving its claim, [namely,] maintaining a valid notice of pendency on the property," and I cannot look past that failure. In addition thereto, plaintiff did not file the loan documents pursuant to Lien Law § 22 and did not seek a CPLR 5519 stay following entry of the order confirming the Referee's report of sale. Lastly, while I acknowledge the inherent risks associated with doing so, plaintiff also failed to bid at the June 2012 foreclosure sale.

In my view, equity is available only to the "vigilant and not those who slumber on their rights" (*Kansas v Colorado*, 514 US 673, 687 [internal quotation marks omitted]). There is no dispute here that plaintiff had options to protect its interests. Plaintiff created this current predicament by its own disregard of basic real property practice. I am unwilling to engage in a balancing of the equities because I see no equities to weigh. I therefore would affirm.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

311

CA 14-01401

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

IN THE MATTER OF ELENA ARRAZOLA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK DEPARTMENT OF MOTOR VEHICLES,
APPEALS BOARD, RESPONDENT-RESPONDENT.

PHETERSON SPATORICO LLP, ROCHESTER (KAMRAN HASHMI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered October 9, 2013 in a proceeding pursuant to CPLR article 78. The judgment confirmed the determination of respondent to deny the application of petitioner for a driver's license and dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging respondent's determination pursuant to 15 NYCRR 136.5 (b) (2) denying her application for a driver's license. Supreme Court properly confirmed the determination and dismissed the petition on the ground that the determination was "neither irrational nor arbitrary and capricious" (*Matter of Sacandaga Park Civic Assn. v Zoning Bd. of Appeals of Town of Northampton*, 296 AD2d 807, 809). Petitioner's facial challenge to 15 NYCRR part 136 is not preserved for our review, and we therefore do not address it (*see Matter of U.S. Energy Dev. Corp. v New York State Dept. of Envtl. Conservation*, 118 AD3d 1381, 1383).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

461

KA 09-00607

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERMAN H. BANK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (John J. Connell, J.), rendered February 27, 2009. The judgment convicted defendant, after a nonjury trial, of manslaughter in the second degree (two counts), vehicular manslaughter in the first degree, vehicular manslaughter in the second degree (two counts), vehicular assault in the second degree, driving while ability impaired by drugs, and one-way violation.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of vehicular manslaughter in the second degree and one count of driving while ability impaired by drugs and dismissing counts four, five, and seven of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, two counts of vehicular manslaughter in the second degree (Penal Law § 125.12 [1]), and one count each of vehicular manslaughter in the first degree (§ 125.13 [4]) and driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]). Defendant contends that he was denied effective assistance of counsel because defense counsel pursued a hopeless defense and, in any event, failed to call an expert who could provide a proper opinion in support of that defense. We reject that contention.

This prosecution arises from an incident in which defendant drove the wrong way on a divided highway, eventually colliding with a vehicle proceeding in the proper direction. The collision resulted in the deaths of two occupants of the other vehicle and injuries to a third. Defendant was found trapped in the driver’s seat of his vehicle, from which it took first responders and ambulance crew

members more than an hour to remove him. A sample of defendant's blood was obtained pursuant to a court order, and an analysis of it revealed, among other things, the presence of cocaine and several of its metabolites. The People's expert toxicologist opined that defendant had a "significant concentration" of cocaine in his system at the time he operated the vehicle. The expert testified that she had seen "a great many cocaine deaths that are due to" the presence of cocaine at such a concentration.

At trial, defendant called an expert pharmacological witness, who opined that defendant was unable to appreciate the nature and consequences associated with ingesting cocaine and driving. After noting that defendant had been diagnosed as suffering from bipolar disorder and that he was prescribed medication therefor, the expert opined that defendant's failure to take the prescribed medication predisposed him to enter the manic or hypomanic phase of his bipolar disorder. The expert further noted that one of the medications recently prescribed to defendant was now counterindicated for people who had bipolar disorder because of the drug's tendency to cause such people to enter a manic phase. The expert opined that defendant would have been unable to appreciate the risks inherent in behavior such as taking cocaine and driving if he were in the manic or hypomanic phase of his bipolar disorder. The expert testified that she relied upon diagnoses in defendant's medical records in determining that he suffered from bipolar disorder, but that she was not a psychological expert and thus could not form an opinion whether defendant was suffering from the disorder when he operated the vehicle.

We reject defendant's contention that he was denied effective assistance of counsel by defense counsel's choice to pursue a defense based on mental disease or defect and by defense counsel's failure to call a psychological or psychiatric expert in support of that defense. The defense of mental disease or defect, insofar as relevant here, "is an affirmative defense [requiring proof] that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate . . . [t]he nature and consequences of such conduct" (Penal Law § 40.15 [1]). With respect to defendant's contention that defense counsel was ineffective because "defense counsel should have simply put the [P]eople to their proof" rather than attempting to present an affirmative defense without an appropriate expert, it is well settled that, "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712). In addition, a reviewing court must "avoid both confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (*People v Baldi*, 54 NY2d 137, 146; *see Benevento*, 91 NY2d at 712; *People v Kurkowski*, 117 AD3d 1442, 1443, *lv denied* 16 NY3d 896; *see also People v McGee*, 20 NY3d 513, 521; *People v Satterfield*, 66 NY2d 796, 798). "The fact that an attorney chooses to rely upon an unsuccessful

defense to the exclusion of another available defense does not mean that the attorney's representation was ineffective" (*People v Robinson*, 156 AD2d 974, 974, *lv denied* 75 NY2d 923; *see People v Lane*, 60 NY2d 748, 750).

Here, defense counsel diligently presented and pursued the defense that defendant was not guilty by reason of mental disease or defect. In support of that defense, he made cogent opening and closing statements, cross-examined the People's witnesses, and offered expert testimony. Furthermore, defendant's contention that defense counsel would have had a greater likelihood of success if he had put the prosecution to its proof rather than pursue the affirmative defense is without foundation in light of the overwhelming quantity and quality of the proof presented by the People. Consequently, we agree with the People that defendant failed to establish " 'the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" in pursuing the affirmative defense (*Benevento*, 91 NY2d at 712; *see People v Roman*, 60 AD3d 1416, 1417-1418, *lv denied* 12 NY3d 928; *see also People v Morgan*, 96 AD3d 1418, 1419, *lv denied* 20 NY3d 987).

Defendant also failed to establish that defense counsel was ineffective in choosing to present the affirmative defense through a pharmacological expert rather than a psychological or psychiatric expert. "It is well settled that the failure to call a particular witness does not necessarily amount to ineffective assistance of counsel" (*People v Muller*, 57 AD3d 1113, 1114, *lv denied* 12 NY3d 761; *see People v Ariosa*, 100 AD3d 1264, 1266, *lv denied* 21 NY3d 1013), especially where, as here, there is "no proof indicating a significant likelihood that an additional expert would have reached an opinion substantially inconsistent with the People's experts" (*People v Venkatesan*, 295 AD2d 635, 637, *lv denied* 99 NY2d 565, *cert denied* 549 US 854), all of whom opined that defendant was acting under the influence of a crack cocaine binge rather than a phase of his bipolar disorder. The choice of expert to support the defense "reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful" (*Benevento*, 91 NY2d at 713). Consequently, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally Baldi*, 54 NY2d at 147).

Finally, as the People correctly concede, counts four, five and seven must be dismissed as lesser inclusory counts of count three, vehicular manslaughter in the first degree. Initially, we note that defendant's failure to preserve the issue for our review is of no moment because preservation is not required (*see People v Moore*, 41 AD3d 1149, 1152, *lv denied* 9 NY3d 879, *reconsideration denied* 9 NY3d 992). With respect to the merits, "concurrent counts are inclusory when the offense charged in one is greater than that charged in the other and when the latter is a lesser offense included within the greater" (*People v Scott*, 61 AD3d 1348, 1350, *lv denied* 12 NY3d 920, *reconsideration denied* 13 NY3d 799; *see* CPL 300.30 [4]; *People v Miller*, 6 NY3d 295, 300). Thus, where, as here, "it is impossible to

commit a particular crime without concomitantly committing, *by the same conduct*, []other offense[s] of lesser grade or degree, the latter [are], with respect to the former, . . . lesser included offense[s]" (*Miller*, 6 NY3d at 301 [internal quotation marks omitted]). Because it is impossible to commit the crime of vehicular manslaughter in the first degree under Penal Law § 125.13 (4), without concomitantly committing the crime of vehicular manslaughter in the second degree under Penal Law § 125.12, or without concomitantly committing the crime of, inter alia, driving while ability impaired by drugs under Vehicle and Traffic Law § 1192 (4), the latter two crimes are inclusory concurrent counts of the former crime. We therefore modify the judgment by dismissing the three counts of the indictment charging the latter two crimes.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

462

KA 11-00324

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS G. WITT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES ECKERT 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 (Richard A. Keenan, J.), rendered October 14, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [2]), defendant contends that County Court erred in refusing to suppress tangible evidence seized from the vehicle in which he was a passenger, as well as certain statements he made to a police officer, because the police lacked the requisite reasonable suspicion of criminal behavior to seize the parked vehicle. That contention is not preserved for our review (*see People v Sanders*, 224 AD2d 956, 956, *lv denied* 88 NY2d 885) and, in any event, it lacks merit.

Immediately prior to the police encounter, defendant was a passenger in a vehicle parked in a handicap zone outside of a Walmart store. A police officer responded to a report by the manager of a nearby supermarket that the vehicle had been involved in "an incident that had occurred" at her store. Based on that information, the officer approached the vehicle and asked defendant and the other two occupants if they had valid driver's licenses. None of the men produced a valid driver's license. One of the men identified himself as the owner of the vehicle, and he told the officer that a fourth man named "Roger," who was allegedly inside the Walmart store, had a valid license. Additional police officers arrived at the scene and attempted to locate "Roger" inside the Walmart and its immediate environs, but they were unsuccessful. Because none of the men in the

vehicle were licensed to operate the vehicle, the police asked the men to exit the vehicle in order to impound and tow it. During the subsequent inventory search of the vehicle, the police located several stolen debit and credit cards.

In evaluating police conduct, a court "must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858; *see People v De Bour*, 40 NY2d 210, 222). It is well settled that "the right to stop a moving vehicle is distinct from the right to approach the occupants of a parked vehicle" (*People v Spencer*, 84 NY2d 749, 753, *cert denied* 516 US 905). Where police officers approach a vehicle that is already parked and stationary, the only level of suspicion necessary to justify that approach is an articulable, credible reason for doing so, not necessarily indicative of criminality (*see People v Ocasio*, 85 NY2d 982, 985; *People v Phillips*, 46 AD3d 1021, 1022, *lv denied* 10 NY3d 815).

Here, we conclude that the police officer "had an 'objective, credible reason' for approaching [the] parked vehicle and requesting information" based upon the supermarket manager's report (*People v Virges*, 118 AD3d 1445, 1445, quoting *Ocasio*, 85 NY2d at 984; *see People v Thomas*, 19 AD3d 32, 33, *lv denied* 5 NY3d 795), "thereby rendering the police encounter lawful at its inception" (*People v Cady*, 103 AD3d 1155, 1156; *see People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844). Upon requesting identification from defendant and the other two occupants of the vehicle, and learning that none of the three men had a valid driver's license, the police searched for the vehicle's purported fourth occupant who, they were told, had a valid driver's license. The right of inquiry was elevated to the right to seize the vehicle after a search for the allegedly licensed driver was unsuccessful. At that point, the officers had a reasonable suspicion either that the vehicle had been operated by an unlicensed driver, or that the vehicle was soon going to be operated by an unlicensed driver, and thus its impoundment and towing was lawful (*see People v Rhodes*, 206 AD2d 710, 710-711, *lv denied* 84 NY2d 1014; *People v Castillo*, 150 AD2d 957, 959, *lv denied* 74 NY2d 806).

Finally, we reject defendant's contention that he had standing to contest the propriety of the seizure of the vehicle. Defendant failed to establish that he had any reasonable expectation of privacy in the vehicle in which he was merely a passenger (*see Rakas v Illinois*, 439 US 128, 142-143, *reh denied* 439 US 1122; *People v Washington*, 37 AD3d 1131, 1132, *lv denied* 8 NY3d 992).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

468

CAF 13-01801

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF ISHANELLYS O., LUIS A.O.
AND LUIS Y.O.
---------- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

LUIS A.O., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

LEAH A. BOUQUARD, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 1, 2013 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, directed respondent to comply with the terms and conditions of an order of protection until September 11, 2027.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the order of protection shall expire on September 26, 2014, and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from two orders of disposition relating to specific parts of an underlying fact-finding order. Turning first to appeal No. 2, respondent challenges Family Court's finding that he sexually abused Kimberly A.P., the daughter of his longstanding live-in girlfriend and thereby derivatively abused and neglected the girlfriend's son, Jonathan L.P. In appeal No. 1, respondent challenges the court's determination that, based on his abuse of Kimberly, he derivatively abused and neglected his three biological children. Respondent also challenges in appeal No. 1 an order of protection directing him to stay away from his biological children, with periodic supervised access, until September 11, 2027, the date his youngest biological child turns 18.

Contrary to respondent's contention in appeal No. 2, the court's finding of repeated sexual abuse of Kimberly is supported by clear and convincing evidence (*see* Family Ct Act § 1046 [b] [ii]). "A child's out-of-court statements may form the basis of a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence

tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142; *see* § 1046 [a] [vi]), and courts have " 'considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse' " (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490, *lv denied* 17 NY3d 708). Here, the out-of-court statements of Kimberly were sufficiently corroborated by the testimony of the child protective services caseworker to whom Kimberly described the repeated abuse, as well as the testimony of petitioner's expert witness, who opined that Kimberly's consistent and detailed accounts of the abuse were reliable and were "consistent with sexual abuse victimization." We need not address respondent's contention that the court erred in allowing Kimberly's sister to testify via closed circuit television from another courtroom about similar abuse the respondent had perpetrated against her, inasmuch as Kimberly's out-of-court statements were otherwise sufficiently corroborated.

We further conclude, in appeal No. 2, that the court properly determined that respondent derivatively abused and neglected Jonathan and, in appeal No. 1, that the court properly determined that respondent derivatively abused and neglected his three biological children. "The record supports the determination of the court that [respondent's] sexual abuse of [Kimberly] demonstrated fundamental flaws in [his] understanding of the duties of parenthood and warranted a finding of derivative neglect with respect to the [other children]" (*Matter of Leeann S. [Michael S.]*, 94 AD3d 1455, 1455 [internal quotation marks omitted]).

We agree with respondent in appeal No. 1, however, that the court erred in entering an order of protection preventing him from having unsupervised visits with his biological children before September 11, 2027, the date his youngest biological child turns 18. "Family Court Act § 1056 (1) prohibits the issuance of an order of protection that exceeds the duration of any other dispositional order in the case" (*Matter of Sheena D.*, 8 NY3d 136, 140), and the dispositional order in appeal No. 1, which places respondent under the supervision of petitioner, expired on September 26, 2014. The expiration date of the order of protection entered with respect to respondent's biological children is also therefore September 26, 2014, and we modify the order in appeal No. 1 accordingly. Because that order of protection has expired, we need not consider respondent's remaining contention in appeal No. 1 concerning that order.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

469

CAF 13-01802

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF JONATHAN L.P. AND KIMBERLY A.P.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LUIS A.O., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered October 1, 2013 in a proceeding pursuant to Family Court Act article 10. The order directed respondent to comply with the terms and conditions of an order of protection.

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

Same memorandum as in *Matter of Ishanellys O*. (___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

476

CA 14-01909

PRESENT: SMITH, J.P., CARNI, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

ACCADIA SITE CONTRACTING, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JEFFREY SKURKA, DEFENDANT-RESPONDENT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (JASON G. ULATOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM F. SAVINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J., for Joseph R. Glownia, J.), entered February 4, 2014. The order, insofar as appealed from, granted the cross motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff was awarded a road construction project by the City of Niagara Falls, and thereafter commenced this defamation action based on statements allegedly made by defendant, the "City Engineer" assigned to oversee the project, to a Niagara Falls news reporter. The statements were subsequently published in the *Niagara Falls Reporter*. The first alleged defamatory statement at issue on this appeal was published as follows: "[Defendant] said the [compaction] test was done wrong, and went so far as to accuse [plaintiff] of rigging the test. He said [plaintiff] 'put the ram hole in the hole and then compacted the soil before they did the test, which would guarantee them test results that would show the soil was compacted regardless of whether it was really compacted or not.' " The second alleged defamatory statement at issue on this appeal was published as follows: "It's pretty clear there is collusion. There is a lot of money at stake here." Plaintiff appeals from an order that, inter alia, granted defendant's cross motion seeking dismissal of the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]). We agree with plaintiff that the court erred in granting the cross motion.

"The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third

party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [internal quotation marks omitted]), and we conclude that the complaint sufficiently alleges those elements and, thus, states a viable cause of action. We further conclude, contrary to defendant's contention, that the "particular words complained of" were sufficiently set forth in the complaint as required by CPLR 3016 (a) and, in any event, plaintiff attached to the complaint the full *Niagara Falls Reporter* article containing the alleged defamatory statements (*see D'Amico*, 120 AD3d at 963; *cf. Massa Constr., Inc. v George M. Bunk, P.E., P.C.*, 68 AD3d 1725, 1725). Defendant contends that, because he did not participate in the drafting of the *Niagara Falls Reporter* article, he cannot be held liable for defamation and, thus, the court properly granted his cross motion. That contention is without merit. It is well established that "[a]nyone giving a statement to a representative of a newspaper authorizing or intending its publication is responsible for any damage caused by the publication" (*Campo v Paar*, 18 AD2d 364, 368).

Defendant further contends that because the first alleged defamatory statement is not reasonably susceptible of a defamatory connotation, the court properly granted the cross motion with respect to that statement. We reject that contention. "In determining the sufficiency of a defamation pleading, we [must] consider 'whether the contested statements are reasonably susceptible of a defamatory connotation' " (*Davis v Boeheim*, 24 NY3d 262, 268), as well as "give the disputed language a fair reading in the context of the publication as a whole" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380). Defendant points out that the complaint does not allege that he used the term "rigging," but we conclude that such is inconsequential inasmuch as there is a basis "from which the ordinary reader could draw an inference" from the publication as a whole that defendant was accusing plaintiff of manipulating the compaction test to achieve a certain result (*James v Gannett Co.*, 40 NY2d 415, 420).

We reject defendant's further contention that the second alleged defamatory statement was not directed at plaintiff, but only at third-party defendant Anthony Milone, plaintiff's chief engineer and, thus, that the court properly granted the cross motion with respect to that statement. Viewing the article as a whole, and granting "every possible favorable inference" to plaintiff (*El Jamal v Weil*, 116 AD3d 732, 733; *see D'Amico*, 120 AD3d at 958), we conclude that the statement referring to "collusion" cannot be isolated from the article as a whole, and must be read to include both Milone and plaintiff (*see Davis*, 24 NY3d at 270).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

496

CA 14-01911

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ.

REGENCY OAKS CORPORATION, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN-SPENCER MCKERNAN, INC., DEFENDANT-APPELLANT.

KEIDEL, WELDON & CUNNINGHAM, LLP, SYRACUSE (DEBRA M. KREBS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 20, 2014. The order granted the motion of plaintiff for partial summary judgment on liability.

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

Memorandum: Plaintiff, a professional employer organization (PEO), commenced this fraud action alleging that defendant is liable for the acts of its former employee, who provided plaintiff with a falsified workers' compensation insurance policy and a certificate of liability insurance purportedly issued by American International Group (AIG). Defendant is an insurance agency, and AIG is one of the insurance companies that defendant represents. Plaintiff alleged that defendant assigned its employee, a "producer" who specialized in obtaining insurance for PEOs, to work with plaintiff. Defendant was aware that its employee had a private company, Professional Insurance Managers (PIM), but the employee had signed a covenant not to compete when he was hired by defendant, and he advised an owner of defendant that he had nothing more to do with PIM. Defendant's employee, however, prepared a proposal for plaintiff from PIM. Plaintiff's president questioned defendant's employee regarding PIM and was advised that PIM was a division of defendant that specialized in PEOs. Defendant's employee directed plaintiff to pay over $220,000 in premium payments to an account that was controlled by PIM, and plaintiff thereafter received what was a purported insurance policy issued by AIG, effective from December 15, 2005 to December 15, 2006. In the spring of 2006, plaintiff received a notice from the New York State Workers' Compensation Board issuing a penalty for failure to have proper workers' compensation coverage in effect. Plaintiff forwarded the notice to defendant's employee, and thereafter received a certificate and letter, purportedly issued by AIG, confirming that

the policy was in full force and effect. Defendant terminated the employee's employment on June 29, 2006 when it learned that he had embezzled funds from another customer.

Supreme Court granted plaintiff's motion seeking partial summary judgment on liability. We affirm.

"In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by [the maker], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421). It is undisputed that the insurance policy purportedly issued by AIG was false, and thus plaintiff established that a false representation was made that was known to be false by defendant's employee. Defendant contends, however, that the justifiable reliance element was not met because it cannot be liable for the acts of its employee, and plaintiff's reliance on the alleged "apparent authority" of defendant's employee was not reasonable.

It is axiomatic that "[t]he mere creation of an agency for some purpose does not automatically invest the agent with 'apparent authority' to bind the principle without limitation . . . An agent's power to bind his [or her] principal is coextensive with the principal's grant of authority" (*Ford v Unity Hosp.*, 32 NY2d 464, 472-473). "Essential to the creation of apparent authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction. The agent cannot by his [or her] own acts imbue himself [or herself] with apparent authority. 'Rather, the existence of "apparent authority" depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal – not the agent' . . . Morever, a third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" (*Hallock v State of New York*, 64 NY2d 224, 231, quoting *Ford*, 32 NY2d at 473). Here, plaintiff contacted defendant seeking workers' compensation coverage, and defendant assigned its employee who specialized in plaintiff's type of business to assist plaintiff. We therefore conclude that plaintiff established that it reasonably relied upon the authority of defendant's employee to act for defendant.

We conclude that plaintiff fulfilled its duty to inquire about the authority of defendant's employee to act for defendant by inquiring as to PIM's authority when its president was presented with a proposal from PIM, and not from defendant (*see Herbert Constr. Co. v Continental Ins. Co.*, 931 F2d 989, 995-996 [2d Cir 1991]). Contrary to the conclusion of our dissenting colleagues, we conclude that plaintiff's reliance on the explanation that PIM was a division of defendant was reasonable under the circumstances (*cf. Marshall v Marshall*, 73 AD3d 870, 871; *Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.*, 55 AD3d 1108, 1110; *1230 Park Assoc., LLC v*

Northern Source, LLC, 48 AD3d 355, 355-356). The proposal stated that PIM represented numerous carriers, including AIG, and that the relationships with those carriers "allow [defendant] to provide clients with the broadest array of services." Furthermore, plaintiff received a policy and a certificate of insurance, albeit falsified, that appeared to be issued by AIG. "An employer is liable for the acts of its employee when the employee 'is doing something in furtherance of the duties he [or she] owes to [the] employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities' " (*Sports Car Ctr. of Syracuse v Bombard*, 249 AD2d 988, 989; *see Holmes v Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034-1035). Thus, because defendant was referenced in the proposal prepared by PIM, and because defendant's employee provided the service for which plaintiff had contacted defendant (*cf. Zigabarra v Falk*, 143 AD2d 901, 901-902), we conclude that plaintiff established that its reliance on the employee's explanation that PIM was a division of defendant was reasonable, and defendant failed to raise an issue of fact sufficient to defeat the motion.

All concur except LINDLEY and DEJOSEPH, JJ., who dissent and vote to reverse in the following memorandum: We respectfully dissent. In our view, Supreme Court erred in granting plaintiff's motion for partial summary judgment. Therefore, we would reverse.

While we agree with the majority that plaintiff had contact with defendant, the principal, in order to purchase workers' compensation insurance and thus had a basis for its belief that defendant's employee acted with the authority of defendant, we conclude that there is a triable issue of fact whether plaintiff's reliance on defendant's employee was reasonable and whether plaintiff failed to make a reasonable inquiry with defendant to verify the extent of the employee's authority.

"[A] third party with whom the agent deals may rely on an appearance of authority only to the extent that such reliance is reasonable" (*Hallock v State of New York*, 64 NY2d 224, 231). The insurance proposal received by plaintiff from the employee had "PROFESSIONAL INSURANCE MANAGERS" (hereafter, PIM) on the top of its coverage page with the employee's personal contact information at the bottom, which included his personal microsoft email address – "LDavisjr@msn.com" – instead of his work email address, which was "LEDavis@nsminc.com." The policy of insurance received by plaintiff does not list defendant but, instead, in the box labeled "Producer's Name & Mailing Address," PIM is listed along with PIM's address in Exton, Pennsylvania. The certificate of insurance lists the "Producer" as "Professional Insurance Managers, Ltd." and both the address and phone number match those of PIM and not defendant. Moreover, plaintiff was told to send its premium payments to an account that, "unbeknownst to [plaintiff]," was controlled by PIM. Plaintiff never went beyond defendant's employee to confirm that PIM was in fact a division of defendant. Subsequently, plaintiff received correspondence from the New York State Workers' Compensation Board explaining that plaintiff did not have the proper insurance in effect.

Plaintiff forwarded the letter to defendant's employee and, in response, plaintiff received a forged letter from American International Group confirming that the policy was in effect. Based upon all of plaintiff's dealings with defendant's employee, including the "PIM" documents and the letter it received from the New York State Workers' Compensation Board, we cannot conclude that plaintiff's inquiry and/or acceptance of the employee's explanation was reasonable as a matter of law (*see Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.*, 55 AD3d 1108, 1109-1111; *Arol Dev. Corp. v Whitman & Ransom*, 215 AD2d 145, 146).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

509

KA 14-00379

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY S. SPENCER, IV, DEFENDANT-APPELLANT.

