SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 13, 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. 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

553.1/14

CA 13-01696

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

ACEA M. MOSEY, AS ADMINISTRATRIX OF THE ESTATE
OF OLIVE REIMANN, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

PARIS CHILDS, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

ZDARSKY, SAWICKI & AGOSTINELLI, LLP, BUFFALO (K. MICHAEL SAWICKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Kevin M. Dillon, J.), entered July 17, 2013. The order, among other things, denied the cross motion of defendant Paris Childs for partial summary judgment.

Now, upon the order and judgment (one paper) of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered June 24, 2014,

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

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

729

CA 13-02144

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

STEVEN M. PHILLIPS, AS EXECUTOR OF THE ESTATE OF BRIAN J. PHILLIPS, DECEASED, AND AS SUCCESSOR ADMINISTRATOR C.T.A. OF THE ESTATE OF WILLIAM G. PHILLIPS, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

BROCK, SCHECHTER & POLAKOFF, LLP, LAWRENCE LEVIN, C.P.A., AND FRANK A. KACZMARCZYK, C.P.A., DEFENDANTS-APPELLANTS.

BROCK, SCHECHTER & POLAKOFF, LLP, LAWRENCE LEVIN, C.P.A. AND FRANK A. KACZMARCZYK, C.P.A., THIRD-PARTY PLAINTIFFS,

V

LAW OFFICES OF EUGENE C. TENNEY, THIRD-PARTY DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS.

GELBER & O'CONNELL, LLC, AMHERST (HERSCHEL GELBER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HISCOCK & BARCLAY, BUFFALO (DAVID M. HEHR OF COUNSEL), FOR THIRD-PARTY DEFENDANT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered September 13, 2013. The order denied the motion of defendants-third-party plaintiffs to compel the further deposition of an employee of third-party defendant.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on May 20, 29 and June 10, 2015,

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

881

KA 11-01779

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAYLA FULTON, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAYLA FULTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (John Lewis DeMarco, J.), rendered September 2, 2010. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree (two counts), assault in the first degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [1], [3]), assault in the first degree (§ 120.10 [1]), and grand larceny in the fourth degree (§ 155.30 [1]), arising from the alleged robbery of a restaurant by defendant and her brother. Defendant contends in her pro se supplemental brief that she was the victim of unconstitutional selective prosecution based upon race (*see generally People v Blount*, 90 NY2d 998, 999), but that contention was forfeited by her plea of guilty (*see People v Santiago*, 55 NY2d 776, 777; *People v Ortiz*, 233 AD2d 955, 956). Defendant further contends in her pro se supplemental brief that counts one, three and four are multiplicitous on the ground that those counts are based upon the same conduct as the conduct charged in count two. That contention is not preserved for our review inasmuch as she failed to challenge the indictment on that ground (*see* CPL 470.05 [2]; *see People v Quinn*, 103 AD3d 1258, 1258, *lv denied* 21 NY3d 946). In any event, the contention is without merit. "An indictment 'is multiplicitous when a single offense is charged in more than one count' " (*Quinn*, 103 AD3d at 1259, quoting *People v Alonzo*, 16 NY3d 267, 269). Where, as here, however, each count "requires proof of an additional fact that the other does not," the indictment is not multiplicitous (*People v Jefferson*, 125

AD3d 1463, 1464, *lv denied* 25 NY3d 990 [internal quotation marks omitted]; *cf. Alonzo*, 16 NY3d at 269-270; *People v Casiano*, 117 AD3d 1507, 1509).

Defendant failed to preserve for our review the contention in her pro se supplemental brief that both the search warrant and her arrest were based upon unreliable statements of an accomplice and thus were not based on probable cause (*see* CPL 470.15 [3] [c]). In any event, we conclude that the contention is without merit inasmuch as "the statement by the identified citizen informant that was against the informant's 'own penal interest constituted reliable information for the purposes of supplying probable cause' " (*People v Brito*, 59 AD3d 1000, 1000, *lv denied* 12 NY3d 814). Contrary to the further contention of defendant in her pro se supplemental brief, County Court "properly refused to suppress the . . . statements that [she] made to police investigators while [she] was in custody. The court's determination that defendant voluntarily waived [her] *Miranda* rights prior to making those statements was based upon the credibility of the witness[ ] at the suppression hearing and thus is entitled to great deference" (*People v Vaughan*, 48 AD3d 1069, 1071, *lv denied* 10 NY3d 845, *cert denied* 555 US 910).

The contention of defendant in her pro se supplemental brief that her plea was not knowingly, intelligently and voluntarily entered because a favorable sentence for her brother was conditioned upon her plea of guilty is not preserved for our review inasmuch as she failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159; *cf. People v Fiumefreddo*, 82 NY2d 536, 538-539). In any event, that contention is without merit because the record does not establish that defendant's plea was connected to her brother's sentence (*cf. Fiumefreddo*, 82 NY2d at 542-543). Furthermore, the record establishes that "nothing in the plea allocution called into question defendant's admitted guilt or the voluntariness of the plea" (*People v Adams*, 66 AD3d 1355, 1355-1356, *lv denied* 13 NY3d 858).

Defendant's contention in her pro se supplemental brief that she was denied effective assistance of counsel based upon defense counsel's allegedly erroneous summary of the evidence during the plea colloquy does not survive the plea of guilty because defendant has "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of the attorney[']s allegedly poor performance' " (*People v Grandin*, 63 AD3d 1604, 1604, *lv denied* 13 NY3d 744).

Finally, contrary to the contention raised in the main and pro se supplemental briefs, the sentence is not unduly harsh and severe.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

898

KA 14-00193

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALBERT ACKERMAN, DEFENDANT-APPELLANT.

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

ALBERT ACKERMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered December 23, 2013. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt.

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 aggravated criminal contempt (Penal Law § 215.52 [1]), defendant contends that County Court erred in imposing an enhanced sentence based upon his postplea arrest for violating an order of protection. We reject that contention. Defendant does not dispute that he was informed, at the time of his plea, that he could receive an enhanced sentence in the event that he committed any new crimes or got into any "trouble," but he contends that there was no legitimate basis for his postplea arrest. Although defendant's contention survives the valid waiver of the right to appeal (*see People v O'Brien*, 98 AD3d 1264, 1264, *lv denied* 20 NY3d 1063), and is preserved for our review through defendant's motion to withdraw his plea on that ground (*cf. People v Fumia*, 104 AD3d 1281, 1281, *lv denied* 21 NY3d 1004), we nevertheless conclude that the contention lacks merit. It is well settled that "a court may not impose an enhanced sentence unless 'the court can be satisfied . . . of the existence of a legitimate basis for the arrest,' . . . [and] here the existence of a legitimate basis was established by the admission of defendant that he violated an order of protection" (*People v Taylor*, 286 AD2d 916, 916, *lv denied* 97 NY2d 688, quoting *People v Outley*, 80 NY2d 702, 713; *see Fumia*, 104 AD3d at 1281-1282). Contrary to defendant's contention, his violation of the order of protection was not an "innocent mistake." He admitted that he was well aware of the existence of the order; that the order prohibited him from having any

contact with the person in whose favor the order had been issued; and that he knew that he could get in trouble for talking to that person. Despite such knowledge, defendant admitted to repeated contact with the person, including a joint vacation to Letchworth State Park. Although defendant contends that "there were no physical or verbal disputes between the parties" and that the contact was initiated by the person in whose favor the order had been issued, those facts are irrelevant to the issue whether he violated the clear and unambiguous terms of the order of protection that required him to have no contact with that person "EVEN IF INVITED" by that person. The sentence, as enhanced by the court, is not unduly harsh or severe.

Defendant further contends that he was improperly sentenced as a second felony offender because the court, in determining whether a Florida conviction could serve as a predicate felony conviction, erroneously relied on the felony complaint instead of a superseding indictment, and thus improperly "extended or enlarged the allegations of the accusatory instrument" (*People v Yancy*, 86 NY2d 239, 247; *see People v De Aga*, 74 AD3d 552, 553). Inasmuch as defendant did not object to the introduction of the Florida felony complaint at the second felony offender hearing, he has failed to preserve his contention for our review (*see People v Samms*, 95 NY2d 52, 57; *De Aga*, 74 AD3d at 553). In any event, defendant and the People agree that the record does not establish whether there was a superseding indictment and, therefore, the "record [has not been] developed for appellate review" (*Samms*, 95 NY2d at 57; *cf. De Aga*, 74 AD3d at 553).

We reject defendant's further contention that he was improperly sentenced as a second felony offender because the predicate Florida conviction, i.e., felony battery in the third degree (Fla Stat § 784.041), is not comparable to New York's felony assault in the second degree (Penal Law § 120.05 [1]) and cannot satisfy the New York test for foreign jurisdiction predicate felonies under Penal Law § 70.06 (1) (b) (i). The Florida statute addresses two separate and distinct offenses, only one of which requires the infliction of great bodily harm. Subdivision (1) provides that a person commits felony battery if he or she "[a]ctually and intentionally touches or strikes another person against the will of the other; and . . . [c]auses great bodily harm, permanent disability, or permanent disfigurement" (Fla Stat § 784.041 [1]). Although the term "great bodily harm" "is not statutorily defined" (*Key v State of Florida*, 837 So 2d 535, 537), that term " 'defines itself and means great as distinguished from slight, trivial, minor, or moderate harm, and as such does not include mere bruises as are likely to be inflicted in a simple assault and battery' " (*Coronado v State of Florida*, 654 So 2d 1267, 1270).

Subdivision (2) provides that "[a] person commits domestic battery by strangulation if the person knowingly and intentionally . . . impedes the normal breathing or circulation of the blood of a family or household member or of a person with whom he or she is in a dating relationship, *so as to create a risk of or cause great bodily harm* by applying pressure on the throat or neck of the other person or by blocking the nose or mouth of the other person" (Fla Stat § 784.041 [2] [a] [emphasis added]). Because the foreign jurisdiction's statute

encompasses conduct that could be either a felony or a misdemeanor, i.e., subdivision (2) includes merely a risk of great bodily harm, we are authorized to review the accusatory instrument (*see People v Medina*, 129 AD3d 429, 430; *see generally People v Muniz*, 74 NY2d 464, 468), and the accusatory instrument submitted at the hearing established that defendant was convicted under the first subdivision. We agree with the First Department that the term "great bodily harm" as used in the Florida statutes is "analogous to New York's requirement of 'serious physical injury,' " and we thus conclude that defendant's conviction under Florida Statutes § 784.041 (1) is "equivalent to a conviction of assault in the second degree" and may serve as a predicate felony conviction under Penal Law § 70.06 (1) (b) (i) (*Medina*, 129 AD3d at 430).

In his pro se supplemental brief, defendant contends that he was denied effective assistance of counsel. To the extent that defendant's contentions with respect thereto survive the guilty plea and valid waiver of the right to appeal (*see People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817; *People v Santos*, 37 AD3d 1141, 1141, *lv denied* 8 NY3d 950), we conclude that his contentions lack merit (*see generally People v Ford*, 86 NY2d 397, 404). We have considered defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

929

KA 11-00192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERY T. RUSSELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 30, 2010. The judgment convicted defendant, upon his plea of guilty, of arson in the second degree and arson in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of arson in the second degree (Penal Law § 150.15) and arson in the third degree (§ 150.10 [1]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (§ 120.05 [4]).

Defendant contends in each appeal that his respective guilty pleas were not knowing, voluntary, and intelligent. That contention is not preserved for our review inasmuch as defendant did not move to withdraw his guilty pleas or move to vacate the judgments of conviction on that ground (*see People v Wilson*, 117 AD3d 1476, 1477; *People v Lewis*, 114 AD3d 1310, 1311, *lv denied* 22 NY3d 1200; *People v Lugg*, 108 AD3d 1074, 1075), and the narrow exception to the preservation rule does not apply here (*see People v Lopez*, 71 NY2d 662, 666). In any event, we conclude that defendant's "yes" and "no" answers during the plea colloquies do not invalidate his guilty pleas (*see Lewis*, 114 AD3d at 1311; *People v Dunham*, 83 AD3d 1423, 1424, *lv denied* 17 NY3d 794). Moreover, contrary to defendant's contention, we conclude that his answers "confirmed the accuracy of [County Court's] recitation of the facts underlying the crime[s], and . . . there is no requirement that [defendant] personally recite those facts" (*People v Whipple*, 37 AD3d 1148, 1148, *lv denied* 8 NY3d 928; *see People v Smith*, 35 AD3d 1256, 1256, *lv denied* 8 NY3d 927). We further conclude that

the court sufficiently inquired about defendant's mental health issues and medications and ensured that he was lucid and understood the proceedings during both plea colloquies, and his pleas were thus knowing, voluntary, and intelligent (*see People v Lear*, 19 AD3d 1002, 1002, *lv denied* 5 NY3d 807; *People v McCann*, 289 AD2d 703, 703-704).

With respect to appeal No. 1, defendant's contention that the court erred in failing to hold a presentence conference or summary hearing (*see* CPL 400.10 [1], [3]) to correct alleged errors in the preplea report is likewise unpreserved because, after defendant pleaded guilty, defense counsel failed to request a hearing after "reserving" his right to do so in his omnibus motion (*see* CPL 470.05 [2]). In any event, the court did not abuse its discretion by proceeding to sentencing without a hearing inasmuch as "[t]he sentencing transcript establishes that the court did not rely upon the allegedly improper material included in the [preplea report] in sentencing defendant" in accordance with the plea agreement (*People v Gibbons*, 101 AD3d 1615, 1616; *see People v Sumpter*, 286 AD2d 450, 452, *lv denied* 97 NY2d 658; *see generally* CPL 400.10 [1]).

We reject defendant's contention that defense counsel was ineffective for failing to request a hearing to challenge the inclusion of information in the preplea report concerning his involvement in previous fires and his mental health diagnosis (*see* CPL 400.10 [1], [3]). Although defendant correctly contends that erroneous information in a preplea report "create[s] an unjustifiable risk of future adverse effects to [him] in other contexts" (*People v Freeman*, 67 AD3d 1202, 1203), we conclude that defendant has made no showing that the information in the preplea report was inaccurate (*see People v Rudduck*, 85 AD3d 1557, 1557-1558, *lv denied* 17 NY3d 861). Moreover, the record demonstrates that the information was gathered during the investigation to prepare the report and, although it may not have met the technical rules for admissibility at trial, it was properly included in the report (*see Rudduck*, 85 AD3d at 1557-1558; *People v Thomas*, 2 AD3d 982, 984, *lv denied* 1 NY3d 602). Thus, under the circumstances presented, we conclude that a request for such a hearing would have had little to no chance of being granted (*see People v Caban*, 5 NY3d 143, 152).

We reject defendant's further contention that defense counsel was ineffective for failing to dispute defendant's "ability to know" that he had set a fire, or that there were people in the building, in light of the results of a subsequent test of his blood alcohol level. We construe defendant's contention as involving the element of intent set forth in Penal Law § 150.15 and § 150.10 (1) and/or the element of knowledge of the presence of a person in the building or reasonable possibility thereof pursuant to section 150.15 (*see generally* § 15.25; *People v Brown*, 52 AD3d 248, 249, *lv denied* 11 NY3d 735). The general rule is that an intoxicated person may form the required intent to commit a crime, and it is for the jury to decide if the extent of the intoxication acted to negate the element of intent (*see People v Dorst*, 194 AD2d 622, 622, *lv denied* 82 NY2d 924; *People v Rivera*, 170 AD2d 625, 626, *lv denied* 77 NY2d 999). The decision whether to pursue

an intoxication defense is clearly one of strategy (*see Swail v Hunt*, 742 F Supp 2d 352, 366). Here, defendant admitted during his plea allocution that he intentionally damaged a building by starting a fire, and that he knew that another person was in the building or that the circumstances were such as to render the presence of such a person a reasonable possibility. Under the circumstances presented on this record, we conclude that defendant has failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's alleged failure to pursue an intoxication defense (*People v Rivera*, 71 NY2d 705, 709). Thus, defendant failed to meet the requisite burden in support of his claim of ineffective assistance of counsel (*see id.*).

Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

930

KA 11-00193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERY T. RUSSELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered November 30, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Same memorandum as in *People v Russell* ([appeal No. 1] ___ AD3d ___ [Nov. 13, 2015]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

967

KA 12-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKIM GRIMES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 2, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third 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 his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). The charges arose from an incident in which police officers detected the odor of marihuana emanating from a vehicle they had stopped for a traffic violation. Defendant, a passenger in that vehicle, was searched and found to possess narcotics.

We reject defendant's contention that the police lacked probable cause to stop the vehicle. It is well settled that a traffic stop is lawful where "a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation" (*People v Robinson*, 97 NY2d 341, 349; *see Whren v United States*, 517 US 806, 810). Here, the police had probable cause to stop the vehicle because they observed the driver pull his car into traffic from its parked position at the curb without using a turn signal (*see* Vehicle and Traffic Law § 1163 [a], [d]; *People v Hawkins*, 45 AD3d 989, 991, *lv denied* 9 NY3d 1034).

Contrary to defendant's further contention, the police had probable cause to search his person inasmuch as "[t]he odor of marihuana emanating from a vehicle, when detected by an officer

qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d 1200, 1201, *lv denied* 22 NY3d 1087 [internal quotation marks omitted]; *see People v Virges*, 118 AD3d 1445, 1445-1446). We reject defendant's contention that the odor of unburned marihuana could not serve as the basis for the search (*see People v Walker*, 128 AD3d 1499, 1500, *lv denied* 26 NY3d 936).

