SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 4, 2013

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

836

CA 13-00451

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

ROBERT DAVIS AND MICHAEL LANG,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES BOEHEIM AND SYRACUSE UNIVERSITY,
DEFENDANTS-RESPONDENTS.

CUTI HECKER WANG LLP, NEW YORK CITY (MARIANN MEIER WANG OF COUNSEL), AND ALLRED, MAROKO & GOLDBERG, LOS ANGELES, CALIFORNIA, FOR PLAINTIFFS-APPELLANTS.

DEBEVOISE & PLIMPTON LLP, NEW YORK CITY (HELEN V. CANTWELL OF COUNSEL), HANCOCK ESTABROOK, LLP, SYRACUSE, AND DINSMORE & SHOHL LLP, PITTSBURGH, PENNSYLVANIA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered May 30, 2012. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiffs commenced this defamation action seeking damages for statements made by James Boeheim (defendant), the head basketball coach for defendant Syracuse University (University), in the wake of allegations by plaintiffs that they were sexually abused by associate head coach Bernie Fine. Contrary to plaintiffs' contention, Supreme Court properly granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

It is undisputed that Fine and defendant were long-time friends and that Fine coached with defendant for approximately 35 years. It is also undisputed that Robert Davis (plaintiff) had reported the alleged abuse to the Syracuse Police Department in 2002 and to the University in 2005. No criminal charges were brought against Fine, and the University advised plaintiff that it had determined following an internal investigation conducted by a law firm that the allegations were not substantiated and that the investigation was closed. Defendant made the alleged defamatory statements on November 17 and 18, 2011 during interviews that appeared at ESPN.com, and syracuse.com, i.e., the online version of the Syracuse Post-Standard, and in the New York Times. Several news articles were thereafter

published based on those interviews. Those articles included the statements of defendant that plaintiff lied when he stated in an interview with ESPN that defendant saw plaintiff lying on the bed in Fine's hotel room in New Orleans in 1987; that plaintiffs were lying with respect to the allegations about Fine; that plaintiff had provided the University with the names of four people who could corroborate his allegations, but that the allegations were not in fact corroborated; and that, in the wake of the scandal at Penn State University involving Jerry Sandusky, a former assistant football coach at that university, plaintiffs were financially motivated in making the allegations against Fine.

"Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation . . . Generally, only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" (*Thomas H. v Paul B.*, 18 NY3d 580, 584). "The issue at this early, preanswer stage of the litigation is whether plaintiff[s'] [complaint] sufficiently allege[s] false, defamatory statements of *fact* rather than mere nonactionable statements of *opinion*" (*Gross v New York Times Co.*, 82 NY2d 146, 149). "Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276, *cert denied* 555 US 1170; *see Weiner v Doubleday & Co.*, 74 NY2d 586, 593, *cert denied* 495 US 930; *Steinhilber v Alphonse*, 68 NY2d 283, 289). Although the Court of Appeals has acknowledged that "[d]istinguishing between opinion and fact has 'proved a difficult' task" (*Mann*, 10 NY3d at 276), it has provided three factors for courts to consider in determining whether the alleged defamatory statements are actionable statements of fact or nonactionable statements of opinion (*see id.*).

We agree with plaintiffs that defendant's statements that they lied and that they did so out of a financial motivation are statements of fact when viewed in light of the first two factors set forth in *Mann*, i.e., those statements use specific language that "has a precise meaning which is readily understood" and are "capable of being proven true or false" (*id.*). We note in particular that, when defendant was asked during the syracuse.com interview what plaintiff's "possible motivation would be to tell his disturbing story at this time," he responded that plaintiff was "trying to get money. He's tried before. And now he's trying again." Although that statement may be interpreted as implying that defendant knew facts that were not available to the reader (*see Gross*, 82 NY2d at 153; *Steinhilber*, 68 NY2d at 289), we are nevertheless mindful that we "must consider the content of the communication as a whole, as well as its tone and apparent purpose and in particular should look to the over-all context in which the assertions were made and determine on that basis whether the reasonable reader would have believed that the challenged statements were conveying facts about . . . plaintiff" (*Mann*, 10 NY3d at 276 [internal quotation marks omitted]). Furthermore, we must "avoid[] the 'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible fact[s]' that might form the basis of a sustainable libel action" (*Gross*, 82 NY2d at 156).

Defendant's statements also must be viewed in light of the third factor set forth in *Mann*, i.e., "whether either the full context of the communication in which the statement[s] appear[] or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*id.* at 276). Defendant additionally stated in the interview with syracuse.com: "So, we are supposed to do what? Stop the presses 26 years later? For a false allegation? For what I absolutely believe is a false allegation? I know [plaintiff is] lying about me seeing him in his hotel room. That's a lie. If he's going to tell one lie, I'm sure there's a few more of them . . . I have never been in Bernie Fine's hotel room in my life . . . Now, could I have once . . . one time? I have a pretty good recollection of things, but I don't ever recollect ever walking into Bernie Fine's hotel room. Ever." In his interview with ESPN, defendant stated: "I know this kid, but I never saw him in any rooms or anything . . . It is a bunch of a thousand lies that [plaintiff] has told. You don't think it is a little funny that his cousin . . . is coming forward? . . . He supplied four names to the university that would corroborate his story. None of them did . . . [T]here is only one side to this story. He is lying."