CHRISTOPHER HAMMOND, COOPERSTOWN, FOR DEFENDANT-APPELLANT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered January 15, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree and grand larceny 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 and on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Allegany County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of burglary in the third degree (Penal Law § 140.20) and grand larceny in the fourth degree (§ 155.30 [7]), defendant contends that County Court erred in imposing an enhanced sentence without specifically warning him of that possibility if he failed to appear for sentencing. The record establishes that defendant was not informed at the time of his plea that he must return for sentencing in order to avoid the imposition of an enhanced sentence. Although defendant failed to preserve his contention for our review by objecting 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 defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the court erred in imposing an enhanced sentence because it "did not advise defendant that a harsher sentence than he bargained for could be imposed if [he] failed to appear at sentencing" (*People v Ortiz*, 244 AD2d 960, 961; *see Sundown*, 305 AD2d at 1076).

We therefore modify the judgment by vacating the sentence, and we remit the matter to Allegany County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea (*see Fortner*, 23 AD3d at 1058). In light of our determination, we do not address defendant's remaining contentions.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

516

KA 13-01758

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN C. MCKNIGHT, JR., ALSO KNOWN AS STEVEN C. MCNIGHT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY 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 July 29, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence imposed, and as modified the judgment is affirmed, and the matter is remitted to Genesee County Court for resentencing in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) arising from an incident that occurred on December 14, 2011 and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (§§ 110.00, 140.25 [2]) arising from a similar incident that occurred on December 15, 2011. The convictions stem from defendant's involvement in a burglary ring operated principally by his neighbor. Defendant contends in both appeals that he was denied due process at sentencing because County Court relied on materially untrue information pertaining to his criminal history. We agree, and we therefore modify the judgment in each appeal by vacating the sentence imposed and remit the matter to County Court for resentencing before a different judge.

As a preliminary matter, we note that defendant did not waive his right to appeal his conviction in appeal No. 1 and, to that extent, there is no impediment to addressing his contention in that appeal. In contrast, we further note that defendant waived his right to appeal in appeal No. 2, and we conclude that such waiver was voluntarily,

knowingly, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256; *People v Brown*, 122 AD3d 133, 136-137, *lv denied* 24 NY3d 1042). We nevertheless address defendant's contention in appeal No. 2 because the waiver of the right to appeal therein does not encompass his challenge to the court's reliance on improper information at sentencing (*see People v Gibbons*, 101 AD3d 1615, 1616; *People v Dimmick*, 53 AD3d 1113, 1113, *lv denied* 11 NY3d 831; *see also People v Brown*, 83 AD3d 1577, 1577, *lv denied* 18 NY3d 992).

Although defendant's contention in both appeals is unpreserved for our review, we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the court erred in sentencing defendant on the basis of "materially untrue assumptions or misinformation" (*People v Naranjo*, 89 NY2d 1047, 1049 [internal quotation marks omitted]; *see People v Francis*, 100 AD3d 1017, 1017; *People v Baker*, 87 AD3d 1313, 1315, *lv denied* 18 NY3d 857; *People v Bratcher*, 291 AD2d 878, 879, *lv denied* 98 NY2d 673; *see generally People v Outley*, 80 NY2d 702, 712). Here, the court characterized defendant as having been involved in "more than 40 residential burglaries" and "all the tens of burglaries," but those statements are unsupported by the record and therefore constitute improper speculation (*see Baker*, 87 AD3d at 1315; *People v Wilson*, 303 AD2d 773, 773, *lv denied* 100 NY2d 589). Inasmuch as we conclude that "the court sentenced . . . defendant, in part, 'on the basis of materially untrue assumptions or misinformation,' . . . defendant was denied due process, and must be resentenced" before a different judge (*Francis*, 100 AD3d at 1017; *see generally Naranjo*, 89 NY2d at 1049). In light of our determination, we need not address defendant's remaining contentions.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

517

KA 13-01759

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN C. MCKNIGHT, JR., ALSO KNOWN AS STEVEN C. MCNIGHT, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY 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 July 29, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Same memorandum as in *People v McKnight* ([appeal No. 1] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

520

CAF 14-00274

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

IN THE MATTER OF DAVID W., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAVID W., SR., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered August 9, 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: Respondent father appeals from an order terminating his parental rights with respect to his son on the ground of permanent neglect. Contrary to the father's contention, Family Court did not abuse its discretion in refusing to enter a suspended judgment (*see Matter of Arella D.P.-D.*, 35 AD3d 1222, 1223, *lv denied* 8 NY3d 809). Petitioner established that the father failed to comply with his service plan, i.e., he failed to complete substance abuse treatment successfully, attend scheduled visitation with the child consistently, or verify that he had obtained stable income and housing (*see Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1576, *lv dismissed in part and denied in part* 16 NY3d 760). "The record therefore supports the court's refusal to grant a suspended judgment inasmuch as the record establishes that the [father] had no 'realistic feasible plan to care for the child[ ] . . . and . . . that [he] was not likely to change [his] behavior' " (*Matter of Dahmani M. [Jana M.]*, 104 AD3d 1245, 1246; *see Matter of Sean W. [Brittany W.]*, 87 AD3d 1318, 1319, *lv denied* 18 NY3d 802).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

525

CA 14-01855

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

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

HOGAN WILLIG, PLLC, AMHERST (KATHERINE MARKEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered January 31, 2014. The order denied the motion of defendant to dismiss the complaint as untimely.

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

Memorandum: Plaintiff commenced this medical malpractice and wrongful death action alleging that, while plaintiff's decedent was a patient at a hospital facility of Erie County Medical Center Corporation (defendant) between April 30, 2011 and May 1, 2011, various agents and/or employees of defendant failed to diagnose and treat decedent's serious medical condition. According to plaintiff, decedent died days later because the condition was not appropriately treated prior to decedent's discharge from defendant's hospital facility on May 1, 2011.

There is no dispute that plaintiff timely commenced an action against defendant for medical malpractice and wrongful death on July 12, 2012. Because defendant is a public benefit corporation (*see* General Construction Law § 66 [1], [4]), however, plaintiff was required to serve a notice of claim (*see* Public Authorities Law § 3641 [1] [a]), which she had not done prior to commencement of the action. Thus, on August 28, 2012, Supreme Court granted plaintiff's application to serve a late notice of claim, and a notice of claim was served on defendant on September 5, 2012. Defendant then moved to dismiss the action on the ground that plaintiff failed to comply with conditions precedent to suit prior to commencement of the action, and the court granted that motion and dismissed the action by order

entered August 30, 2013. That order provided that the action was dismissed "without prejudice and subject to the terms of CPLR [] 205 (a)."

On September 10, 2013, plaintiff commenced the instant action. Thereafter, defendant moved to dismiss the action pursuant to CPLR 3211 on the ground that plaintiff failed to comply with Public Authorities Law § 3641 (1) (c), contending that the one-year and 90-day requirement in that section was a "condition precedent to suit" not subject to the six-month extension of time provided for in CPLR 205 (a). The court denied the motion and concluded that the one-year and 90-day period for commencement of an action against defendant pursuant to Public Authorities Law § 3641 (1) (c) is not a condition precedent to suit but, rather, is a statute of limitations. Therefore, the court further concluded that CPLR 205 (a) applied to the dismissal of the prior action and that the commencement of the instant action was timely. We agree.

It is well settled that CPLR 205 (a) does not apply when an act has to be performed within a statutory time requirement and is a condition precedent to suit (*see Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 378-379; *Glamm v City of Amsterdam*, 67 AD2d 1056, 1057-1058, *affd* 49 NY2d 714, *rearg denied* 49 NY2d 918). We recognize, by way of example, that the one-year statutory period for commencement of suit against the Port Authority Trans-Hudson Corporation set forth in McKinney's Unconsolidated Laws of NY § 7107 has been held to be a condition precedent to suit not entitled to the tolling benefit of CPLR 205 (a) (*see Yonkers Contr. Co.*, 93 NY2d at 378-379). As emphasized by the Court of Appeals in *Yonkers*, "Unconsolidated Laws § 7107 unambiguously allows an action against the Port Authority only '*upon the condition* that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year' " (*id.*, 93 NY2d at 379). Here, Public Authorities Law § 3641 (1) (c) contains no similar express conditional language.

We note that CPLR 205 (a) has been held to apply to proceedings commenced under General Municipal Law § 50-i (*see Smith v Rensselaer County*, 52 AD2d 384, 387), the language of which is identical to that of Public Authorities Law § 3641 (1) (c) at issue herein. We thus conclude that the express language of section 3641 (1) (c) does not support defendant's contention that the one-year and 90-day period is a condition precedent and not a statute of limitations (*see Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 576; *Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332, 333, *lv denied* 5 NY3d 702).

Turning to the second prong of the *Yonkers* analysis, we reject defendant's contention that personal injury actions did not exist against it under common law and that Public Authorities Law § 3641 (1) (c) created the medical malpractice and wrongful death causes of action interposed by plaintiff. The basis of the determination in *Yonkers* that the statute created the cause of action against the Port Authority was based upon the express language of McKinney's Unconsolidated Laws of NY § 7101 whereby the Port Authority conditioned its waiver of sovereign immunity and consent to suit on

timely commencement (*id.*, 93 NY2d at 379). Here, there is no such provision in Title 6, Article 10-C, where section 3641 is codified. Thus, as distinguished from the situation in *Yonkers*, it cannot be said here that, in "a single enactment[, i.e., Public Authorities Law § 3641], the State not only consented to suits against [defendant] but also expressly incorporated within the act a requirement of timely suit as an integral part of its waiver of sovereign immunity" (*Yonkers Contr. Co.*, 93 NY2d at 379).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

526

CA 14-01956

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

BAUSCH & LOMB INCORPORATED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RES EXHIBIT SERVICES, LLC, DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR DEFENDANT-APPELLANT.

NIXON PEABODY LLP, ROCHESTER (TERENCE L. ROBINSON, JR., OF COUNSEL), AND LARIMER LAW, PLLC, PITTSFORD, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 14, 2014. The order denied defendant's motion for partial summary judgment and granted plaintiff's cross motion for partial summary judgment.

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

Memorandum: The parties entered into a "Services Agreement" pursuant to which defendant agreed, inter alia, to provide trade show services to plaintiff, and plaintiff agreed, inter alia, to pay for those services in accordance with a two-tiered rate structure. Whether payment was to be made at the higher tier, i.e., the Standard Rate, or the discounted tier, i.e., the Adjusted B & L Rate (ABLR), depended upon plaintiff's utilization of defendant's services at major trade shows specifically designated in the Services Agreement. Plaintiff utilized defendant at the first three major trade shows in 2012, in March, April, and June, but hired a new vendor for the fourth such show in November 2012. Plaintiff requested that defendant release its property to the new vendor, which was to begin picking up the property on October 1, 2012. Defendant objected to plaintiff's terms for releasing and moving the property and refused to release it pursuant to those terms. Plaintiff commenced this action seeking, inter alia, the return of its trade show exhibits. Defendant asserted counterclaims seeking, inter alia, payment of sums allegedly remaining due under the Services Agreement.

Supreme Court properly denied defendant's motion for partial summary judgment, which sought an order, inter alia, finding plaintiff liable for warehouse services provided by defendant and awarding judgment for the amount of several unpaid invoices relating to those services. Defendant failed to meet its initial burden of establishing

its entitlement to judgment as a matter of law with respect to those items (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

The court also properly granted plaintiff's cross motion for partial summary judgment dismissing the counterclaims to the extent that they seek payment at the Standard Rate for services provided prior to October 1, 2012. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 245 [internal quotation marks omitted]). Here, the Services Agreement clearly and unambiguously provides that the discounted ABLR rate was applicable at all of the major trade shows in which plaintiff utilized defendant's services. The Standard Rate was applicable in the event that plaintiff failed to utilize defendant's services for one or more major trade shows. In that event, plaintiff agreed to pay defendant at the Standard Rate for all services performed during the corresponding calendar quarter. Here, plaintiff utilized defendant's services at all major trade shows during the first three quarters of 2012 and, thus, the court properly concluded that the discounted ABLR rate applied to services provided by defendant prior to October 1, 2012, i.e., the beginning of the fourth quarter of 2012.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

548

CA 14-01096

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

DAVID K. BORYSZEWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN E. HENDERSON, GENERAL MOTORS ACCEPTANCE CORPORATION, NIAGARA FRONTIER RECOVERY, LLC, AND NIAGARA FRONTIER RECOVERY AND REMARKETING, LLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 21, 2014. The judgment, among other things, awarded defendants costs and disbursements.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained during a confrontation with John E. Henderson (defendant) that arose in connection with defendant's repossession of a pickup truck from an impound lot owned by plaintiff. At the time of the alleged accident, defendant was transporting the pickup truck on the bed of a flatbed truck and plaintiff was a pedestrian. When defendant stopped at a traffic light, plaintiff approached the flatbed truck on foot, stepped onto the running board, and allegedly sustained an injury when defendant drove away. Plaintiff alleged, inter alia, that during the incident defendant violated Vehicle and Traffic Law §§ 425, 1162 and 1212, UCC 9-609, and Penal Law § 140.10 (a). Following a trial, the jury returned a verdict of no cause of action based on its determinations that the accident did not occur during the repossession of the pickup truck and that defendant was not negligent. Supreme Court thereafter denied plaintiff's motion seeking, inter alia, to set aside the verdict as against the weight of the evidence and based upon juror misconduct.

Plaintiff failed to preserve for our review his contention that the court erred in failing to charge the jury with respect to defendant's alleged Vehicle and Traffic Law violations in accordance

with PJI 2:26. He did not request that charge or object to the charge as given (*see* CPLR 4110-b, 5501 [a] [3]; *McCummings v New York City Tr. Auth.*, 177 AD2d 24, 31-32, *affd* 81 NY2d 923, *rearg denied* 82 NY2d 706, *cert denied* 510 US 991; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 22 AD3d 975, 976), nor in any event did he raise that alleged error in his posttrial motion. "In the absence of preservation, a jury verdict will not be set aside based on an alleged error in the charge where, as here, the alleged error is not fundamental, i.e., 'it is [not] so significant that the jury was prevented from fairly considering the issues at trial' " (*Wood v Strong Mem. Hosp. of Univ. of Rochester*, 273 AD2d 929, 930).

We reject plaintiff's further contention that the court erred in denying that part of his posttrial motion to set aside the verdict as against the weight of the evidence. "[T]he preponderance of the evidence in favor of plaintiff is not so great that the verdict could not have been reached upon any fair interpretation of the evidence, nor is the verdict palpably wrong or irrational" (*Kettles v City of Rochester*, 21 AD3d 1424, 1425). Finally, "on the record of this case, there was no showing of the 'substantial risk of prejudice' necessary to warrant the granting of the motion to set aside the verdict" based upon the allegedly improper communication between a juror and an alternate juror during the trial, and thus the court properly denied that part of plaintiff's posttrial motion to set aside the verdict based upon juror misconduct (*Snediker v County of Orange*, 58 NY2d 647, 649).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

549

CA 14-01097

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

DAVID K. BORYSZEWSKI, PLAINTIFF-APPELLANT,

V ORDER

JOHN E. HENDERSON, GENERAL MOTORS ACCEPTANCE CORPORATION, NIAGARA FRONTIER RECOVERY, LLC, AND NIAGARA FRONTIER RECOVERY AND REMARKETING, LLC, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered March 17, 2014. The order denied plaintiff's motion to set aside the jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

551

CA 14-01818

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

V.M. PAOLOZZI IMPORTS, INC., DOING BUSINESS AS DEALMAKER HONDA, DOING BUSINESS AS DEALMAKER HONDA OF WATERTOWN, DEALMAKER AUTO GROUP, L.L.C., DEALMAKER DODGE, LLC, DEALMAKER FORD, INC., DEALMAKER, L.L.C., DOING BUSINESS AS SEAWAY CHEVROLET-OLDS, B&J AUTO SALES, INC., DOING BUSINESS AS SEAWAY FORD, DEALMAKER FORD OF CLAY, LLC, DOING BUSINESS AS DEALMAKER BODY SHOP, AND DEALMAKER NISSAN, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JUNIOR STEFANINI, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

TOWNE, RYAN & PARTNERS, P.C., ALBANY (DANA K. SCALERE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered December 20, 2013. The order granted the motion of defendant Junior Stefanini for summary judgment dismissing plaintiffs' complaint as against him.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that, although the court erred in determining that plaintiffs failed to plead a fraud cause of action with the requisite specificity pursuant to CPLR 3016 (b), the court nevertheless properly dismissed that cause of action against Junior Stefanini (defendant). The fraud cause of action was based on nothing more than speculation and unsubstantiated assertions, and plaintiffs failed to raise an issue of fact to defeat that part of defendant's motion for summary judgment dismissing it against him (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

556

KA 14-00056

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN J. SIVERTSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 18, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). Contrary to defendant's contention, we conclude that the warrantless entry by police into defendant's residence was justified by probable cause and exigent circumstances (*see People v Burr*, 124 AD2d 5, 8, *affd* 70 NY2d 354, *cert denied* 485 US 989). The evidence at the suppression hearing established that, after promptly responding to a 911 call reporting a robbery of a convenience store by a man with a knife, the police learned that a store employee had followed and observed the perpetrator fleeing into the rear of a multiple dwelling. The store employee reported to the police that the perpetrator was wearing a hat and scarf. A neighbor at that location reported to the police that a man matching the perpetrator's description lived in the subject building and had been outside the front of that building approximately 20 to 30 minutes prior to the robbery—wearing a hat and scarf. Thus, we conclude that the police reasonably believed that they had located the perpetrator, who was still armed, as they observed defendant in his apartment unit from the outside (*see People v Jones*, 134 AD2d 451, 451, *lv denied* 70 NY2d 1007). The evidence established that the police did not know if defendant had access to the remainder of the building (*see People v Stevens*, 57 AD3d 1515, 1515, *lv denied* 12 NY3d 822). There is no evidence that the force used by the police to gain entry was unreasonable or premature in light of the circumstances (*see generally People v Glia*, 226 AD2d 66,

73, *appeal dismissed* 91 NY2d 846). Although defendant contends that he was sleeping and groggy or in a stupor when the police observed him in his apartment, and thus he did not present a risk of escape (*see generally People v Green*, 182 AD2d 704, 704, *lv denied* 80 NY2d 831), the police testified that defendant was observed moving about in the apartment, awake and watching television when they arrived outside the apartment. According to the police testimony, it was only after they requested that defendant answer the door that he gave the appearance of being asleep. "The hearing court's assessment of credibility is entitled to great weight, and the court's determination will not be disturbed where, as here, it is supported by the record" (*People v Little*, 259 AD2d 1031, 1032, *lv denied* 93 NY2d 926). We conclude that in light of all the facts, the suppression court properly determined that there was an urgent need that justified the warrantless entry in this case (*see People v McBride*, 14 NY3d 440, 446, *cert denied* 562 US 931).

We agree with defendant that certain comments made by the prosecutor during summation were improper, particularly those reflecting upon defendant's silence or demeanor following his arrest (*see People v McArthur*, 101 AD3d 752, 752-753, *lv denied* 20 NY3d 1101). We conclude, however, that the prosecutor's comments "were not so pervasive or egregious as to deprive defendant of a fair trial" (*People v Jones*, 114 AD3d 1239, 1241, *lv denied* 23 NY3d 1038 [internal quotation marks omitted]). Thus, contrary to the contention of defendant, the "failure to object to those comments does not constitute ineffective assistance of counsel" (*People v Nicholson*, 118 AD3d 1423, 1425).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, the evidence of identification of him as the perpetrator was legally sufficient (*see People v Ponder*, 19 AD3d 1041, 1042, *lv denied* 5 NY3d 809; *see generally Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that he was improperly adjudicated a persistent violent felony offender (*see* CPL 470.05 [2]; *People v Butler*, 203 AD2d 35, 35, *lv denied* 83 NY2d 965). In any event, having been previously adjudicated a second violent felony offender based on the 2004 conviction he now seeks to challenge, "[t]he question is . . . no longer open" (*People v Loughlin*, 66 NY2d 633, 635-636, *rearg denied* 66 NY2d 916).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

561

KA 13-01465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD HOWARD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 30, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We reject defendant's contention that, because the traffic stop of his motor vehicle was, as defendant characterizes it, "pre-ordained," County Court erred in refusing to suppress the evidence obtained by the police following the stop. It is well settled that, "where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant" (*People v Robinson*, 97 NY2d 341, 349; *see Whren v United States*, 517 US 806, 812-813). Moreover, the credibility determinations of the suppression court "are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record" (*People v Spann*, 82 AD3d 1013, 1014 [internal quotation marks omitted]). Here, the testimony of the police officer that he observed the passenger in defendant's vehicle without a seat belt as the vehicles passed each other, and smelled the odor of burnt marihuana when he approached defendant's passenger after the traffic stop, is not, contrary to defendant's contention, incredible as a matter of law (*see People v*

Villanueva, 137 AD2d 852, 853, *lv denied* 71 NY2d 1034). Nor did any alleged inconsistencies in the officer's testimony render it "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829), or "demonstrate that it was a fabrication patently tailored to meet constitutional objections" (*People v Granger*, 122 AD3d 940, 941). Additionally, having justifiably stopped the vehicle for a traffic violation and having detected the odor of marihuana from inside it, the police had reasonable suspicion that the vehicle contained drugs, and the subsequent canine sniff was proper (*see People v Ponzo*, 111 AD3d 1347, 1348).

We reject defendant's further contention that the court and/or the prosecutor improperly informed the jury of the pretrial suppression ruling. We conclude that the court properly instructed the jury that it was not to consider the lawfulness of the stop of defendant's vehicle, and that instruction was appropriately balanced by instructions relating to credibility and the testimony of police officers (*see People v Murphy*, 284 AD2d 120, 120, *lv denied* 97 NY2d 685).

Defendant contends that his Sixth Amendment right of confrontation was violated by the court's pretrial ruling that the entirety of the passenger's statement made to the police during the traffic stop would be admissible if defendant "opened the door" by offering a part thereof (*see generally People v Rogers*, 103 AD3d 1150, 1153, *lv denied* 21 NY3d 946). That contention is not preserved for our review inasmuch as defendant failed to object to the admission of the entire statement on that specific ground (*see People v Rivera*, 33 AD3d 450, 450-451, *lv denied* 7 NY3d 928), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, we conclude that the court properly exercised its discretion in conducting an in camera inquiry and in sua sponte excusing a venireperson who expressed fear of retribution during jury selection (*see People v Wilson*, 88 NY2d 363, 378-379; *People v Stone*, 239 AD2d 872, 873, *lv denied* 90 NY2d 943), and we conclude that defendant was not deprived of his right to counsel or to the selection of an impartial jury thereby (*see Wilson*, 88 NY2d at 378-379).

We reject defendant's further contention that the court erred in permitting the prosecutor to elicit hearsay from a police witness. The testimony of the police officer that he told his partner in the patrol vehicle that he had observed a seat belt violation in defendant's vehicle was not offered for the truth of the matter but, rather was offered for the effect on the listener, i.e., to explain the conduct of the partner, as the operator of the police vehicle, in stopping defendant's vehicle (*see People v Lester*, 83 AD3d 1578, 1579, *lv denied* 17 NY3d 818). We therefore further conclude, contrary to defendant's contention, that his counsel was not ineffective in failing to object to that testimony (*see generally People v Loomis*,

126 AD3d 1394, 1394-1395).

Defendant further contends that the prosecutor improperly bolstered the credibility of a police officer by asking the officer on redirect examination if he would be jeopardizing his career by "mak[ing] this stuff up" over "one arrest," and by making comments of a similar nature during summation. Although that tactic is generally impermissible (*see People v Webb*, 68 AD2d 331, 333; *see also People v Bonaparte*, 98 AD2d 778, 778), we conclude that, under the circumstances, it was fair response, respectively, to defense counsel's cross-examination of that witness (*see People v Celdo*, 291 AD2d 357, 358, *lv denied* 98 NY2d 673; *People v Greenhagen*, 78 AD2d 964, 965, *lv denied* 52 NY2d 833), and defense counsel's summation (*see People v Balnavis*, 175 AD2d 134, 134, *lv denied* 79 NY2d 824; *People v Hernandez*, 128 AD2d 637, 637, *lv denied* 70 NY2d 648).

Although we agree with defendant that it was improper for the prosecutor to comment upon and emphasize the hollow-point nature of the bullets in the recovered gun, that impropriety was not so egregious as to deny defendant a fair trial (*see generally People v Diaz*, 52 AD3d 1230, 1231, *lv denied* 11 NY3d 831).

Finally, we have reviewed the remaining instances of alleged ineffective assistance of counsel raised by defendant and conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

562

KA 13-00462

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE TERRY, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 22, 2011. Defendant was resentenced upon his conviction of assault in the second degree (three counts), reckless endangerment in the first degree (three counts) and criminal possession of a weapon in the second degree (four counts).