Defendant further contends that the search and seizure were illegal because the police officers tailored their testimony to establish probable cause to stop the vehicle. That contention is not preserved for our review (*see People v Estivarez*, 122 AD3d 1292, 1292), and it is without merit in any event. The credibility determinations of the hearing court are entitled to great deference and will not be disturbed unless clearly unsupported by the record, which is not the case here (*see People v Ponzo*, 111 AD3d 1347, 1347).

Defendant contends that Supreme Court failed to make a proper finding of a prior felony conviction pursuant to CPL 400.21 inasmuch as the court failed to ask him whether he wanted to controvert any of the allegations set forth in the CPL 400.21 statement. That contention is not preserved for our review (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Butler*, 96 AD3d 1367, 1368), and is without merit in any event. Defendant admitted the prior felony conviction in open court during the plea hearing and, thus, he waived strict compliance with CPL 400.21 (*see People v Vega*, 49 AD3d 1185, 1186, *lv denied* 10 NY3d 965). Moreover, although the court did not formally ask defendant whether he wished to controvert any of the allegations set forth in the CPL 400.21 statement, the record establishes that defendant had an opportunity to do so (*see People v Hughes*, 28 AD3d 1185, 1185, *lv denied* 7 NY3d 790; *see also People v Irvin*, 111 AD3d 1294, 1297, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930). Thus, under the circumstances, we conclude that there was the requisite substantial compliance with CPL 400.21 (*see Irvin*, 111 AD3d at 1297; *Hughes*, 28 AD3d at 1185).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

972

KA 10-01385

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANDY SLADE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 25, 2010. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree and as modified the judgment is affirmed, and a new trial is granted on counts two and three of the indictment.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal sale of a controlled substance in the third degree (Penal Law §§ 20.00, 220.39 [1]), criminal possession of a controlled substance in the third degree (§§ 20.00, 220.16 [1]), and criminally using drug paraphernalia in the second degree (§§ 20.00, 220.50 [2]), defendant contends that the evidence is legally insufficient to establish his liability as an accessory or his constructive possession of the drugs and drug paraphernalia. Defendant failed to preserve that contention for our review inasmuch as he failed to make a motion for a trial order of dismissal specifically directed at those alleged insufficiencies (*see People v Beard*, 100 AD3d 1508, 1509; *People v Goodrum*, 72 AD3d 1639, 1639, *lv denied* 15 NY3d 773; *see generally People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's contention is without merit inasmuch as there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495).

"To establish an acting-in-concert theory in the context of a drug sale, the People must prove not only that the defendant shared the requisite *mens rea* for the underlying crime but also that defendant, in furtherance of the crime, solicited, requested, commanded, importuned or intentionally aided the principal in the commission of the crime . . . Although the case law discussing these criteria is somewhat fact-specific, integral to each inquiry is whether a defendant exhibited any calculated or direct behavior that purposefully affected or furthered the sale of the controlled substance . . . The key to our analysis is whether a defendant intentionally and directly assisted in achieving the ultimate goal of the enterprise—the illegal sale of a narcotic drug" (*People v Bello*, 92 NY2d 523, 526; *see People v Kaplan*, 76 NY2d 140, 144-145). Here, the evidence and the reasonable inferences drawn therefrom establish that defendant intentionally and directly assisted another in the sale of cocaine to an undercover officer by removing barricades on the door to the residence to allow the officer to enter the apartment, standing guard at the door during the officer's transaction with the principal, acting as a lookout during the sale by looking out the peephole of the door to the residence, letting the officer out of the door and securing that door upon the officer's exit from the residence. We conclude that such evidence, viewed in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's guilt as an accessory to the sale of a controlled substance (*see e.g. People v Eduardo*, 44 AD3d 371, 372, *affd* 11 NY3d 484; *People v Rivera*, 250 AD2d 423, 423, *lv denied* 92 NY2d 904; *People v Fuentes*, 246 AD2d 474, 474, *lv denied* 91 NY2d 941; *People v Lopez*, 200 AD2d 525, 525, *lv denied* 83 NY2d 1005). "Acting as a lookout is calculated behavior that furthers a drug sale by ensuring that the sale is not interrupted and the buyer and seller are not apprehended" (*People v Mondon*, 30 Misc 3d 1235 [A], 2011 NY Slip Op 50369[U], * 2).

We further conclude that, based on the evidence admitted at trial, the evidence is legally sufficient to establish that defendant had constructive possession of the drugs and drug paraphernalia found in the residence. " 'Where, as here, defendant is not found in actual possession of drugs [that] were not in plain view, the People must establish his [or her] constructive possession . . . with proof supporting the conclusion that he [or she] exercised dominion and control over the [area where the drugs were found]' " (*People v Archie*, 78 AD3d 1560, 1561, *lv denied* 16 NY3d 856; *see generally People v Manini*, 79 NY2d 561, 573-574). Here, the evidence admitted at trial established that defendant was a resident or occupant of the apartment who had control of the premises, and the fact that large quantities of narcotics and paraphernalia associated with narcotics were found in the heating vents of the residence "permitted the reasonable inference that defendant had both knowledge and possession of the narcotics [and paraphernalia]" (*People v Tirado*, 47 AD2d 193, 195, *affd* 38 NY2d 955; *see People v Diaz*, 220 AD2d 260, 260-261; *see also People v Turner*, 27 AD3d 962, 963).

Viewing the evidence admitted at trial in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d

342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Although we have concluded that the conviction is based on legally sufficient evidence and that the verdict is not against the weight of the evidence, we agree with defendant that Supreme Court erred in admitting in evidence an oral statement of defendant for which no CPL 710.30 notice had been given. The statement at issue was defendant's response to a question about where he resided. The statement was made while police officers were executing a search warrant at the apartment and while defendant, who was wearing only a pair of shorts, was handcuffed and lying on the floor. At that point, one of the officers began to complete a prisoner data report. When the officer asked defendant where he resided, defendant responded, "here."

Generally, a defendant's answer concerning his address, when "elicited through routine administrative questioning that [is] not designed to elicit an incriminating response" (*People v Watts*, 309 AD2d 628, 629, *lv denied* 1 NY3d 582; *see generally People v Rodney*, 85 NY2d 289, 292-293), will be considered pedigree information not subject to CPL 710.30 notice requirements even if the statement later proves to be inculpatory (*see People v Perez*, 198 AD2d 540, 542, *lv denied* 82 NY2d 929). That is "[b]ecause responses to routine booking questions—pedigree questions . . . —are not suppressible even when obtained in violation of *Miranda* [and, therefore, a] defendant lacks a constitutional basis upon which to challenge the voluntariness of his [or her] statement" (*Rodney*, 85 NY2d at 293). "[W]here there is no question of voluntariness, the People are not required to serve defendant with notice" (*id.*).

As the Court of Appeals recognized, however, "the People may not rely on the pedigree exception if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case" (*id.*). Although the question concerning defendant's address appears to have been a facially appropriate question, we conclude that, under the circumstances of this case and, more specifically, under the circumstances in which the question was asked, the question was likely to elicit an incriminating admission and had a "necessary connection to an essential element of [the possessory] crimes charged" under Penal Law §§ 220.16 and 220.50 (2) (*People v Velazquez*, 33 AD3d 352, 354, *lv denied* 7 NY3d 929). We agree with defendant that the error in admitting that statement cannot be considered harmless insofar as it relates to the possessory counts of the indictment inasmuch as the People relied heavily on that statement to establish defendant's constructive possession of the drugs and drug paraphernalia (*cf. People v Baker*, 32 AD3d 245, 250, *lv denied* 7 NY3d 865). We therefore modify the judgment by reversing those parts convicting defendant of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree, and we grant a new trial on those counts of the indictment (*see People v Kims*, 96 AD3d 1595, 1597, *affd* 24 NY3d 422). We reach a contrary conclusion with respect to the sale count of the indictment and conclude that any

error in the admission of defendant's statement was harmless with respect to that count. The evidence in support of that count was overwhelming and "there is no reasonable possibility that the introduction of [defendant's] statement[] at trial played a role in the jury's verdict" on that count (*Baker*, 32 AD3d at 250).

Contrary to defendant's final contention, insofar as it concerns the criminal sale count, i.e., the sole count of the indictment for which a new trial is not being ordered, the court did not err in denying his request for a circumstantial evidence charge. "A circumstantial evidence charge is required [only] where the evidence against a defendant is 'wholly circumstantial' " (*People v Guidice*, 83 NY2d 630, 636; *see People v Daddona*, 81 NY2d 990, 992; *People v Smith*, 90 AD3d 1565, 1566, *lv denied* 18 NY3d 998). Here, however, "[d]efendant was not entitled to a circumstantial evidence charge because the case did not rest entirely on circumstantial evidence" (*Lopez*, 200 AD2d at 525). " 'Eyewitness testimony . . . established that defendant engaged in acts which directly proved that at the very least he acted as a lookout while the crime was being committed' " (*People v Jones*, 306 AD2d 88, 88, *lv denied* 100 NY2d 583, quoting *People v Roldan*, 88 NY2d 826, 827).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1002

CAF 15-00372

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

IN THE MATTER OF ROSANNE DELSIGNORE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FRANK A. DELSIGNORE, JR., RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

LAW OFFICE OF CHARLES A. MESSINA, BLASDELL (CHARLES A. MESSINA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 19, 2014. The order denied the objections of respondent to an order of the Support Magistrate.

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

Memorandum: Petitioner commenced this postjudgment divorce proceeding seeking an increase in the child support paid by respondent. Respondent appeals from an order that denied his objections to the Support Magistrate's order, which directed that his support payments be increased. Contrary to respondent's contention, Family Court did not err in denying his objection to that part of the Support Magistrate's order refusing to apply his payments for his daughter's college expenses as a credit against his child support obligation. " 'A credit against child support for college expenses is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries' " (*Juhasz v Juhasz* [appeal No. 2], 92 AD3d 1209, 1212). In addition, however, "such a credit covers only those expenses associated with the child's room and board, rather than college tuition" (*Ayers v Ayers*, 92 AD3d 623, 625; *see Azizo v Azizo*, 51 AD3d 438, 439-440). Here, the child received certain grants and awards that paid for some of her expenses, and the Support Magistrate properly concluded that the college bills did not establish what part, if any, of those grants and awards was applied to room and board. Consequently, respondent failed to establish that the payments were duplicative of his child support obligation (*see generally Matter of Levy v Levy*, 52 AD3d 717, 718). The Support Magistrate also properly concluded that petitioner was required to maintain a residence for the parties' other child throughout the year, and for the college student during school breaks

(*see Juhasz*, 92 AD3d at 1212). Inasmuch "[a]s the Support Magistrate's findings were based on credibility determinations and supported by the record, they should not be disturbed" (*Matter of Gansky v Gansky*, 103 AD3d 894, 895).

Contrary to respondent's further contention, the court did not abuse its discretion in denying his objections to that part of the Support Magistrate's order that calculated petitioner's income. In determining the amount of child support that a parent must pay, a support magistrate "is required to begin the calculation with the parent's 'gross (total) income as should have been or should be reported in the most recent federal income tax return' " (*Matter of Moran v Grillo*, 44 AD3d 859, 860; *see Marlinski v Marlinski*, 111 AD3d 1268, 1270). Although a support magistrate is "also permitted . . . to consider current income figures for the tax year not yet completed" (*Moran*, 44 AD3d at 860), he or she is not required to do so, and here the Support Magistrate properly used the prior year's income tax figures to calculate both parties' incomes. Respondent's further contention that the Support Magistrate should have imputed additional income to petitioner based on her ability to work is similarly without merit. There is no evidence that petitioner reduced her resources or income in order to reduce or avoid her obligation to support the children (*see* Family Ct Act § 413 [1] [b] [5] [v]; *Lattuca v Lattuca*, 129 AD3d 1683, 1684). Indeed, as the Support Magistrate properly noted, petitioner's income had in fact increased during the time prior to the filing of the petition. We therefore conclude that "the Support Magistrate did not improvidently exercise her discretion in declining to impute additional income to" petitioner (*Matter of Saladino v Saladino*, 115 AD3d 867, 868).

Finally, the court properly denied respondent's objection to that part of the Support Magistrate's order refusing to characterize the health insurance premiums that he paid on behalf of the subject children as an unreimbursed health care expense that should be divided between the parties. "Health insurance premiums are not the equivalent of 'unreimbursed health care expenses' pursuant to Family Court Act § 413 (1) (c) (former [5]), which was in effect when the [judgment of divorce was entered]" (*Matter of Kreiswirth v Shapiro*, 103 AD3d 725, 725-726). Furthermore, as part of the parties' stipulation underlying that judgment, respondent expressly agreed to pay the children's health care premiums in addition to his pro rata share of the unreimbursed medical expenses. We note in any event that the Support Magistrate took respondent's payment of those health care premiums into account in deciding to apply the statutory cap on the parties' income in calculating respondent's child support obligation.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1014

KA 13-01865

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD E. HOGUE, DEFENDANT-APPELLANT.

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

GERALD E. HOGUE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered August 19, 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 upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying his application pursuant to *Batson v Kentucky* (476 US 79) inasmuch as the prosecutor's explanations for striking the prospective juror were vague and nonspecific, thereby compelling an inference of discriminatory motive. We reject that contention. After the court determined that defendant had established a prima facie case of discrimination, the prosecutor explained that he was striking the juror because, throughout the proceedings, the prospective juror had "appeared completely bored and disinterested." Moreover, the prospective juror was "resting her head on her hand" and admitted that she was just "trying to stay awake." Inasmuch as the prospective juror was the first juror seated on the first panel, the prosecutor questioned whether she could be an interested and conscientious juror throughout the entire trial. Affording considerable deference to the court's determination that the prosecutor's specific and race-neutral reasons were nonpretextual (*see People v Harris*, 50 AD3d 1608, 1608, *lv denied* 10 NY3d 959; *see generally People v Hernandez*, 75 NY2d 350, 356, *affd* 500 US 352), we conclude that the court properly denied defendant's *Batson* challenge (*see People v Artis*, 262 AD2d 215, 215, *affd* 94 NY2d 507, *rearg denied* 95 NY2d 849; *People v Alston*, 307 AD2d

1046, 1046, *lv denied* 1 NY3d 539).

Defendant further contends that he was denied a fair trial by the admission of evidence of an uncharged crime, i.e., physically striking a 15-year-old girl during a melee that occurred before he was arrested for the instant offense (*see generally People v Ventimiglia*, 52 NY2d 350), as well as the lack of any curative instructions related to that evidence. Although defendant concedes that his contention is not preserved for our review because "he did not object to the testimony in question" (*People v Paul*, 78 AD3d 1684, 1684, *lv denied* 16 NY3d 834), he further contends that he was denied effective assistance of counsel because defense counsel failed to object to such evidence, failed to request a *Ventimiglia* hearing, and failed to request curative instructions following the admission of the *Ventimiglia* evidence. In our view, the evidence was admissible because it " 'provided background information explaining' " why the police officers were called to the scene (*People v Coldiron*, 87 AD3d 1383, 1383, *lv denied* 19 NY3d 959), and "was needed to complete the narrative of the events" that prompted police involvement (*People v Miller*, 286 AD2d 981, 982, *lv denied* 97 NY2d 657). Even assuming, arguendo, that the court "erred in admitting evidence of [an uncharged crime] without a prior ruling that [such] evidence was admissible . . . and failed to give appropriate limiting instructions to the jury," we conclude that the errors are harmless in light of the overwhelming proof of defendant's guilt (*People v Smith* [appeal No. 1], 266 AD2d 889, 889, *lv denied* 94 NY2d 907; *see People v Watkins*, 229 AD2d 957, 957, *lv denied* 89 NY2d 931). Here, as in *Watkins*, "[t]here is no significant probability that defendant would have been acquitted but for [those errors]" (229 AD2d at 957; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention related to the alleged ineffective assistance of counsel, we conclude that "any error on trial counsel's part in not [objecting to and in not] requesting a limiting instruction regarding the evidence of [the] past uncharged crime[] does not rise to the level of ineffective assistance of counsel when that error is viewed in light of trial counsel's 'entire representation of defendant' " (*People v Leonard*, 129 AD3d 1592, 1594, quoting *People v Oathout*, 21 NY3d 127, 132). Moreover, defendant has "failed 'to demonstrate the absence of strategic or other legitimate explanations' for the failure of defense counsel to pursue a . . . *Ventimiglia* hearing, or to object to the admission of [such evidence] at trial" (*People v Webster*, 56 AD3d 1242, 1242-1243, *lv denied* 11 NY3d 931, quoting *People v Rivera*, 71 NY2d 705, 709).

Contrary to his contention, defendant was not denied his right to counsel when his request to substitute assigned counsel was denied. "The court made the requisite minimal inquiry into defendant's reasons for requesting new counsel," but defendant failed to establish good cause for the substitution of counsel (*People v Goossens*, 92 AD3d 1281, 1281-1282, *lv denied* 19 NY3d 960 [internal quotation marks omitted]). "We note that the court had previously granted defendant's request to substitute counsel, and that [t]he right of an indigent

criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option" (*id.* at 1282 [internal quotation marks omitted]; *see generally People v Sides*, 75 NY2d 822, 824).

Defendant contends that the court erred in granting the People's motion directing him to submit a buccal swab. We reject that contention. A court may issue an order to obtain corporeal evidence, such as blood or saliva, from a suspect where the People establish: "(1) probable cause to believe the suspect has committed the crime, (2) a 'clear indication' that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable" (*Matter of Abe A.*, 56 NY2d 288, 291; *see People v Smith*, 95 AD3d 21, 24). In opposition to the People's motion, defendant conceded that the People had established the third factor. Thus, to the extent that defendant contends on appeal that the People failed to meet that factor, that contention has been waived (*see e.g. People v Jones*, 110 AD3d 1484, 1485, *lv denied* 22 NY3d 1157; *People v Laracuente*, 21 AD3d 1389, 1390, *lv denied* 6 NY3d 777). With respect to the remaining two factors, we conclude that the court properly granted the People's motion. Where, as here, the request was made after the defendant has been indicted, "the indictment provided the court with the requisite clear indication that probative evidence could be discovered from [the] buccal swab" (*People v Small*, 79 AD3d 1807, 1809, *lv denied* 16 NY3d 837 [internal quotation marks omitted]), as well as the requisite "statutory authority and probable cause" (*People v Pryor*, 14 AD3d 723, 725, *lv denied* 6 NY3d 779).