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

Memorandum: Defendant was convicted in 2003 upon a jury verdict of, inter alia, three counts of assault in the second degree (Penal Law § 120.05 [2]) and four counts of criminal possession of a weapon in the second degree (§ 265.03 [2]), and County Court failed to impose a period of postrelease supervision with respect to those counts as required by Penal Law § 70.45 (1). Defendant contends that, because he had served nearly eight years of his original 20-year sentence of imprisonment, the sentencing court violated his constitutional rights against double jeopardy and to due process by resentencing him pursuant to Correction Law § 601-d and pronouncing the relevant term of postrelease supervision (PRS). As defendant himself acknowledges, however, the Court of Appeals has explicitly held that a resentencing to correct a failure to pronounce a period of PRS is permissible (*see People v Sparber*, 10 NY3d 457, 472), and that such resentencing does not violate the prohibition against double jeopardy or the right to due process when it occurs before completion of a defendant's originally-imposed sentence of imprisonment; moreover, the Court explicitly rejected defendant's instant contention that he had served a significant portion of his sentence and thus had a reasonable expectation of the finality of his sentence (*see People v Lingle*, 16 NY3d 621, 630-633). "Indeed, the court was bound to impose 'statutorily-required sentences' " (*People v Mike*, 124 AD3d 1325,

1325, quoting *Lingle*, 16 NY3d at 633).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

566

CAF 13-01303

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

IN THE MATTER OF EMILY A.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GINA A., RESPONDENT-APPELLANT,
AND BRIAN H., RESPONDENT.
(APPEAL NO. 1.)

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (KELIANN M. ARGY OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered June 3, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, continued the subject child's placement with petitioner.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order in a proceeding pursuant to Family Court Act article 10 that, inter alia, changed the permanency goal for the subject child to placement for adoption. In appeal No. 2, the mother appeals from an order in a proceeding pursuant to Social Services Law § 384-b that revoked a suspended judgment after a hearing and terminated her parental rights with respect to the child. We note at the outset that, contrary to the contention of the foster parents, the mother's appeals are not moot.

The mother contends in both appeals that she was denied due process and a fair trial because Family Court undertook the "role of a prosecutor" and demonstrated "a bias against her." We reject that contention. It is well settled that a "trial court has broad authority to control the courtroom, rule on the admission of evidence, elicit and clarify testimony, expedite the proceedings and to admonish counsel and witnesses when necessary" (*Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1132, *lv denied* 11 NY3d 708 [internal quotation marks omitted]). In this case, we conclude that the Judge neither abused nor exceeded his authority to question witnesses, or to elicit and clarify testimony (*see Matter of Stanziano v Stanziano*, 235 AD2d 845, 846), and we observe that "[a]cting in the best interests and

welfare of [the child] is not a denial of due process to the parent[]" (*Matter of Rockland County Dept. of Social Servs. v Brian McM.*, 193 AD2d 121, 124-125).

Contrary to the mother's contention in appeal No. 2, it was not necessary that a party file a notice of motion and motion to revoke the suspended judgment in order for the court, on its own initiative, to conduct a hearing on that issue (*see Matter of Kim Shantae M.*, 221 AD2d 199, 200). Although 22 NYCRR 205.50 (d) (1) provides a procedural mechanism for an interested party to raise alleged violations of a suspended judgment, that provision does not limit or restrict the court's authority to initiate such a proceeding in its role as parens patriae (*see Finlay v Finlay*, 240 NY 429, 434). Nor does that provision limit a court's inherent authority to vacate its own judgments (*see Amy M. v Leland C.*, 8 Misc 3d 1011[A], 2005 NY Slip Op 51021[U], *3 [Fam Ct, Monroe County 2005]). Our determination with respect to the above contention renders academic the mother's technical challenges to the form of the motion papers served on behalf of the foster parents.

We reject the mother's further contention in appeal No. 2 that it was premature to terminate her parental rights. Family Court has the authority to revoke a suspended judgment after a hearing if it finds, upon a preponderance of the evidence, that the parent failed to comply with one or more of its conditions (*see Matter of Aaron S.*, 15 AD3d 585, 586; *Matter of Judith D.*, 307 AD2d 311, 312, *lv denied* 1 NY3d 505). Here, the preponderance of the evidence at the hearing established that the mother knowingly and willfully violated certain conditions of the suspended judgment and that termination of the mother's parental rights was in the best interests of the child (*see* Social Services Law § 384-b [1] [b]; [4] [d]; Family Ct Act § 631; *see also Matter of Jhanelle B. [Eliza P.]*, 93 AD3d 1201, 1201-1202, *lv denied* 19 NY3d 805; *Matter of Clifton ZZ. [Latrice ZZ.]*, 75 AD3d 683, 685). Contrary to the mother's final contention in appeal No. 2, the court did not abuse or improvidently exercise its discretion in declining to extend the suspended judgment (*see* Family Ct Act § 633 [b]; *Matter of Lestariyah A. [Demetrious L.]*, 89 AD3d 1420, 1420-1421; *Matter of Ricky Joseph V.*, 24 AD3d 683, 684).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

567

CAF 13-01764

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

IN THE MATTER OF EMILY A.

LIVINGSTON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

GINA A., RESPONDENT-APPELLANT.

GARY LIPPERT AND LISA LIPPERT, INTERVENORS-RESPONDENTS.
(APPEAL NO. 2.)

JEANNIE MICHALSKI, CONFLICT DEFENDER, GENESEO (KELIANN M. ARGY OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR INTERVENORS-RESPONDENTS.

Appeal from an order of the Family Court, Livingston County (Dennis S. Cohen, J.), entered August 28, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Same memorandum as in *Matter of Emily A.* ([appeal No. 1] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

568

CA 14-01849

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

NANCY BURKHART, SISTER AND LEGAL GUARDIAN FOR
BRIAN BURKHART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PEOPLE, INC., ELISA SMITH, KATELYNNE COLEMAN,
AMY MAZURKIEWICZ, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

DAMON MOREY LLP, BUFFALO (AMY ARCHER FLAHERTY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (JOSEPH D. MORATH, JR., OF COUNSEL), AND CLAUDE A. JOERG, LOCKPORT, FOR PLAINTIFF-RESPONDENT.

PAUL R. KIETZMAN, DELMAR, FOR NYSARC, INC., AMICUS CURIAE.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered February 18, 2014. The order denied the motion of defendants People, Inc., Elisa Smith, Katelynne Coleman and Amy Mazurkiewicz for summary judgment dismissing the seventh, eighth, ninth and fourteenth causes of action.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and plaintiff's 7th, 8th, 9th, and 14th causes of action are dismissed.

Memorandum: Plaintiff commenced this action on behalf of her brother, Brian Burkhart (Brian), a developmentally disabled individual residing in a group home owned and operated by People, Inc. (defendant). The complaint alleges two instances of negligence involving defendant. The first instance relates to the allegedly inadequate response of defendant's employees, defendants Elisa Smith and Amy Mazurkiewicz, to seizures suffered by Brian on January 12, 2008. The second instance relates to an incident on January 17, 2008 in which Brian, on an outing at a local movie theater under the supervision of defendant's employee, defendant Katelynne Coleman, was allowed to wander from the theater and onto a busy nearby roadway, where he was struck by a vehicle driven by defendant Lucian Visone and owned by defendant Lakefront Construction, Inc. Brian allegedly suffered serious injuries as a result of that accident.

The complaint asserts causes of action based on, inter alia, defendant's alleged violation of Public Health Law § 2801-d, which

allows a patient of a "residential health care facility" to maintain a private action against the facility when the facility deprives him or her of "any right or benefit created or established for the well-being of the patient by the terms of any contract, by any state statute, code, rule or regulation or by any applicable federal statute, code, rule or regulation" (§ 2801-d [1]). Defendant and its employee defendants moved for summary judgment dismissing the causes of action based on section 2801-d, contending that the statute does not apply to group homes such as the one operated by defendant. Supreme Court denied the motion, holding that, because the group home provides some "health-related service" to its residents, it qualifies as a "residential health care facility" to which the statute applies. We now reverse.

Pursuant to Public Health Law § 2801 (3), a " '[r]esidential health care facility' means a nursing home or a facility providing health-related service." The parties agree that the group home operated by defendant does not qualify as a nursing home. Rather, the issue on appeal is whether the group home is a residential health care facility because it provides "health-related service," which is defined as "service in a facility or facilities which provide or offer lodging, board and *physical care* including, but not limited to, the recording of health information, dietary supervision and supervised hygienic services incident to such service" (§ 2801 [4] [b] [emphasis added]). We conclude that defendant's group home is not a residential health care facility.

Although the group home provides some "physical care" to its residents in addition to lodging and board, as plaintiff points out, it does not necessarily follow that it provides a "health-related service" and is therefore a residential health care facility under Public Health Law § 2801-d. We note that Public Health Law article 28 applies to institutions "serving *principally* as facilities . . . for the rendering of health-related service" (§ 2800 [emphasis added]), and the provisions of the article relate specifically to hospitals and nursing homes, institutions that clearly serve *principally* as facilities for the provision of health-related service (*see* §§ 2801-2826). Indeed, section 2801-d (2) awards compensation to plaintiffs for violations of the statute based in part on the daily per-patient rate established in section 2807, which pertains to "hospital reimbursement" for "hospital service and health-related service."

In addition, plaintiff premises the alleged violation of Public Health Law § 2801-d in part on alleged violations of 10 NYCRR 415.11 and 415.12, regulations that relate to the minimum standards applicable to nursing homes and that deal specifically with assessment and care planning (*see* 10 NYCRR 415.11), and quality of care (*see* 10 NYCRR 415.12), for nursing home residents. In fact, 10 NYCRR part 415 uses the term "[n]ursing home" interchangeably with the term "residential health care facility" (10 NYCRR 415.2 [k]).

The legislative history of the statute reinforces our conclusion that the term "residential health care facility" is meant to apply to nursing homes and similar facilities that are governed by the Public

Health Law. Section 2801-d was enacted "to redress the abuse of patients in nursing homes" (*Doe v Westfall Health Care Ctr.*, 303 AD2d 102, 112), and "the term 'residential health care facility' was intentionally used by the Legislature in an effort to curb abuses in the nursing home industry and provide a more flexible penalty system against nursing homes than was previously available" (*Town of Massena v Whalen*, 72 AD2d 838, 839). We therefore conclude that the cause of action provided by section 2801-d was intended to apply to nursing homes, and other facilities such as assisted living facilities, operated by entities in the "nursing home industry."

In contrast to a hospital or nursing home, the group home owned and operated by defendant is governed by the Mental Hygiene Law and regulated by the Office for People with Developmental Disabilities (OPWDD), and operates pursuant to a certificate issued by the Commissioner of OPWDD (*see* Mental Hygiene Law article 16; 14 NYCRR part 686; *see also* Mental Hygiene Law § 13.07). The group home is classified as an "individualized residential alternative" community residence, defined as "a facility providing room, board, and individualized protective oversight" for "persons who are developmentally disabled and who, in addition to these basic requirements, need supportive interpersonal relationships, supervision, and training assistance in the activities of daily living" (14 NYCRR 686.99 [l] [2] [iii]). Under the plain language of the regulations governing it, the group home does not serve "principally" as a facility "for the rendering of health-related service" governed by Public Health Law article 28 (§ 2800).

Thus, notwithstanding that the group home may provide some "physical care" to residents such as Brian incident to its provision of "individualized protective oversight," we conclude that the group home is not a "residential health care facility" subject to the private right of action available under Public Health Law § 2801-d, and the court therefore erred in denying the motion for summary judgment dismissing plaintiff's causes of action based on that statute.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

569

CA 14-02024

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

MANUEL LOPEZ, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

FAHS CONSTRUCTION GROUP, INC.,
DEFENDANT-RESPONDENT-APPELLANT.

FAHS CONSTRUCTION GROUP, INC., THIRD-PARTY
PLAINTIFF,

V

TARGET GROUP OF CENTRAL NEW YORK, INC.,
THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (H.J. HUBERT OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (JILL LEVY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT AND THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeals from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered June 13, 2014. The order denied the motion of plaintiff for partial summary judgment and denied in part the motions of defendant and 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 action seeking damages for injuries he sustained when he fell into a hole in a countertop while working at a construction site in Cortland, New York, and his complaint alleges, inter alia, claims for common-law negligence and the violation of Labor Law §§ 200, 240 (1), and 241 (6). Defendant-third-party plaintiff, Fahs Construction Group, Inc. (Fahs), was the general contractor for the project, and Fahs subcontracted certain asbestos removal work to third-party defendant, Target Group of Central New York, Inc. (Target), plaintiff's employer.

Insofar as relevant to this appeal, plaintiff moved for partial summary judgment on his Labor Law § 240 (1) claim, and Target and Fahs (collectively, defendants) each moved for summary judgment dismissing

the complaint in its entirety. Supreme Court, inter alia, denied plaintiff's motion, and denied those parts of defendants' motions seeking dismissal of the section 240 (1) claim and the section 241 (6) claim insofar as the latter is based on the violation of 12 NYCRR 23-1.7 (b). Plaintiff appeals, each of the defendants cross-appeals, and we affirm.

At the time of the accident, plaintiff was attempting to scrape asbestos from a 10-foot ceiling. In the room where he was working, there were two A-frame ladders, a scaffold, and a "scraper bar." Plaintiff testified during his deposition that he stepped up onto a countertop in the corner of the room instead of using the ladders, scaffold, or scraper bar, because using those items was too dangerous or too difficult. As plaintiff was scraping the corner, he fell into a hole in the countertop where a sink previously had been located.

We conclude that the court properly denied the parties' motions with respect to the Labor Law § 240 (1) claim. In our view, there are triable issues of fact whether plaintiff had "adequate safety devices available," whether "he knew both that they were available and that he was expected to use them," whether "he chose for no good reason not to do so," and whether "had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). Consequently, summary judgment is not appropriate here (*see id.*; *Thompson v Sithe/Independence, LLC*, 107 AD3d 1385, 1387; *Kuntz v WNYG Hous. Dev. Fund Co. Inc.*, 104 AD3d 1337, 1338; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1427-1428; *cf. Kuhn v Camelot Assn., Inc*. [appeal No. 2], 82 AD3d 1704, 1705-1706).

We further conclude that the court properly denied those parts of defendants' motions with respect to the Labor Law § 241 (6) claim insofar as it is based on the alleged violation of 12 NYCRR 23-1.7 (b) (1). Contrary to defendants' contention on their cross appeals, "[t]hat regulation is sufficiently specific to support a section 241 (6) violation . . . , and we have held that it applies to any hazardous opening into which a person may step or fall . . . provided that [it is] one of significant depth and size" (*Wrobel v Town of Pendleton*, 120 AD3d 963, 966 [internal quotation marks omitted]).

We have examined defendants' remaining contentions on their cross appeals and conclude that they are without merit.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

578.2

CA 14-01480

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

STEPHEN CLENDENIN AND CAROL CLENDENIN,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF MILO, COLBY PETERSEN, GARY BOARDMAN,
YATES COUNTY SOIL AND WATER CONSERVATION
DISTRICT, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ADORANTE, TURNER & ASSOC., CAMILLUS (ANTHONY P. ADORANTE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JOHN M. WELLS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COLBY PETERSEN AND YATES COUNTY SOIL AND WATER CONSERVATION DISTRICT.

LIPPMAN O'CONNOR, BUFFALO (THOMAS D. SEAMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS TOWN OF MILO AND GARY BOARDMAN.

Appeal from an order of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered November 8, 2013. The order granted the motions of defendants Town of Milo, Colby Petersen, Gary Boardman and Yates County Soil and Water Conservation District for summary judgment.

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

Memorandum: Plaintiffs commenced this action seeking damages arising from an allegedly defective septic system on residential property they purchased from defendants Raymond and Rose Mangan in June 2009. The complaint alleges that the Mangans engaged in fraud by failing to disclose to plaintiffs the defective septic system, and that defendant Yates County Soil and Water Conservation District (District), through its employee, defendant Colby Petersen, negligently inspected the septic system on May 4, 2009. Petersen found that the septic system "passed" his inspection and therefore issued the Mangans a "certificate of inspection." Although plaintiffs were informed prior to closing by their property inspector, a professional engineer, that there was a problem with the septic system, plaintiffs allege that they relied on the District's "certificate of inspection" and therefore purchased the property despite their own inspector's concerns. The complaint, as amplified

by the bill of particulars, further alleges that defendant Town of Milo (Town) was negligent in issuing a certificate of occupancy for the property when it was built in 1998, inasmuch as the septic system was defective when it was initially installed. Plaintiffs seek $21,065 in damages, which is the amount they expended to have a new septic system installed on the property.

We conclude that Supreme Court properly granted the motions of the District and the Town seeking summary judgment dismissing the complaint as against them and their employees. As the court concluded, the statute of limitations with respect to the negligence causes of action had expired by the time plaintiffs commenced this action and, contrary to plaintiffs' contention, CPLR 214-c does not apply. CPLR 214-c (1) provides that "the three-year period within which an action to recover *damages for personal injury or injury to property* caused by the latent effects of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property must be commenced shall be computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier" [emphasis added]).

Here, plaintiffs do not seek "damages for personal injury or injury to property" (CPLR 214-c [1]); rather, they seek to be compensated for the cost of replacing an allegedly defective septic system. Thus, section 214-c is inapplicable to this action (*see generally Germantown Cent. Sch. Dist. v Clark, Clark, Millis & Gilson*, 100 NY2d 202, 206; *Manhattanville Coll. v James John Romeo Consulting Engr., P.C.*, 5 AD3d 637, 640-641). Moreover, the Court of Appeals, in interpreting section 214-c, has made clear that it applies only to toxic torts (*see Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 767), and plaintiffs' claims have nothing do to with toxic substances. Instead, plaintiffs merely allege that the septic system was defective and that defendants failed to identify the defects during their inspections. We thus conclude that the court properly determined that the causes of action against the moving defendants are time-barred.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

602

CA 14-01889

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

CHARLES M. ALBERT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KATHLEEN A. MACHOLS, DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 24, 2014 in a personal injury action. The order denied the motion of defendant 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 granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle he was operating collided head-on with a vehicle operated by defendant. Supreme Court erred in denying defendant's motion seeking summary judgment dismissing the complaint. Defendant met her initial burden by establishing as a matter of law that the emergency doctrine applied (*see generally Caristo v Sanzone*, 96 NY2d 172, 174), i.e., she established that she was operating her vehicle in a lawful and prudent manner when plaintiff's vehicle suddenly and without warning crossed into her lane of travel, and there was nothing she could have done to avoid the collision (*see Hill v Cash*, 117 AD3d 1423, 1426; *Wasson v Szafarski*, 6 AD3d 1182, 1183). "Although 'it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the [driver's] response was reasonable' . . . , we conclude that summary judgment is appropriate here because defendant[] presented 'sufficient evidence to establish the reasonableness of [her] actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact' " (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329-1330).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

611

KA 13-01486

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE WALLACE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 10, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act in the first degree and attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver 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: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

615

KA 12-00766

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY LINDSEY, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 7, 2012. The judgment convicted defendant, upon a jury verdict, of aggravated driving while intoxicated, aggravated unlicensed operation of a motor vehicle in the first degree, driving while intoxicated and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [b]), aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a]), driving while intoxicated (§ 1192 [3]), and endangering the welfare of a child (Penal Law § 260.10 [1]), defendant contends that Supreme Court abused its discretion in denying his request for an adjournment of the trial to secure an allegedly reluctant defense witness, i.e., defendant's girlfriend at the time of his arrest. We reject that contention.

"It is well established that the decision whether to grant an adjournment is a matter resting within the sound discretion of the trial court . . . It is also well established, however, that there is a more liberal policy in favor of granting a short adjournment . . . when the delay is requested in order to insure a fundamental right . . . , e.g., the request for an adjournment to produce an [exculpatory] witness, and that the court's discretionary power is more narrowly constru[ed] in those circumstances" (*People v Walker*, 28 AD3d 1116, 1117 [internal quotation marks omitted], *amended on rearg* 31 AD3d 1226; *see Chambers v Mississippi*, 410 US 284, 302). The proponent of an adjournment to secure witness testimony is required to show that he or she exercised "reasonable diligence" in procuring the witness's

testimony (*People v Becoats*, 17 NY3d 643, 652, *cert denied* ___ US ___, 132 S Ct 1970; *see People v Johnson*, 145 AD2d 573, 574, *lv denied* 73 NY2d 923).

Here, we conclude that the "court was justified in finding . . . that defense counsel did not act with reasonable diligence" in securing the witness's testimony (*Becoats*, 17 NY3d at 652). Defense counsel acknowledged to the court that both she and defendant's investigator had spoken to the witness, and the witness was on defendant's witness list, thereby indicating that defendant understood that the witness would provide him with exculpatory testimony. Between arraignment and trial, however—a period of almost six months—defense counsel took no steps to secure the witness's appearance, but instead relied on the People, who had obtained a material witness order, to secure the witness's appearance at trial. Moreover, the record establishes that defense counsel spoke to the witness the night before she sought the adjournment, and the witness was in the courthouse, albeit with respect to her own criminal matter, on the day that defense counsel sought the adjournment. Those facts undermine defense counsel's assertion to the court that the witness was difficult to locate. We therefore perceive no abuse of discretion in the denial of the request for an adjournment (*see Walker*, 28 AD3d at 1117).

With respect to defendant's remaining contention, the People correctly concede that the court erred in admitting the affidavit of mailing in order to prove defendant's knowledge of the prior suspension of his license, which is an element of aggravated unlicensed operation of a motor vehicle in the first degree, because an affidavit of mailing is testimonial in nature (*see People v Pacer*, 6 NY3d 504, 507-508). We nevertheless conclude that, in light of defendant's admission to the police that he knew his license had been suspended, the error is harmless (*see People v Douglas*, 4 NY3d 777, 779).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

617

KA 11-02461

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE PRICE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 1, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by judicial misconduct (*see People v Brown*, 120 AD3d 1545, 1545-1546, *lv denied* 24 NY3d 1082), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant contends that he was denied effective assistance of counsel at sentencing because defense counsel withdrew a challenge to defendant's adjudication as a persistent felony offender. We reject that contention inasmuch as the challenge would have had " '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). Contrary to defendant's further contention that defense counsel was ineffective for failing to argue against the imposition of the maximum sentence, we conclude that, "given the nature of defendant's criminal record and the criminal conduct herein, . . . no statement made by defense counsel at sentencing 'would have had an impact on the sentence imposed' " (*People v Saladeen*, 12 AD3d 1179, 1180, *lv denied* 4 NY3d 767).

Defendant "failed to preserve for our review his . . . contention

that the sentence imposed was a vindictive punishment for rejecting the plea offer and proceeding to trial" (*People v Brown*, 111 AD3d 1385, 1387, *lv denied* 22 NY3d 1155; *see People v Hurley*, 75 NY2d 887, 888). In any event, that contention is without merit. "[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his [or her] right to trial" (*People v Spencer*, 108 AD3d 1081, 1083, *lv denied* 22 NY3d 1159 [internal quotation marks omitted]). Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

618

CAF 13-02017

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

IN THE MATTER OF BARBARA MAJUK, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY CARBONE, RESPONDENT-APPELLANT.

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-RESPONDENT.

JOSEPH C. BANIA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered October 22, 2013 in a proceeding pursuant to Family Court Act article 6. The order terminated respondent's visitation with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 6, and she subsequently filed an amended petition seeking an order directing that respondent father's visitation with the subject child be supervised by an appropriate agency. The father appeals from an order that sua sponte directed that he was to have no further contact or visitation with the child. We conclude that Family Court erred in sua sponte granting relief that was not requested by the parties or the Attorney for the Child (*see Matter of Myers v Markey*, 74 AD3d 1344, 1345; *see also Matter of Joseph P.*, 106 AD3d 1548, 1551; *see generally Kernan v Williams* [appeal No. 2], 125 AD3d 1440, 1441, *lv denied* ___ NY3d ___ [May 1, 2015]). We therefore reverse and remit the matter to Family Court for further proceedings on the amended petition.

Initially, insofar as the brief of the mother may be read to advance the contention that the father may not appeal because he defaulted in the hearing court by failing to appear for a scheduled court appearance, we reject that contention. Although no appeal lies from an order entered on default (*see generally Hines v Hines*, 125 AD2d 946, 946), the record reflects that the father's attorney appeared on his behalf, and it is well settled that " '[a] party who is represented at a scheduled court appearance by an attorney has not failed to appear' " (*Matter of Manning v Sobotka*, 107 AD3d 1638, 1639; *see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536; *Matter of Bradley*

M.M. [Michael M.-Cindy M.], 98 AD3d 1257, 1258; *Matter of Isaiah H.*, 61 AD3d 1372, 1373).

Next, we note the well-settled proposition that " '[n]o appeal lies as of right from an order [that] does not decide a motion made on notice' " (*Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, 1088, *lv denied* 10 NY3d 710; *see Sholes v Meagher*, 100 NY2d 333, 335; *Matter of White v Wilcox*, 109 AD3d 1145, 1146, *lv dismissed in part and denied in part* 22 NY3d 1085, 1086). Here, although the father did not seek leave to appeal from the court's sua sponte determination to permanently deprive him of all contact and visitation with his child, we exercise our discretion to treat his notice of appeal as an application for leave to appeal, and we grant the application in the interest of justice (*see* CPLR 5701 [c]; *see e.g. Vogelgesang v Vogelgesang*, 71 AD3d 1132, 1133; *Matter of Walker v Bowman*, 70 AD3d 1323, 1323-1324).

With respect to the merits, we agree with the father that the order must be reversed (*see Myers*, 74 AD3d at 1345). The amended petition sought supervised visitation, but the court permanently terminated the father's access to the child, instead. The record establishes that the parties had no notice that such an order might be issued, and that they were not afforded an opportunity to address the necessity for such an order.

We have considered the remaining contentions of the parties and conclude that they are without merit or are academic in light of our determination.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

619

CAF 14-00455

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

IN THE MATTER OF QUA'MEL W.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

NIAYA W., RESPONDENT-APPELLANT.

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

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

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered February 14, 2014 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 terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. Contrary to the mother's contention, we conclude that petitioner established "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the mother] and the child" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* § 384-b [3] [g] [i]; [7] [a]). In coming to that conclusion, we are not unmindful that "[a]n agency must always determine the particular problems facing a parent with respect to the return of his or her child and make affirmative, repeated, and meaningful efforts to assist the parent in overcoming these handicaps" (*Matter of Olivia L.*, 41 AD3d 1226, 1226-1227 [internal quotation marks omitted]). We also recognize, however, that the agency's efforts, no matter how diligent, can be frustrated by the lack of cooperation from the parent (*see Matter of Asianna NN. [Kansinya OO.]*, 119 AD3d 1243,1244-1245, *lv denied* 24 NY3d 907; *Matter of Jacob E. [Valerie E.]*, 87 AD3d 1317, 1318; *Matter of Ashley Lisa D.*, 46 AD3d 359, 359), and the record establishes that such frustration of the agency's efforts occurred here. The record also establishes that, despite petitioner's diligent efforts to encourage and strengthen the

parental relationship, the mother failed substantially and continuously to plan for the future of the child (*see* § 384-b [7] [a]; *Matter of Jessica P.*, 291 AD2d 935, 935).

The mother failed to preserve for our review her contention that Family Court erred in admitting into evidence petitioner's entire case file without a proper foundation inasmuch as she failed to object to the admission of the case file on that ground (*see Matter of Constance NN.*, 47 AD3d 986, 986). Finally, the record supports the court's determination that a suspended judgment would not serve the best interests of the child (*see Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307, *lv denied* 14 NY3d 709; *Matter of Emmeran M.*, 66 AD3d 1490, 1490).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

628

CA 14-01828

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

JAMES P. RENDER,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

FRANK J. GIZZO, JR.,
DEFENDANT-APPELLANT-RESPONDENT.

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

GELBER & O'CONNELL, LLC, AMHERST (KRISTOPHER A. SCHWARZMUELLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered June 26, 2014. The order denied those parts of the motion of plaintiff seeking an additur, judgment notwithstanding the verdict and to set aside the verdict as against the weight of the evidence, granted that part of the motion seeking to set aside the verdict as inconsistent and ordered a new trial on proximate cause, serious injury and damages.

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

Memorandum: Plaintiff commenced this action seeking damages for personal injuries he sustained in a motor vehicle accident, and the matter proceeded to trial. The jury returned a verdict in plaintiff's favor, finding that plaintiff sustained a serious injury under the 90/180-day category of serious injury within the meaning of Insurance Law § 5102 (d). The jury awarded plaintiff damages for past pain and suffering and future medical expenses but declined to award damages for future pain and suffering. After the jury rendered its verdict, Supreme Court directed the parties to submit any motions later, and discharged the jury. Supreme Court granted plaintiff's posttrial motion to set aside the verdict insofar as plaintiff contended that the verdict was inconsistent, and ordered a new trial on the issues of proximate cause, serious injury, and damages. Defendant appeals from that part of the order, and plaintiff cross-appeals to the extent that the order denied those parts of the motion seeking an additur, an order granting judgment notwithstanding the verdict, and an order setting aside the verdict as against the weight of the evidence. We affirm.

Contrary to defendant's contention on appeal, the court properly granted that part of the motion seeking to set aside the verdict as inconsistent. We note that, inasmuch as the court's postverdict direction to the parties prevented plaintiff from making a motion before the court discharged the jury, the court properly determined that " 'the disbanding of the jury without . . . objection . . . obliterate[s] neither [the] right to seek a new trial[ ] nor the court's capacity to grant it[ ] where[, as here,] the interest of justice manifestly requires it' " (*Applebee v County of Cayuga* [appeal No. 1], 103 AD3d 1267, 1269; *see Califano v Automotive Rentals*, 293 AD2d 436, 437; *Kim v Cippola*, 231 AD2d 886, 886-887; *see also Dessasore v New York City Hous. Auth.*, 70 AD3d 440, 441). Contrary to defendant's further contention, the court properly concluded that the verdict was irreconcilable (*see generally Allen v Lowczus*, 118 AD3d 1258, 1258-1259; *Applebee*, 103 AD3d at 1268; *Campopiano v Volcko*, 82 AD3d 1587, 1589).

Plaintiff contends on cross appeal that the court erred in denying the motion insofar as it sought an additur, an order granting judgment notwithstanding the verdict, and an order setting aside the verdict as against the weight of the evidence. "We are unable to review [those] contention[s], however, because plaintiff[] failed to submit a [complete] transcript" of the trial testimony (*Yoonessi v Givens*, 78 AD3d 1622, 1623, *lv denied* 17 NY3d 718; *see generally Lewis v Lewis*, 194 AD2d 648, 650; *Usyk v Track Side Blazers*, 182 AD2d 1125, 1125-1126). Furthermore, plaintiff's "references to a supplemental record are improper, no motion for enlargement of the record having been made" (*Mane v Brusco*, 280 AD2d 436, 437; *see Smith v Woods Constr. Co.*, 309 AD2d 1155, 1157).

Finally, we note that plaintiff's further contention on his cross appeal regarding the court's denial of his motion for a directed verdict is not before us because the order on appeal does not resolve any such motion. Furthermore, it appears that no order was entered on such a motion but, rather, plaintiff's motion was apparently denied in a bench decision during the trial, and it is well settled that "[n]o appeal lies from a mere decision" (*Kuhn v Kuhn*, 129 AD2d 967, 967; *see Gay v Gay* [appeal No. 1], 118 AD3d 1331, 1332).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

630

CA 14-01784

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

ROBERT M.D. AND KATHERINE A.D., INDIVIDUALLY,
AND AS PARENTS AND NATURAL GUARDIANS OF
BRANDON S.D., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

FRANK W. STERLING, DEFENDANT-APPELLANT.

LOSI GANGI, BUFFALO (PATRICK J. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 29, 2014. The order, insofar as appealed from, granted that part of the motion of plaintiffs seeking partial summary judgment on the issue of liability on their civil battery cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is denied in its entirety.

Memorandum: Plaintiffs, individually and on behalf of their child, commenced this action for, among other things, civil battery, seeking damages for injuries sustained when defendant allegedly intentionally touched their child in an offensive manner. In an earlier criminal action, defendant acknowledged that he had touched the child's buttocks and pleaded guilty to endangering the welfare of a child (Penal Law § 260.10 [1]). Plaintiffs moved for partial summary judgment on liability, alleging with respect to the cause of action for civil battery that, because defendant had pleaded guilty to "sexually abusing" the child in the earlier criminal proceeding, there was no question of fact to be determined with respect to defendant's liability for civil battery. We agree with defendant that Supreme Court erred in granting the motion to that extent, and that the motion should have been denied in its entirety.

We agree with defendant that the identity of issues required for the application of collateral estoppel is lacking. "A criminal conviction may be given collateral estoppel effect in a subsequent civil litigation if there is an identity of issues and a full and fair opportunity to litigate in the [criminal] action" (*Hooks v*

Middlebrooks, 99 AD2d 663, 663; *see Buechel v Bain*, 97 NY2d 295, 303-304, *cert denied* 535 US 1096). "To recover damages for battery founded on bodily contact, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent" (*Roe v Barad*, 230 AD2d 839, 840, *lv dismissed* 89 NY2d 938). Here, we conclude that bodily contact is the only element of civil battery established by defendant's plea in the criminal action and, thus, plaintiffs failed to establish the requisite "identity of issues" between the crime of endangering the welfare of a child and civil battery (*see Hooks*, 99 AD2d at 663; *see generally Roe*, 230 AD2d at 840).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

635

KA 15-00119

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

CHARLES R. PIERRE, DEFENDANT-RESPONDENT.

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

VAN HENRI WHITE, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Monroe County Court (Douglas A. Randall, J.), entered July 21, 2014. The order granted the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10 (1) (g).

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

Memorandum: The People appeal from an order granting defendant's motion pursuant to CPL 440.10 (1) (g) seeking to vacate the judgment convicting him, following a jury trial in 2003, of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]), two counts of murder in the second degree (§ 125.25 [1]) and one count of arson in the second degree (§ 150.15) (*People v Pierre*, 37 AD3d 1172, *lv denied* 8 NY3d 989). Contrary to the People's contention, County Court properly determined, following a hearing, that defendant proved by a preponderance of the evidence that "[n]ew evidence has been discovered since the entry of [the] judgment . . . , which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 440.10 [1] [g]; *see* CPL 440.40 [6]).

Two witnesses testified at the hearing that a third party (declarant) admitted that he beat the two victims with a baseball bat in their apartment and set a fire to destroy the evidence. The victims lived in the downstairs apartment of a building on First Street in Rochester, and the declarant lived in the upstairs apartment. One witness was a "jailhouse lawyer" from whom the declarant sought legal advice in 2013 on the issue whether he could be convicted of those crimes after another person had been convicted of them. The witness testified that the declarant was concerned that his

wife, who had left him, would report to the police that he had committed the crimes. At the time he allegedly made the statements, the declarant was awaiting trial for a 2007 murder, in which the victim was beaten and a fire was set in her home. The witness subsequently testified for the People in that trial, and the declarant was convicted of the crimes charged. The declarant's ex-wife testified at the hearing that the declarant told her on the day of the crimes in 2002 that he had committed them. She testified that, two days later, she told the declarant that she was leaving him and intended to report his crimes to the police, and that the declarant threatened to kill her and everyone she loved if she did so. A police witness testified that a 2005 police report indicated that, when responding to a domestic violence report involving the declarant and his wife, the declarant's wife was heard to say to the declarant, "if you don't leave I will tell them about the two people you killed on First Street." Also admitted in evidence at the hearing was a recording of the police interview with the declarant's ex-wife regarding both the 2002 and 2007 crimes.

We reject the People's contention that the testimony of the two witnesses regarding the declarant's alleged statements are not admissible in evidence as admissions against his penal interest because defendant did not establish that the declarant was unavailable to testify (*see People v McFarland*, 108 AD3d 1121, 1122, *lv denied* 24 NY3d 1220). Inasmuch as the declarant allegedly admitted to killing two people and committing arson, it is reasonable to assume that he would exercise his Fifth Amendment right to refuse to incriminate himself (*see People v Ennis*, 11 NY3d 403, 413, *cert denied* 556 US 1240; *McFarland*, 108 AD3d at 1122). Also contrary to the People's contention, the evidence is supported by independent competent proof indicating that it is trustworthy and reliable (*see People v Brensic*, 70 NY2d 9, 15, *remittitur amended* 70 NY2d 722; *People v Settles*, 46 NY2d 154, 167). Although there was no evidence at the hearing that the evidence presented at defendant's trial established that the victims were beaten to death, we may take judicial notice of our own records of defendant's appeal, which establish that the victims died in the manner described by the witnesses, as reported by the declarant, and that the evidence against defendant was wholly circumstantial (*see McFarland*, 108 AD3d at 1122-1123). Indeed, "where, as here, the declarations exculpate the defendant, they are subject to a more lenient standard, and will be found sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement[s] might be true . . . That is because [to do otherwise] may deny a defendant his or her fundamental right to present a defense" (*id.* at 1122 [internal quotation marks omitted]).

We also reject the People's contention that the court erred in admitting the testimony of the declarant's ex-wife because his disclosures were subject to a spousal privilege and the declarant had not consented to her testimony as required by CPLR 4502 (b). The threat made by the declarant against his wife "is strong evidence that [the declarant] was not then relying upon any confidential relationship to preserve the secrecy of his acts and words, and is sufficient in itself to remove these communications from the

protection of the privilege" (*People v Dudley*, 24 NY2d 410, 415; *cf. People v Fediuk*, 66 NY2d 881, 883-884).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

636

KA 12-01348

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLARD BAILEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEONARD & CURLEY, PLLC, ROME (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered July 9, 2012. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree.

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

Same memorandum as in *People v Bailey* ([appeal No. 2] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

637

KA 14-00570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLARD BAILEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEONARD & CURLEY, PLLC, ROME (MARK C. CURLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Oneida County (Barry M. Donalty, A.J.), dated January 14, 2014. 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, Oneida County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant appeals from a judgment of County Court (Donalty, J.) convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [2]). In appeal No. 2, he appeals, with permission of this Court, from an order of Supreme Court (Donalty, A.J.) denying his motion to vacate that judgment pursuant to CPL 440.10 (1) (g). Defendant failed to preserve for our review his contentions in appeal No. 1, i.e., that the prosecutors violated their *Brady* obligation concerning an agreement they made with a codefendant in return for providing testimony against defendant, that the court improperly characterized the codefendant's testimony and gave incorrect jury instructions regarding that testimony, that the court impermissibly restricted the scope of voir dire questioning, and that the court improperly permitted a sworn juror to remain on the jury despite the juror's lack of capacity to decide the issues fairly. We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

In appeal No. 2, defendant contends that the court erred in denying his CPL article 440 motion without a hearing. We agree. Defendant moved to vacate the judgment on two grounds, neither of which may be decided without a hearing. First, he contended that the

People violated their *Brady* obligation because they failed to disclose that they made a specific plea agreement with the codefendant at the start of the proceedings, contingent upon the codefendant testifying against defendant. Defendant contended that the People effectuated that agreement by, among other things, obtaining an indictment charging the codefendant with a lower level crime than the class B violent felony that was lodged against defendant, to avoid the plea bargaining restrictions in CPL 220.10 (5) (d) (ii), and by agreeing that the codefendant could withdraw his plea to the lower level felony and plead guilty to a misdemeanor if he cooperated against defendant. Defendant submitted evidence in support of his contentions, including transcripts of the prosecutor's statements in the codefendant's case regarding the agreement, and those transcripts also established that the prosecutor had discussed the agreement with the victim before it was implemented.

In opposition to the motion, the trial assistant prosecutor denied that the People made any promises to the codefendant, and we note that the People maintained that position throughout the trial proceedings, on summation, and in opposition to defendant's CPL article 330 and 440 motions. Indeed, in their brief on appeal, the People contend that "[n]o promises were made to [the codefendant] by the prosecution." "A prosecutor's duty of disclosing exculpatory material extends to disclosure of evidence impeaching the credibility of a prosecution witness whose testimony may be determinative of guilt or innocence" (*People v Baxley*, 84 NY2d 208, 213, *rearg dismissed* 86 NY2d 886), and the codefendant's testimony here clearly demonstrates that he was such a witness. Therefore, as the Court of Appeals stated in a similar situation, "[i]t is worth noting . . . that no prosecutor with knowledge of the negotiations . . . has yet made a full disclosure to any court" regarding the promises that were made to the codefendant in exchange for his cooperation against defendant (*People v Steadman*, 82 NY2d 1, 6). We conclude that defendant's contentions in support of his motion, together with the supporting evidence that he submitted in conjunction with his motion, raise a question of fact regarding whether promises were made to the codefendant in return for his testimony against defendant, beginning before the matter was presented to the grand jury and continuing throughout the trial and thereafter, and thus whether defendant may be entitled to a new trial based on the failure to disclose material that affects the credibility of a key prosecution witness (*see People v Harris*, 35 AD3d 1197, 1197). Contrary to the People's contention, the record does not permit adequate review of those issues, and we agree with defendant that the court erred in denying the motion without a hearing on the ground that "sufficient facts appear on the record with respect to the ground[s] or issue[s] raised upon the motion to permit adequate review thereof upon [direct] appeal" (CPL 440.10 [2] [b]).

The second ground advanced by defendant in support of his CPL article 440 motion was that a juror lacked the capacity to serve on the jury, and that the juror had misrepresented his employment status in response to questioning by the court. Defendant submitted some evidence establishing that the prospective juror may be developmentally disabled and that he may have misrepresented his prior

and current employment, but defendant's investigator was unable to obtain more information without judicial subpoenas that the court declined to provide. Inasmuch as defendant submitted evidence that called into question "whether this particular juror should have been entrusted with the responsibilities of fact finding [because the juror] did not understand the lawyers or the judge" (*People v Sanchez*, 99 NY2d 622, 623), the court further erred in denying the motion on the ground that the issue could be decided on direct appeal.

We therefore reverse the order in appeal No. 2 and remit the matter to Supreme Court to decide defendant's motion following a hearing on the issues raised therein, including the details of any promises that were made to the codefendant and whether the People breached their *Brady* obligation to disclose those promises, and whether the juror misrepresented his employment and lacked the capacity to sit on the jury.

We do not consider the People's further contentions that the court should have denied the motion pursuant to CPL 440.30 (4) (b) and (d). The court did not decide the motion adversely to defendant on those grounds, and thus we may not affirm the order in appeal No. 2 on those grounds (*see People v Concepcion*, 17 NY3d 192, 197-198; *People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 93 NY2d 849).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

638

KA 12-00591

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORI BUCKMAN, 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 Monroe County Court (Alex R. Renzi, J.), rendered February 1, 2012. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: In 2008, defendant was convicted upon a plea of guilty of one count each of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We modified the judgment of conviction by vacating the sentence imposed on both counts and remitted the matter to County Court for resentencing because "County Court erred in failing to impose a sentence for each count of which defendant was convicted" (*People v Buckman*, 90 AD3d 1635, 1636, *lv denied* 18 NY3d 955). Upon remittal, County Court resentenced defendant on one count to a determinate term of incarceration of nine years, to be followed by five years of postrelease supervision, and to a concurrent indeterminate term of incarceration of 2 to 4 years on the other count.

We reject defendant's contention that the court erred in denying his motion to withdraw his plea with respect to both counts. While it is well settled that "a guilty plea induced by an unfulfilled promise either must be vacated or the promise honored" (*People v Selikoff*, 35 NY2d 227, 241, *cert denied* 419 US 1122), it is also well settled that "[c]ompliance with a plea bargain is to be tested against an objective reading of the bargain, and not against a defendant's subjective interpretation thereof" (*People v Cataldo*, 39 NY2d 578, 580). Here, the only sentencing promise made to defendant was that he would receive a nine-year term of incarceration in exchange for his plea of

guilty to both counts of the indictment. Thus, inasmuch as the aggregate prison term imposed by the court on resentencing was nine years of incarceration, we conclude that defendant "clearly received the benefit of his bargain" (*People v Collier*, 22 NY3d 429, 434, *cert denied* ___ US ___).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

640

KA 13-01924

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOVAN BARKSDALE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOVAN BARKSDALE, DEFENDANT-APPELLANT PRO SE.

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 August 29, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends in his main and pro se supplemental briefs that County Court erred in determining that he lacked standing to seek suppression of the weapon seized by the police without conducting a hearing on the issue of standing. We reject that contention. It is undisputed that the weapon was not found on defendant's person or on property in which defendant had a legitimate expectation of privacy (*see People v Wesley*, 73 NY2d 351, 357-358), nor did defendant allege that police conduct caused him to relinquish control of the weapon (*see People v Mendoza*, 82 NY2d 415, 432).

Contrary to defendant's further contention, the court properly denied his *Batson* challenge based on its determination that the prosecutor's explanation for the peremptory challenge at issue was not pretextual (*see People v Ramos*, 124 AD3d 1286, 1287).

Defendant failed to preserve for our review his contention regarding the alleged legal insufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19; *People v Arroyo*, 111 AD3d 1299, 1299, *lv denied* 23 NY3d 960). Viewing the evidence in light of the elements

of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We further reject defendant's contention that the court erred in admitting the testimony of a police officer regarding the meaning and/or interpretation of certain "street slang" used in a recorded telephone call made by defendant while he was incarcerated. "[E]xpert testimony interpreting the meaning of words is not restricted to narcotics cases . . . , and the record establishes that the police officer was qualified to interpret the language based on his experience" (*People v Browning*, 117 AD3d 1471, 1471, *lv denied* 23 NY3d 1060). Although in one instance the officer may have gone beyond merely interpreting certain words or phrases from the recorded telephone call, we note that the court issued an agreed upon cautionary instruction to the jury, which effectively "eliminated any potential prejudice to defendant" (*People v Green*, 170 AD2d 1024, 1025, *lv denied* 78 NY2d 966).

We likewise reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to file a CPL 30.30 motion and defense counsel's failure to make a specific motion for a trial order of dismissal based on legal insufficiency. With respect to the CPL 30.30 motion, we conclude that such a motion would have been unsuccessful, and defense counsel is not ineffective for failing to make a motion that has little or no chance of success (*see People v Harris*, 97 AD3d 1111, 1111-1112, *lv denied* 19 NY3d 1026). We reach the same conclusion with respect to defense counsel's failure to make a specific motion for a trial order of dismissal (*see id.*).

Finally, we reject defendant's challenge to the severity of the sentence.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

641

KA 11-00414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT BURNICE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARY P. DAVISON 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 (Richard A. Keenan, J.), rendered December 17, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty to two counts of burglary in the second degree (Penal Law § 140.25 [2]). We agree with defendant that the waiver of the right to appeal was not valid inasmuch as it is not evident from the record that County Court (Keenan, J.) determined that defendant understood the consequences of that waiver (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Lopez*, 6 NY3d 248, 256). Furthermore, the court did not advise defendant that the waiver included a challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928; *People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076). In any event, we conclude that defendant's challenge to the negotiated sentence as unduly harsh and severe is without merit.

We reject defendant's further contention that the court abused its discretion by refusing to accept defendant's initial plea to one count of the indictment after defendant stated that the court threatened and pressured him into accepting the plea (*see People v Mercado*, 226 AD2d 1125, 1125, *lv denied* 88 NY2d 968). We also reject defendant's contention that County Court (Argento, J.) misapprehended its authority when it failed to issue a "violent felony override" upon the retirement of the judge who had reserved on defendant's request for such an override at the time of sentencing. Judge Argento properly noted that there is no procedure for the issuance of such a document. Indeed, "no regulation or statute provides for such a

document" (*People v Ellis*, 123 AD3d 1054, 1054; *see generally People v Massey*, 111 AD3d 1359, 1359). To the extent that the provisions of 7 NYCRR 1900.4 (c) (1) (iii) are utilized by the Department of Corrections and Community Supervision in determining whether certain inmates are eligible for institutional programming (*see generally People v Dozier*, 109 AD3d 838, 840, *lv denied* 22 NY3d 1040; *Matter of Clow v Coughlin*, 222 AD2d 781, 781-782), we note that defendant was not prevented by the court from obtaining documentation from the court or the District Attorney indicating that no weapons were used in these offenses and that no person sustained a serious injury.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

645

KA 14-00512

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER M. EDWARDS, 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 (Matthew J. Murphy, III, J.), rendered February 28, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, intimidating a victim or witness in the second degree and assault in the third 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 a jury verdict of, inter alia, burglary in the first degree (Penal Law § 140.30 [2]) and intimidating a victim or witness in the second degree (§ 215.16 [2]), defendant contends that the verdict is against the weight of the evidence with respect to those crimes. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Gibson*, 89 AD3d 1514, 1515, *lv denied* 18 NY3d 924). Defendant's further contention that the verdict is inconsistent because he was convicted of burglary in the first degree but was acquitted of the count of assault in the third degree related to that same incident is not preserved for our review inasmuch as defendant failed to object to the verdict before the jury was discharged (*see People v Bartlett*, 89 AD3d 1453, 1454, *lv denied* 18 NY3d 881), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's challenge to the severity of the sentence.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

646

CAF 12-01975

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

IN THE MATTER OF PAULINE KEICHER, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DONALD SCHEIFLA, RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 1, 2012 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Memorandum: Petitioner brought a petition in March 2012 pursuant to Family Court Act article 8 alleging that respondent committed various family offenses. Family Court granted respondent's motion to dismiss the petition, without prejudice, pursuant to CPLR 3211 (a) (7). We affirm. The court determined that, because the petition failed to specify when the alleged incidents occurred, the court was unable to ascertain whether the allegations were the subject of a December 2011 hearing following which the court dismissed the petition for failure to prove the allegations by a preponderance of the evidence. Any allegations concerning events that were the subject of the 2011 hearing were barred by collateral estoppel (*see Maybaum v Maybaum*, 89 AD3d 692, 695), and thus the petition would have been properly dismissed to that extent. We are unable to review the propriety of the court's decision, however, because petitioner failed to include in the record on appeal either the petition that was the subject of the 2011 hearing or the transcript of that hearing. Petitioner, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

648

CAF 14-01134

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

IN THE MATTER OF ZACHARY H.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JESSICA H., RESPONDENT-APPELLANT.

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

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (POLLY E. JOHNSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, ATTORNEY FOR THE CHILD, OSWEGO.

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered May 28, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights over 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 that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and freed the child for adoption. Contrary to the mother's 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" (*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 problem that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see Matter of Cayden L.R. [Melissa R.]*, 108 AD3d 1154, 1155-1156, *lv denied* 22 NY3d 866; *Ja-Nathan F.*, 309 AD2d at 1152). Contrary to the further contention of the mother, Family Court properly determined that she failed to plan for the future of the child, although able to do so (*see Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341). The mother did not comply with her service plan, inasmuch as she did not regularly attend visitation, find stable housing, or consistently

engage in mental health treatment.

Finally, the court did not abuse its discretion in refusing to enter a suspended judgment. The record supports the court's determination that a suspended judgment, i.e., "a brief grace period designed to prepare the parent to be reunited with the child" (*Matter of Michael B.*, 80 NY2d 299, 311), was not in the best interests of the child (*see Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525). The mother's "negligible progress" in addressing the issues that initially necessitated the child's removal from her custody " 'was not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*Alexander M.*, 106 AD3d at 1525).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

651

CA 14-02303

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION.

BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.

K&L GATES LLP, NEW YORK CITY (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (JON NED LIPSITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered April 15, 2013. The order, insofar as appealed from, denied the motion of defendant Crane Co. for summary judgment.