Finally, defendant contends in his pro se supplemental brief that he was subjected to an illegal de facto arrest and, as a result, any physical and identification evidence obtained as a result of that arrest should have been suppressed. That contention lacks merit. As a preliminary matter, to the extent that defendant sought suppression of evidence seized from a codefendant, that contention is not preserved for our review inasmuch as defendant failed to assert his claims of standing at the suppression hearing (*see People v Carter*, 86 NY2d 721, 722-723, *rearg denied* 86 NY2d 839). In any event, we conclude that defendant "lacks standing to challenge the search of [the codefendant], since [defendant] was not the person against whom the search was directed[,] and he cannot complain that his constitutional privacy protections have been infringed as a result of [the search of the codefendant]" (*People v Pursley*, 158 AD2d 255, 256; *see People v Douglas*, 23 AD3d 1151, 1152, *lv denied* 6 NY3d 812; *People v Dawson*, 269 AD2d 817, 818, *lv denied* 95 NY2d 833).

Contrary to defendant's remaining contentions concerning the suppression ruling, we conclude that police officers had reasonable suspicion to stop and detain defendant after an "identified citizen-informant" informed the officers that defendant, who was still in the vicinity, had just assaulted a girl and was in possession of a weapon (*People v Brown*, 288 AD2d 152, 152, *lv denied* 97 NY2d 727; *see People v Whorley*, 125 AD3d 1484, 1484, *lv denied* 25 NY3d 1173). Once detained, defendant abandoned a bag containing bullets, which was then seized by the officers. Inasmuch as defendant's abandonment of the

bag was not caused by any illegal police conduct, the court properly refused to suppress the evidence contained therein (*see People v Sierra*, 83 NY2d 928, 930; *People v McKinley*, 101 AD3d 1747, 1749, *lv denied* 21 NY3d 1017).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1047

CA 15-00271

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

LORI SHAMP, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN SHAMP, DEFENDANT-RESPONDENT-APPELLANT.

STEPHEN M. LEONARDO, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

UNDERBERG & KESSLER LLP, ROCHESTER (LEAH E. TARANTINO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 19, 2014 in a divorce action. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking the phrase "with primary physical residence of [the subject child] awarded to the mother, with visitation to the father" from the fourth decretal paragraph, and by vacating the award of child support, and as modified the judgment is affirmed without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: In this action for divorce and ancillary relief, plaintiff wife appeals and defendant husband cross-appeals from a judgment of divorce that, inter alia, distributed the marital assets, ordered the wife to pay child support, and denied the husband's request for spousal maintenance. Addressing first the issues raised on the cross appeal, we reject the husband's contention that Supreme Court erred in denying his request for maintenance. The record establishes that the court properly considered "the payee spouse's reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" in determining whether to award maintenance (*Hartog v Hartog*, 85 NY2d 36, 52; *see* Domestic Relations Law § 236 [B] [6] [a]). Contrary to the husband's contention, the court did not err in refusing to credit his testimony that his income ranged from $25,000 to $33,000 per year where, as here, the husband failed to provide his income tax returns or any valid evidence of his income or earnings, and the evidence establishes that he indicated on a vehicle loan application that he made approximately $60,000 per year (*see generally Kent v Kent*, 291 AD2d 258, 259). We conclude that the court did not abuse its discretion in refusing to award maintenance to the husband, based on the amount of

income that the court properly imputed to the husband, and the court's "appropriate balancing of [the husband's] needs and [the wife's] ability to pay" (*Torgersen v Torgersen*, 188 AD2d 1023, 1024, *lv denied* 81 NY2d 709; *see Guy v Guy*, 118 AD3d 1352, 1352; *Smith v Winter*, 64 AD3d 1218, 1220, *lv denied* 13 NY3d 709).

Contrary to the husband's further contention, the court properly denied his request for counsel fees. " '[F]or a party to be entitled to an award of counsel fees, there must be sufficient documentation to establish the value of the services performed' " (*Johnston v Johnston*, 63 AD3d 1555, 1556; *see Kalish v Kalish*, 289 AD2d 202, 203), and the husband failed to provide any such documentation.

We agree with the husband, however, that the court erred in providing in the judgment that "primary physical residence of [the subject child] is awarded to the mother, with visitation to the father." Pursuant to a prior stipulation, the parties agreed to shared custody with approximately an even distribution of parenting time, and the court accepted that stipulation by ordering that the stipulation be incorporated in, but not merged into, the judgment of divorce. That stipulation, as the court noted in its decision, "reveals a truly 50-50 shared parenting plan." "[T]hus, neither [parent] is the primary physical custodian" (*Matter of Disidoro v Disidoro*, 81 AD3d 1228, 1229, *lv denied* 17 NY3d 705; *see generally Eberhardt-Davis v Davis*, 71 AD3d 1487, 1487-1488). Consequently, the court erred in awarding primary physical residence to the mother. We therefore modify the judgment accordingly.

We reject the wife's contention on her appeal that the court erred in its distribution of the marital property. "[T]rial courts 'are granted substantial discretion in determining what distribution of marital property . . . will be equitable under all the circumstances' " (*Oliver v Oliver*, 70 AD3d 1428, 1429). Here, we conclude that the court properly exercised its broad discretion in its equitable distribution of the marital property (*see Martinson v Martinson*, 32 AD3d 1276, 1277), upon considering the requisite statutory factors (*see generally* Domestic Relations Law § 236 [B] [5] [d]).

The wife further contends that the court erred in its child support award. We agree. "The three-step statutory formula of the [Child Support Standards Act (CSSA)] for determining the basic child support obligation must be applied in all shared custody cases . . . and the noncustodial parent [must be] directed to pay a pro rata share of that obligation unless the court finds that amount to be 'unjust or inappropriate' based upon a consideration" of the factors set forth in Domestic Relations Law § 240 (1-b) (f) (*Baraby v Baraby*, 250 AD2d 201, 204; *see Bast v Rossoff*, 91 NY2d 723, 727). Although we conclude that the court properly determined that the wife is the noncustodial parent for CSSA purposes because her income exceeds the income properly imputed to the husband (*see Disidoro*, 81 AD3d at 1229; *Eberhardt-Davis*, 71 AD3d at 1487-1488; *Baraby*, 250 AD2d at 204), we agree with the wife that the court erred in making its child support award

pursuant to the CSSA without determining whether her share is unjust or inappropriate based on the factors set forth in Domestic Relations Law § 240 (1-b) (f).

It is well settled that, where "the amount of [the] basic child support obligation is 'unjust or inappropriate' because of the shared custody arrangement of the parents, the court may then utilize 'paragraph (f)' to fashion an appropriate award" (*Bast*, 91 NY2d at 732). Here, we agree with the wife that the court erred in failing to review the child support award in light of those factors. We therefore further modify the judgment by vacating the child support award. Because the record is insufficient to determine whether those factors should apply or what the appropriate amount of child support should be, we remit the matter to Supreme Court to recalculate child support pursuant to the CSSA after, insofar as the court deems necessary, complete disclosure regarding the parties' financial situations, a hearing, and consideration of the factors in section 240 (1-b) (f) of the Domestic Relations Law (*see Sonbuchner v Sonbuchner*, 96 AD3d 566, 568-569; *McLoughlin v McLoughlin*, 63 AD3d 1017, 1019).

We also agree with the wife that the court erred in failing to deduct the FICA tax payments from her gross income (*see Johnston*, 63 AD3d at 1555-1556). "Pursuant to Domestic Relations Law § 240 (1-b) (b) (5) (vii) (H), '. . . [FICA] taxes actually paid' shall be deducted from income prior to determining the combined parental income" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1398). Consequently, upon remittal for a new determination of child support pursuant to the CSSA, the court should make that deduction when determining the propriety of and, if necessary, the amount of child support.

We have considered the remaining contentions of the parties on their appeal and cross appeal, and we conclude that they are without merit.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1053

CA 14-01874

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

WELLS FARGO BANK, N.A., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DONALD ALESSI AND ROSEMARY A. ALESSI,
DEFENDANTS-APPELLANTS.

SARGENT & COLLINS, WILLIAMSVILLE (RICHARD G. COLLINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGAN LOVELLS US LLP, NEW YORK CITY (GABRIELLE B. RUDA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered March 29, 2014. The order granted the motion of plaintiff for summary judgment, dismissed the counterclaims of defendants and granted plaintiff judgment in the amount of $210,162.57.

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

Memorandum: Plaintiff commenced this action to collect the outstanding principal and interest due under a home equity line of credit agreement executed by defendants as part of a transaction for the purchase of improved real estate in Florida. Although the transaction included a security instrument in the form of a mortgage lien, plaintiff elected to proceed at law with this action on the debt following defendants' default in payment (*see generally* RPAPL 1301; *Wyoming County Bank & Trust Co. v Kiley*, 75 AD2d 477, 480). Plaintiff thereafter moved for summary judgment on the amended complaint and sought dismissal of the counterclaims, and defendants opposed the motion and cross-moved for summary judgment on their counterclaims. The parties conceded that no questions of fact exist and sought judicial resolution on the basis of their submissions on the motion and cross motion (*see G. B. Kent & Sons v Helena Rubinstein, Inc.*, 47 NY2d 561, 565; *Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572, 577, *lv denied* 17 NY3d 708). Supreme Court granted plaintiff's motion, directing that judgment be entered against defendants in the sum of $210,162.57 and dismissing defendants' counterclaims. We affirm.

Plaintiff met its initial burden by submitting the note and evidence that defendants failed to make payments required by its terms

(*see Gateway State Bank v Shangri-La Private Club for Women*, 113 AD2d 791, 791-792, *affd* 67 NY2d 627; *Harvey v Agle*, 115 AD3d 1200, 1200). "It was then incumbent on the defendants to come forward with proof of evidentiary facts showing the existence of a triable issue of fact with respect to a bona fide defense" (*Gallagher v Kazmierczuk*, 245 AD2d 418, 418). We reject defendants' contention that the home equity line of credit agreement, read alone or in conjunction with the mortgage, is a "nonrecourse" loan and that plaintiff's remedy is limited thereby to an action to foreclose the mortgage. There is no language in the agreement or the mortgage that establishes that it was the intention of the parties that plaintiff's "only recourse in connection with the underlying loan was the mortgaged property" (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248; *cf. Adams v Fountains Senior Props. of N.Y., Inc.*, 38 AD3d 804, 805).

Contrary to defendants' further contention, we conclude that the real estate appraisal plaintiff obtained as part of its own loan underwriting protocol cannot provide a basis for defendants' affirmative defense that they detrimentally relied upon a fraudulently inflated appraisal in executing the loan and mortgage documents (*see Newman v Wells Fargo Bank, N.A.*, 85 AD3d 435, 435). It is well settled that appraisals are generally not actionable under a theory of fraud or fraudulent inducement because such representations of value are matters of opinion upon which there can be no basis for detrimental reliance (*see Brang v Stachnik*, 235 App Div 591, 592, *affd* 261 NY 614; *Ellis v Andrews*, 56 NY 83, 85-87; *Stuart v Tomasino*, 148 AD2d 370, 371; *see also Newman*, 85 AD3d at 435).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1064

KA 12-01003

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY COKER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered January 5, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We agree with defendant that "the waiver of the right to appeal is invalid because the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]; *see People v Box*, 96 AD3d 1570, 1571, *lv denied* 19 NY3d 1024). Further, the People correctly concede that the court failed to ensure "that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256; *see Jones*, 107 AD3d at 1590).

Defendant failed to move to withdraw the plea or to vacate the judgment of conviction on the ground that the court's *Outley* warning was not part of the plea agreement and thus failed to preserve for our review his contention that the court erred in imposing an enhanced sentence (*see People v Scott*, 101 AD3d 1773, 1773-1774, *lv denied* 21 NY3d 1019). In any event, that contention is without merit inasmuch as "the record establishes that defendant 'was clearly informed of the consequences of his failure' to abide by the conditions of his plea agreement" (*id.* at 1774), and defendant stated that he understood that

he was subject to an enhanced sentence in the event that he was "involved in any new criminal conduct." Even assuming, arguendo, that defendant's contention that he was denied effective assistance of counsel based upon counsel's failure to object to that condition survives his plea of guilty, we reject that contention. The record establishes that defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Laurendi*, 126 AD3d 1401, 1402; *People v Parson*, 122 AD3d 1441, 1442-1443).

Defendant likewise failed to preserve for our review his contention that the court erred in failing to hold a hearing on the issue whether he violated the "new criminal conduct" condition of his plea agreement because he failed to request such a hearing (*see People v Ali O.*, 115 AD3d 1353, 1353-1354, *lv denied* 23 NY3d 960). In any event, we conclude that "[t]he court was not required to conduct an evidentiary hearing to determine the veracity of defendant's excuses," and that the court conducted a sufficient inquiry before determining that defendant had engaged in criminal conduct before it imposed the enhanced sentence (*People v Albergotti*, 17 NY3d 748, 750).

Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1065

CA 15-00255

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

ANTONIO MARTIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LANCER INSURANCE COMPANY, DEFENDANT-APPELLANT.

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

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD NICOTRA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 17, 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.

Memorandum: Plaintiff commenced this breach of contract action seeking no fault benefits under an insurance policy issued by defendant to D & M Collision, Inc. (D & M), a car dealership that allegedly owned the vehicle in which plaintiff was injured when it was struck from behind by another vehicle. Defendant moved for summary judgment dismissing the complaint, contending that the vehicle in question was not owned by D & M, its insured, at the time of the accident and thus is not covered by the policy. We conclude that Supreme Court properly denied the motion inasmuch as there is an issue of fact whether D & M owned the vehicle.

Plaintiff had a business relationship with D & M's owner whereby plaintiff would use D & M's dealer credentials to purchase used vehicles at auction. On June 14, 2012, plaintiff, using D & M's credentials, purchased a 2001 Chrysler 300 at auction for $600. Although plaintiff used his own money to purchase the vehicle, the Retail Certificate of Sale form (form MV-50) issued in conjunction with the sale identifies D & M as the buyer. Approximately two months later, in mid-August 2012, plaintiff agreed to sell the vehicle to Edward Hardy. The title to the vehicle could not be transferred to Hardy, however, until the vehicle passed inspection, and the vehicle could not pass inspection until its computer codes had been cleared. According to plaintiff, the vehicle had to be driven a certain distance in order for the codes to be cleared.

On August 31, 2012, the vehicle was involved in an accident while Hardy was driving and plaintiff was a passenger. At that time, title to the vehicle still had not been transferred to Hardy because the codes had not yet been cleared, and the vehicle therefore had not yet passed inspection. In the accident, plaintiff sustained injuries for which he received medical treatment, and he thereafter sought payment of his medical expenses by defendant under the policy it issued to D & M. Defendant refused to provide coverage on the ground that its policy did not cover the vehicle because the vehicle was not owned by D & M, and plaintiff thereafter commenced this action.

The no-fault coverage defendant provided to D & M covered all vehicles "owned" by D & M. Vehicle and Traffic Law § 128 defines an "owner" as "[a] person, other than a lien holder, having the property in or title to a vehicle." Generally, "ownership is in the registered owner of the vehicle or one holding the documents of title[,] but a party may rebut the inference that arises from these circumstances" (*Fulater v Palmer's Granite Garage*, 90 AD2d 685, 685, *appeal dismissed* 58 NY2d 826; *see also Zegarowicz v Ripatti*, 77 AD3d 650, 653). Where there is conflicting evidence of ownership, the issue must be resolved by a trier of fact (*see Sosnowski v Kolovas*, 127 AD2d 756, 758; *Fulater*, 90 AD2d at 685). Moreover, we note that there may be more than one owner of a vehicle and, to the extent that there is more than one owner here, they may be jointly and severally liable to plaintiff (*see* Vehicle and Traffic Law § 388 [1], [3]; *Hassan v Montuori*, 99 NY2d 348, 353).

Here, the evidence submitted by defendant in support of its motion failed to eliminate all issues of fact whether D & M owned the subject vehicle at the time of the accident. Notably, the vehicle was purchased with D & M's dealer credentials and, at the time of the accident, D & M had title to the vehicle, and its dealer plates were on the vehicle. Although defendant presented additional evidence seeking to rebut the presumption of D & M's ownership arising from those circumstances, the court properly concluded that it failed to do so (*see generally Aronov v Bruins Transp.*, 294 AD2d 523, 524; *Sosnowski*, 127 AD2d at 758).

Defendant's remaining contentions are raised for the first time on appeal and thus are not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1087

KA 12-01688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MORRIS B. YUSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 7, 2012. The judgment convicted defendant, upon a jury verdict, of identity theft in the first degree (two counts) and criminal possession of a forged instrument in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts each of identity theft in the first degree (Penal Law § 190.80 [3]) and criminal possession of a forged instrument in the second degree (§ 170.25), stemming from two different incidents in which defendant deposited forged checks into his bank account. Defendant, relying on *People v Barden* (117 AD3d 216, 224-230, *lv granted* 24 NY3d 959), contends that the conviction of identity theft in the first degree is not supported by legally sufficient evidence because the People did not establish that he assumed the identity of another person. We reject that contention. As relevant herein, the statute provides that "[a] person is guilty of identity theft in the first degree when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby . . . commits or attempts to commit a class D felony" (§ 190.80 [3]). There was no evidence at trial that defendant presented himself as the victims or acted as those victims, and the People proceeded on the theory that defendant assumed the identity of the victims by using their personal identifying information. In relevant part, the term " 'personal identifying information' means a person's name, address, telephone number, date of birth, driver's license number, social security number, place of employment . . . [or]

checking account number or code" (§ 190.77 [1]).