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

Memorandum: In this products liability action, plaintiff, on behalf of Lee Holdsworth (decedent) and his deceased wife, seeks damages for injuries sustained by decedent as a result of his exposure to asbestos products used in conjunction with valves manufactured by Crane Co. (defendant). The valves were part of a system that transported steam throughout the industrial plant where decedent was employed from 1956 to 1982. The complaint alleges that defendant failed to warn decedent of the risk of asbestos in component parts, i.e., gaskets and packing, used in conjunction with its valves. Decedent was allegedly exposed to asbestos fibers when, in replacing the worn-out component parts to defendant's valves, he scraped the "baked on" asbestos material from the valves. We conclude that Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint against it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Defendant contends that, because it did not produce or sell the component parts containing asbestos, it did not place those parts into

the stream of commerce and thus cannot be liable for a failure to warn of the dangers associated with asbestos, relying on *Rastelli v Goodyear Tire & Rubber Co.* (79 NY2d 289). We have recently rejected defendant's interpretation of *Rastelli* as applied to component parts containing asbestos that are used with its products (*see Matter of Eighth Jud. Dist. Asbestos Litig.*, 115 AD3d 1218, *lv granted* 24 NY3d 907), as has the First Department (*see Matter of New York City Asbestos Litig.*, 121 AD3d 230, *mot to dismiss appeal denied* 24 NY3d 1216).

It is well established that "a plaintiff may recover in strict products liability or negligence when a manufacturer fails to provide adequate warnings regarding the use of its product . . . A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its products of which it knew or should have known" (*Rastelli*, 79 NY2d at 297). Although the Court of Appeals determined that, under the facts presented in *Rastelli*, defendant Goodyear Tire & Rubber Co. was not liable for failing to warn about the potential dangers of mounting the tire on a multipiece rim, we conclude that the same result is not mandated here (*see New York City Asbestos Litig.*, 121 AD3d at 252). Even assuming, arguendo, that defendant met its initial burden of establishing that its valves did not require components containing asbestos in order to perform as intended, we conclude that plaintiff raised an issue of fact whether defendant knew that components that did not contain asbestos would be unable to withstand the heat for the intended purpose of the valve when used in high pressure steam lines, that it intended that component parts containing asbestos would be used for that purpose, and thus that the exposure to asbestos when replacing those components to ensure that the valves functioned properly was foreseeable (*see generally Rastelli*, 79 NY2d at 297). Defendant's reliance on our decision in *Matter of Eighth Jud. Dist. Asbestos Litg.* (92 AD3d 1259, 1260, *lv denied* 19 NY3d 803) is misplaced, because in that case there was no evidence that the valves required external insulation or that defendant knew that external insulation would be used (*see New York City Asbestos Litig.*, 121 AD3d at 249; *cf. Berkowitz v A.C.& S., Inc.*, 288 AD2d 148, 149).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

652

CA 14-01886

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

IN THE MATTER OF COUNTY OF CAYUGA,
PETITIONER-PLAINTIFF-RESPONDENT,

V 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.

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

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered June 13, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, annulled respondents-defendants' determination dated February 10, 2014 that denied petitioner-plaintiff's claims for reimbursement of overburden expenses incurred prior to January 1, 2006.

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 (*see Matter of County of Chautauqua v Shah* [appeal No. 1], 126 AD3d 1317).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

655

CA 14-02110

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

PRISCILLA MORRIS, AS ADMINISTRATRIX OF THE ESTATE OF FRANCIS LEE MORRIS, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ROCHESTER-GENESEE REGIONAL TRANSPORTATION AUTHORITY, LIFT LINE, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

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

CELLINO & BARNES, P.C., ROCHESTER (K. JOHN WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 7, 2014. The order, among other things, denied in part the motion of defendants Rochester-Genesee Regional Transportation Authority and Lift Line, Inc., to dismiss certain causes of action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 26 and 28, 2015,

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

656

CA 15-00015

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

SHELLY F. MOORE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NANCY A. CURTISS, DEFENDANT-APPELLANT,
AND HENRY COX, DEFENDANT-RESPONDENT.

ADAMS, HANSON, REGO, KAPLAN & FISHBEIN, WILLIAMSVILLE (BETHANY A. RUBIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

MURA & STORM, PLLC, BUFFALO (RYAN MURA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered August 12, 2014. The order denied the motion of defendant Nancy A. Curtiss for summary judgment dismissing the complaint and all cross claims against her.

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 sustained in a motor vehicle accident. Plaintiff was a passenger in a taxicab operated by defendant Henry Cox, and the collision occurred when Cox made a right-hand turn into a driveway in the path of a vehicle operated by defendant Nancy A. Curtiss. Her vehicle skidded on the snowy roadway when she applied her brakes in an effort to avoid Cox's vehicle. Supreme Court properly denied the motion of Curtiss seeking summary judgment dismissing the complaint against her. We agree with Curtiss that, as the driver with the right-of-way, she was entitled to anticipate that Cox would obey the traffic laws that required him to yield to her oncoming vehicle (*see Rose v Lebreth*, ___ AD3d ___, ___ [May 8, 2015]; *Lescenski v Williams*, 90 AD3d 1705, 1705, *lv denied* 18 NY3d 811). Nevertheless, viewing the submissions of the parties in the light most favorable to plaintiff and Cox, as we must (*see Victor Temporary Servs. v Slattery*, 105 AD2d 1115, 1117), we conclude that the submissions of Curtiss in support of her motion raise an issue of fact whether she failed to see Cox's turn signal and thus failed to " 'exercise reasonable care under the circumstances to avoid an accident' " (*Cupp v McGaffick*, 104 AD3d 1283, 1284). We further conclude that the submissions of Curtiss

raise an issue of fact whether the speed at which she was traveling, although reduced because of the weather conditions, was reasonable and prudent under the circumstances (*see Campo v Neary*, 52 AD3d 1194, 1196; *Pietrantoni v Pietrantoni*, 4 AD3d 742, 742, *lv dismissed* 2 NY3d 823).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

657

CA 14-01888

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

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

V 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.

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), NANCY ROSE STORMER, P.C., UTICA, AND BOND SCHOENECK & KING, PLLC, FOR PETITIONER-PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William P. Polito, J.), entered July 3, 2014 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, annulled respondents-defendants' February 20, 2014 and March 6, 2014 denial of petitioner-plaintiff's reimbursement claims.

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 (*see Matter of County of Chautauqua v Shah* [appeal No. 1], 126 AD3d 1317).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

658

CA 14-02081

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

IN THE MATTER OF PATRICIA DEROSA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PAUL DYSTER, AS MAYOR OF CITY OF NIAGARA FALLS,
AND CITY OF NIAGARA FALLS,
RESPONDENTS-RESPONDENTS.

LAW OFFICES OF W. JAMES SCHWAN, BUFFALO (W. JAMES SCHWAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered March 4, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondents to dismiss the petition and dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing her CPLR article 78 petition seeking to direct respondents to provide her with family health insurance coverage. This is the second proceeding petitioner has commenced pursuant to CPLR article 78 seeking such health insurance coverage from respondents. Her prior petition was granted by Supreme Court, which determined that petitioner was entitled to family health insurance coverage provided by respondents at no cost to her pursuant to a Memorandum of Understanding between respondent City of Niagara Falls and petitioner's union. Our modification of the judgment in the prior appeal was on grounds not relevant herein (*Matter of DeRosa v Dyster*, 90 AD3d 1470). We conclude that the instant petition, which seeks identical relief based on the same provisions in the Memorandum of Understanding, "is precisely the type of repetitive litigation the doctrine of claim preclusion is designed to avoid" (*Matter of Reilly v Reid*, 45 NY2d 24, 31), and it was properly dismissed based on the doctrine of res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357; *Barrett v Setright*, 193 AD2d 1094, 1095, *lv denied* 82 NY2d 662; *Israel v Walter*

Kaye Assoc., 145 AD2d 467, 468-469, *lv denied* 74 NY2d 607).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

659

KA 11-01818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. PRINDLE, 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 Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered August 3, 2011. Defendant was resentenced upon his conviction of manslaughter in the second degree.

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

Memorandum: Defendant appeals from a resentence imposed by Supreme Court upon remittal from the Court of Appeals, which modified the judgment by reducing his conviction of murder in the second degree (Penal Law § 125.25 [2]) to manslaughter in the second degree (§ 125.15 [1]) (*People v Prindle*, 16 NY3d 768, 769). Upon remittal, the court adjudicated defendant a persistent felony offender and resentenced him to an indeterminate term of imprisonment of 15 years to life.

Defendant initially contends that New York's persistent felony offender statute is unconstitutional in light of the rule in *Apprendi v New Jersey* (530 US 466). We reject that contention. It is well settled that the persistent felony offender statute is constitutional (*see People v Battles*, 16 NY3d 54, 59, *cert denied* ___ US ___, 132 S Ct 123; *People v Quinones*, 12 NY3d 116, 122-131, *cert denied* 558 US 821). Contrary to defendant's further contention, his resentencing does not violate the rule in *Alleyne v United States* (___ US ___, 133 S Ct 2151), inasmuch as the factors that made him eligible for enhanced sentencing were prior convictions that were based on proof beyond a reasonable doubt, and thus those factors were not "based on [the court's] finding by a preponderance of the evidence" (*Alleyne*, ___ US at ___, 133 S Ct at 2163).

Contrary to defendant's further contention, "[i]t is settled law that the sentencing of a defendant as a persistent felony offender

. . . does not implicate the protections embodied in the Double Jeopardy Clauses of the Federal and State Constitutions" (*People v Pelkey*, 294 AD2d 669, 670, *lv denied* 98 NY2d 771; *see People v Sailor*, 65 NY2d 224, 226-227, *cert denied* 474 US 982; *see also Monge v California*, 524 US 721, 728-729).

Finally, we reject defendant's contentions that he was improperly adjudicated a persistent felon, and that the sentence is unduly harsh and severe. We conclude that defendant's "history and character . . . and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest" (Penal Law § 70.10 [2]; *see People v Bastian*, 83 AD3d 1468, 1470, *lv denied* 17 NY3d 813; *People v Perry*, 19 AD3d 619, 619, *lv denied* 5 NY3d 809, *reconsideration denied* 5 NY3d 855).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

660

KA 14-00784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK NICHOLSON, DEFENDANT-APPELLANT.

HUNT & BAKER, HAMMONDSPORT (BRENDA S. ASTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Steuben County Court (Marianne Furfure, A.J.), entered December 26, 2013. 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.*). We reject defendant's contention that reversal is required because County Court failed to state what burden of proof it imposed on defendant's request for a downward departure (*see generally People v Gillotti*, 23 NY3d 841, 861). In any event, we conclude, based upon our review of the record, that defendant failed to establish his entitlement to a downward departure by a preponderance of the evidence (*see People v Merkley*, 125 AD3d 1479, 1479; *see generally Gillotti*, 23 NY3d at 861).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

661

KA 13-01896

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER REED, DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Erie County Court (Michael L. D'Amico, J.), entered September 13, 2013. The order, insofar as appealed from, denied that part of the motion of defendant seeking DNA testing pursuant to CPL 440.30 (1-a) (a).

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

Memorandum: Defendant appeals from that part of an order denying his pro se motion pursuant to CPL 440.30 (1-a) seeking DNA testing of blood that was on his boots when he was arrested. Because the blood was subjected to DNA testing before trial, and "CPL 440.30 (1-a) does not provide for retesting of DNA material" (*People v Holman*, 63 AD3d 1088, 1088, *lv denied* 13 NY3d 860; *see People v Jones*, 307 AD2d 721, 722, *lv denied* 1 NY3d 574, *reconsideration denied* 1 NY3d 629), we conclude that County Court properly denied the motion. In any event, we note that the primary issue at trial was the identity of the perpetrator who committed, inter alia, nine counts of murder in the second degree, and the People established through the testimony of multiple eyewitnesses, without presenting any DNA evidence, that the perpetrator was defendant (*People v Reed*, 236 AD2d 866, 866-867, *lv denied* 89 NY2d 1099). We therefore further conclude that there is no reasonable probability that the verdict would have been more favorable to him even if DNA testing had established that the blood on the boots was not that of any of the victims (*see* CPL 440.30 [1-a] [a] [1]; *People v Pitts*, 4 NY3d 303, 311, *rearg denied* 5 NY3d 783; *People v Swift*, 108 AD3d 1060, 1061-1062, *lv denied* 21 NY3d 1077; *People v Brown*, 36 AD3d 961, 961-962, *lv denied* 8 NY3d 920).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

662

KA 13-01565

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLIE MIXON, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (M. William Boller, A.J.), entered May 16, 2013. The order, insofar as appealed from, denied that part of the motion of defendant seeking DNA testing pursuant to CPL 440.30 (1-a).

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

Memorandum: Defendant appeals from an order insofar as it denied his motion pursuant to CPL 440.30 (1-a) seeking DNA testing of items secured in connection with his 1990 conviction of one count of arson in the first degree and six counts of murder in the second degree (*People v Mixon*, 203 AD2d 909, *lv denied* 84 NY2d 830, *reconsideration denied* 84 NY2d 909). We conclude that Supreme Court properly denied the motion. Defendant failed to establish that if DNA tests had been conducted on certain items from the crime scene and the results had been admitted at his trial that "there exists a reasonable probability that the verdict would have been more favorable to" him (CPL 440.30 [1-a] [a] [1]; *see People v Mixon*, 30 AD3d 1103, 1103, *lv denied* 7 NY3d 903).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

665

KA 12-00688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN E. SIMS, DEFENDANT-APPELLANT.

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

GLENN E. SIMS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered February 21, 2012. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]). We agree with defendant that the waiver of the right to appeal is invalid inasmuch as the purported waiver was obtained at sentencing, and there is no indication that Supreme Court obtained a knowing and voluntary waiver of that right at the time of the plea (*see People v Pieper*, 104 AD3d 1225, 1225). We nevertheless reject defendant's contention that the sentence is unduly harsh or severe.

Defendant's contention in his pro se supplemental brief that the indictment was defective for failing to give sufficient specificity with respect to the time frames for the alleged crimes is waived by his plea of guilty (*see* CPL 200.50 [7] [a]; *People v Young*, 100 AD3d 1186, 1187-1188, *lv denied* 21 NY3d 1021; *People v Riley*, 267 AD2d 1072, 1073; *cf. People v Iannone*, 45 NY2d 589, 600). In any event, "[w]here, as here, [a] crime charged in the indictment is a continuing offense, 'the usual requirements of specificity with respect to time do not apply' " (*People v Errington*, 121 AD3d 1553, 1554), and we conclude that the time frames recited in the indictment were specific enough to satisfy the requirements of due process (*see id.*; *People v Muhina*, 66 AD3d 1397, 1398, *lv denied* 13 NY3d 909). Defendant's

further contention in his pro se supplemental brief that he was denied effective assistance of counsel is also without merit. Defendant made " 'no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that [he] entered the plea because of his attorney[']s allegedly poor performance' " (*People v Granger*, 96 AD3d 1669, 1670, *lv denied* 19 NY3d 1102; *see People v Gerald*, 103 AD3d 1249, 1250-1251). Finally, we reject defendant's contention in his pro se supplemental brief that the court erred in failing to listen to his statements in recorded phone calls before issuing its decision after the *Huntley* hearing. Inasmuch as there was no showing that the content of defendant's statements was relevant to the issue of voluntariness, there was no error (*see People v Rutley*, 57 AD3d 1497, 1497, *lv denied* 12 NY3d 821).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

668

KA 13-01491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. CARNEY, DEFENDANT-APPELLANT.

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

JOHN W. CARNEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 28, 2013. 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 his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant " 'in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976), and that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal forecloses any challenge by defendant to the severity of the bargained-for sentence (*see id.* at 255; *see also People v Vincent*, 114 AD3d 1171, 1171, *lv denied* 23 NY3d 969; *People v Williams*, 49 AD3d 1280, 1280; *see generally People v Lococo*, 92 NY2d 825, 827).

Defendant's further contention that the court failed to comply with the procedural requirements of CPL 400.21 does not survive his valid waiver of the right to appeal inasmuch as he challenges the procedure pursuant to which he was sentenced as a second felony offender, rather than the legality of the sentence (*see People v*

Adams, 64 AD3d 1186, 1187, *lv denied* 13 NY3d 834).

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

670

CAF 14-00870

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

IN THE MATTER OF THE ADOPTION OF HAILEY

TAYLOR G., PETITIONER-APPELLANT,

ORDER

V

DARLA L., RESPONDENT-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, FOR PETITIONER-APPELLANT.

KRYSTAL A. RUPERT, ATTORNEY FOR THE CHILD, LOWVILLE.

Appeal from an order of the Family Court, Lewis County (Donald E. Todd, A.J.), entered April 22, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the application of petitioner to revoke a surrender instrument.

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: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

676

CA 14-02139

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

BRANDYWINE PAVERS, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAT J. BOMBARD, ERMA C. JERVA, DENISE M. THURSTON, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS,

---

DAVID P. MARTIN, COURT APPOINTED RECEIVER, RESPONDENT.

HINMAN, HOWARD & KATTELL, LLP, BINGHAMTON (LINDA B. JOHNSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DENISE M. THURSTON, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered February 10, 2014 in a foreclosure action. The order, insofar as appealed from, granted the application of defendant Denise M. Thurston for an order directing that a portion of an appeal undertaking, posted on behalf of defendant Pat J. Bombard, be paid to her.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the application is denied, and the proceeds of the undertaking are ordered to be paid to plaintiff.

Memorandum: Plaintiff commenced this action to foreclose on property owned by defendant Pat J. Bombard. Bombard appealed from an amended judgment of foreclosure and sale (amended judgment) and obtained a stay of all proceedings to enforce the amended judgment, including any sale of the property, upon the posting of an undertaking in the amount of $120,000. Defendant Denise M. Thurston, who obtained several judgments against Bombard for unpaid child support, issued restraining notices on the undertaking posted by Bombard. After we affirmed the amended judgment (*see Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209), almost $95,000 of the undertaking was applied to unpaid real estate taxes upon the property pursuant to a "stipulation and order." The remaining amount was released to plaintiff to hold in escrow. The property was purchased by plaintiff for less than the amount owing to plaintiff. Thurston thereafter made an application for an order directing that a portion of the proceeds of the undertaking be paid to her, and Supreme Court granted that relief,

ordering plaintiff to pay Thurston approximately $12,000, representing the outstanding amount of her judgments against Bombard, and further ordering that plaintiff could retain the balance of the proceeds of the undertaking. Plaintiff now appeals from that part of the order directing it to pay a portion of the proceeds of the undertaking to Thurston, and we reverse the order to that extent.

The undertaking posted by Bombard for the stay of the amended judgment was pursuant to CPLR 5519 (a) (6), which provides in relevant part that "if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency." Here, the amended judgment provided that Bombard was required to pay any deficiency, and we therefore conclude that plaintiff established its entitlement to the undertaking once it showed that there was a deficiency. The fact that Thurston filed restraining notices against the undertaking did not give her priority over plaintiff (*see Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 579-580; *Matter of Kitson & Kitson v City of Yonkers*, 10 AD3d 21, 25).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

682

CA 14-01679

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

IN THE MATTER OF HAMILTON EQUITY GROUP, LLC, AS ASSIGNEE OF HSBC BANK USA, NATIONAL ASSOCIATION, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH A. ABLES, JR., RESPONDENT, JUAN E. IRENE, PLLC, AND JUAN E. IRENE, INDIVIDUALLY AND DOING BUSINESS AS THE LAW OFFICE OF JUAN E. IRENE, ESQ., RESPONDENTS-RESPONDENTS.

RUPP, BAASE, PFALZGRAF & CUNNINGHAM LLC, BUFFALO (R. ANTHONY RUPP, III, OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered January 15, 2014. The order dismissed the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a turnover order pursuant to CPLR 5225 (b). In a prior action, Supreme Court awarded petitioner money damages against Juan E. Irene, PLLC (PLLC) and Juan E. Irene, individually and doing business as the Law Office of Juan E. Irene, Esq. (respondent), as well as an order of replevin and a writ of seizure covering any attorneys' fees that would be paid by certain clients of the PLLC. Respondent appealed from the judgment in that action insofar as the judgment awarded money damages against him, and he appealed from the order insofar as it granted that part of petitioner's motion seeking summary judgment against him. We vacated the judgment and reversed the order "insofar as appealed from" (*Hamilton Equity Group, LLC v Juan E. Irene, PLLC*, 101 AD3d 1703, 1703).

We agree with petitioner that the court erred in dismissing the petition. The petition sought to recover attorneys' fees owing to the PLLC from one of the clients listed in the order of replevin. Our prior order did not affect the judgment and order entered against the PLLC. Indeed, we noted that respondent "does not dispute that

[petitioner] has a security interest in a portion of the attorney[s'] fees that may be generated by those personal injury cases" (*id.* at 1704).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

684

CA 15-00047

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

GREGORY S. HEDLUND, PLAINTIFF-RESPONDENT,

V ORDER

JAMESTOWN PUBLIC SCHOOLS, JAMESTOWN PUBLIC SCHOOLS BOARD OF EDUCATION, DEFENDANTS-RESPONDENTS, AND PICONE CONSTRUCTION CORPORATION, DEFENDANT.

PICONE CONSTRUCTION CORPORATION, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

GILLETTE MASONRY, INC., THIRD-PARTY DEFENDANT-APPELLANT.

MACDONALD, ILLIG, JONES & BRITTON LLP, ERIE, PENNSYLVANIA (BRUCE L. DECKER, JR., OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

FARACI LANGE LLP, BUFFALO (PETER F. BRADY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (GERARD E. O'CONNOR OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered April 24, 2014. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment on liability pursuant to Labor Law § 240 (1) against defendants Jamestown Public Schools and Jamestown Public Schools Board of Education; denied those parts of the cross motion of defendants Jamestown Public Schools and Jamestown Public Schools Board of Education for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim and § 241 (6) claim insofar as it alleged a violation of 12 NYCRR 23-5.1 (c) and 12 NYCRR 23-5.1 (g); granted that part of the cross motion of defendants Jamestown Public Schools and Jamestown Public Schools Board of Education for summary judgment on defense and contractual indemnification against defendant Picone Construction Corporation; and granted the cross motion of third-party plaintiff Picone Construction Corporation for summary judgment on defense and

contractual indemnification against third-party defendant, Gillette Masonry, Inc.

It is hereby ORDERED that said appeal from the order insofar as it granted that part of the cross motion of defendants Jamestown Public Schools and Jamestown Public Schools Board of Education seeking summary judgment against defendant Picone Construction Corporation be and the same hereby is unanimously dismissed (*see* CPLR 5511), and the order is affirmed without costs for reasons stated in the decision at Supreme Court.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

685

KA 12-01370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BLAIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 18, 2012. The appeal was held by this Court by order entered October 3, 2014, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (121 AD3d 1570). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court to decide those parts of defendant's pretrial motion seeking inspection of the grand jury minutes and dismissal of the indictment on the grounds that the evidence before the grand jury was legally insufficient and the grand jury proceeding was defective (*People v Blair*, 121 AD3d 1570, 1571-1572). In that prior decision, we rejected defendant's remaining contentions. Upon remittal, the court denied the above-mentioned parts of defendant's motion. Defendant raises no contentions with respect to that denial and has thus abandoned any such contentions (*see People v Bridgeland*, 19 AD3d 1122, 1123; *People v Jones*, 2 AD3d 1397, 1399, *lv denied* 2 NY3d 742), and we therefore affirm the judgment.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

686

KA 12-00764

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON L. WRIGHT, ALSO KNOWN AS EIGHT-BALL,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

687

KA 12-00765

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON L. WRIGHT, ALSO KNOWN AS EIGHT-BALL,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 24, 2012. 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

689

KA 14-00568

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE L. LEIGHTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered May 9, 2013. The judgment convicted defendant, upon her plea of guilty, of failure to exercise due care, reckless driving, driving while ability impaired by drugs, driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, vehicular assault in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [4]). We agree with defendant that the waiver of the right to appeal does not encompass her challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal" with respect to her conviction that she was also waiving her right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

690

KA 14-00057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ELAINA J. MEAD, ALSO KNOWN AS ELAINA MEAD,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered December 4, 2013. The judgment convicted defendant, upon her plea of guilty, of attempted menacing a police officer or peace officer.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

691

KA 14-00491

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ADAM C. SMITH, DEFENDANT-APPELLANT.

CHRISTOPHER MICHAEL PALERMO, WOLCOTT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered October 17, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and conspiracy in the fourth degree.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

694

KA 14-00064

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE G. JOHNSON, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (SYDNEY V. PROBST OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 28, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress the handgun seized from him as he stood on the porch of his cousin's residence. Contrary to defendant's contention, the police conduct "was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858). The officer had an "objective, credible reason, not necessarily indicative of criminality," to approach defendant to request information (*People v Moore*, 6 NY3d 496, 498; *see People v DeBour*, 40 NY2d 210, 223; *People v Bracy*, 91 AD3d 1296, 1297, *lv denied* 20 NY3d 1060). The officer's level of suspicion and the justification for increasingly intrusive police action escalated when defendant turned and the officer observed the outline of a handgun in the pocket of defendant's windbreaker jacket. Based on that observation, the officer had at least a "founded suspicion that criminal activity [was] afoot" to support his common-law right to inquire whether the object was a gun (*DeBour*, 40 NY2d at 223; *see People v Hollman*, 79 NY2d 181, 184-185). When defendant gave an affirmative response, the officer was entitled to pat down defendant, seize the handgun (*see People v Trott*, 105 AD3d 1416, 1417, *lv denied* 21 NY3d 1020), and arrest defendant (*see People*

v Forbes, 244 AD2d 954, 954, *lv denied* 91 NY2d 941).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

696

CAF 13-02184

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

IN THE MATTER OF TAMMY L. GAINES,
PETITIONER-APPELLANT,

V ORDER

JASON F. PERRY, RESPONDENT-RESPONDENT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-APPELLANT.