We decline to follow *Barden*, which concludes that "assumption of identity is not necessarily accomplished when a person uses another's personal identifying information" (*id.* at 227), and that the People must prove both that a defendant used the personal identifying information of the victim and that he assumed the victim's identity (*see id.* at 226-227). Instead, we conclude that the statute is unambiguous and defines the phrase "assumes the identity of another person" by the phrase that immediately follows it, i.e., by, inter alia, using the personal identifying information of that other person (Penal Law § 190.80). Therefore, inasmuch as the People established that defendant used the personal identifying information of the victims, they thereby established that defendant assumed their identities for the purposes of the statute.

Defendant's further challenge to the legal sufficiency of the evidence with respect to the identity theft convictions is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crime of identity theft in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, defendant contends that the ability of certain jurors to remain fair and impartial was affected by an allegedly prejudicial remark made by a police officer in their presence. County Court questioned the jurors who were present when the remark was made and determined that none of them overhead the prejudicial remark (*see generally People v Buford*, 69 NY2d 290, 299). The court therefore did not abuse its discretion in denying defendant's motion for a mistrial (*see People v Matt*, 78 AD3d 1616, 1617, *lv denied* 15 NY3d 954; *People v Bassett*, 55 AD3d 1434, 1435, *lv denied* 11 NY3d 922; *People v Figueroa*, 37 AD3d 246, 247, *lv denied* 8 NY3d 984).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1108

KA 13-01934

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

COLLIN M. BROWN, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), 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 (Mark H. Fandrich, A.J.), rendered October 1, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (four counts).

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Mackey*, 79 AD3d 1680, 1681, *lv denied* 16 NY3d 860).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1110

KA 12-01251

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SHAWN NELSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered May 29, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and reckless endangerment in the first degree.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1113

KA 14-01317

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS A. HUFF, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

DEMETRIUS A. HUFF, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 3, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that Supreme Court erred in denying his motion to suppress physical evidence seized from the attic of the home where he resided with his grandmother. We reject that contention. Following a hearing, the court credited the testimony of a detective that the grandmother had voluntarily consented to the search. Although the detective was unable to obtain a written consent to the search, "[i]t is well settled that consent can be established by conduct" (*People v Sinzheimer*, 15 AD3d 732, 734, *lv denied* 5 NY3d 794). According to the detective who testified at the hearing, the grandmother, who had a master's degree, was pleasant and cooperative, she let the detectives into the house, and she led them directly to the attic and unlocked the door to the attic for them. Only after the inculpatory evidence was found did the grandmother become aggravated and refuse to sign the consent form. Although the grandmother testified that she let the detectives into her home only after they told her they had a search warrant, the testifying detective denied telling the grandmother that they had a search warrant.

The court credited the testimony of the detective, and " '[i]t is well settled that [t]he suppression court's credibility determinations . . . are granted deference and will not be disturbed unless unsupported by the record' " (*People v May*, 100 AD3d 1411, 1412, *lv*

denied 20 NY3d 1063). Crediting such testimony, we conclude that the People met their burden of establishing " 'that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied' by the actions of the law enforcement authorities" (*People v Quagliata*, 53 AD3d 670, 671, *lv denied* 11 NY3d 834, quoting *Schneckloth v Bustamonte*, 412 US 218, 248). The grandmother manifested her consent to the search by her willingness to cooperate and her conduct in leading the officers to the attic and unlocking the door thereto (*see People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104; *People v Allah*, 54 AD3d 632, 632, *lv denied* 12 NY3d 755; *Quagliata*, 53 AD3d at 672; *cf. People v McFadden*, 179 AD2d 1003, 1004, *appeal dismissed* 79 NY2d 996).

Defendant further contends that the court erred in refusing to suppress his statements to the police. At the suppression hearing, a detective testified that defendant was read and waived his *Miranda* rights before the initial interview. Although the actual card could not be located and thus was not presented at the hearing, the court credited the detective's unrebutted testimony, and such a credibility determination is entitled to great deference (*see People v Prochilo*, 41 NY2d 759, 761). "[T]he warnings given by this experienced [detective] were adequate and fully conveyed to defendant his rights. No more is required" (*People v Vega*, 225 AD2d 890, 891, *lv denied* 88 NY2d 943).

We reject defendant's contention that his statements were not voluntarily given because he was 17 years old at the time of the interview, allegedly suffered from a learning disability and was unaccompanied by his grandmother to the interview. "A court generally must look to the totality of the circumstances to determine the voluntariness of an inculpatory statement . . . 'The factors to be examined in determining the totality of the circumstances surrounding a defendant's confession include the duration and conditions of detention, the attitude of the police toward the defendant, and the age, physical state, and mental state of the defendant' " (*People v Brown*, 113 AD3d 785, 785, *lv denied* 23 NY3d 1018; *see People v Kemp*, 266 AD2d 887, 888, *lv denied* 94 NY2d 921). In this case, defendant "was legally an adult . . . Thus, there was no requirement that defendant's [guardian] be present during the police questioning" (*People v Lewis*, 277 AD2d 1010, 1011, *lv denied* 96 NY2d 736). Moreover, there was no evidence that defendant was isolated from his grandmother as a result of "official deception or trickery" (*People v Salaam*, 83 NY2d 51, 55). Although defendant contends that he suffered from a learning disability, the grandmother testified at the hearing that defendant was able to complete age-appropriate school work. We thus conclude that "there is insufficient evidence in the record to support [defendant's] assertion that [he] had [a learning disability] or subnormal intelligence and, therefore, could not knowingly or intelligently waive his rights" (*People v Herr*, 203 AD2d 927, 928, *affd* 86 NY2d 638).

Defendant also challenges the voluntariness of the statement based on the seven-hour interrogation that preceded his first

statement. We conclude, however, that the duration of the interview did not render the resulting statement involuntary. Defendant was given breaks to use the bathroom and smoke cigarettes, and he was offered food and beverages (*see People v Clyburn-Dawson*, 128 AD3d 1350, 1351; *People v Figueroa-Norse*, 120 AD3d 913, 914, *lv denied* 25 NY3d 1071; *People v Collins*, 106 AD3d 1544, 1545, *lv denied* 21 NY3d 1072). We thus conclude "that the People proved beyond a reasonable doubt that defendant's statements were voluntary" (*Kemp*, 266 AD2d at 888).

Contrary to defendant's further contention, we conclude that the court properly granted the People's motion to vacate defendant's earlier plea of guilty to a reduced charge of manslaughter in the first degree. In accordance with that earlier plea agreement, defendant had agreed to testify truthfully against the codefendant in exchange for being permitted to plead guilty to the reduced charge. After defendant entered his plea and was called to testify at the codefendant's trial, however, defendant denied all the facts that he had previously admitted in his statements and plea colloquy. It is well settled that "[c]onditions agreed upon as part of a plea bargain are generally enforceable, unless violative of statute or public policy" (*People v Hicks*, 98 NY2d 185, 188). We reject defendant's contention that he substantially complied with the terms of the plea agreement. "Whether a defendant has in fact performed his end of a plea bargain is not tested by the defendant's subjective interpretation but rather[, it is tested] by an objective interpretation of the agreement" (*People v Cuadrado*, 161 AD2d 232, 233, *lv denied* 76 NY2d 855) and, here, there can be no legitimate dispute that defendant failed to perform his end of the bargain when he refused to testify truthfully at the codefendant's trial (*see e.g. People v Brennan*, 62 AD3d 1167, 1168, *lv denied* 13 NY3d 794; *People v Dunton*, 10 AD3d 808, 808, *lv denied* 4 NY3d 830; *Cuadrado*, 161 AD2d at 233). Where, as here, a defendant has materially breached the plea agreement, the court "ha[s] the authority to vacate the [defendant's] guilty plea" (*Matter of Klein v Cowhey*, 161 AD2d 643, 643; *see People v Aponte*, 212 AD2d 157, 161), and the matter may proceed to trial on the original indictment (*see generally People v Bartley*, 47 NY2d 965, 966).

Contrary to defendant's contention, the testimony of the jailhouse informant was not incredible as a matter of law (*see People v Carr*, 99 AD3d 1173, 1174, *lv denied* 20 NY3d 1010), i.e., "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Ponzo*, 111 AD3d 1347, 1348 [internal quotation marks omitted]; *see People v Errington*, 121 AD3d 1553, 1555, *lv denied* 25 NY3d 1163).

Defendant contends that the evidence is legally insufficient to support the conviction of intentional murder. To the extent that defendant contends that there was no evidence of his intent to kill the victim and no evidence that he inflicted the fatal injuries, those contentions have not been preserved for our review (*see People v Gray*, 89 NY2d 10, 19; *People v Broadnax*, 52 AD3d 1306, 1307, *lv denied* 11

NY3d 830). In any event, those contentions lack merit. Here, defendant's intent to kill may be inferred from the evidence that he stabbed the victim 10 times and held the victim down while others stabbed him (*see People v Pearson*, 93 AD3d 1343, 1343, *lv denied* 19 NY3d 866; *People v Moore*, 184 AD2d 1042, 1042, *lv denied* 80 NY2d 907). Although there is no evidence that defendant inflicted the fatal stab wounds, he was charged as an accessory, and the jury was instructed on accessorial liability. As we noted in the case of the codefendant (*People v Nafi*, ___ AD3d ___ [Oct. 2, 2015]), "[a]ccessorial liability requires only that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid another in the conduct constituting the offense" (*People v Chapman*, 30 AD3d 1000, 1001, *lv denied* 7 NY3d 811 [internal quotation marks omitted]).

With respect to defendant's remaining challenges to the sufficiency of the evidence, we conclude that the evidence, when viewed in the light most favorable to the People, is legally sufficient to support the conviction (*see People v Contes*, 60 NY2d 620, 621; *see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, 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 an acquittal would have been unreasonable, and thus that the verdict is not against the weight of the evidence (*see id.* at 348; *Bleakley*, 69 NY2d at 495).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1115

KA 14-00835

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMMY L. SIMMONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), rendered April 23, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon 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 following a jury trial of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [4]), defendant contends that the evidence is legally insufficient to support the conviction because the People failed to present evidence that he possessed a shotgun on or about the date charged in the accusatory instrument and failed to present legally sufficient evidence of possession. Because defendant's motion for a trial order of dismissal and his renewed motion after putting in his own proof were not " 'specifically directed' " at the first alleged error, defendant failed to preserve that contention for our review (*People v Gray*, 86 NY2d 10, 19). We reject defendant's challenge to the sufficiency of the evidence that he possessed the shotgun. We conclude that, "viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349, quoting *People v Acosta*, 80 NY2d 665, 672).

Defendant further contends that he was deprived of a fair trial by prosecutorial misconduct on summation. By failing to object to any of the alleged instances of prosecutorial misconduct, defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Easley*, 124 AD3d 1284, 1285, *lv denied* 25 NY3d 1200). In any event,

we conclude that defendant's contention is without merit.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1117

KA 11-00253

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL F. NELSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 23, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that Supreme Court erred in refusing to charge the jury with respect to the voluntariness of defendant's statements to the police. We reject that contention. "A court is required to provide a charge regarding the voluntariness of defendant's statements only if defendant raises that issue, and 'evidence sufficient to raise a factual dispute [is] adduced either by direct or cross-examination' " (*People v Nathan*, 108 AD3d 1077, 1078, *lv denied* 23 NY3d 966, quoting *People v Cefaro*, 23 NY2d 283, 288-289). Here, defendant did not submit any evidence presenting a genuine issue of fact concerning the voluntariness of his statements, and we therefore conclude that the court was not required to instruct the jury on that issue (*see People v Canfield*, 111 AD3d 1396, 1396, *lv denied* 22 NY3d 1087; *Nathan*, 108 AD3d at 1078).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1118

CA 15-00735

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

W. JAMES CAMPERLINO, PLAINTIFF-APPELLANT,

V ORDER

TOWN OF MANLIUS MUNICIPAL CORPORATION, VILLAGE OF MANLIUS, DEFENDANTS-RESPONDENTS, BENITA ROGERS, FRANK HEATH, CHRISTINE WARFIELD SMITH, EVAN SCOTT SMITH, KERI SEAGRAVES, DAVID ALTHOFF, MARY ANN CALO, MICHAEL J. CALO, DR. DAVID FEIGLIN, SHARON A. LINDBERG, JEROME A. LINDBERG, CAROL ILACQUA, DAVID SAMUEL AND TROOP D VETERANS, INC., INTERVENORS-RESPONDENTS.

LONGSTREET & BERRY, LLP, SYRACUSE (MICHAEL J. LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, SYRACUSE (DAVID M. CAPRIOTTI OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF MANLIUS MUNICIPAL CORPORATION.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT VILLAGE OF MANLIUS.

NEIL M. GINGOLD, FAYETTEVILLE, FOR INTERVENORS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 25, 2014 in a declaratory judgment action. The judgment, among other things, adjudged that the restrictive covenants in the 1981 agreement apply to plaintiff’s property in lots 95 and 85 east of Sweet Road in the Town of Manlius.

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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1119

CA 15-00492

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

RESETARITS CONSTRUCTION CORPORATION,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS,
DEFENDANT-RESPONDENT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH J. MANNA OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (THOMAS M. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Niagara County (Timothy J. Walker, A.J.), entered July 21, 2014. The order, among other things, denied plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment.

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

Memorandum: In this action to recover damages for breach of contract arising from a construction project, plaintiff appeals and defendant cross-appeals from an order that denied their respective motion and cross motion seeking, inter alia, summary judgment. We affirm for reasons stated in the decision at Supreme Court. We write only to address plaintiff's contentions regarding the denial of that part of its motion seeking to preclude defendant from presenting certain evidence at trial based on defendant's failure to comply with prior discovery orders. The court concluded that defendant had submitted a letter and other documents in response to the prior discovery orders demonstrating that defendant had complied with the prior orders. Plaintiff failed to include those documents in the record on appeal, however, and we thus are unable to review plaintiff's present contention that the court erred in determining that the documents were sufficient to establish defendant's compliance with the prior orders. Plaintiff, as the party raising this issue on its appeal, "submitted this appeal on an incomplete record and must suffer the consequences" (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see Killian v Heiman*, 105 AD3d 1459, 1459-1460; *Matter of Rodriguez v*

Ward, 43 AD3d 640, 641).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1123

CA 15-00574

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

JAVELL FOX, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF UTICA, DEFENDANT-APPELLANT.

WILLIAM M. BORRILL, CORPORATION COUNSEL, UTICA (ZACHARY C. OREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered September 22, 2014. The order, among other things, denied defendant's motion to dismiss plaintiff's claim.

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

Memorandum: Plaintiff filed a verified claim in this action and, before answering, defendant filed a CPLR 3211 motion to dismiss, contending that plaintiff had "yet to file a Summons or a Complaint" and that "a complete failure to file is a jurisdictional defect." Relying upon CPLR 2001, Supreme Court deemed the claim to be a complaint and excused the failure to file a summons as "an irregularity that shall be disregarded in this case." That was error. We agree with defendant that CPLR 2001 does not permit a court to disregard the complete failure to file a summons, i.e., an initial paper necessary to commence an action (*see Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 328; *O'Brien v Contreras*, 126 AD3d 958, 958-959). As recognized by the Court of Appeals in quoting from the Senate Introducer's Memorandum in support of the bill that amended CPLR 2001, the statute may be invoked as a basis to correct or clarify " 'a mistake in the method of filing, AS OPPOSED TO A MISTAKE IN WHAT IS FILED' " (*Goldenberg*, 16 NY3d at 328 [capitalization in original]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1130

KA 14-01321

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN MCKINNON, DEFENDANT-APPELLANT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU 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 (Christopher J. Burns, J.), rendered May 14, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses his challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1132

KA 11-01118

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ROY L. TERRY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (ERIC M. DOLAN OF COUNSEL), AND TREVETT CRISTO SALZER & ANDOLINA P.C., 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 (Francis A. Affronti, J.), rendered March 29, 2011. 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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1133

KA 14-00838

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNY Q. RUSSELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Richard C. Kloch, Sr., A.J.), rendered January 10, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to a determinate term of two years, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of assault in the second degree (Penal Law § 120.05 [2]) and sentencing him to a determinate term of incarceration of four years, followed by a period of three years of postrelease supervision. As the People correctly concede, defendant's waiver of the right to appeal at the plea proceeding encompassed the original sentence of probation, but did not encompass the sentence of incarceration imposed following his violation of probation (*see People v Johnson*, 77 AD3d 1441, 1442, *lv denied* 15 NY3d 953).

We agree with defendant that the sentence of incarceration is unduly harsh and severe under the circumstances of this case, and we therefore modify the sentence as a matter of discretion in the interest of justice to a determinate term of imprisonment of two years, followed by a period of three years of postrelease supervision (*see generally* CPL 470.15 [6] [b]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1135

KA 14-00581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS LYON, ALSO KNOWN AS THOMAS J. LYON,
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 judgment of the Monroe County Court (James J. Piampiano, J.), rendered January 23, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that, after a hearing, revoked the sentence of probation previously imposed on his conviction of grand larceny in the third degree (former Penal Law § 155.35) and sentenced him to a term of imprisonment. Defendant contends that County Court failed to schedule and conduct a prompt hearing on his alleged violation of a condition of probation, thereby violating CPL 410.70 (1). We reject that contention.