LOVALLO & WILLIAMS, BUFFALO (TIMOTHY R. LOVALLO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

JOSEPH C. BANIA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered October 4, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

697

CAF 12-01583

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

IN THE MATTER OF JOHNATHAN B.M.,
RESPONDENT-APPELLANT.
---------- MEMORANDUM AND ORDER
STEUBEN COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO, FOR RESPONDENT-APPELLANT.

ALAN P. REED, COUNTY ATTORNEY, BATH, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered August 2, 2012 in a proceeding pursuant to Family Court Act article 3. The order, among other things, placed respondent in the custody of the Commissioner of Social Services of Steuben County for a period of one year.

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

Memorandum: On appeal from an order of disposition placing him in the custody of the Commissioner of Social Services of Steuben County for a period of one year, respondent contends that his admission to acts that, if committed by an adult, would constitute the crime of forcible touching was defective because Family Court failed to comply with Family Court Act § 321.3 (1). We agree. That section prohibits a court from consenting to the entry of an admission unless it has ascertained, through an allocution of the respondent and his or her parent, that respondent is aware of, inter alia, " 'all possible dispositional alternatives' " (*Matter of Sean R.P.*, 24 AD3d 1200, 1201, *lv denied* 6 NY3d 711). " 'The statute's requirements . . . are mandatory and nonwaivable,' " and preservation therefore is not required (*id.*). Here, respondent's admission was defective inasmuch as "the court failed to ascertain that respondent and his parents were aware of 'all possible dispositional alternatives' " (*id.*), such as the possibilities of a conditional discharge or an extension of placement (*see Matter of Melvin A.*, 216 AD2d 227, 227-228*; see also Matter of Andrew J.S.*, 48 AD3d 1224, 1225; *Matter of Franklin M.*, 11 AD3d 469, 469-470; *Matter of Joseph P.*, 229 AD2d 318, 318; *cf. Matter of Daquan BB.*, 83 AD3d 1281, 1282-1283; *Matter of Eric CC.*, 298 AD2d 632, 633). "Because the period of respondent's placement has expired, the petition must be dismissed" (*Sean R.P.*, 24 AD3d at 1201; *see Matter of Alex Z.*, 82 AD3d 995, 996*; cf. Matter of Dakota L.K.*, 70

AD3d 1334, 1335; *Matter of Tyler D.*, 64 AD3d 1243, 1243; *Franklin M.*, 11 AD3d at 470).

In view of our determination, we do not address respondent's remaining contentions concerning the factual sufficiency of the admission or the disposition.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

701

CA 14-02298

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

COLLEEN M. ZBOCK, AS ADMINISTRATRIX OF THE ESTATE OF JOHN P. ZBOCK, JR., DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

DANIEL B. GIETZ, ET AL., DEFENDANTS, PHILLIP C. FOURNIER, FOURNIER ENTERPRISES, INC., AND COPE BESTWAY EXPRESS, INC., DOING BUSINESS AS BESTWAY DISTRIBUTION SERVICE, DEFENDANTS-APPELLANTS.

BURDEN, GULISANO & HICKEY, LLC, BUFFALO (ANDREW KOWALEWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered May 14, 2014. The order denied the motion of defendants Phillip C. Fournier, Fournier Enterprises, Inc., and Cope Bestway Express, Inc., doing business as Bestway Distribution Service, to preclude plaintiff from presenting testimony of Stephanie P. Messina or, in the alternative, to compel plaintiff's counsel to produce a copy of Stephanie P. Messina's statement.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

702

CA 14-02273

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

RICHARD E. SAYERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JANICE M. SAYERS, DEFENDANT-RESPONDENT.

HANDELMAN WITKOWICZ & LEVITSKY, LLP, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (MARGARET MCMULLEN RESTON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered May 21, 2014. The order, among other things, denied the motion of plaintiff for a downward modification of maintenance.

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

Memorandum: Plaintiff husband appeals from an order that denied his motion seeking, inter alia, a downward modification of his maintenance obligation and counsel fees. We note at the outset that, while we agree with plaintiff that Supreme Court misapplied our holding in *Foti v Foti* (114 AD3d 1207) in denying that part of the motion seeking a downward modification of his maintenance obligation, the error is of no moment. In *Foti*, we held that the wife was not entitled to partial summary judgment determining that certain property was separate property because there was an issue of fact whether she had commingled her interests in the property with marital property. In so holding, we noted that the parties had filed a joint federal tax return in which the wife reported her interest in the properties as tax losses, and we wrote that " '[a] party to litigation may not take a position contrary to a position taken in an income tax return' " (*id.* at 1208). Here, contrary to the court's determination, plaintiff was not taking a position contrary to a position taken on previously filed tax returns. Plaintiff and his current wife filed joint income tax returns, listing their income and earnings. At the hearing on his motion, plaintiff attempted to distinguish his income and earnings from those of his current wife. He at no time contradicted information contained in the tax return. In any event, we note that, regardless of the court's erroneous reliance on *Foti*, a court may appropriately consider the assets of a party's current spouse in determining whether to modify the party's maintenance obligation (*see*

e.g. Chisholm v Chisholm, 138 AD2d 829, 830-831).

We reject plaintiff's contention that the court erred in refusing to modify his maintenance obligation. Generally, where there is a separation agreement that remains in force, "no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party" (Domestic Relations Law § 236 [B] [9] [b] [1]; *see Leo v Leo*, 125 AD3d 1319, 1319; *Martin v Martin*, 80 AD3d 579, 580). The parties to a separation agreement, however, "may contractually provide for a support modification on a lesser standard than legally required" (*Glass v Glass*, 16 AD3d 120, 121; *see Martin*, 80 AD3d at 580; *Heller v Heller*, 43 AD3d 999, 1000), and here the parties did so. The parties' separation agreement provides that, should the husband establish that he has suffered a substantial decrease in his income by reason of circumstances beyond his control, rendering him unable to meet his obligation of support, he "shall be entitled to an adjustment" of his maintenance payments. Even assuming, arguendo, that plaintiff established that he had suffered a substantial decrease in his income by reason of circumstances beyond his control, we nevertheless conclude that he failed to establish that he is unable to meet his maintenance obligations. According to the evidence adduced at the hearing, plaintiff gifted $60,000 to $70,000 to his adult children as the cash value of an insurance policy that he canceled. He gave his youngest child money every year, ranging from $5,000 to $12,500. Plaintiff and his current wife rent a home on Canandaigua Lake "not far from where [they] live." Moreover, plaintiff has substantial assets, including a second home in Florida, and he transferred an annuity in his name to an account in his current wife's name (*see Gerringer v Gerringer*, 152 AD2d 652, 653).

Finally, we reject plaintiff's contention that he is entitled to an award of counsel fees. "Because [plaintiff] has sufficient funds and income with which to pay [his] counsel fees, the court did not err in denying that part of [his] . . . motion seeking such fees" (*Bennett v Bennett*, 13 AD3d 1080, 1083, *lv denied* 6 NY3d 708; *see Burns v Burns* [appeal No. 2], 238 AD2d 886, 886).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

704

CA 14-02074

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

IN THE MATTER OF FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW BY COUNTY OF GENESEE, PETITIONER-APPELLANT;

ORDER

JENNIFER BOBZIN, RESPONDENT-RESPONDENT.

PHILLIPS LYTLE LLP, ROCHESTER (ANTHONY J. IACCHETTA OF COUNSEL), FOR PETITIONER-APPELLANT.

DREW & DREW, LLP, BUFFALO (ALANA P. CARR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered April 17, 2014 in a proceeding pursuant to RPTL article 11. The order, among other things, granted respondent's motion to vacate a judgment of foreclosure.

Now, upon reading and filing the stipulation to withdraw appeal signed by the attorneys for the parties on May 18, 2015,

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

707

CA 14-01856

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

DAVID G. HARRIS, PLAINTIFF-APPELLANT,

V ORDER

SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER AND SUSAN ALBRING, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DAVID G. HARRIS, PLAINTIFF-APPELLANT PRO SE.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS S. D'ANTONIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered January 2, 2014. The order and judgment granted the motion of defendants to dismiss the complaint.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

708

CA 14-01857

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

DAVID G. HARRIS, PLAINTIFF-APPELLANT,

V ORDER

SYRACUSE UNIVERSITY, NANCY CANTOR, ERIC SPINA, MELVIN STITH, RANDAL ELDER AND SUSAN ALBRING, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DAVID G. HARRIS, PLAINTIFF-APPELLANT PRO SE.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (THOMAS S. D'ANTONIO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered April 3, 2014. The order, among other things, denied the motion of plaintiff for a stay of judgment.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

711.1

KA 12-00753

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a resentence of the Seneca County Court (Dennis F. Bender, J.), rendered March 7, 2011. Defendant was resentenced by imposing terms of postrelease supervision.

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

Same memorandum as in *People v Harris* ([appeal No. 2] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

711.2

KA 03-00716

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered March 27, 2003. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, arson in the second degree, reckless endangerment in the first degree and assault 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 resentence following the entry of the judgment in appeal No. 2, which convicted him following a jury trial of numerous offenses, including assault in the first degree (Penal Law § 120.10 [3]) and arson in the second degree (§ 150.15). He was sentenced to various determinate and indeterminate terms of incarceration, but County Court failed to impose periods of postrelease supervision on the determinate sentences as required by Penal Law § 70.45 (1). To correct that oversight, the court in appeal No. 1 resentenced defendant to the original terms of incarceration and imposed the requisite periods of postrelease supervision (*see generally* Correction Law § 601-d). In appeal No. 3, defendant appeals from an order denying his CPL 440.10 motion to vacate the judgment of conviction in appeal No. 2.

Addressing first defendant's contentions with respect to the judgment in appeal No. 2, we conclude that the court properly refused to suppress statements made by defendant at the crime scene and, subsequently, at the police station. Defendant's initial statements at the scene were made to the first trooper who arrived at the scene, in response to questions concerning how the ongoing fire had been started and if there was anyone else inside the residence. Those statements are admissible inasmuch as defendant was not in custody (*see People v Rodriguez*, 111 AD3d 1333, 1333, *lv denied* 22 NY3d 1158*; see generally People v Paulman*, 5 NY3d 122, 129), and the trooper's

questions were proper based on "the 'emergency doctrine' " (*People v Doll*, 21 NY3d 665, 670, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552), i.e., legitimate public safety concerns. After defendant was taken into custody, he was issued *Miranda* warnings by a different trooper. During the entire conversation between defendant and that trooper, defendant was shaking his head left to right. When asked if he understood the warnings, defendant responded affirmatively and, when asked if he wished to talk to the trooper, defendant remained silent.

One hour later, two investigators attempted to talk to defendant at the scene but, before they did so, one of the investigators asked defendant if he had been read the *Miranda* warnings, if those warnings had been read by a uniformed sergeant, if defendant understood those warnings and if he would agree to talk to the troopers. Defendant, who was no longer shaking his head left to right, responded affirmatively to each question, and made several incriminating statements. Shortly thereafter, defendant was transported to a local police station, where he was interviewed and gave three separate written statements. Several hours after his arrival at the police station, the first statement was printed out. Defendant read out loud his *Miranda* warnings from the top of that first statement, and he affirmatively waived the *Miranda* rights. At no time during the entire process did defendant ask to speak with an attorney or ask the investigators to stop speaking with him. Further, at no point did anyone threaten defendant or make any promises to him. Throughout the interview, the college-educated defendant was courteous and cooperative, although he had one hand cuffed to the wall.

Defendant correctly contends that he did not explicitly waive his *Miranda* rights while at the crime scene or before the interview process began at the police station. It is well settled, however, "that 'an explicit verbal waiver is not required; an implicit waiver may suffice and may be inferred from the circumstances' " (*People v Jones*, 120 AD3d 1595, 1595; *see People v Sirno*, 76 NY2d 967, 968; *People v Davis*, 55 NY2d 731, 733). Here, defendant agreed to speak with investigators after confirming that he had been issued *Miranda* warnings and understood those warnings. We thus conclude that a knowing and voluntary waiver of the *Miranda* rights may be inferred from the circumstances (*see Sirno*, 76 NY2d at 968; *Jones*, 120 AD3d at 1595).

Defendant further contends that the investigators should have repeated the *Miranda* warnings at the police station before any questioning began. We reject that contention. "[W]here, as here, 'a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives those rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, so long as the custody [was] continuous' " (*People v Johnson*, 20 AD3d 939, 939, *lv denied* 5 NY3d 853; *see People v Peterkin*, 89 AD3d 1455, 1455-1456, *lv denied* 18 NY3d 885; *People v Debo*, 45 AD3d 1349, 1350, *lv denied* 10 NY3d 809). Here, because defendant was issued the *Miranda* warnings at the crime scene,

reaffirmed his understanding of those warnings at the crime scene and implicitly waived those rights at the crime scene, there was no need to repeat the warnings before defendant was questioned at the station a short time later.

Defendant further contends that the court's jury instruction and the People's proof at trial materially varied from the allegations in the indictment with respect to the first count of the indictment and rendered that count of the indictment duplicitous. Following the close of proof at trial, the court instructed the jury that it could convict defendant of that count, charging defendant with assault in the first degree, if it found, inter alia, that defendant "beat [the victim] with a piece of wood and/or his fists." The court repeated that instruction after a request from the jury. The indictment, however, alleged that defendant "beat[] her with his fists *and* a piece of wood" (emphasis added).

While defendant seemingly contends that the indictment was rendered duplicitous by the court's instruction, defendant's actual contention is not that the proof at trial established more than one assault but, rather, that the court's instruction to the jury "differed significantly from the theory of the crime charged in the indictment" (*People v Charles*, 61 NY2d 321, 326), and thus violated his "right to be tried and convicted of only those crimes and upon only those theories charged in the indictment" (*People v Gaston*, 104 AD3d 1206, 1207, *lv denied* 22 NY3d 1156). Such a contention must be preserved (*see e.g. People v Odom*, 53 AD3d 1084, 1086, *lv denied* 11 NY3d 792; *People v Prato*, 143 AD2d 205, 206, *lv denied* 72 NY2d 1049, *reconsideration denied* 73 NY2d 858), unless the change in theory concerned an essential element of the offense, i.e., "[t]he variation from the theory of prosecution found in the indictment did not merely alter a factual incident in a way still consistent with that theory, but in fact changed the theory itself" (*Charles*, 61 NY2d at 329; *see People v Greaves*, 1 AD3d 979, 980; *People v Scott*, 159 AD2d 975, 976). Inasmuch as the court's instruction did not change an essential element of the offense, defendant's failure to object renders his contention unpreserved for our review.

In any event, we conclude that defendant's contention lacks merit. " 'Where an offense may be committed by doing any one of several things, the indictment may, in a single count, group them together and charge the defendant with having committed them all, and a conviction may be had on proof of the commission of any one of the things, without proof of the commission of the others' " (*Charles*, 61 NY2d at 327-328; *see People v Kaid*, 43 AD3d 1077, 1082-1083). "In charging the jury in the disjunctive, rather than in the conjunctive, the court did not amend the indictment, permit the People to change the theory of the prosecution, or render the count duplicitous" (*People v Frascone*, 271 AD2d 333, 333). We thus reject defendant's further contention that defense counsel was ineffective in failing to preserve that issue for our review. "There 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). We likewise reject

defendant's contention that defense counsel was ineffective based on his failure to request an intoxication charge. Such a charge was not warranted because the record does not contain evidence that defendant's use of intoxicants was " 'of such nature or quantity to support the inference that their ingestion was sufficient to affect defendant's ability to form the necessary criminal intent' " (*People v Sirico*, 17 NY3d 744, 745, quoting *People v Rodriguez*, 76 NY2d 918, 920).

Defendant further contends that defense counsel was ineffective in failing to retain and call an arson expert to testify at trial. That contention lacks merit. "Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence" (*People v West*, 118 AD3d 1450, 1451, *lv denied* 24 NY3d 1048 [internal quotation marks omitted]; *see People v Venkatesan*, 295 AD2d 635, 637, *lv denied* 99 NY2d 565, *cert denied* 549 US 854). We do not address defendant's remaining challenge to the effectiveness of counsel because it "is raised for the first time in defendant's reply brief and thus is not properly before us" (*People v Jones*, 300 AD2d 1119, 1120, *lv denied* 2 NY3d 801; *see People v Hall*, 106 AD3d 1513, 1514, *lv denied* 22 NY3d 956).

We reject defendant's challenge to the severity of the resentence in appeal No. 1 and, finally, we conclude with respect to appeal No. 3 that the court properly denied defendant's CPL 440.10 motion. In that motion, defendant alleged, inter alia, that he had informed defense counsel before trial that some of his signatures on the statements had been forged. He thus alleged that defense counsel was ineffective in failing to retain a handwriting expert. Attached to the motion were reports from a handwriting expert, who had been retained by defendant's family after trial. At the hearing on the motion, however, defense counsel testified that he first learned of defendant's allegations of forgery when defendant testified at trial. "The conflicting testimony with respect to whether trial counsel had been informed about the [alleged forgery] prior to the trial presented an issue of credibility for the hearing court[,] and we decline to disturb the resolution of that issue" (*People v Castaneda*, 198 AD2d 292, 293, *lv denied* 83 NY2d 870). Moreover, the testimony of defendant's proposed handwriting expert was suspect and of little probative value inasmuch as it was internally inconsistent, contradicted in parts by the expert's own reports, and contradicted by defendant's own testimony. We thus conclude that defendant has failed to demonstrate that the expert testimony "would have assisted the jury in its determination or that [defendant] was prejudiced by its absence" (*West*, 118 AD3d at 1451 [internal quotation marks omitted]; *see generally People v Hobot*, 84 NY2d 1021, 1023-1024). Defendant therefore "failed to meet his burden at the hearing on the motion of 'proving by a preponderance of the evidence every fact essential to support the motion' " (*People v Smith*, 16 AD3d 1081, 1082, *lv denied* 4 NY3d 891, quoting CPL 440.30 [6]).

Entered: June 12, 2015

Clerk of the Court
Frances E. Cafarell

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

711.3

KA 06-02577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC HARRIS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, 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 Seneca County Court (Dennis F. Bender, J.), entered July 31, 2006. 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 affirmed.

Same memorandum as in *People v Harris* ([appeal No. 2] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

711

CA 14-01919

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

IN THE MATTER OF JAMES R. DIEGELMAN AND
ANDREA M. DIEGELMAN, CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND CITY OF BUFFALO BOARD OF
EDUCATION, RESPONDENTS-APPELLANTS.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (John P. Lane, J.H.O.), entered January 16, 2014. The order granted the application of claimants for leave to serve a late notice of claim.

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

Memorandum: On appeal from an order granting claimants' application seeking leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5), respondents contend that Supreme Court abused its discretion in granting the application because the claim, which is premised upon an injury sustained during the employment of claimant James R. Diegelman as a police officer, is barred by General Municipal Law § 207-c and thus is patently without merit. We agree. Respondents are correct that the claim is barred by section 207-c (*see Damiani v City of Buffalo*, 198 AD2d 814, 814-815, *lv denied* 83 NY2d 757; *see also Dischiavi v Calli*, 111 AD3d 1258, 1262), and leave to file a late notice of claim "is not appropriate for a patently meritless claim" (*Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

712

TP 14-02106

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

IN THE MATTER OF DAVID SCOTT, BY SHERI DANA AND MICHAEL DANA, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

HURWITZ & FINE, P.C., BUFFALO (EDWARD C. ROBINSON OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Genesee County [Robert C. Noonan, A.J.], entered November 24, 2014) to annul a determination of respondent that petitioner made certain uncompensated transfers prior to his admission to a skilled nursing facility.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination that he made certain uncompensated transfers prior to his admission to a skilled nursing facility. "In reviewing a Medicaid eligibility determination made after a fair hearing, '[a] court must review the record, as a whole, to determine if [respondent's] decisions are supported by substantial evidence and are not affected by an error of law' " (*Matter of Barbato v New York State Dept. of Health*, 65 AD3d 821, 822-823, *lv denied* 13 NY3d 712). At the fair hearing, petitioner asserted that certain transfers were made pursuant to a personal service agreement (PSA) between him and his daughter and son-in-law. The PSA provided that petitioner would pay his daughter and son-in-law $5,000 per month "for services and care." The PSA did not set forth any specific services that would be provided to petitioner, but it required someone to be present with him at the residence. If the daughter or son-in-law were not present, petitioner agreed to pay for additional care as needed. Over the course of the next four years, payments pursuant to the PSA were not made on a regular basis. Rather, the daughter and son-in-law withdrew money from petitioner's checking account to pay their debts as they saw fit. For example, in one year, no payments were made and, in the

month petitioner entered a skilled nursing facility, a transfer of $60,000 was made.

At the fair hearing, petitioner gave no explanation of the services that were provided other than transportation on occasion, did not submit any documentation regarding the services, and offered no proof regarding the fair market value of any services. We therefore conclude that substantial evidence supports the determination that the transfer of assets were uncompensated transfers (*cf. Matter of Kerner v Monroe County Dept. of Human Servs.*, 75 AD3d 1085, 1087). We reject petitioner's contention that the matter should be remitted to Supreme Court, as the matter was in *Kerner*, so that petitioner can provide the necessary proof. In *Kerner*, the PSA specified the services that would be provided to the petitioner, and the record in that case established that the petitioner offered some proof and testimony regarding the services that were rendered to him (*see id.* at 1086-1087). Here, petitioner was advised by the local agency that he needed to submit specific proof with respect to the services, but petitioner provided none, and we will not speculate whether petitioner could provide such proof upon a remittal. We have considered petitioner's remaining contention and conclude that it is without merit.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

717

KA 08-00227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN D. LIPFORD, ALSO KNOWN AS KEVY KEV,
DEFENDANT-APPELLANT.

JOHN R. LEWIS, SLEEPY HOLLOW, 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 (Francis A. Affronti, J.), rendered November 21, 2007. The judgment convicted defendant, upon a jury verdict, of kidnapping 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 kidnapping in the second degree (Penal Law § 135.20). The jury acquitted defendant of the remaining counts of the indictment, including murder in the second degree (§ 125.25 [3]), robbery in the first degree (§ 160.15 [2]), and assault in the second degree (§ 120.05 [2]). We reject defendant's contention that the testimony of an accomplice was not sufficiently corroborated. Accomplice testimony must be corroborated by evidence "tending to connect the defendant with the commission of [an] offense" (CPL 60.22 [1]). " 'The corroborative evidence need not show the commission of the crime . . . It is enough if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 192-193, quoting *People v Dixon*, 231 NY 111, 116). Indeed, "some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant" (*id.* at 194). Moreover, "evidence that defendant was present at the scene of the crime or was with the accomplices shortly before or after the crime can, under certain circumstances, provide the necessary corroboration of the accomplices' testimony" (*People v Bolden*, 161 AD2d 1126, 1126-1127, *lv denied* 76 NY2d 853).

Here, the accomplice testified that he met defendant, the victim,

and a codefendant outside the house at 98 Durnan Street; the victim looked like he had been beaten, and his hands were behind his back. They proceeded to the basement of 12 Athens Street, where they were joined by another codefendant. There, over the course of about an hour, one of the codefendants beat the victim and poured gasoline in his shoes in an attempt to get him to set up a drug deal with his friend (murder victim). The victim's hands were tied with plastic ties. After the victim made the call, defendant, the accomplice, the victim, and the codefendants proceeded to another location to meet the murder victim, where the robbery and murder occurred. There was police testimony that the victim showed signs of having been beaten and smelled of gasoline when he was at the hospital the evening of the incident, and blood stains that were collected from a weight bench at 12 Athens Street matched the victim's DNA. That evidence supported the accomplice's testimony that the victim was held against his will at 12 Athens Street. In addition, duct tape and a plastic tie were retrieved from the basement of 98 Durnan Street. DNA on the duct tape matched that of the victim, and the plastic tie had a mixture of DNA, from which the victim and defendant could not be excluded as contributors. That evidence harmonized with the accomplice's testimony that when he saw the victim outside of 98 Durnan Street, his hands were behind his back and it looked as though he had been beaten (*see Reome*, 15 NY3d at 195; *People v Highsmith*, 124 AD3d 1363, 1364). Finally, the testimony of a witness regarding the scene where the robbery and murder took place harmonized with the accomplice's version of events, including the presence of defendant with the victim shortly after the kidnapping (*see Reome*, 15 NY3d at 195; *Highsmith*, 124 AD3d at 1364).

Defendant failed to preserve for our review his contention that the kidnapping charge merged with the robbery or assault charges (*see People v Hanley*, 20 NY3d 601, 606; *People v Nelson*, 57 AD3d 1441, 1442). In any event, that contention is without merit (*see Nelson*, 57 AD3d at 1442). The abduction of the victim was an act discrete from the later robbery of the murder victim (*see generally Hanley*, 20 NY3d at 606). While the kidnapping of the victim may have been for the purpose of forcing the victim to contact the murder victim, there was no merger of the kidnapping of the victim and the robbery of the murder victim inasmuch as the kidnapping constituted "a crime in itself" (*People v Gonzalez*, 80 NY2d 146, 153; *People v Collazo*, 45 AD3d 899, 901, *lv denied* 9 NY3d 1032). There was also no merger of the kidnapping of the victim and the assault of the victim. The abduction here was not brief (*cf. People v James*, 114 AD3d 1202, 1203-1204, *lv denied* 22 NY3d 1199), and it was not "so much [a] part of [the assault] that the [assault] could not have been committed without such acts [or] that independent criminal responsibility may not fairly be attributed to them" (*People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975 [internal quotation marks omitted]). As in *McEathron*, "the kidnapping was not a part of the assault. Rather, . . . the assault was incidental to the kidnapping" (*id.* at 916). Inasmuch as "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d

143, 152), defendant's further contention that he was denied effective assistance of counsel based on counsel's failure to preserve the merger issue for our review is without merit.