Defendant was placed on probation and, at his request, the court transferred the supervision of probation to the State of Wisconsin. Defendant was thereafter convicted of several new forgery- and theft-related felony charges in Wisconsin, and sentenced to prison there. A Monroe County probation officer filed with the court "an information for delinquency," i.e., a "request for a declaration of delinquency by a probation officer" (CPL 410.30), asking the court to issue a probation warrant for defendant's arrest, and the court issued such a warrant (*see* CPL 410.40 [2]). That warrant was lodged as a detainer against defendant in Wisconsin. While serving his sentence in Wisconsin, defendant wrote several letters to both the court and the prosecutor in New York, seeking to waive extradition, to be returned to court in New York, to be assigned counsel, and to plead guilty to violating the conditions of probation based on his convictions in Wisconsin. No extradition or transfer proceedings took place,

however, until after defendant had served his Wisconsin prison sentence. Two days after completing his Wisconsin sentence and one day after he was transported to New York, defendant was brought before the court, which committed him to custody and then, after several adjournments to which defendant consented, conducted a hearing pursuant to CPL 410.70. At the conclusion of the hearing, the court found that defendant violated the conditions of his probation and revoked the previously-imposed term of probation. Contrary to defendant's contention, the hearing on his violation of probation was not improperly delayed.

"If at any time during the period of a sentence of probation . . . the court has reasonable grounds to believe that the defendant has violated a condition of the sentence, the court may issue a warrant to a police officer or to an appropriate peace officer directing him or her to take the defendant into custody and bring the defendant before the court without unnecessary delay" (CPL 410.40 [2]). Furthermore, "[t]he defendant is entitled to a hearing . . . promptly after the court has . . . committed him" to custody upon a warrant issued in response to a probation officer's allegation that he violated a condition of his probation (CPL 410.70 [1]). Here, defendant contends that he was deprived of a prompt hearing based upon the four factors set forth in *People v Horvath* (37 AD3d 33, 38), i.e., "the length of the delay, the reason for the delay, whether the probationer is responsible in any portion of the delay, and whether the probationer has suffered prejudice as a result of the delay." We reject that contention. The factors in *Horvath* are based on that Court's conclusion that "the defendant was in the custody of a state correctional facility as a sentenced inmate . . . and was available to the Probation Department to be produced on the warrant throughout the period of her incarceration" (*Horvath*, 37 AD3d at 38). Here, to the contrary, defendant was incarcerated in Wisconsin and, as the Court of Appeals has stated, although "[a] probationer subject to a declaration of delinquency and incarcerated in a New York prison may readily be transported to a New York court for an appearance at a VOP hearing[,] . . . [t]he extradition of such a probationer from an out-of-state prison to New York for an appearance in a New York court is quite another matter" (*People v Feliciano*, 17 NY3d 14, 23). Indeed, the Court of Appeals further noted that "decisions have generally interpreted [the Interstate Agreement on Detainers] to mean that states are not constitutionally obligated to execute detainers lodged out of state against parole or probation violators before their release from prison" (*id.* at 27). Here, the violation of probation detainer was promptly filed in Wisconsin based on the issuance of the probation warrant, defendant was arraigned upon the warrant within two days of completing his Wisconsin sentence and arriving in New York, and any adjournments thereafter were with his consent. Under those circumstances, we conclude that his hearing pursuant to CPL 410.70 (1) was not improperly delayed.

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

merit.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1140

CAF 14-01770

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

IN THE MATTER OF XAVIER B. AND AMIR B.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, ORDER
PETITIONER-APPELLANT;

NADIR J.B., RESPONDENT-RESPONDENT.

TANYA J. CONLEY, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

TANYA J. CONLEY, ATTORNEY FOR THE CHILDREN, ROCHESTER, APPELLANT PRO SE.

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

Appeals from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered September 24, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order dismissed the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 24 and 29, 2015, and by the Attorney for the Children on September 28, 2015,

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1142

CA 15-00709

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

ROBERT JAMES ANDERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAMES M. KERNAN AND MARLENE KERNAN,
DEFENDANTS-RESPONDENTS.

KINSELLA HOGGAN, LLP, ALBANY (JOHN D. HOGGAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT JAMES M. KERNAN.

GEORGE F. ANEY, HERKIMER, FOR DEFENDANT-RESPONDENT MARLENE KERNAN.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered August 4, 2014. The order and judgment, among other things, granted defendants' motions for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for defendants' alleged breach of a joint venture agreement. The purpose of the alleged joint venture was to develop a market for workers' compensation insurance coverage through professional employer organizations (PEO). Supreme Court properly granted defendants' respective motions seeking summary judgment dismissing the complaint against each of them. We note at the outset, with respect to defendant Marlene Kernan (Marlene), that although the notice of motion stated that she was seeking dismissal of the complaint pursuant to CPLR 3211 (a) (7), her attorney's affirmation stated that she was seeking summary judgment. The court, in its decision, acknowledged the discrepancy and treated the motion as one for summary judgment. On the merits, the court properly concluded that Marlene made a prima facie showing that she did not agree to enter into a joint venture with plaintiff, and that plaintiff failed to raise a triable issue of fact (*see Commander Terms. Holdings, LLC v Poznanski*, 84 AD3d 1005, 1009; *Schnur v Marin*, 285 AD2d 639, 639-640; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

The court also properly concluded that defendant James M. Kernan (James) made a prima facie showing that he did not agree to enter into

a joint venture with plaintiff, and that plaintiff failed to raise a triable issue of fact. To establish the existence of a joint venture agreement, "it is not 'enough that two parties have agreed together to act in concert to achieve some stated objective' " (*Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317, *appeal dismissed* 358 US 39). Thus, even accepting as true plaintiff's assertion in opposition to James's motion that he and James agreed to go into business to develop the market for workers' compensation coverage in the PEO industry, we conclude that their "mutual assent with respect to a general principle is unenforceable, as a matter of contract law, on the ground of indefiniteness, as it amounts to no more than an agreement to agree" (*Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 276; *see Needel v Flaum*, 248 AD2d 957, 958).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1145

CA 15-00548

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

CARRIANN RAY, PLAINTIFF-APPELLANT,

V ORDER

ANNETTE FRANCHINI, INDIVIDUALLY AND AS DIRECTOR OF HUMAN RESOURCES, NEW YORK STATE EDUCATION DEPARTMENT, DEFENDANT-RESPONDENT.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HINMAN STRAUB P.C., ALBANY (JOSEPH M. DOUGHERTY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 19, 2014. The order and judgment granted the motion of defendant to dismiss the complaint and dismissed 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 (*see Ingle v Glamore Motor Sales*, 73 NY2d 183, 188-190).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1152

KA 09-01961

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT FULLEN, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 30, 2009. The appeal was held by this Court by order entered June 13, 2014, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (118 AD3d 1297).

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 conduct a reconstruction hearing with respect to the victim's missing psychiatric records (*People v Fullen*, 118 AD3d 1297). Upon remittal, the prosecutor prepared a new subpoena, and the records were again given to the court, which forwarded them to this Court. Upon our review of those records, we conclude that the court did not abuse its discretion in denying defendant access to them (*see People v Tirado*, 109 AD3d 688, 688-689, *lv denied* 22 NY3d 959, *reconsideration denied* 22 NY3d 1091, *cert denied* ___ US___, 135 S Ct 183; *People v Toledo*, 270 AD2d 805, 806, *lv denied* 95 NY2d 858; *see also People v Bird*, 284 AD2d 339, 339, *lv denied* 96 NY2d 916). " '[C]onfidential psychiatric records should be disclosed only when their confidentiality is significantly outweighed by the interests of justice' " (*Tirado*, 109 AD3d at 688). Here, defendant was aware that the victim was hospitalized for an unspecified mental health issue in July 2007, that she suffered from depression, and that she was prescribed medication around the time of the criminal incident herein. Defendant was able to cross-examine both the victim and her mother regarding those matters (*see Toledo*, 270 AD2d at 806; *People v Arredondo*, 226 AD2d 322, 322, *lv denied* 88 NY2d 964). In addition, we agree with the court that there was nothing in the records that was relevant to the victim's credibility or competency to testify (*see Toledo*, 270 AD2d at 806; *see generally*

People v Dudley, 167 AD2d 317, 321). Inasmuch as defendant's need for the records did not outweigh the need to preserve their confidentiality, we reject defendant's contention that the court committed reversible error in denying him access to those records (*see Toledo*, 270 AD2d at 806). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1153

KA 13-01022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RACHAEL CASEY, DEFENDANT-APPELLANT.

KEIR M. WEYBLE, OF THE SOUTH CAROLINA BAR, ADMITTED PRO HAC VICE, AND EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

M. CHRIS FABRICANT, NEW YORK CITY, FOR INNOCENCE NETWORK, AMICUS CURIAE.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Steuben County Court (Marianne Furfure, A.J.), entered April 26, 2013. The order denied the motion of defendant to vacate a judgment of conviction.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order denying, without a hearing, her CPL 440.10 motion to vacate the 2003 judgment convicting her following a jury trial of, inter alia, arson in the first degree (Penal Law § 150.20) and two counts of murder in the second degree (§ 125.25 [2], [3]) in connection with the death of her seven-month-old daughter (*People v Casey*, 37 AD3d 1113, *lv denied* 8 NY3d 983). In support of her motion, defendant contended that defense counsel was deficient based upon his failure to obtain mental health experts to explain why her various versions of the events were inconsistent. Defendant further contended that she was denied effective assistance of counsel based upon defense counsel's failure to obtain an expert to refute the theory of the People's fire investigation expert, an investigator for the arson bureau of the New York State Office of Fire Prevention and Control, or to utilize nationally recognized standards of fire investigation published in the National Fire Protection Association 921 Guide for Fire and Explosion Investigations (NFPA 921 guide) during his cross-examination of the People's expert. Defendant has abandoned on appeal her remaining allegation of ineffective assistance of counsel (*see generally People v Rivera*, 117 AD3d 1475,

1476, *lv denied* 23 NY3d 1024).

We agree with County Court that the recent forensic evaluations are not sufficient to establish that defense counsel was deficient in failing to obtain any mental health experts to explain why defendant provided multiple inconsistent versions of the events (*see generally People v Kot*, 126 AD3d 1022, 1025, *lv denied* 25 NY3d 1203). We conclude, however, that the court erred in denying defendant's motion without a hearing to the extent that defendant contended that defense counsel was deficient in failing to utilize alleged nationally recognized standards of fire investigation, either through the testimony of an expert or to aid in the cross-examination of the People's expert. Specifically, defendant contends that the theory of the People's expert that the fire was intentionally started was scientifically flawed based upon information contained in the NFPA 921 guide and that defense counsel's failure to counter that opinion constituted ineffective assistance of counsel.

It is well established that "there may be cases in which a single failing in an otherwise competent performance is so 'egregious and prejudicial' as to deprive a defendant of [her] constitutional right to a fair trial" (*People v Turner*, 5 NY3d 476, 480). We conclude that defendant raised a factual issue whether defense counsel's failure to utilize information contained in the NFPA 921 guide, either through expert testimony or during cross-examination, was unreasonable (*see People v Conway*, 118 AD3d 1290, 1291). In our view, a hearing must be held to determine whether the NFPA 921 guide was generally accepted in New York State as authoritative at the time of the trial and whether expert testimony was available. We therefore reverse the order and remit the matter for a hearing in order for defendant to establish by a preponderance of the evidence that defense counsel's failure to retain an expert or to utilize the information in the NFPA 921 guide was not reasonable (*see* CPL 440.30 [6]). If defendant meets her burden, then defense counsel will have an opportunity "to provide a tactical explanation for the omission" of an expert witness and/or the information contained in the NFPA 921 guide from the defense (*People v Dombrowski*, 87 AD3d 1267, 1268 [internal quotation marks omitted]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1154

KA 14-01093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DALE K. BUTLER, JR., DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered June 9, 2014. The judgment convicted defendant, upon his plea of guilty, of unlawful manufacture of methamphetamine in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]). We conclude that the record establishes that defendant knowingly, voluntarily and intelligently waived his 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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1155

KA 13-02110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARDREQUEZ HAYNES, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ANTHONY M. ROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 10, 2013. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree (two counts), criminal possession of a weapon in the third degree and possession of burglar's tools.

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

Memorandum: On appeal from a judgment convicting him after a nonjury trial of, inter alia, two counts of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the evidence is legally insufficient to support the assault convictions because the People did not adequately prove the element of intent and failed to disprove his defense of justification. By failing to move for a trial order of dismissal " 'specifically directed' " at the purported legal insufficiency of the evidence, however, defendant failed to preserve that contention for our review (*People v Hawkins*, 11 NY3d 484, 492, quoting *People v Gray*, 86 NY2d 10, 19).

Defendant further contends that the verdict is against the weight of the evidence only to the extent that the People failed to disprove his justification defense beyond a reasonable doubt. We reject that contention. The use of a "knife to inflict injury upon one's victim constitutes the use of deadly physical force" (*People v Davis*, 118 AD2d 206, 209, *lv denied* 68 NY2d 768; *see People v Jones*, 24 AD3d 815, 816, *lv denied* 6 NY3d 777), and the use of deadly physical force is justifiable only when "[t]he actor reasonably believes that such other person is using or about to use deadly physical force" (Penal Law § 35.15 [2] [a]). Although one of the victims had a pocket knife secreted on his person, there is no dispute that neither victim displayed a weapon or dangerous instrument before being cut by

defendant with a knife, and the evidence at trial established that the victims were not using or attempting to use deadly physical force against defendant at the time. Thus, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that Supreme Court's rejection of the justification defense is not against the weight of the evidence (*see People v Goley*, 113 AD3d 1083, 1084, citing *People v Romero*, 7 NY3d 633, 643-644).

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1156

KA 13-00424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANZEL ROLAND, DEFENDANT-APPELLANT.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., 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 Erie County Court (Kenneth F. Case, J.), rendered February 15, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the periods of postrelease supervision imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that his waiver of the right to appeal is invalid. We need not address that contention inasmuch as the waiver would not foreclose his remaining contentions, i.e., that the plea was involuntary (*see People v Schrecengost*, 273 AD2d 937, 937, *lv denied* 95 NY2d 938), and that the sentence is illegal (*see People v Stachnik*, 101 AD3d 1590, 1592, *lv denied* 20 NY3d 1104). Defendant failed to preserve for our review his contention that his plea was rendered involuntary by the statement of County Court, "without mention of the mitigating circumstances provision of Penal Law § 70.25 (2-b), that his sentences were required to be consecutive" (*People v Zelaya*, 253 AD2d 686, 686, *lv denied* 92 NY2d 1041). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We agree with defendant, however, that the court erred in imposing consecutive periods of postrelease supervision. Penal Law § 70.45 (5) (c) requires that such periods merge and are satisfied by the service of the longest unexpired term (*see People v Allard*, 107

AD3d 1379, 1379). We therefore modify the judgment accordingly.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1157

KA 14-01541

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

IMPERIAL DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 23, 2013. 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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1158

KA 12-00136

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMADHAN RAJAB, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered October 24, 2011. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty in County Court following remittal (*People v Rajab*, 79 AD3d 1718), of rape in the first degree (Penal Law § 130.35 [4]). We reject defendant's contention that the waiver of the right to appeal was not valid (*see generally People v Lopez*, 6 NY3d 248, 256). Defendant failed to preserve for our review his contention that Supreme Court, the court that sentenced defendant, relied on the original presentence investigation before imposing the agreed-upon sentence, without obtaining an updated presentence report (*see People v Woods*, 122 AD3d 1400, 1401, *lv denied* 25 NY3d 1210). In any event, that contention is without merit. "[W]here as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and the [sentencing following remittal], to require an update . . . does not advance the purpose of CPL 390.20 [a]" (*People v Lard*, 73 AD3d 1464, 1465, *lv denied* 14 NY3d 889). Contrary to defendant's further contention, the agreed-upon sentence is not unduly harsh or severe.

Defendant further contends that defense counsel did not properly advise him of the immigration consequences of his plea and that he was thereby denied effective assistance of counsel. We reject that contention. Although "counsel 'must advise [his or] her client regarding the risk of deportation,' . . . that . . . duty 'is more limited' where the 'deportation consequences of a particular plea are

unclear or uncertain' " (*People v Hernandez*, 22 NY3d 972, 975, *cert denied* ___ US ___, 134 S Ct 1900), and here, the deportation consequences are uncertain in light of the political asylum status of defendant. The record establishes that defense counsel explained to County Court that defendant understood that, as a political refugee, he would not be deported to his country of origin, but that he could be deported to another country (*see* 8 USC §§ 1158 [c] [1] [A]; 1231 [b]). Indeed, defendant advised County Court that, knowing that he could be deported to a country other than his country of origin, he wished to proceed with the plea. Defendant thus was not denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). To the extent that defendant's contentions involve allegations of deficient performance of counsel that do not appear on the record, they must be raised by way of a motion pursuant to CPL 440.10 (*see People v Peque*, 22 NY3d 168, 202-203).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1159

KA 12-01818

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS B. WORTH, DEFENDANT-APPELLANT.