Contrary to defendant's contention, Supreme Court properly allowed rebuttal testimony to show evidence of consciousness of guilt (*see People v Comerford*, 70 AD3d 1305, 1306; *People v Kearse*, 177 AD2d 392, 392, *lv denied* 79 NY2d 1003). Defendant's further contention regarding a question asked by the prosecutor during redirect examination of the rebuttal witness is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we reject defendant's contention that the court, in imposing the sentence, improperly considered the fact that a murder occurred. Contrary to defendant's contention, "[t]he court did not base its sentence on a crime of which defendant had been acquitted . . . , but rather sentenced him based on all the relevant facts and circumstances surrounding the crime of which he was convicted" (*People v Rogers*, 103 AD3d 1150, 1154, *lv denied* 21 NY3d 946), as it was required to do (*see People v Cox*, 78 AD3d 1571, 1572, *lv denied* 16 NY3d 742). One relevant fact here was that " 'the circumstances of defendant's crime included a death,' " and " 'defendant's acquittal on the [murder charge] did not require [the c]ourt to overlook' " that fact (*Cox*, 78 AD3d at 1572). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

720

CAF 14-00385

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

IN THE MATTER OF JAVONTE G.

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

SHAWN E., RESPONDENT-APPELLANT.

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

ARTHUR C. STEVER, IV, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered February 19, 2014 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

721

CAF 14-00126

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

IN THE MATTER OF MARY E. COUNTRYMAN, ALSO KNOWN AS MARY E. CONLEY, PETITIONER-RESPONDENT,

V ORDER

WILLIS C. COUNTRYMAN, JR., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

RUTHANNE G. SANCHEZ, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered December 23, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner 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 Family Court.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

722

CAF 14-00569

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

IN THE MATTER OF DAVID A. LUGO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JAMIE M. HAMILL, RESPONDENT-RESPONDENT.

IN THE MATTER OF JAMIE M. HAMILL,
PETITIONER-RESPONDENT,

V

DAVID A. LUGO, RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Supreme Court, Genesee County (Eric R. Adams, A.J.), entered March 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall have joint legal custody of the subject child, with primary residency with the mother.

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

Memorandum: Petitioner-respondent father and respondent-petitioner mother are the parents of the child who is the subject of this proceeding. Pursuant to a 2007 court order, the parties had joint legal custody of the child with primary residency to the mother. In late 2012, the mother's living situation became uncertain, and the father agreed to have the child live with him. The father prepared an affidavit reciting that the father would have "primary custody" and would have the child stay with him during the week and with the mother on the weekends, and the mother signed the affidavit. In May 2013, the mother requested that the child be returned to her for primary residency, and the father denied the request. The father filed a petition seeking to modify the 2007 order and grant him primary residency of the child, while the mother filed a petition seeking to

enforce the 2007 order. Supreme Court found that a change of circumstances had occurred since the 2007 order, but the court concluded that it was in the child's best interests to continue joint custody with primary residency with the mother.

The father contends that the court erred in not giving effect to the parties' 2012 agreement and that the mother was required to show a change in circumstances from the time that the agreement was signed by the mother. We reject that contention. The agreement, signed only by the mother and not reduced to an order, was merely an informal arrangement and simply a factor for the court to consider in making its ultimate determination (*see Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *Matter of Bruce BB. v Debra CC.*, 307 AD2d 408, 409). Contrary to the father's further contention, the court's determination that the best interests of the child would be served by granting primary residency to the mother is supported by a sound and substantial basis in the record (*see Betro v Carbone*, 5 AD3d 1110, 1110).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

724

CAF 14-00295

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

IN THE MATTER OF ANDREA E. RAFFERTY,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL J. RAFFERTY, RESPONDENT-APPELLANT.

IN THE MATTER OF MICHAEL J. RAFFERTY,
PETITIONER-APPELLANT,

V

ANDREA E. RAFFERTY, RESPONDENT-RESPONDENT.

IN THE MATTER OF ANDREA E. RAFFERTY,
PETITIONER-RESPONDENT,

V

MICHAEL J. RAFFERTY, RESPONDENT-APPELLANT.

JOHN J. RASPANTE, UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

DOUGLAS M. DEMARCHÉ, JR., ATTORNEY FOR THE CHILD, NEW HARTFORD.

Appeal from an order of the Family Court, Oneida County (Julia M. Brouillette, R.), entered October 28, 2013 in a proceeding pursuant to Family Court Act articles 6 and 8. The order, inter alia, awarded Andrea E. Rafferty sole custody of the subject child.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

736.1

CAF 13-01398

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

IN THE MATTER OF BRANDON L. GUNN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RACHAEL S. GUNN, RESPONDENT-APPELLANT.

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

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (RUPAK R. SHAH OF COUNSEL), FOR PETITIONER-RESPONDENT.

COURTNEY S. RADICK, ATTORNEY FOR THE CHILDREN, OSWEGO.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered July 25, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole legal and primary physical custody of the parties' children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order entered in July 2013 that, inter alia, awarded petitioner father sole legal and primary physical custody of the parties' children and granted visitation to the mother. The mother contends that the award of custody to the father was not in the children's best interests, that Family Court improperly excluded hearsay statements of the children that related to abuse and neglect, and that she was denied effective assistance of counsel. The Attorney for the Children (AFC), who did not file a notice of appeal, submitted a brief contending that the award of custody to the father should be reversed based on a change of circumstances since entry of the order and because it is in the best interests of the children to live with the mother, and that the children were denied effective assistance of counsel because their trial attorney did not file a notice of appeal.

The AFC has submitted new information to this Court that the children have been living with the mother in Maryland since December 2014, apparently upon the father's consent. In addition, the AFC and the mother note that the father's living arrangement has changed. It is well settled that "we may 'take notice of . . . new facts and

allegations to the extent they indicate that the record before us is no longer sufficient for determining [the father's] fitness and right to [sole legal and primary physical custody] of [the children]' " (*Matter of Nichols v Nichols-Johnson*, 78 AD3d 1679, 1680, quoting *Matter of Michael B.*, 80 NY2d 299, 318; *see Matter of Kennedy v Kennedy*, 107 AD3d 1625, 1626). Given the above new information, we reverse the order and remit the matter to Family Court "for an expedited hearing on the issue whether the alleged change in circumstances affects the best interests of the children" (*Kennedy*, 107 AD3d at 1626; *see Matter of Bosque v Blazejewski-D'Amato*, 123 AD3d 704, 705). In light of our determination, we do not consider the contentions of the mother or the remaining contention of the AFC.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

737

KA 14-00966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BUTLER, 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 May 5, 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 ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that Supreme Court erred in denying his request for a downward departure from his presumptive risk level. While defendant correctly contends that "[a]n offender's response to treatment, if exceptional, can be the basis for a downward departure" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 17 [2006]), we conclude that "defendant failed to prove by a preponderance of the evidence that his response to treatment was exceptional" (*People v Torres*, 124 AD3d 744, 746; *see People v Stewart*, 123 AD3d 784, 785, *lv denied* 24 NY3d 916). We thus further conclude that "defendant failed to meet his burden of 'prov[ing] the existence of the alleged mitigating factor[] . . . by a preponderance of the evidence' " (*People v Colon*, 124 AD3d 1340, 1340, *lv denied* 25 NY3d 902, quoting *People v Gillotti*, 23 NY3d 841, 861).

In any event, it is well established that "[a] sex offender's successful showing by a preponderance of the evidence of facts in support of an appropriate mitigating factor does not automatically result in the relief requested, but merely opens the door to the SORA court's exercise of its sound discretion upon further examination of all relevant circumstances" (*People v Worrell*, 113 AD3d 742, 743 [internal quotation marks omitted]; *see People v Smith*, 122 AD3d 1325,

1326). Even assuming, arguendo, that defendant established that his response to treatment was exceptional, we nevertheless conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see Smith*, 122 AD3d at 1326).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

738

KA 13-00827

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT TORRES, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, 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 (Thomas J. Miller, J.), rendered May 10, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, attempted sodomy in the first degree (two counts), sodomy 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 burglary in the second degree (Penal Law § 140.25 [2]), two counts of attempted sodomy in the first degree (§ 110.00, former § 130.50 [1]), and one count each of sodomy in the first degree (former § 130.50 [1]) and sexual abuse in the first degree (§ 130.65 [1]). We reject defendant's contention that County Court erred in denying his *Batson* challenge. The court properly determined that the prosecutor provided a race-neutral explanation for excluding the prospective juror (*see People v Tucker*, 22 AD3d 353, 353-354, *lv denied* 6 NY3d 760; *People v Williams*, 13 AD3d 1214, 1214-1215, *lv denied* 4 NY3d 857), and "defendant failed to meet [his] 'ultimate burden of persuading the court' that the People's race-neutral reasons for exercising a peremptory challenge with respect to an African-American juror were pretextual" (*People v Johnson*, 38 AD3d 1327, 1328, *lv denied* 9 NY3d 866, quoting *People v Smocum*, 99 NY2d 418, 422). Defendant's further contention that the court erred in sua sponte dismissing a hearing-impaired prospective juror is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his contention that his conviction of one of the two counts of attempted sodomy in the first degree is not supported by legally sufficient evidence (*see*

People v Gray, 86 NY2d 10, 19). In any event, we reject that contention inasmuch as the evidence is legally sufficient to establish that defendant's "actions came within dangerous proximity" of committing deviate sexual intercourse (*People v Hamilton*, 256 AD2d 922, 923, *lv denied* 93 NY2d 874; *see* Penal Law former §§ 130.00 [2], 130.50). We reject defendant's contention that the court was required to direct that certain sentences run concurrently rather than consecutively pursuant to Penal Law § 70.25 (2). The victim's testimony established that, although part of a continuous course of activity, the acts were separate and distinct (*see People v Bailey*, 17 AD3d 1022, 1023, *lv denied* 5 NY3d 803). Finally, the sentence, as reduced by operation of law (*see* § 70.30 [1] [e] [vi]), is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

742

CAF 13-01891

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

IN THE MATTER OF CRYSTIANA M.

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

CRYSTAL M., RESPONDENT,
AND PAMELA J., RESPONDENT-APPELLANT.

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

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

JESSICA L. VESPER, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 22, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the child in the custody of her paternal aunt under the supervision of petitioner.

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

Memorandum: Respondent Pamela J. (grandmother) contends that Family Court erred in finding that she neglected her granddaughter. We note at the outset that, although the grandmother erroneously appealed from the fact-finding order rather than the order of disposition, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the order of disposition (*see Matter of Morgan P.*, 60 AD3d 1362, 1362; *Matter of Ariel C.*, 248 AD2d 976, 976, *lv denied* 92 NY2d 801; *see also* CPLR 5520 [c]).

We conclude that petitioner established by a preponderance of the evidence that the grandmother, who was a person legally responsible for the child (*see* Family Ct Act § 1012 [g]), neglected the child (*see* § 1012 [f] [1] [B]). It is well established that "a child may be adjudicated to be neglected when a parent or caretaker 'knew or should have known of circumstances which required action in order to avoid actual or potential impairment of the child and failed to act accordingly' " (*Matter of Darcy Y. [Christopher Z.]*, 103 AD3d 955, 956; *see Matter of Wyatt YY. [Melissa OO.]*, 118 AD3d 1061, 1062). The evidence at the hearing established that the grandmother knew that the mother was addicted to opiates and that the grandmother either illegally purchased suboxone for the mother or provided the mother

with money knowing that the mother was going to use that money to buy suboxone herself. We have previously held that the misuse and illegal purchase of suboxone may support a finding of neglect (*see Matter of Samaj B. [Towanda H.-B.-Wade B.]*, 98 AD3d 1312, 1313). During this same period of time, the grandmother, who had informal custody of the child, allowed the mother to care for the child during the day. Moreover, the court concluded, based on the evidence at the hearing, that the grandmother was "feeding [the mother's] known drug addiction to keep the child with her without any court proceedings being involved." Such evidence is sufficient to establish that the grandmother neglected the child (*see Wyatt YY.*, 118 AD3d at 1062; *Matter of Stevie R. [Arvin R.]*, 111 AD3d 1078, 1079; *Matter of Alaina E.*, 33 AD3d 1084, 1086).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

743

CAF 14-00869

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

IN THE MATTER OF RONALD D. ROSSBOROUGH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HALA Y. ALATAWNEH, RESPONDENT-RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR PETITIONER-APPELLANT.

JOSEPH P. MILLER, CUBA, FOR RESPONDENT-RESPONDENT.

PETER J. DEGNAN, ATTORNEY FOR THE CHILD, ALFRED.

DAVID E. CODDINGTON, ATTORNEY FOR THE CHILDREN, HORNELL.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered March 27, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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

Memorandum: Petitioner father appeals from an order denying his petitions for visitation with his two former stepchildren, for modification of the visitation order with respect to his child with respondent mother, and for violation of visitation orders. The father's contention regarding visitation with the older stepchild is moot because he is now 18 years old (*see Matter of Woodruff v Adside*, 26 AD3d 866, 866). The father contends that Family Court erred in determining that visitation with the younger stepchild was not in her best interests. We conclude that the court properly dismissed the petition seeking visitation with the younger stepchild, but our reasoning differs from that of the court. We conclude that the father lacks standing to seek visitation with the younger stepchild (*see Matter of Reeves v Erie County Dept. of Social Servs.*, 96 AD3d 1471, 1471; *Matter of Multari v Sorrell*, 287 AD2d 764, 765-766). The father's contention that the doctrine of judicial estoppel applies here is not properly before us because it is raised for the first time in his reply brief (*see Matter of Deuel v Dalton*, 33 AD3d 1158, 1159; *Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149).

Contrary to the father's contention, the court properly

determined that he failed to show a change in circumstances to warrant a modification of the visitation order and failed to establish that the mother willfully violated a clear mandate of the visitation orders (*see Matter of Sorokina v Moody*, 91 AD3d 1307, 1307).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

744

CAF 13-01576

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

IN THE MATTER OF KWAME B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DASHAWN B., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

COLLEEN SUTHERLAND HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 31, 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

745

CAF 13-01577

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

IN THE MATTER OF CHANCE B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DASHAWN B., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

COLLEEN SUTHERLAND HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 31, 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

746

CAF 13-01578

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

IN THE MATTER OF TATYANNA B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DASHAWN B., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

COLLEEN SUTHERLAND HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 31, 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

747

CAF 13-01579

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

IN THE MATTER OF TEEHONESTEE B.

GENESEE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DASHAWN B., RESPONDENT-APPELLANT.
(APPEAL NO. 4.)

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

COLLEEN SUTHERLAND HEAD, BATAVIA, FOR PETITIONER-RESPONDENT.

JACQUELINE M. GRASSO, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered July 31, 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.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

749

CAF 14-00557

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

IN THE MATTER OF ELIZABETH A. DENISE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THEODORE R. DENISE, RESPONDENT-RESPONDENT.

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

WENDY S. SISSON, GENESEO, FOR RESPONDENT-RESPONDENT.

LORENZO NAPOLITANO, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 17, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted custody of the subject child to respondent.

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

Memorandum: Petitioner mother appeals from an order that, inter alia, awarded respondent father custody of the parties' child. Contrary to the mother's contention, "this proceeding involves an initial court determination with respect to custody and, '[a]lthough the parties' informal arrangement is a factor to be considered, [the father] is not required to prove a substantial change in circumstances in order to warrant a modification thereof' " (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). Affording great deference to Family Court's assessment of witness credibility, we conclude that the court's determination to award custody of the child to the father with liberal visitation to the mother is supported by a sound and substantial basis in the record (*see Matter of Cross v Caswell*, 113 AD3d 1107, 1107; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

751

CA 14-01207

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

BERNARD OLIVIERI, MARY OLIVIERI, PETER OLIVIERI, PAUL OLIVIERI, AND DANIEL OLIVIERI, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

RUSSELL P. COLOSI, DDS, INDIVIDUALLY AND DOING BUSINESS AS RUSSELL P. COLOSI, DDS, PATRICIA COLOSI, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (CARLTON K. BROWNELL, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT RUSSELL P. COLOSI, DDS, DOING BUSINESS AS RUSSELL P. COLOSI, DDS.

HISCOCK & BARCLAY, LLP, ALBANY (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RUSSELL P. COLOSI, DDS, INDIVIDUALLY, AND PATRICIA COLOSI.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered April 9, 2014. The order, insofar as appealed from, granted the motion of defendants Russell P. Colosi, DDS, individually, and Patricia Colosi and dismissed the first cause of action against those defendants.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendants Russell P. Colosi, DDS, individually, and Patricia Colosi is denied, and the first cause of action is reinstated against them.

Memorandum: Plaintiffs commenced this action asserting, inter alia, causes of action for adverse possession and defamation. Russell P. Colosi, DDS, individually, and Patricia Colosi (individual defendants) moved to dismiss the complaint against them, and Russell P. Colosi, DDS, doing business as Russell P. Colosi, DDS, separately moved for summary judgment dismissing the complaint against him. Supreme Court converted the motion of the individual defendants to one for summary judgment and granted both motions. Plaintiffs, as limited by their brief, contend only that the court erred in granting the motion of the individual defendants with respect to the first cause of action, for adverse possession, and we agree. We therefore reverse

the order insofar as appealed from.

We note at the outset that we agree with plaintiffs that the court erred in applying the 2008 amendments to RPAPL article 5 with respect to the adverse possession cause of action. Plaintiffs alleged in their verified complaint that, since 1956, they have adversely possessed the disputed property by actions such as constructing drainage systems on the disputed property. In support of their motion, the individual defendants did not dispute the time frames alleged by plaintiffs. Therefore, inasmuch as plaintiffs claim that they gained title to the disputed property by adverse possession prior to 2008, the amendments to RPAPL article 5 do not apply (*see Hammond v Baker*, 81 AD3d 1288, 1289-1290; *Perry v Edwards*, 79 AD3d 1629, 1631).

Although the individual defendants met their initial burden of establishing that they are the record owners of the disputed property, we agree with plaintiffs that they raised a triable issue of fact regarding their claim to title through adverse possession (*see generally King's Ct. Rest., Inc. v Hurondel I, Inc.*, 87 AD3d 1361, 1362). A plaintiff alleging a claim of adverse possession must establish that possession of the disputed property was "(1) hostile and under claim of right; (2) actual; (3) open and notorious; (4) exclusive; and (5) continuous for the required period" (*Walling v Przybylo*, 7 NY3d 228, 232; *see West Middlebury Baptist Church v Koester*, 50 AD3d 1494, 1495). Contrary to the contention of the individual defendants, the fact that plaintiffs offered to purchase the disputed property in 2009 did not negate the element of hostility inasmuch as plaintiffs allege that their title to the disputed property vested well before that offer (*cf. Garrett v Holcomb*, 215 AD2d 884, 885; *see generally City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 123-124, *appeal dismissed* 58 NY2d 824).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

755

CA 14-02174

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

DAWN L. BAKER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY P. BAKER, DEFENDANT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEONARD G. TILNEY, JR., LOCKPORT, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered April 8, 2014. The order, insofar as appealed from, denied that part of defendant's motion seeking an award of child support.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, that part of defendant's motion seeking an award of child support is granted, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Defendant father, as limited by his brief, contends that Supreme Court erred in denying his motion insofar as he sought an order directing plaintiff mother to pay child support for the parties' son. In denying that part of the motion, the court concluded that there was insufficient proof to justify a change in the child's emancipation status.

We agree with the father that the court erred in concluding that the child's return to parental custody and control neither revived his unemancipated status nor reinstated the support obligations of his parents. It is well settled that " '[a] parent is obligated to support his or her child until the age of 21' " (*Matter of Cedeno v Knowlton*, 98 AD3d 1257, 1257; *see* Family Ct Act § 413 [1] [a]). It is equally well settled that "[e]mancipation of the child suspends or terminates this duty to support" (*Matter of Thomas B. v Lydia D.*, 69 AD3d 24, 28; *see Cedeno*, 98 AD3d at 1257). "[C]hildren are deemed emancipated if they attain economic independence through employment, entry into military service or marriage and, further, may be deemed constructively emancipated if, without cause, they withdraw from parental supervision and control" (*Matter of Bogin v Goodrich*, 265 AD2d 779, 781).

In this case, the record establishes, and the parties stipulated, that the child was constructively emancipated in June 2012 when he

moved out of the mother's residence and into an apartment with friends in an effort to avoid the mother's rules requiring him to attend school and not use illicit drugs (*see e.g. Matter of Donnelly v Donnelly*, 14 AD3d 811, 812; *Matter of Columbia County Dept. of Social Servs. v Richard O.*, 262 AD2d 913, 914-915; *see generally Matter of Parker v Stage*, 43 NY2d 128, 133-134; *Matter of Roe v Doe*, 29 NY2d 188, 193). The issue in this appeal is whether the child's unemancipated status was revived when he moved in with his father after "being treated for withdrawal" (*see e.g. Matter of Kendall v Fazzone*, 18 AD3d 908, 908; *Bogin*, 265 AD2d at 781; *Matter of Hamdy v Hamdy*, 203 AD2d 958, 958-959).

"[T]he case law makes clear that a child's unemancipated status may be revived provided there has been a sufficient change in circumstances to warrant the corresponding change in status" (*Bogin*, 265 AD2d at 781). "Permitting reversion to unemancipated status is consistent with the statutory principle that parents are responsible for the support of their dependent children until the children attain the age of 21" (*Hamdy*, 203 AD2d at 958). Generally, a return to the parents' custody and control has been deemed sufficient to revive a child's unemancipated status (*see e.g. Kendall*, 18 AD3d at 908; *Bogin*, 265 AD2d at 780-781; *cf. Matter of Chambers v Chambers*, 295 AD2d 654, 655). Although most of the cases concerning a revival of a child's unemancipated status involve a child's return to the home that he or she abandoned versus the home of the noncustodial parent (*see e.g. Kendall*, 18 AD3d at 908; *Bogin*, 265 AD2d at 780), we conclude that the return to the noncustodial parent's supervision and control does not preclude a revival of unemancipated status inasmuch as it has generally been held that "the move from one parent's home to the other parent's home does not constitute emancipation as th[e] child is neither self-supporting nor free from parental control" (*Matter of Burns v Ross*, 19 AD3d 801, 802; *see Matter of Stabley v Caci-Stabley*, 68 AD3d 1682, 1683; *cf. Donnelly*, 14 AD3d at 812-813). In this case, the child did not immediately move in with the father after flouting the mother's rules (*cf. Donnelly*, 14 AD3d at 812-813). Rather, he engaged in treatment for his addiction and then resumed living under the supervision and control of a parent while attending school. We thus conclude that the facts of this case are distinguishable from those in *Donnelly*.

We reject the mother's contention that, because the father stipulated to the earlier order, he was required to establish an unanticipated and unreasonable change of circumstances (*see generally Matter of Boden v Boden*, 42 NY2d 210, 213). Despite the father's stipulation that the child was emancipated, "[t]he child . . . is not bound by the terms of [that] agreement" (*id.* at 212), and the issue in this case is the child's right to receive adequate support (*see generally Matter of Brescia v Fitts*, 56 NY2d 132, 139-140). Even assuming, arguendo, that the father was required to show an unanticipated and unreasonable change of circumstances, we would nevertheless conclude that the child's substance abuse treatment and return to parental custody and control constitute such a change of circumstances (*see generally Winnert-Marzinek v Winnert*, 291 AD2d 921,

921).

In our view, the reversion to unemancipated status under the facts of this case would promote the underlying statutory principles requiring parents to support children until they reach the age of 21 (*see Hamdy*, 203 AD2d at 958). Inasmuch as "[t]he record amply supports the finding that the parties' son lived with [the father] during the relevant period and was not emancipated, . . . an award of child support [to the father is] appropriate" (*Matter of DiOrio v Rossman*, 73 AD3d 1352, 1352). We therefore reverse the order insofar as appealed from, grant that part of the father's motion seeking an award of child support and remit the matter to Supreme Court to calculate the amount of child support owed by the mother to the father.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

756

CA 14-02166

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

MARY DORE-COCKERHAM, PLAINTIFF-RESPONDENT,

V ORDER

TOWN OF FORESTPORT, DEFENDANT-APPELLANT.

SHANTZ & BELKIN, LATHAM (DEREK L. HAYDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN J. KERNAN, ORISKANY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered March 18, 2014. The order denied the motion of defendant for summary judgment.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

759

CA 14-00549

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

IN THE MATTER OF PAUL DAVILA,
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 (Michael M. Mohun, A.J.), entered February 19, 2014 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 for reasons stated in the decision at Supreme Court.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

762

KA 14-02086

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

IN THE MATTER OF REPORT OF JEFFERSON COUNTY
GRAND JURY OF JULY 2013

---------- ORDER

SCOTT D. MCNAMARA, SPECIAL PROSECUTOR, APPELLANT;

JOHN BURNS, JEFFERSON COUNTY SHERIFF, RESPONDENT.

SCOTT D. MCNAMARA, SPECIAL PROSECUTOR, UTICA, APPELLANT PRO SE.