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

DOUGLAS B. WORTH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a resentence of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered September 7, 2012. Defendant was resentenced upon his conviction of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a resentence of imprisonment of 2 to 4 years as a second felony offender upon his 1990 conviction of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). In our prior decision, we granted defendant's CPL 440.20 motion to set aside the sentence originally imposed, determining that the sentence was illegal because Supreme Court failed to sentence him as a second felony offender (*People v Worth*, 83 AD3d 1547, 1548; *People v Worth*, 83 AD3d 1549). In his CPL 440.20 motion, defendant argued that he should have been sentenced as a second felony offender based on a prior conviction in 1989 of attempted robbery in the third degree. Although the plea colloquy from the 1990 conviction was not part of the record before us on the appeal from the CPL 440.20 motion (*see Worth*, 83 AD3d at 1548), that plea agreement was before the court when it resentenced defendant, and it showed that defendant had been promised a sentence of incarceration of 2⅓ to 7 years as a first felony offender.

We reject defendant's contention that the court erred in denying his motion to withdraw his plea. Defendant argued that the promised sentence could not be fulfilled and thus the only remedy was to allow him to withdraw the plea. We reject that contention. The court resentenced defendant to a sentence with a minimum and maximum term

less than what he was promised, and defendant therefore received the benefit of his bargain (*see People v Ruddy*, 51 AD3d 1134, 1135-1136, *lv denied* 12 NY3d 787; *see generally People v Collier*, 22 NY3d 429, 433-434, *cert denied* ___ US ___, 134 S Ct 2730). "[S]pecific performance of a plea bargain does not foreclose 'technical divergence from the precise terms of the plea agreement' so long as the defendant's reasonable expectations are met" (*Collier*, 22 NY3d at 433).

Defendant further contends that the court should have held a hearing pursuant to CPL 400.21 because he raised constitutional challenges to his 1989 conviction. Defendant, however, waived those challenges to the 1989 conviction. Defendant was adjudicated a second felony offender based on the 1989 conviction when he was sentenced on a conviction in 1994, and he did not show good cause for his failure to challenge the constitutionality of the 1989 conviction at that time (*see* CPL 400.21 [7] [b]; [8]; *People v Odom*, 63 AD3d 408, 409, *lv denied* 13 NY3d 798; *People v Scott*, 283 AD2d 1006, 1006-1007, *lv denied* 96 NY2d 907).

We have considered the contentions of defendant in his pro se supplemental brief and conclude that, to the extent that they have not been addressed by our decision herein, they are either outside the scope of this appeal or without merit.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1163

CAF 13-01349

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

IN THE MATTER OF NADYA S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRAUNA S., RESPONDENT-APPELLANT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 19, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Petitioner commenced this proceeding seeking to terminate the parental rights of respondent mother with respect to her daughter on the grounds of, inter alia, mental illness (*see* Social Services Law § 384-b [4] [c]). We note at the outset that the mother's contention that Family Court erred in admitting in evidence the records of a certain agency is moot inasmuch as those records related only to the petition alleging that the child was a permanently neglected child (*see* § 384-b [4] [d]), which the court dismissed with prejudice. To the extent that the mother contends that other records were improperly admitted in evidence, those records are not part of the stipulated record on appeal, and thus we have not considered that contention (*see Matter of Santoshia L.*, 202 AD2d 1027, 1028).

The mother further contends that her rights were violated by the admission of the testimony of the court-appointed psychologist because the psychological evaluation was conducted in English and without the benefit of a Spanish interpreter. She also contends that the methodology utilized by the psychologist to determine that her comprehension of the English language was sufficient to proceed with the evaluation in English should have been subject to a *Frye* hearing. The mother failed to object to the testimony of the psychologist,

however, and thus failed to preserve those contentions for our review (*see generally Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648, *lv denied* 21 NY3d 852). We note with respect to the first contention that, in any event, the record establishes that the mother advised the psychologist that she was comfortable proceeding with the evaluation using English when he discussed with her whether the assessments should be conducted in English or Spanish, and that two prior psychological evaluations had been conducted in English.

Contrary to the contention of the mother, the court properly determined that petitioner met its burden of demonstrating by clear and convincing evidence that she is presently and for the foreseeable future unable to provide proper and adequate care for the child by reason of mental illness, particularly severe cognitive deficits and certain personality traits, none of which is treatable (*see Matter of Zachary R. [Duane R.]*, 118 AD3d 1479, 1480; *Kaylene S.*, 101 AD3d at 1648).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1164

CAF 14-01921

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

IN THE MATTER OF CHARLES P.,
RESPONDENT-APPELLANT.

MONROE COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PAUL D. IRVING OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered September 22, 2014 in a proceeding pursuant to Family Court Act article 3. The order, inter alia, adjudicated respondent to be a juvenile delinquent.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed acts that, if committed by an adult, would constitute two counts of the crime of robbery in the second degree (Penal Law § 160.10 [1], [3]). We reject respondent's contention that the showup identification procedure was unduly suggestive. The showup was conducted in temporal and geographic proximity to the crime (*see Matter of Jose T.*, 127 AD3d 875, 877; *People v Williams*, 118 AD3d 1478, 1479, *lv denied* 24 NY3d 1090; *People v Kirkland*, 49 AD3d 1260, 1260-1261, *lv denied* 10 NY3d 961, *cert denied* 555 US 1181). The fact that respondent was in handcuffs and accompanied by an officer at the time of the showup did not, by itself, render the procedure unduly suggestive (*see Matter of Madeline D.*, 125 AD3d 965, 966; *People v Cooper*, 152 AD2d 939, 939, *lv denied* 74 NY2d 846; *see also Matter of Terron B.*, 77 AD3d 499, 500). In addition, nothing said by the officers was unduly suggestive or otherwise improper (*see Matter of Nathaniel W.*, 121 AD3d 407, 407; *People v Jeffries*, 125 AD2d 412, 412, *lv denied* 69 NY2d 882).

Although respondent preserved for our review his contention that the evidence is legally insufficient to establish that he committed the robbery as a principal, he failed to preserve for our review his further contention that the evidence is legally insufficient to establish that he shared the intent of the actual perpetrators and is culpable as an accomplice (*see Matter of Jonathan S.*, 55 AD3d 1324,

1324-1325). In any event, we conclude that the evidence is legally sufficient to establish that he committed acts that, if committed by an adult, would constitute the crime of robbery in the second degree under Penal Law § 160.10 (1) and (3). The evidence, viewed in the light most favorable to the presentment agency, established that respondent was one of three perpetrators who forcibly stole personal property from the victim and then entered the victim's vehicle and fled the scene. Respondent "knowingly participated" in the acts and is culpable as an accomplice (*People v Allah*, 71 NY2d 830, 832; *see* § 20.00; *Matter of Kadeem W.*, 5 NY3d 864, 867; *Matter of Jamal G.*, 127 AD3d 1081, 1082). We further conclude that the court's findings are not against the weight of the evidence (*see Matter of Shannon F.*, 121 AD3d 1595, 1596, *lv denied* 24 NY3d 913; *Matter of Isaac J.*, 109 AD3d 1176, 1176; *Matter of Shawn D.R.-S.*, 94 AD3d 1544, 1545).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1168

CA 15-00575

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

DARTNELL ENTERPRISES, INC., PLAINTIFF-APPELLANT,

V ORDER

HEWLETT-PACKARD COMPANY (INDIVIDUALLY, AND AS SUCCESSOR-IN-INTEREST TO COMPAQ COMPUTER CORPORATION), DEFENDANT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (H. TODD BULLARD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), MORGAN LEWIS & BROCKIUS LLP, PHILADELPHIA, PENNSYLVANIA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 18, 2014. The order, among other things, granted defendant's motion for summary judgment dismissing the amended complaint.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1169

CA 15-00659

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

IN THE MATTER OF THE ESTATE OF PETER L. PETTI, DECEASED.

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

NICHOLAS PETTI, PETITIONER-APPELLANT;

PHILIP D. PETTI, SR., RESPONDENT-RESPONDENT.

LAW OFFICE OF THOMAS R. MCCARTHY, LIVERPOOL (G. WINSTON DELONG OF COUNSEL), FOR PETITIONER-APPELLANT.

PHILIP D. PETTI, SR., RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Surrogate's Court, Ontario County (Frederick G. Reed, S.), entered June 30, 2014. The order granted respondent's motion to dismiss the amended petition for a compulsory accounting.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, the amended petition is granted, and the matter is remitted to Surrogate's Court, Ontario County, for further proceedings.

Memorandum: Petitioner commenced this proceeding in Surrogate's Court seeking to compel an accounting of the estate of Peter L. Petti (decedent). Petitioner is decedent's son and, pursuant to the terms of decedent's will that was admitted to probate, any assets to which decedent would be entitled from the settlement of his father's estate would be paid directly to petitioner, if he had attained the age of 21. The will otherwise directed petitioner's guardians to use the assets to establish a trust for the benefit of petitioner, which trust would run until petitioner reached the age of 21. Decedent died in 1996, when petitioner was six years old, and respondent was named executor of decedent's estate and a guardian of the person and property of petitioner. In 2000, the administrator of the estate of decedent's father issued payments of approximately $17,000 to decedent representing his share of the estate, and those payments were sent to respondent as executor of decedent's estate. In 2009, petitioner signed a release providing that, in consideration of $5,000 received from respondent and his wife, petitioner released them "from all actions . . . whatsoever." The release further provided that it was "more particularly in connection with a certain guardianship of the person and property of [petitioner] made in . . . Surrogate[']s Court . . . and the discharge of said Releasee(s) by Releasor for any and all accounting of all funds received by said Releasee(s) during said

guardianship which were previously given or spent on [petitioner] . . . for his care and custody through his years of minority while residing with Releasee(s).”

We conclude that the Surrogate abused his discretion in granting respondent’s motion to dismiss the amended petition (*see* SCPA 2205 [1]; *cf. Matter of Sangiamo*, 116 AD2d 654, 654; *Matter of Taber*, 96 AD2d 890, 890; *see generally Matter of Mastroianni*, 105 AD3d 1136, 1138). The release applies only to respondent and his wife in their roles as guardians, and does not foreclose petitioner from maintaining an action against respondent in his role as executor of decedent’s estate.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1170

CA 14-02259

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

MELISSA MISENHEIMER, PLAINTIFF-RESPONDENT,

V ORDER

QUENTIN MISENHEIMER, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MARISSA A. COHELEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

MCCANN FIRM, LLC, ORCHARD PARK (JENNIFER M. MCCANN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered August 25, 2014. The order denied defendant's motion to dismiss the complaint.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1173

CA 14-01183

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

COUNTY OF LIVINGSTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD E. CHABOT AND BETHANY J. RAGUE,
DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered June 5, 2014. The judgment, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Defendants appeal from a judgment declaring that plaintiff is the owner in fee of a parcel of real property that was subject to an in rem foreclosure proceeding on delinquent tax liens pursuant to RPAPL article 11 and dismissing the counterclaims. Defendants contend that plaintiff failed to comply with the notice provisions of RPAPL 231 (2) (a) with respect to the public auction of the property, which they contend constitutes a jurisdictional defect in the in rem foreclosure proceeding. Although defendants raised that issue as a counterclaim, defendants failed to oppose the motion for summary judgment on that ground and thus that contention is not properly before us (*see Ciesinski v Town of Aurora*, 282 AD2d 984, 985). Furthermore, defendants failed to move to open the default judgment within one month as required by RPTL 1131. In any event, defendants' contention is without merit. Where, as here, a tax district becomes vested with title to real property by virtue of a foreclosure proceeding (*see* RPTL 1136 [3]), it is authorized to sell or convey the real property "with or without advertising for bids, notwithstanding the provisions of any general, special or local law" (RPTL 1166 [1]). Contrary to defendants' contention, our decision in *Matter of Foreclosure of Tax Liens [ExxonMobil Oil Corp.—Hughes]* (41 AD3d 1243, 1243-1244) does not compel a different result. In that case, respondent City of Buffalo had not been vested with title to the

property pursuant to RPTL 1136 (3).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1174

CA 15-00598

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

JEAN POTTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KURT GRAGE, INDIVIDUALLY AND AS OWNER, AND DOING BUSINESS AS INVISIBLE FENCE OF FINGER LAKES AND MIDSTATE, DEFENDANT-APPELLANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered June 19, 2014. The order denied defendant's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the breach of warranty claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she tripped over a wire that was installed by defendant as a component of an invisible fence, to keep her dog on her property. The wire was supposed to be buried, but at the time of the accident defendant had not yet buried it. In her complaint, plaintiff alleged that she sustained injuries based on defendant's negligence and breach of warranty.

We agree with defendant that Supreme Court erred in denying that part of his motion for summary judgment dismissing the breach of warranty claim, and we therefore modify the order accordingly. "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569; *see General Motors, LLC v B.J. Muirhead Co., Inc.*, 120 AD3d 927, 928; *Davies v Jerry*, 107 AD3d 1553, 1554). Here, the warranty in the parties' contract of sale provided that defendant was liable for products that were defective by reason of improper workmanship, but further provided that the customer's sole remedy for breach because of this defect was to have the defective equipment repaired or replaced. In support of his motion, defendant submitted evidence that, when he became aware that

plaintiff had tripped on the subject wire, defendant came to the property and buried the wire. Defendant therefore established that plaintiff has no further remedy for breach of warranty, and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Contrary to defendant's further contention, however, the court properly denied that part of the motion seeking summary judgment dismissing the negligence claim. A defendant "may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316; *see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389). We conclude that plaintiff may maintain a separate negligence claim under the circumstances of this case, in which she alleged that defendant negligently failed to correct a dangerous condition, of which he had actual or constructive notice (*see Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1198, *amend on rearg* 41 AD3d 1324; *see generally New York Univ.*, 87 NY2d at 316). In support of his motion, defendant failed to establish his entitlement to summary judgment dismissing that claim (*see generally Zuckerman*, 49 NY2d at 562). Even assuming, arguendo, that the dangerous condition was open and obvious, we conclude that such condition is relevant only to plaintiff's comparative fault and does not absolve defendant of his duty (*see Cashion v Bajorek*, 126 AD3d 1354, 1354).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1176

CA 15-00171

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

LARRY LANGE, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR CLAIMANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (VALERIE BARBIC OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered September 15, 2014. The order denied the motion of claimant for permission to file a late claim.

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

Memorandum: We reject claimant's contention that the Court of Claims erred in denying his motion seeking permission to file a late claim against defendant based upon its alleged negligence and violation of Labor Law §§ 200 and 241 (6). " 'Court of Claims Act § 10 (6) permits a court, in its discretion, upon consideration of certain enumerated factors, to allow a claimant to file a late claim' " (*Matter of Smith v State of New York*, 63 AD3d 1524, 1524). "Moreover, although the court must consider the six factors enumerated in Court of Claims Act § 10 (6), those factors are not exhaustive and the presence or absence of any one factor is not controlling" (*Ledet v State of New York*, 207 AD2d 965, 966). Here, the court considered the enumerated statutory factors and concluded that none weighed in favor of claimant. While we conclude that three of the factors favor claimant, i.e., notice, opportunity to investigate and lack of substantial prejudice to defendant, we decline to disturb the court's exercise of discretion, inasmuch as the record supports the court's determination that "the excuse offered for the delay is inadequate and the proposed claim is of questionable merit" (*Matter of Perez v State of New York*, 293 AD2d 918, 919; *see Matter of Magee v State of New York*, 54 AD3d 1117, 1118).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1178

TP 15-00724

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

IN THE MATTER OF RALPH ALICEA, 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 (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered April 22, 2015) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1179

TP 15-00700

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

IN THE MATTER OF DIEDRE WYNN, PETITIONER,

V ORDER

MONROE COUNTY AND NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENTS.

DIEDRE WYNN, PETITIONER PRO SE.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (ROBERT P. YAWMAN, III, OF COUNSEL), FOR RESPONDENT MONROE COUNTY.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MARILYN BALCACER OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [John J. Ark, J.], entered April 24, 2015) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the petition is dismissed for reasons stated in the decision of respondent New York State Division of Human Rights.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1183

KA 15-00329

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

ALAN HEMPHILL, DEFENDANT-RESPONDENT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), dated January 20, 2015. The order granted the motion of defendant to suppress a firearm.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated at Supreme Court and the indictment is dismissed.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1184

KA 12-02158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RICKY JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 18, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree (two counts), criminal possession of a controlled substance in the second degree, criminal possession of a weapon in the second degree and conspiracy in the fourth degree.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1186

KA 14-01517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA I.S.-S., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 27, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed as moot (*see People v Griffin*, 239 AD2d 936).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1189

CAF 14-00520

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

IN THE MATTER OF ROBERT E. TROMBLEY, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTIN S. PAYNE, RESPONDENT-APPELLANT.

IN THE MATTER OF KRISTIN S. PAYNE,
PETITIONER-APPELLANT,

V

ROBERT E. TROMBLEY, JR., RESPONDENT-RESPONDENT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

FARES A. RUMI, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 5, 2014 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted sole custody of the subject children to Robert E. Trombley, Jr.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, dismissed her cross petition seeking modification of a prior custody order and sole custody of the children. While this appeal was pending, the parties filed additional modification petitions and, after a hearing, Family Court issued an order continuing sole custody of the children with petitioner-respondent father and visitation with the mother. We conclude that this appeal is therefore moot (*see Matter of Smith v Cashaw* [appeal No. 1], 129 AD3d 1551, 1551; *Matter of Morgia v Horning* [appeal No. 1], 119 AD3d 1355, 1355; *Matter of Kirkpatrick v Kirkpatrick*, 117 AD3d 1575, 1576), and the exception to the mootness doctrine does not apply (*see Smith*, 129 AD3d at 1551; *Kirkpatrick*, 117 AD3d at 1576; *see generally Matter*

of Hearst Corp. v Clyne, 50 NY2d 707, 714-715).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1192

CA 15-00772

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

DENNIS BRENNAN, PLAINTIFF-RESPONDENT,

V ORDER

RONALD W. BRISBEE, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (KARALYN M. ROSSI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered July 1, 2014. The order denied the motion of defendant to dismiss the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 17 and 24, 2015, and filed in the Cattaraugus County Clerk's Office on June 26, 2015,

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1193

CA 15-00660

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

BAC HOME LOANS SERVICING, LP, FORMERLY KNOWN AS COUNTRYWIDE HOME LOANS SERVICING, LP,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER J. MCCOMBIE, III, DEFENDANT-APPELLANT,
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL., DEFENDANTS.