Appeal from an order of the Jefferson County Court (Kim H. Martusewicz, J.), dated December 18, 2013. The order forever sealed a certain grand jury report.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Report, Grand Jury Exhibit 83A of Sept./Oct. 1993 Suffolk County Grand Jury IC, Term X.*, 221 AD2d 541, 541; *Matter of Report of Grand Jury of County of Tompkins Impaneled Apr. 24, 1984*, 110 AD2d 44, 45).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

764

TP 14-02148

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

IN THE MATTER OF JAWWAD ABDUL-HALIM, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENTS.

JAWWAD ABDUL-HALIM, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF 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, Seneca County [Dennis F. Bender, A.J.], entered November 26, 2014) to review a determination, after a tier III hearing, that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling those parts of the determination finding that petitioner violated rules 100.10 (7 NYCRR 270.2 [B] [1] [i]) and 107.20 (7 NYCRR 270.2 [B] [8] [iii]) and vacating the recommended loss of good time, and as modified the determination is confirmed without costs, respondents are directed to expunge from petitioner's institutional record all references to the violation of those rules, and the matter is remitted to respondents for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking review of a determination following a tier III disciplinary hearing that he violated the following disciplinary rules: 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]); 100.10 (7 NYCRR 270.2 [B] [1] [i] [assault on inmate]); 103.20 (7 NYCRR 270.2 [B] [4] [ii] [soliciting]); 113.25 (7 NYCRR 270.2 [B] [14] [xv] [drug possession]); 113.30 (7 NYCRR 270.2 [B] [14] [xx] [possession of unauthorized UCC materials]); 114.10 (7 NYCRR 270.2 [B] [15] [i] [smuggling]); 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statements or information]); 105.13 (7 NYCRR 270.2 [B] [6] [iv] [gangs]); 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]); 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visitation violation]); and 180.11 (7 NYCRR 270.2 [B] [26] [ii] [facility correspondence violation]). Supreme Court transferred the matter to this Court

pursuant to CPLR 7804 (g).

Respondents correctly concede that the alleged violations of disciplinary rules 100.10, i.e., assault on inmate, and 107.20, i.e., false statements, are not supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139), and we therefore modify the determination accordingly. Inasmuch as the hearing officer recommended six months' loss of good time, and as the record does not reflect the relationship between those violations and the recommendation, we further modify the determination by vacating the recommended loss of good time, and we remit the matter for reconsideration of that recommendation (*see Matter of Holmes v Fischer*, 114 AD3d 1158, 1159). Because the other penalties have been served, we need not remit the matter with respect to those penalties (*see id.*).

We reject petitioner's contention that the remaining violations are not supported by substantial evidence (*see generally Vega*, 66 NY2d at 139). Those violations were supported by, inter alia, the misbehavior report, the testimony of the reporting officer and another employee, and documentary evidence, including several letters mailed by petitioner arranging for illegal drugs to be smuggled into the facility and discussing gang activity. We have reviewed petitioner's remaining contentions and conclude that none warrants reversal or further modification.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

765

KA 14-00049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT W. TETRAULT, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (NICHOLAS P. DIFONZO 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 October 21, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree and attempted criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and attempted criminal possession of a weapon in the third degree (§§ 110.00, 265.02 [1]), defendant contends that his waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that his waiver of the right to appeal is invalid because, during the course of the allocution concerning the waiver of defendant's right to appeal his conviction, County Court did not mention "that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412; *see People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 706). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

767

KA 11-02498

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WALTER LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 30, 2011. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, assault in the second degree, criminal possession of a weapon in the third degree, unlawful imprisonment in the second degree, and assault 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, inter alia, assault in the second degree (Penal Law § 120.05 [2]) and two counts of assault in the third degree (§ 120.00 [1]). During the trial, County Court admitted in evidence certain portions of the victim's recorded 911 call pursuant to the excited utterance and prompt outcry exceptions to the hearsay rule. Defendant's contention that the court erred in admitting this recording and that he was thereby deprived of a fair trial is not preserved for our review (*see* CPL 470.05 [2]; *People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in permitting the physician who examined the victim to testify that the victim reported being hit by defendant. Defendant failed to preserve that contention for our review inasmuch as defense counsel made only an "unspecified objection to the disputed testimony followed by an off-the-record side-bar" (*People v Nurse*, 176 AD2d 197, 198, *lv denied* 79 NY2d 830). In any event, we conclude that any error in the admission of the testimony was harmless because the evidence of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant if the testimony had been excluded (*see*

generally People v Crimmins, 36 NY2d 230, 241-242; *People v Thomas*, 282 AD2d 827, 828-829, *lv denied* 96 NY2d 925).

The general motion made by defendant for a trial order of dismissal did not preserve for our review his contention with respect to counts one and two of the indictment that the evidence is insufficient to show that the victim sustained a physical injury (*see* Penal Law §§ 10.00 [9]; 120.05 [2]; 120.00 [1]; *People v Chiddick*, 8 NY3d 445, 447-448; *Gray*, 86 NY2d at 19). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that the victim sustained a physical injury (*see* § 10.00 [9]; *Chiddick*, 8 NY3d at 447-448; *see generally People v Bleakley*, 69 NY2d 490, 495).

Finally, we reject defendant's contention that the verdict is against the weight of the evidence because of inconsistencies in the victim's testimony. The victim's testimony was not "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). Any inconsistencies in the victim's testimony presented issues of credibility for determination by the jury (*see People v Scheidelman*, 125 AD3d 1426, 1426-1427), and we see no basis for disturbing the jury's credibility determinations in this case. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

768

KA 12-00339

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW PYKE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Jeffrey R. Merrill, A.J.), rendered November 15, 2011. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

770

KA 14-02098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PETER SUDLIK, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON 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 9, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and assault 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 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 his waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that County Court permitted defendant to reserve the right to challenge the severity of the sentence on appeal and, thus, the valid waiver of the right to appeal does not encompass that challenge. Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

771

KA 13-02207

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH A. SMITH, DEFENDANT-APPELLANT.

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

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 18, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the third degree (four counts) and perjury 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 of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), four counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and perjury in the first degree (§ 210.15). We reject defendant's contention that County Court erred in permitting the People to present evidence concerning his prior uncharged drug sales. That evidence was admissible to establish defendant's intent to sell drugs, a necessary element of each of the controlled substance charges (*see People v Laws*, 27 AD3d 1116, 1117, *lv denied* 7 NY3d 758). In addition, the evidence of those uncharged crimes was admissible to establish the perjury charge (*see People v De Vivo*, 282 AD2d 770, 771, *lv denied* 96 NY2d 900). Moreover, the court properly concluded that the probative value of the evidence outweighed its prejudicial effect (*see People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797), and it gave an appropriate limiting instruction (*see People v Rogers*, 103 AD3d 1150, 1152-1153, *lv denied* 21 NY3d 946).

Defendant's contention "that he was denied a fair trial based upon prosecutorial misconduct is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct" (*People v Paul*, 78 AD3d 1684, 1684, *lv denied* 16 NY3d 834; *see* CPL 470.05 [2]). We decline to exercise our power to review that

contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the verdict finding him guilty of the controlled substance offenses is against the weight of the evidence. Viewing the evidence in light of the elements of those 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). Finally, the sentence is not unduly harsh or severe.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

774

CAF 13-01206

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

IN THE MATTER OF ANNABELLA B.C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SANDRA L.C., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered June 5, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: In appeal No. 1, respondent appeals from an order of fact-finding and disposition entered on consent of the parties and the Attorney for the Child determining that her daughter is a neglected child (*see* Family Ct Act § 1051 [a]). In appeal No. 2, respondent appeals from an order settling the record on appeal. Family Court refused to include in the record on appeal the transcript of a proceeding before a court attorney referee two months after the court's determination wherein respondent told the referee that she consented to the order because she was coerced by her attorney to do so.

Addressing first the order in appeal No. 2, contrary to respondent's contention, the court properly refused to include the transcript in the record on appeal in appeal No. 1 inasmuch as the court's determination in appeal No. 1 was not based upon that information (*see Balch v Balch* [appeal No. 2], 193 AD2d 1080, 1080; *see also Matter of Cicardi v Cicardi*, 263 AD2d 686, 686; *see generally Paul v Cooper* [appeal No. 2], 100 AD3d 1550, 1551, *lv denied* 21 NY3d 855). Inasmuch as the order at issue in appeal No. 1 was entered upon the consent of the parties, appeal No. 1 must be dismissed (*see Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592; *Matter of Cherilyn P.*,

192 AD2d 1084, 1084, *lv denied* 82 NY2d 652).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

775

CAF 14-01815

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

IN THE MATTER OF ANNABELLA B.C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SANDRA L.C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-APPELLANT.

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

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered September 24, 2014 in a proceeding pursuant to Family Court Act article 10. The order settled the record on appeal.

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

Same memorandum as in *Matter of Annabella B.C.* ([appeal No. 1] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

776

CAF 14-00201

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

IN THE MATTER OF SHANTELLE SMITH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDRE R. CASHAW, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

WILLIAM D. BRODERICK, JR., ELMA, FOR PETITIONER-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR RESPONDENT-RESPONDENT.

JENNIFER Z. BLACKHALL, ATTORNEY FOR THE CHILD, CHEEKTOWAGA.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered June 25, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: These consolidated appeals arise from a series of proceedings pursuant to Family Court Act article 6, in which the parties sought, inter alia, an order resolving custody and visitation issues with respect to their daughter. We take judicial notice of the fact that, while these appeals were pending, the parties filed further petitions seeking modification of the two orders on appeal. An order resolving, among other things, custody and visitation issues with respect to the subject child, was thereafter entered upon consent of the parties, thereby rendering these appeals moot (*see Matter of Salo v Salo*, 115 AD3d 1368, 1368; *Matter of Justeen T.*, 17 AD3d 1148, 1148). We conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

777

CAF 14-00203

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

IN THE MATTER OF ANDRE R. CASHAW,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHANTELLE SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, FOR PETITIONER-RESPONDENT.

JENNIFER Z. BLACKHALL, ATTORNEY FOR THE CHILD, CHEEKTOWAGA.

Appeal from an order of the Family Court, Erie County (Paul G. Buchanan, J.), entered August 20, 2013 in a proceeding pursuant to Family Court Act article 6. The order awarded the parties joint legal custody of the subject child with Andre R. Cashaw acting as the primary residential parent.

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

Same memorandum as in *Matter of Smith v Cashaw* ([appeal No. 1] ___ AD3d ___ [June 12, 2015]).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

778

CA 14-02167

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

FINANCITECH, LTD., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GML SYRACUSE LLC, AMADEUS DEVELOPMENT, INC.,
DEFENDANTS-RESPONDENTS,
HOLMES KING KALLQUIST & ASSOCIATES, LLP, ET AL.,
DEFENDANTS.

MAYNARD, O'CONNOR, SMITH & CATALINOTTO, LLP, ALBANY (JUSTIN W. GRAY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MELVIN & MELVIN, PLLC, SYRACUSE (KENNETH J. BOBRYCKI OF COUNSEL), FOR DEFENDANT-RESPONDENT GML SYRACUSE LLC.

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK PC, NEW YORK CITY (ROGER A. RAIMOND OF COUNSEL), FOR DEFENDANT-RESPONDENT AMADEUS DEVELOPMENT, INC.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 8, 2014. The order, among other things, denied plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff appeals from an order denying its motion for summary judgment in this action to foreclose two mortgages. Following entry of that order, the mortgaged premises were acquired by the City of Syracuse Industrial Development Agency in a proceeding pursuant to the Eminent Domain Procedure Law. "It is well established that, upon the vesting of title in a condemnation proceeding, all lien interests in the subject property by virtue of mortgages, unpaid taxes, or unsatisfied judgments, are extinguished" (*Matter of County of Rockland [Kohl Indus. Park Co.]*, 172 AD2d 607, 609; *see Matter of County of Nassau [Gelb-Siegel*], 24 NY2d 621, 626). The relief sought by plaintiff in the motion, i.e., appointment of a receiver and foreclosure of the mortgages, is no longer available, and the appeal must therefore be dismissed as moot (*see Matter of Tessler v Board of Educ. of City of N.Y.*, 49 AD3d 428, 429).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

782

CA 14-01844

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

CAROL DURNEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PETER J. MCQUILLEN, JUDITH M. MCQUILLEN,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

KNAUF SHAW LLP, ROCHESTER (AMY K. KENDALL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BONARIGO & MCCUTCHEON, BATAVIA (KRISTIE L. DEFREZE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered June 6, 2014. The order, inter alia, granted in part the motion of defendants Peter J. McQuillen and Judith M. McQuillen for summary judgment.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted in part the motion for summary judgment of defendants Peter J. McQuillen and Judith M. McQuillen. We affirm for reasons stated in the "decision and order" of Supreme Court, and we write only to note that, under the circumstances presented, we decline to search the record to reach issues raised by defendants, who did not cross-appeal from the order (*see Ginter v Flushing Terrace, LLC*, 121 AD3d 840, 845; *New York Univ. Hosp. Rusk Inst. v Government Empls. Ins. Co.*, 39 AD3d 832, 833).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

787

CA 14-02268

PRESENT: SCUDDER, P.J., SCONIERS, VALENTINO, AND DEJOSEPH, JJ.

TODD D. COOK AND LAURA L. COOK,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

SUSAN E. HILL, AS TRUSTEE OF THE SUSAN E. HILL REVOCABLE LIVING TRUST, CURTISS R. HILL, AS TRUSTEE OF THE CURTISS R. HILL REVOCABLE LIVING TRUST, MARC J. HAAS, BETSEY K. HASS, TIMOTHY D. FOURNIER, SUSAN A. FOURNIER, PATRICIA R. DAVIS, RICHARD K. WHITMORE, AS TRUSTEE OF THE YVONNE S. WHITMORE QUALIFIED PERSONAL RESIDENCE TRUST (CANANDAIGUA) U/A DATED AUGUST 1, 2005, ROBERT URLAUB, THOMAS URLAUB, ALLISON DIMARCO, AS CO-TRUSTEES OF THE LOWELL B. URLAUB AND MARY B. URLAUB TRUST U/A DATED DECEMBER 31, 2012, BRUCE D. PATT, TRUDIE A. KIRSHNER, MARGARET D. ALDRIDGE, SUSAN W. LOWELL, THEODORE L. LENZ, BELINDA A. LENZ, GEORGE W. KARPUS, KATHLEEN P. KARPUS, THEODORE G. LENZ AND KAREN B. LENZ, DEFENDANTS-RESPONDENTS-APPELLANTS, ET AL., DEFENDANTS.

HARTER SECREST & EMERY LLP, ROCHESTER (JERAULD E. BRYDGES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered October 15, 2014. The order, inter alia, denied the motion of plaintiffs and the cross motion of defendants-respondents for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

788

CA 14-02304

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

MORGAN RV PARK MANAGEMENT, LLC, MORGAN RV PARK INVESTMENTS, LLC, ATLANTIC BLUEBERRY HILL RV RESORT LLC, BLUE BERRY HILL RV LLC, BUENA VISTA RV LLC, COLD BROOK LLC, CRYSTAL LAKE RV RESORT, LLC, GRAND LAKE RV AND GOLF RESORT LLC, MAYS LANDING RV RESORT, LLC, MOUNTAIN PINES RV RESORT LLC, PINE ACRES RV RESORT, LLC, ROUNDUP LLC, STONE BRIDGE LLC, THREE LAKES RV PARK, LLC, BLUE BERRY HILL RV SPE LLC, BUENA VISTA RV SPE LLC, COLD BROOK SPE LLC, ROUNDUP SPE LLC, AND ROBERT MORGAN, PLAINTIFFS-RESPONDENTS,

V ORDER

COMM 2006-C8 RV PARK MASTER SPE, LLC, DEFENDANT-APPELLANT, ET AL., DEFENDANT.

HERRICK FEINSTEIN LLP, NEW YORK CITY (JEFFREY I. WASSERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A., NEW YORK CITY (JOSEPH BARBIERE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 6, 2014. The order granted the motion of plaintiffs for a preliminary injunction and enjoined defendant Comm 2006-C8 RV Park Master SPE, LLC, from drawing down a certain letter of credit.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 12, 2015,

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

791

KA 13-01195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DEVAN SIMMONS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS OF COUNSEL), 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 (Alex R. Renzi, J.), rendered March 6, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

796

KA 11-02527

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MATTHEW FREEMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (William D. Walsh, J.), rendered November 28, 2011. Defendant was resentenced upon his conviction of burglary in the first degree (two counts), aggravated assault upon a police officer or peace officer and criminal possession of a weapon in the second degree (two counts).

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

807

CA 14-01765

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

IN THE MATTER OF THE APPLICATION UNDER
ARTICLE 7 OF THE REAL PROPERTY TAX LAW BY
SHOPPINGTOWN MALL, LLC (LBUBS),
PETITIONER-RESPONDENT,

V ORDER

ASSESSOR, BOARD OF ASSESSORS AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF DEWITT,
TOWN OF DEWITT, RESPONDENTS-RESPONDENTS,
AND JAMESVILLE DEWITT CENTRAL SCHOOL
DISTRICT, INTERVENOR-RESPONDENT.

SHOPPINGTOWN MALL NY, LLC, PROPOSED
INTERVENOR-APPELLANT.

CRONIN, CRONIN, HARRIS & O'BRIEN, P.C., UNIONDALE (RICHARD CRONIN OF COUNSEL), FOR PROPOSED INTERVENOR-APPELLANT.

COOPER ERVING & SAVAGE LLP, ALBANY (DAVID C. ROWLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

BOND, SCHOENECK & KING, LLP, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 10, 2014 in a proceeding pursuant to RPTL article 7. The order denied the motion of Shoppingtown Mall NY, LLC to intervene.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

815

TP 14-02080

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

IN THE MATTER OF JAMES STANBACK, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered November 17, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

817

TP 14-02116

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

IN THE MATTER OF ROBERT HAIGLER, PETITIONER,

V ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

ROBERT HAIGLER, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PETER H. SCHIFF OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered November 25, 2014) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

830

CAF 14-00137

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

IN THE MATTER OF JOSEPH CALLOWAY,
PETITIONER-RESPONDENT,

V ORDER

MARQUITA ALLEN, ALSO KNOWN AS MARQUITA DAVIS,
RESPONDENT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-APPELLANT.

ALEXANDER KOROTKIN, ROCHESTER, FOR PETITIONER-RESPONDENT.

ROBERT P. TURNER, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered December 6, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner sole and primary physical custody of the subject child.

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

831

CAF 14-01053

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

IN THE MATTER OF SEAN E. PALMER,
PETITIONER-APPELLANT,

V ORDER

TERESA CORBETT, RESPONDENT-RESPONDENT.

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-RESPONDENT.

JOHN W. HALLETT, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered March 27, 2014 in a proceeding pursuant to Family Court Act article 6. The order directed that petitioner shall have no visitation with 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 Family Court.

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

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

1414/14

CA 14-00905

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

TESHA PALADINO, PLAINTIFF-RESPONDENT,

V ORDER

AMANDA BERNARDINI, MOLLY MCCLATCHEY,
PATRICIA MCCLATCHEY, DAVID MCCLATCHEY,
DEFENDANTS-RESPONDENTS,
FLORENCE GIORDANO AND LIZA MARLETTE,
DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AMANDA L. MACHACEK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JASON C. LUNA, PLLC, HAMBURG (JASON C. LUNA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ROBERT E. SCOTT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered August 27, 2013. The order, insofar as appealed from, denied in part the motion of defendants Florence Giordano and Liza Marlette for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 24, 2015,

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

Entered: June 12, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (355/06) KA 04-02388. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DARRYL STOKES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., LINDLEY, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (616/13) KA 08-02220. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHERROD CARTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ. (Filed June 12, 2015.)

MOTION NO. (540/14) KA 12-01248. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL A. ROSS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 12, 2015.)

MOTION NOS. (92/13 and 1153/14) KA 11-00966. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAVAN DARK, ALSO KNOWN AS MIKE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, VALENTINO AND DEJOSEPH, JJ.

(Filed June 12, 2015.)

MOTION NO. (1361/14) CAF 13-01515. -- IN THE MATTER OF ZINETA AVDIC, PETITIONER-APPELLANT-RESPONDENT, V REFIK AVDIC, RESPONDENT-RESPONDENT-APPELLANT. IN THE MATTER OF REFIC AVDIC, PETITIONER-RESPONDENT-APPELLANT, V ZINETA AVDIC, RESPONDENT-APPELLANT-RESPONDENT. SUSAN B. MARRIS, ESQ., ATTORNEY FOR THE CHILD, APPELLANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (1364/14) CA 14-00851. -- RADON CORPORATION OF AMERICA, INC., PLAINTIFF-APPELLANT-RESPONDENT, V NATIONAL RADON SAFETY BOARD, DEFENDANT-RESPONDENT, RADON TESTING CORPORATION OF AMERICA, INC., DEFENDANT-RESPONDENT-APPELLANT, NANCY BREDHOFF AND ANDREAS GEORGE, DEFENDANTS-RESPONDENTS. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (1393/14) CA 14-00673. -- ROGER D. CRAIN, PLAINTIFF-APPELLANT, V BILL E. MANNISE AND CYNTHIA L. MANNISE, DEFENDANTS-RESPONDENTS. WILLIAM E. MANNISE AND CYNTHIA L. MANNISE, THIRD-PARTY PLAINTIFFS, V MICHAEL ARCURI, THIRD-PARTY DEFENDANT. -- Motion for reargument or leave to appeal to the

Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND SCONIERS, JJ. (Filed June 12, 2015.)

MOTION NO. (4/15) KA 14-00465. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERRY GILLARD, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (6/15) KA 13-00410. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RYAN P. BRAHNEY, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (7/15) KA 13-01456. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RYAN P. BRAHNEY, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (14/15) CA 13-00976. -- ADAM VILLAR, PLAINTIFF-APPELLANT, V COUNTY OF ERIE, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (21/15) CA 13-00979. -- ADAM VILLAR, PLAINTIFF-APPELLANT, V TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (97/15) KA 10-00076. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL JONES, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CARNI, VALENTINO, AND WHALEN, JJ. (Filed June 12, 2015.)

MOTION NO. (108/15) CA 13-00385. -- IN THE MATTER OF THE ESTATE OF MAGDA CORDELL MCHALE, DECEASED. DENISE KELLEHER, PETITIONER-RESPONDENT-RESPONDENT, EVAN MCHALE, RESPONDENT-PETITIONER-APPELLANT; THE JOHN MCHALE AND MAGDA MCHALE ARCHIVES FOUNDATION, RESPONDENT-RESPONDENT. CHARITABLE BENEFICIARIES, INTERESTED PARTY-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (110/15) CA 14-01110. -- IN THE MATTER OF TOWN BOARD OF TOWN OF BRIGHTON, ON BEHALF OF TOWN OF BRIGHTON, AND WEST BRIGHTON FIRE PROTECTION DISTRICT, PETITIONERS-PLAINTIFFS-RESPONDENTS, V WEST BRIGHTON FIRE

DEPARTMENT, INC., RESPONDENT-DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (115/15) CA 14-01114. -- KATHLEEN BENEDETTI, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF ERIC SMITH, DECEASED, PLAINTIFF-RESPONDENT, V ERIE COUNTY MEDICAL CENTER CORPORATION, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (127/15) CA 14-00358. -- LAURA SHELTERS, PLAINTIFF-RESPONDENT, V CITY OF DUNKIRK HOUSING AUTHORITY, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (240/15) CA 14-01129. -- MARGARITA ZULEY, M.D., PLAINTIFF-APPELLANT, V ELIZABETH WENDE BREAST CARE, LLC, WENDE LOGAN-YOUNG, M.D., STAMATIA DESTOUNIS, M.D., PHILIP MURPHY, M.D., POSY SEIFERT, D.O., AND PATRICIA SOMERVILLE, M.D., DEFENDANTS-RESPONDENTS. -- Motion for reargument of the appeal is granted to the extent that, upon reargument, the memorandum and order entered March 27, 2015 (126 AD3d 1460), is amended by adding “December” before the year “2004” in the seventh sentence of the

first paragraph of the memorandum and by deleting the period at the end of the eighth sentence of the first paragraph of the memorandum and adding the following language thereafter: ", and Logan-Young's attorney reiterated that proposal in August 2005. In November 2005, however, Logan-Young's attorney indicated that the purchase price would be $2 million, which would not be decreased by profits from the practice pending the closing." PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed June 12, 2015.)

MOTION NO. (263/15) CA 14-01423. -- HOLLY M. REDMOND, PLAINTIFF-RESPONDENT, V DENIS M. REDMOND AND CANDACE G. REDMOND, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (265/15) CA 14-01716. -- GREGORY MILLER, PLAINTIFF-RESPONDENT, V WEBB OF BUFFALO, LLC, DEFENDANT-RESPONDENT-APPELLANT, BURKE HOMES, LLC, AND TIME WARNER CABLE, INC., DEFENDANTS-APPELLANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, SCONIERS, AND VALENTINO, JJ. (Filed June 12, 2015.)

MOTION NO. (284/15) CA 14-01684. -- ADAM WEIERHEISER, PLAINTIFF-RESPONDENT, V MCCANN'S, INC., DOING BUSINESS AS MOONEY'S SPORTS BAR & GRILL, AND DARRT AMUSEMENT, INC., DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J.,

LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed June 12, 2015.)

MOTION NO. (322/15) KA 13-01489. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL J. BURNETT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed June 12, 2015.)

KAH 14-00992. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. CURTIS DAVIS, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from a Judgment [denominated order] of the Supreme Court, Wyoming County, Michael M. Mohun, A.J. - Habeas Corpus). PRESENT: SCUDDER, P.J., SMITH, SCONIERS, VALENTINO, AND DEJOSEPH, JJ. (Filed June 12, 2015.)