LAW OFFICE OF THOMAS R. MCCARTHY, LIVERPOOL (G. WINSTON DELONG OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRYAN CAVE LLP, NEW YORK CITY (ROBERT ROTHBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered June 4, 2015. The judgment directed that the mortgaged premises described in the complaint be sold at public auction.

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

Memorandum: Plaintiff commenced this action to foreclose on a mortgage that was secured by property owned by Alexander J. McCombie, III (defendant). Defendant appeals from an order that, inter alia, granted plaintiff's motion seeking summary judgment on the relief sought in the complaint and dismissal of the counterclaims.

We note at the outset that the order was subsumed in a judgment of foreclosure and sale that was subsequently entered. While the appeal properly lies from the judgment, we exercise our discretion to treat the notice of appeal as valid and deem the appeal to be from the judgment (*see* CPLR 5520 [c]; *Kovalsky-Carr Elec. Supply Co., Inc. v Hartford Cas. Ins. Co.*, 130 AD3d 1534, 1534). We further note that, on appeal, defendant challenges the order only insofar as it granted that part of plaintiff's motion seeking summary judgment dismissing the counterclaims. We therefore deem abandoned any contention by defendant with respect to the order insofar as it granted the relief sought in the complaint (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Contrary to defendant's contention, we conclude that Supreme

Court properly granted that part of plaintiff's motion for summary judgment dismissing the first counterclaim, which alleges that plaintiff was negligent in its dealings with defendant after he defaulted. The relationship between the parties is a contractual one between plaintiff as mortgagee and defendant as mortgagor (*see Beckford v Empire Mut. Ins. Group*, 135 AD2d 228, 233), and plaintiff owed defendant no legal duty independent of the mortgage (*see Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 111 AD3d 1374, 1376, *lv denied* 22 NY3d 864). Plaintiff was under no obligation under the mortgage to grant defendant's requests for a short sale or a deed in lieu of foreclosure after defendant defaulted on his loan payments (*see Home Sav. of Am. v Isaacson*, 240 AD2d 633, 633; *see also Wells Fargo Bank, N.A. v VanDyke*, 101 AD3d 638, 638).

The court also properly granted plaintiff's motion with respect to the second counterclaim, which seeks punitive damages arising from the parties' respective financial situations following the financial crisis of 2007-2008. Defendant cannot recover punitive damages because he fails "to assert an underlying [counterclaim] upon which a demand for punitive damages can be grounded" (*Roconova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616). Moreover, defendant cannot assert a counterclaim against plaintiff under the statute that created the Troubled Asset Relief Program ([TARP] 12 USC § 5211 *et seq.*), inasmuch as he has no private right of action against plaintiff under TARP (*see Ruotolo v Fannie Mae*, 933 F Supp 2d 512, 523 [SDNY], *appeal dismissed* ___ F3d ___ [June 5, 2013]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1197

CA 15-00602

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

IN THE MATTER OF ANTHONY DESA, M.B., B.S.,
PETITIONER-RESPONDENT,

V ORDER

STATE OF NEW YORK, SUNY UPSTATE MEDICAL UNIVERSITY,
WILLIAM D. GRANT, Ed.D., AND STEPHEN J. KNOHL, M.D.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

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

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 10, 2014 in a proceeding pursuant to CPLR article 78. The order, among other things, held respondents in civil contempt of prior orders of the court.

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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1198

CA 15-00610

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

IN THE MATTER OF ANTHONY DESA, M.B., B.S.,
PETITIONER-RESPONDENT,

V ORDER

STATE OF NEW YORK, SUNY UPSTATE MEDICAL UNIVERSITY,
WILLIAM D. GRANT, Ed.D, AND STEPHEN J. KNOHL, M.D.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

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

WEISBERG & ZUKHER, PLLC, SYRACUSE (DAVID E. ZUKHER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered June 20, 2014 in a proceeding pursuant to CPLR article 78. The order awarded petitioner attorney's fees and costs.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Villar v Howard*, 126 AD3d 1297, 1300).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1201

KA 13-02192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON J. ERVING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered October 15, 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]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, voluntary and intelligent, and it thus encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256). We note, however, that the certificate of conviction erroneously states that defendant was convicted of violating section 265.03 (2), and it must therefore be corrected to reflect that defendant was convicted of violating section 265.03 (3) (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1203

KA 10-02117

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NOEL R. RIVERA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered July 15, 2010. The judgment convicted defendant, upon a jury verdict, of assault in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of assault in the first degree (Penal Law § 120.10 [1]). We agree with defendant that Supreme Court erred in precluding defense counsel from questioning a defense witness regarding the basis of her knowledge of a prosecution witness's reputation for truthfulness and honesty (*see People v Hanley*, 5 NY3d 108, 112-114; *People v Hopkins*, 56 AD3d 820, 821-822; *see also People v Carter*, 31 AD3d 1167, 1168). " '[A] party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for purposes of impeachment, has a bad reputation in the community for truth and veracity' " (*People v Fernandez*, 17 NY3d 70, 76; *see Hanley*, 5 NY3d at 112). We conclude, however, that the error is harmless. The evidence of guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant if they were allowed to hear testimony that the prosecution witness had a bad reputation for truthfulness (*see Hopkins*, 56 AD3d at 823-824; *see generally People v Crimmins*, 36 NY2d 230, 241-242; *cf. Hanley*, 5 NY3d at 114-115).

Defendant's contention that the prosecutor's summation and the court's instruction to the jury constructively amended the indictment and thereby improperly changed the theory of the prosecution is not preserved for our review (*see People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014; *People v Osborne*, 63 AD3d 1707, 1708, *lv denied* 13

NY3d 748; *People v Odom*, 53 AD3d 1084, 1086, *lv denied* 11 NY3d 792). In any event, that contention is without merit. The indictment charged defendant with assaulting one of the victims "by means of a deadly weapon, to wit: a shotgun." Defendant contends that he was prejudiced both by the prosecutor's summation, which suggested that defendant shot that victim first with a shotgun and then a revolver, after the shotgun jammed, and the court's charge, which instructed the jury that they were to determine whether defendant committed assault "by means of a deadly weapon." The indictment, however, " 'charged more than the People were required to prove under the statute . . . , and the trial court's charge did not usurp the grand jury's powers or change the theory of the prosecution' " (*Odom*, 53 AD3d at 1086; *see People v Spann*, 56 NY2d 469, 471-473; *see also People v Sage*, 204 AD2d 746, 747, *lv denied* 84 NY2d 832). The People never changed their theory that the victim at issue was shot by defendant's use of a shotgun. Defendant's further contention that the trial evidence rendered the indictment duplicitous is not preserved for our review (*see People v Allen*, 24 NY3d 441, 449-450), 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]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct (*see People v Benton*, 106 AD3d 1451, 1451-1452, *lv denied* 21 NY3d 1040; *People v Wellsby*, 30 AD3d 1092, 1093, *lv denied* 7 NY3d 796). In any event, his contention is without merit. The prosecutor's remarks on summation were within "the broad bounds of rhetorical comment permissible during summations" and did not shift the burden of proof (*People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975 [internal quotation marks omitted]). The prosecutor's remarks regarding defendant's possession of the revolver was a fair response to defense counsel's summation and fair comment on the evidence (*see People v Walker*, 117 AD3d 1441, 1441-1442, *lv denied* 23 NY3d 1044). The prosecutor did not engage in misconduct in questioning certain police officers and, to the extent the prosecutor engaged in misconduct during her cross-examination of a defense witness, that misconduct was not so egregious as to deprive defendant of a fair trial (*see Wellsby*, 30 AD3d at 1093). Finally, we reject defendant's contention that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1204

KA 14-01528

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROKYM KNOX, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, 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 (Russell P. Buscaglia, A.J.), rendered May 21, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]), defendant contends that Supreme Court erred in refusing to suppress identification testimony. We agree with the People that the valid waiver by defendant of his right to appeal encompasses that contention (*see People v Kemp*, 94 NY3d 831, 833; *People v Caraballo*, 59 AD3d 971, 971, *lv denied* 12 NY3d 852).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1206

KA 14-00228

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD E. MEAD, JR., DEFENDANT-APPELLANT.

DAVID J. PAJAK, ALDEN, 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 his *Alford* plea, of attempted assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by striking as a condition of probation the requirement that defendant consent to the waiver of his Fourth Amendment right protecting him from a search of his home and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his *Alford* plea of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Contrary to defendant's contention, his waiver of the right to appeal was knowing, voluntary and intelligent (*see People v Bradshaw*, 18 NY3d 257, 264-265), and that waiver encompasses his challenge to the length of the term of probation imposed (*see People v Lopez*, 6 NY3d 248, 256). To the extent that the written waiver of the right to appeal included nonwaivable rights, those rights are "excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*People v Williams*, ___ AD3d ___, ___ [Oct. 2, 2015] [internal quotation marks omitted]).

We agree with defendant, however, that the waiver of the right to appeal does not encompass his challenge to the condition of probation that required him to sign a consent to waive his Fourth Amendment right protecting him from a search of his home on the ground that it is related to defendant's "drug/alcohol abuse," inasmuch as that condition was not part of the plea agreement (*see generally People v Leiser*, 124 AD3d 1349, 1350). We also agree with defendant that the condition does not relate to "the probationary goal of rehabilitation" and thus is not enforceable on that ground (*People v Hale*, 93 NY2d 454, 460; *cf. People v Schunk*, 269 AD2d 857, 857). Indeed, the

presentence report indicated that the 51-year-old defendant, a first-time offender, does not have a history of drug or alcohol abuse and that he was not under the influence of drugs or alcohol at the time of the offense. It is well established that "a probationer's home is protected by the constitutional requirement that searches be reasonable . . . [A] probationer loses some privacy expectations and some part of the protections of the Fourth Amendment, but not all of both" (*Hale*, 93 NY2d at 459). We therefore modify the judgment by striking as a condition of probation the requirement that defendant consent to the waiver of his Fourth Amendment right protecting him from a search of his home.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1207

KA 15-00614

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JAMEL NELLONS, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

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

PAUL G. CAREY, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated July 8, 2014. The order granted in part the motion of defendant to dismiss the indictment by reducing the first count thereof to criminal possession of a controlled substance in the seventh degree.

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

Memorandum: After defendant was arrested and charged with possessing crack cocaine, the People presented evidence to a grand jury, which issued an indictment charging him with criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). Defendant moved to dismiss the indictment based on the alleged insufficiency of the evidence presented to the grand jury, and Supreme Court granted the motion in part by reducing the first count of the indictment to criminal possession of a controlled substance in the seventh degree (§ 220.03). The People appeal, and we affirm. The testimony at the grand jury establishes that two police officers pursued a vehicle driven by defendant, and that one of the officers pursued defendant after he exited the still-moving vehicle and fled on foot. Defendant was found with two bags of crack cocaine weighing a total of eight grams. One officer testified that a drug user would not possess that amount of drugs, and that a drug user would not possess drugs without also having utensils with which to consume them.

We reject the People’s contention that the evidence was sufficient to make out a prima facie case that defendant possessed the cocaine with the intent to sell it. Although “defendant’s possession of a ‘substantial’ quantity of drugs can be cited as circumstantial

proof of an intent to sell . . . , it cannot be said as a matter of law that the quantity of uncut and unpackaged drugs possessed in this case permitted an inference that defendant intended to sell them. More than mere possession of a modest quantity of drugs, not packaged for sale and unaccompanied by any other saleslike conduct, must be present for such an inference to arise" (*People v Sanchez*, 86 NY2d 27, 35; *cf. People v Smith*, 213 AD2d 1073, 1074). We note that the "modest quantity of drugs" in *Sanchez* was 3½ ounces of cocaine, far more than the drugs possessed by this defendant, which amounted to less than ⅛ of an ounce. Consequently, the court properly concluded that the evidence was insufficient to establish that defendant possessed a controlled substance with intent to sell it (*see generally People v Smith [Nicole]*, 74 AD3d 1249, 1250; *People v Lamont*, 227 AD2d 873, 875).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1208

KA 15-00616

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

JAMEL NELLONS, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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

PAUL G. CAREY, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from a revised order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated August 7, 2014. The revised order granted in part the motion of defendant to dismiss the indictment by reducing the first count thereof to criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Perez*, 130 AD3d 1496, 1496; *Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1209

KA 14-00857

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON A. RANSIER, DEFENDANT-APPELLANT.

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (AMY L. HALLENBECK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (James M. Metcalf, A.J.), rendered February 14, 2014. 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]). "By failing to object to [County C]ourt's ultimate *Sandoval* ruling, defendant failed to preserve for our review his contention . . . that the ruling constitutes an abuse of discretion" (*People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). In any event, we conclude that the court's *Sandoval* ruling did not constitute a "clear abuse of discretion warranting reversal" (*id.* at 1151-1152 [internal quotation marks omitted]). The court properly exercised its discretion in allowing the prosecutor to cross-examine defendant with respect to his prior conviction of criminal possession of stolen property in the fifth degree, a crime involving individual dishonesty (*see People v Williams*, 98 AD3d 1234, 1235, *lv denied* 21 NY3d 947). Contrary to defendant's contention, the court's *Sandoval* ruling was not inconsistent and contradictory merely because the court further ruled that the People could generally ask defendant whether he had been convicted of a felony and not the specific crime of burglary in the third degree. The court properly balanced the probative value of each conviction against the risk of prejudice to defendant (*see People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852).

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish his intent to commit a crime inside the dwelling (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that

contention lacks merit (*see People v Beaty*, 89 AD3d 1414, 1416-1417, *affd* 22 NY3d 918; *People v Bergman*, 70 AD3d 1494, 1494, *lv denied* 14 NY3d 885). 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). Finally, the sentence is not unduly harsh or severe.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1213

CA 14-01109

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

IN THE MATTER OF ANTHONY LATSON,
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 May 13, 2014 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1215

CA 15-00555

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

DANIEL REDEYE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PROGRESSIVE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAN D. KOHANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 7, 2014. The order and judgment, inter alia, granted the motion of defendant for summary judgment seeking, among other things, to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking supplementary uninsured/underinsured motorist (SUM) benefits from defendant, his motor vehicle liability insurer. Plaintiff was a pedestrian who was injured after a vehicle operated by a drunk driver collided with a parked vehicle, which was propelled into plaintiff and two other pedestrians. Plaintiff commenced an action against the driver of the vehicle as well as a fire company that allegedly served the driver alcoholic beverages prior to the accident, and he received a settlement from both. Defendant denied plaintiff's claim for SUM benefits, stating that coverage was exhausted by the recovery from both the driver and the fire company, prompting plaintiff to commence this action.

Supreme Court properly granted defendant's motion for summary judgment seeking, inter alia, to dismiss the complaint. Plaintiff does not dispute that the SUM coverage is properly reduced by the amount he recovered from the driver's insurer. He contends, however, that it was improper to reduce the SUM coverage from the amount he received from the fire company under its general liability insurance policy. We reject that contention. Condition 11 (e) of the SUM endorsement under defendant's policy provided that SUM coverage "shall not duplicate . . . any amounts recovered as bodily injury damages

from sources other than motor vehicle bodily injury liability insurance policies or bonds." Here, the payment plaintiff received from the fire company's insurer was for bodily injury damages, and thus the amount of SUM benefits available to plaintiff was properly reduced by that amount (*see Weiss v Tri-State Consumer Ins. Co.*, 98 AD3d 1107, 1110-1111).

Contrary to plaintiff's contention, the policy is not ambiguous and condition 11 does not conflict with condition 6 of the SUM endorsement (*see generally Dean v Tower Ins. Co. of N.Y.*, 19 NY3d 704, 708; *White v Continental Cas. Co.*, 9 NY3d 264, 267). Condition 6 provides that the maximum payment under the SUM endorsement is the difference between the SUM limit and any payments received from a motor vehicle bodily injury liability policy. It does not state that the difference is "the" SUM payment that is to be given to plaintiff, but rather it states that the difference is the "maximum" payment, which the average insured would understand to mean that it could be further reduced (*see generally Dean*, 19 NY3d at 708). Condition 6 and condition 11 together resulted in a reduction in the SUM benefits available by the total settlement received by plaintiff in his prior action.

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1218

CA 15-00745

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

SHERIE L. LARABY AND SCOTT P. LARABY,
PLAINTIFFS-RESPONDENTS,

V ORDER

GEOFFREY R. COULTER, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY SENDZIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (MATTHEW F. BELANGER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 17, 2014. The order granted the motion of plaintiffs for partial summary judgment on the issues of defendant's negligence and serious injury.

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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1226

KA 14-00255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DYLAN FOX, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered December 23, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and driving while ability impaired by drugs, as a misdemeanor.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on September 9, 2015 and by the attorneys for the parties on September 9 and 21, 2015,

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1234

CAF 14-00685

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

IN THE MATTER OF JAMES E. DONOHUE,
PETITIONER-APPELLANT,

V ORDER

TANYA M. DONOHUE, RESPONDENT-RESPONDENT.

JEANNIE MICHALSKI, CONFLICT DEFENDER, GENESEO (HEIDI FEINBERG OF COUNSEL), FOR PETITIONER-APPELLANT.

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

JOHN M. LOCKHART, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered March 14, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied in part the petition to modify a prior order.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1246.1

CA 14-01335

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

CAPITAL ONE NA, PLAINTIFF-RESPONDENT,

V ORDER

DAVID COLUCCI, DEFENDANT-APPELLANT.

LAW OFFICE OF JOHN J. DELMONTE, NIAGARA FALLS (JOHN J. DELMONTE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RUBIN & ROTHMAN, LLC, ISLANDIA (DAVID K. KOWALENKO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 8, 2013. The order, among other things, denied defendant's motion to vacate a default judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 23, 2015,

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1247

TP 15-00723

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

IN THE MATTER OF JOHN HORACE, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY 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 April 24, 2015) to review a determination of respondent. The determination revoked the parole of petitioner.

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 revoking his parole release and remanding him to serve another 42 months of incarceration. We note at the outset that Supreme Court erred in transferring the matter to this Court inasmuch as this proceeding does not involve a substantial evidence issue (*see* CPLR 7803 [4]; 7804 [g]). "A substantial evidence issue 'arises only where a quasi-judicial hearing has been held and evidence [has been] taken pursuant to law' . . . and[, here,] no hearing was held" (*Matter of Scherz v New York State Dept. of Health*, 93 AD3d 1302, 1303). We nevertheless review the merits of the petition in the interest of judicial economy (*see Scherz*, 93 AD3d at 1303; *Matter of Moore v Alexander*, 53 AD3d 747, 748 n 2, *lv denied* 11 NY3d 710).

Contrary to petitioner's contention, we conclude that his plea to the parole violations was knowing, voluntary and intelligent inasmuch as "[p]etitioner was represented by counsel . . . and the Administrative Law Judge explained to him the substance of the plea agreement, which he indicated that he understood" (*Matter of James v Chairman of the N.Y. State Bd. of Parole*, 106 AD3d 1300, 1300; *see Matter of Steele v New York State Div. of Parole*, 123 AD3d 1170,

1170).

Petitioner further contends that the plea allocution was insufficient because he was never asked to admit that he violated one or more conditions of parole "in an important respect" (Executive Law § 259-i [3] [f] [x]; *see* 9 NYCRR 8005.20 [b]; *see also Matter of DeFina v New York State Div. of Parole*, 27 Misc 3d 170, 178). We reject that contention. As a preliminary matter, we note that petitioner's "guilty plea, standing alone, is 'sufficient to provide a rational basis for the finding of guilt as to the charged violation[s]' " (*Matter of Ramos v New York State Div. of Parole*, 300 AD2d 852, 854; *see Matter of Fuller v Goord*, 299 AD2d 849, 849-850, *lv dismissed* 100 NY2d 531). Moreover, the facts underlying those charged violations establish the severity of petitioner's violations. Petitioner was convicted of, inter alia, rape in the first degree based on evidence that he impregnated a comatose patient at a nursing facility while she was under his care (Penal Law § 130.35 [2]; *People v Horace*, 277 AD2d 957, *lv denied* 96 NY2d 784). In admitting to numerous violations of the conditions of parole, petitioner admitted that, in the eight months since his release, he had possessed sexually explicit DVDs, ordered and possessed sexual enhancement drugs and/or medications, and possessed numerous handwritten pages documenting research on "date-rape" drugs. As a result of those violations, and other misconduct, petitioner had also been discharged from his sexual offender treatment program. In our view, the violations to which petitioner admitted are violations in an important respect inasmuch as they "are of a kind that bespeak a serious threat to public safety" (*People ex rel. Gaskin v Smith*, 55 AD2d 1004, 1006; *cf. DeFina*, 27 Misc 3d at 178-179).

Contrary to petitioner's final contention, the time assessment of 42 months is not unduly harsh and severe. For a category 1 violator, such as petitioner (*see* 9 NYCRR 8005.20 [c] [1] [iv]), the minimum time assessment must be either 15 months or a hold to the "maximum expiration of the sentence, whichever is less" (9 NYCRR 8005.20 [c] [1]). "The Executive Law does not place an outer limit on the length of that assessment, and [respondent's] determination may not be modified upon judicial review 'in the absence of impropriety' " (*Matter of Bell v Lemons*, 78 AD3d 1393, 1393-1394; *see* Executive Law § 259-i [3] [f] [x]; [g]; *Matter of Rosa v Fischer*, 108 AD3d 1227, 1228, *lv denied* 22 NY3d 855). Under the circumstances of this case, including the nature of the underlying charges as well as the severity and multitude of violations, we conclude that there was no impropriety here and, thus, there is no reason to modify the 42-month time assessment (*see Matter of Krouth v New York State Bd. of Parole*, 184 AD2d 1012, 1013, *lv denied* 80 NY2d 758).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1248

TP 15-00672

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

IN THE MATTER OF CHRISTIAN HANLON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE POLICE, RESPONDENT.

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP, LAKE SUCCESS (ERIC BROUTMAN OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [Ann Marie Taddeo, J.], entered April 1, 2015) to review a determination of respondent. The determination terminated the employment of petitioner.

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 finding him guilty of disciplinary charges and terminating his employment as a State Trooper following a hearing pursuant to Civil Service Law § 75. We reject petitioner's contention that certain charges were time-barred pursuant to Civil Service Law § 75 (4). Pursuant to that statute, a disciplinary action must be commenced within 18 months of the occurrence of the "alleged incompetency or misconduct complained of"; however, if the misconduct charged "would, if proved in a court of appropriate jurisdiction, constitute a crime," the 18-month limitation does not apply (*id.*; *see Matter of Langler v County of Cayuga*, 68 AD3d 1775, 1776; *Matter of Mieles v Safir*, 272 AD2d 199, 199). Here, the charges alleged conduct that would, if proved, constitute the crime of official misconduct (Penal Law § 195.00) and, therefore, they are not time-barred (*see Matter of McFarland v Abate*, 203 AD2d 190, 190). Contrary to petitioner's further contentions, the determination is supported by substantial evidence, and the penalty is not shocking to one's sense of fairness (*see Matter of Tessiero v Bennett*, 50 AD3d 1368, 1369-1370; *Matter of Wilburn v McMahon*, 296 AD2d 805, 806-807). Finally, Supreme Court did not abuse its discretion in denying petitioner's requested discovery inasmuch as petitioner failed to demonstrate that discovery was necessary (*see Matter of Bramble v New York City Dept.*

of Educ., 125 AD3d 856, 857; *see generally* CPLR 408, 7804 [a]).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1253

CAF 14-01687

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

IN THE MATTER OF CRYSTIANA M.

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

CRYSTAL M., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, EAST AMHERST, 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 August 1, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, placed the subject child in the custody of Tammy A.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Francis S. [Wendy H.]*, 67 AD3d 1442, *lv denied* 14 NY3d 702).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1254

CAF 14-01819

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

IN THE MATTER OF ALDA M. MERKLE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES RICHARD HENRY, RESPONDENT-APPELLANT.

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

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT.

Appeal from an order of the Family Court, Ontario County (William F. Kocher, J.), entered August 25, 2014 in a proceeding pursuant to Family Court Act article 6. The order modified the terms of respondent's visitation with the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the petition of the Attorney for the Child in its entirety, and as modified the order is affirmed without costs.

Memorandum: Respondent father filed a petition to modify a prior custody order by seeking joint custody of the child, and the Attorney for the Child (AFC) filed a petition seeking to suspend visitation between the child and the father. Pursuant to a consent agreement and order, petitioner mother had sole custody of the child, and the father had visitation every weekend. In its decision, Family Court stated that a hearing had been held on the father's petition, and also recited that the AFC's petition was before the court. In the remainder of its decision, however, the court addressed only the AFC's petition and modified the father's visitation. We agree with the father that Family Court erred in failing to issue any findings of fact or conclusions of law in determining whether it was in the best interests of the child to modify the prior custody arrangement. The record, however, is sufficient for us to make that determination (*see Matter of Moredock v Conti*, 130 AD3d 1472, 1473; *Matter of Caughill v Caughill*, 124 AD3d 1345, 1346). Even assuming, arguendo, that the father made the requisite showing of a change in circumstances, we conclude that it was not in the best interests of the child to change custody from sole custody to joint custody (*see Matter of Dingeldey v Dingeldey*, 93 AD3d 1325, 1326; *Matter of VanDusen v Riggs*, 77 AD3d 1355, 1355; *Matter of Scialdo v Cook*, 53 AD3d 1090, 1091). The father suffered from mental illness and did not have a stable living

situation. In addition, the parties' relationship made a joint custody arrangement not feasible (*see Matter of Mills v Rieman*, 128 AD3d 1486, 1487). We therefore see no basis for granting the father's petition.

We further agree with the father that the court erred in granting the AFC's petition insofar as it ordered that visitation with the child be "at such times as may be agreed and arranged between the [father] and child," and that the child "shall be expected to initiate contact with [the father] for visitation," and we therefore modify the order accordingly. There is a rebuttable presumption that a noncustodial parent will be granted visitation (*see Matter of Granger v Misercola*, 21 NY3d 86, 90-91), and the AFC "failed to establish by a preponderance of the evidence that visitation with [the father] would be detrimental to the child, and thus she did not overcome the presumption that visitation with [the father] is in the child's best interest[s]" (*Matter of Cormier v Clarke*, 107 AD3d 1410, 1411, *lv denied* 21 NY3d 865; *see generally Granger*, 21 NY3d at 92). Inasmuch as the AFC sought only to suspend visitation, not to modify the terms of the visitation, the petition should have been denied in its entirety. In any event, to the extent the court construed the AFC's petition as one to modify visitation, the court erred in granting the petition to that extent. By allowing the child to dictate the terms of the visitation, the court's order "tends unnecessarily to defeat the right of visitation" (*Matter of Casolari v Zambuto*, 1 AD3d 1031, 1031 [internal quotation marks omitted]; *see Matter of Jeffrey T. v Julie B.*, 35 AD3d 1222, 1222; *Matter of Jordan v Jordan*, 288 AD2d 709, 710; *Sturm v Lyding*, 96 AD2d 731, 731). A court "cannot 'delegate its authority to determine visitation to either a parent or a child' " (*Matter of Taylor v Jackson*, 95 AD3d 1604, 1605). The court's order "has the practical effect of denying [the father] his right to visitation with his child indefinitely without the requisite showing that visitation would be detrimental to [the child's] welfare" (*Sturm*, 96 AD2d at 731).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1258

CA 14-01922

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

CHRIS MOUSTAKOS, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 121157.)

CHRIS MOUSTAKOS, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renée Forgensi Minarik, J.), entered July 30, 2014. The order denied claimant's motion for partial summary judgment.

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

Memorandum: Claimant commenced this action seeking damages for, inter alia, unlawful confinement after the Third Department annulled the determination in a prison disciplinary proceeding that he had violated various inmate rules (*Matter of Moustakos v Venettozzi*, 92 AD3d 992). Contrary to claimant's contention, the Court of Claims properly denied his motion for partial summary judgment on liability on his cause of action for unlawful confinement.

The Third Department found that defendant had violated claimant's "right to present relevant documentary evidence" when it failed to provide claimant with a memorandum containing allegedly exculpatory evidence (*id.* at 993; *see* 7 NYCRR 254.6 [a] [3]). Defendant did not appeal from the order of the Third Department and is thus collaterally estopped from challenging the Court's determination that defendant violated its own rules and regulations (*see DuBois v State of New York*, 25 Misc 3d 1137, 1139; *see generally D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664).

We reject claimant's contention that the decision of the Third Department entitles him to partial summary judgment on liability on the unlawful confinement cause of action. It is well settled that, where, as here, the actions of correction personnel have violated the due process safeguards contained in 7 NYCRR parts 252 through 254, those actions "[will] not receive immunity" (*Arteaga v State of New York*, 72 NY2d 212, 221). Contrary to claimant's contention, however,

the absence of an immunity defense does not entitle claimant to partial summary judgment on liability on his unlawful confinement cause of action. As defendant correctly contends, the "removal of immunity . . . does not result in absolute liability to defendant because claimant is still required to prove the merits of his claim" (*Turley v State of New York*, Ct Cl, June 4, 2010, Hard, J., claim No. 111013, UID No. 2010-032-504; *see Moreno v State of New York*, Ct Cl, Apr. 5, 2001, Bell, J., claim No. 100335, UID No. 2001-007-551). "Where, as here, a prison inmate contends that he was wrongfully confined as a result of the flawed prison disciplinary proceeding, once the absolute immunity is removed by showing that the governing rules and regulations were not followed, he [or she] may recover damages if he [or she] is able to prove the traditional elements of the tort of [unlawful confinement]: (1) that the confinement was intentional; (2) that Claimant was conscious of the confinement; (3) that Claimant did not consent to the confinement; and (4) that the confinement was not otherwise privileged" (*Kilpatrick v State of New York*, Ct Cl, Dec. 2001, Patti, J., claim No. 100462, UID No. 2001-013-031, citing *Broughton v State of New York*, 37 NY2d 451, 456; *cf. Lamage v State of New York*, 31 Misc 3d 1205[A], 2010 NY Slip Op 52393[U], *2-3). "In other words, not every violation of the rules and regulations governing the imposition of prison discipline will result in liability on the part of the State; the rule violations merely remove the cloak of absolute immunity and make the State potentially liable, if liability would be imposed under common law tort principles" (*Kilpatrick*, claim No. 100462, UID No. 2001-013-031).

Here, there is no dispute concerning the first three elements of the unlawful confinement cause of action, and the dispositive issue is whether claimant established as a matter of law that the confinement was not otherwise privileged. He did not. "Absent any evidence that the [exculpatory evidence] . . . would have . . . changed the outcome of the hearing, the Court of Claims properly denied claimant's motion for partial summary judgment" (*Watson v State of New York*, 125 AD3d 1064, 1065; *cf. DuBois*, 25 Misc 3d at 1142).

Finally, we note that claimant improperly contends for the first time in his reply brief that the exculpatory evidence would have changed the outcome of the hearing, and we therefore do not address that contention (*see Przesiek v State of New York*, 118 AD3d 1326, 1327).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1259

CA 15-00758

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

STEVEN R. SAUMURE AND RHONDA SAUMURE,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V ORDER

U.R. BEST RESORT, INC., ANDERSON BARNEY REAL ESTATE MANAGEMENT GROUP, LLC, AND SMITH STRUCTURES, INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS U.R. BEST RESORT, INC. AND ANDERSON BARNEY REAL ESTATE MANAGEMENT GROUP, LLC.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT SMITH STRUCTURES, INC.

Appeal and cross appeals from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered July 17, 2014. The order denied the motion of plaintiffs for partial summary judgment and granted in part and denied in part the cross motions of defendants for summary 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: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1260

CA 15-00326

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

DEBRA L. SHERMAN, PLAINTIFF-APPELLANT,

V ORDER

STEVE J. HEROD, DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered November 6, 2014. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

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

1263

CA 15-00642

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

JASON T. AUGHTMON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RAYMOND T. WARD AND TAMMEY M. WARD,
DEFENDANTS-RESPONDENTS.

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (KRISTEN B. DEGNAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 5, 2014. The order, insofar as appealed from, denied plaintiff's motion for partial 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 a vehicle owned by defendant Tammey M. Ward and driven by defendant Raymond T. Ward collided with the vehicle driven by plaintiff. Following discovery, plaintiff moved for partial summary judgment on the issue whether he sustained a serious injury under the 90/180-day category of serious injury (*see* Insurance Law § 5102 [d]). Supreme Court properly denied the motion. Contrary to plaintiff's contention, he failed to meet his initial burden with respect to the 90/180-day category inasmuch as he failed to submit evidence establishing as a matter of law that he sustained "a medically determined injury or impairment of a non-permanent nature" that was causally related to the subject accident (*id.*; *see Heatter v Dmowski*, 115 AD3d 1325, 1326; *see also Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400). In support of his motion, plaintiff submitted, inter alia, the affirmed report of a physician who examined plaintiff on behalf of defendants. The physician concluded, based on all of plaintiff's medical reports, as well as the imaging studies conducted since the date of the accident (*cf. Quinones v Ksieniewicz*, 80 AD3d 506, 506-507), that plaintiff had "extensive congenital variation and degenerative disease of the lumbar spine that was not caused by the accident of record" and that plaintiff's injuries were caused by those preexisting "anatomical elements." We thus conclude that plaintiff failed to meet his burden of establishing, as a matter of law, that his alleged pain and injuries were caused by the subject accident (*see*

generally Carrasco v Mendez, 4 NY3d 566, 580).

Entered: November 13, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (284/98) KA 15-01280. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC TOLLIVER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (169/00) KA 98-02437. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DESHARD WRIGHT, ALSO KNOWN AS MONEY, ALSO KNOWN AS "D", DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (585/07) KA 04-01393. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYRONE MONROE, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (1298/09) KA 08-02280. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MURTADA S. EBRAHIM, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO,

LINDLEY, AND WHALEN, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (273/10) KA 07-02345. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL L. SCHROCK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (398/11) KA 10-00819. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V THOMAS WASHINGTON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (868/13) KA 11-00188. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LESTER P. IRVING, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Nov. 13, 2015.)

MOTION NO. (1072/13) KA 11-00577. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DEYON T. ROBERTS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Nov. 13, 2015.)

KA 14-01666. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON A. BURNHAM, DEFENDANT-APPELLANT. -- The case is held, the decision is

reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his guilty plea of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). We conclude that there is a nonfrivolous issue as to whether County Court erred in failing, sua sponte, to conduct a competency hearing pursuant to CPL 730.30 (2). We therefore relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Oswego County Court, Donald E. Todd, J. - Attempted Burglary, 2nd Degree). PRESENT: SCUDDER, P.J., SMITH, CENTRA, WHALEN, AND DEJOSEPH, JJ. (Filed Nov. 13, 2015.)