We conclude that defendant's statements demonstrate his support for Fine, his long-time friend and colleague, and also constitute his reaction to plaintiff's implied allegation, made days after Penn State University fired its long-term football coach, that defendant knew or should have known of Fine's alleged improprieties. We therefore conclude that the content of the statements, together with the surrounding circumstances, " 'are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact' " (*Mann*, 10 NY3d at 276). Based upon "the content of the communication[s] as a whole, as well as [their] tone and apparent purpose[, together with] the over-all context in which the assertions were made" (*id.*), we thus conclude that the court properly determined that defendant's statements constitute opinion, not fact.

We have reviewed plaintiffs' remaining contentions and conclude that they are without merit.

All concur except SMITH and FAHEY, JJ., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent because we cannot agree with the majority's conclusion that Supreme Court properly granted defendants' motion to dismiss the complaint pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. In our view, the statements of James Boeheim (defendant) of which plaintiffs complain constitute "mixed opinion," i.e., "statement[s] of opinion that impl[y] a basis in facts which are not disclosed to the reader or listener" (*Gross v New York Times Co.*, 82 NY2d 146, 153), and we would thus reverse the order, deny the motion and reinstate the complaint.

We agree with the majority that "[t]he issue at this early, preanswer stage of the litigation is whether [the complaint] sufficiently allege[s] false, defamatory statements of *fact* rather

than mere nonactionable statements of *opinion*" (*id.* at 149). We further agree with the majority that our analysis is guided by the factors for distinguishing between expressions of opinion and assertions of fact, to wit: " '(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact' " (*Mann v Abel*, 10 NY3d 271, 276, *cert denied* 555 US 1170; *see Thomas H. v Paul B.*, 18 NY3d 580, 584). In view of the majority's determination with respect to the first two factors, our analysis focuses on the third factor, and with respect to that factor we note the rule requiring us to "look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader [or listener] would have believed that the challenged statements were conveying facts about the . . . plaintiff[s]' " (*Brian v Richardson*, 87 NY2d 46, 51, quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254, *cert denied* 500 US 954; *see Mann*, 10 NY3d at 276).

Applying that rule here, and noting the principles set forth in *Leon v Martinez* (84 NY2d 83, 87-88) in light of the important point that this appeal concerns a *preanswer* motion to dismiss, we cannot agree with the majority that the complaint does not sufficiently allege false, defamatory statements of fact (*see Gross*, 82 NY2d at 153-154). We note that the complaint alleges, inter alia, that in one interview with the Syracuse Post-Standard defendant stated, "The Penn State thing came out and the kid behind this is trying to get money. He's tried before. And now he's trying again . . . That's what this is about. Money." The complaint further alleges that defendant "made similar statements to ESPN, telling the national sports news network: 'It is a bunch of a thousand lies that [plaintiff Robert Davis] has told . . . He supplied four names to the university that would corroborate his story. None of them did . . . there is only one side to this story. He is lying." According to the complaint, defendant added, "I believe they saw what happened at Penn State, and they are using ESPN to get money. That is what I believe."

Although we are mindful of the timing of the disputed statements, we conclude that through the statements noted above the complaint sufficiently alleges false, defamatory representations of fact about plaintiffs, i.e., that Davis was lying about Bernie Fine, that Davis had previously tried to obtain money through similar allegations, and that Davis and plaintiff Michael Lang, who the complaint alleges is a relative of Davis, were doing so again through the instant allegations (*see Thomas H.*, 18 NY3d at 584; *Gross*, 82 NY2d at 156; *cf. Mann*, 10 NY3d at 276-277). We thus agree with plaintiffs that the statements constitute mixed opinion, i.e., opinion that "implies a basis in facts which are not disclosed to the reader or listener" (*Gross*, 82 NY2d at 153). We also conclude that "the defamatory nature of the statement[s] [at issue here] cannot be immunized by pairing [them] with [the words,] 'I believe' " (*Thomas H.*, 18 NY3d at 585).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

837

CA 12-02073

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

BONNIE L. BURTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL T. SCIANO, M.D., ET AL., DEFENDANTS,
AND RITE AID OF N.Y., INC., DOING BUSINESS AS
RITE AID PHARMACY, DEFENDANT-RESPONDENT.

COTE & VAN DYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered August 17, 2012. The order granted the motion of defendant Rite Aid of N.Y., Inc., doing business as Rite Aid Pharmacy, to dismiss the complaint and cross claims against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly arising from the medical treatment that she received for breathing difficulties. Insofar as relevant here, plaintiff sought damages from defendant Rite Aid of N.Y., Inc., doing business as Rite Aid Pharmacy (Rite Aid), for its alleged negligence in filling a prescription that was written by another defendant. Plaintiff appeals from an order that granted Rite Aid's motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint and all cross claims against it.

Contrary to plaintiff's contention, Supreme Court properly granted Rite Aid's motion to dismiss the complaint for failure to state a cause of action. It is well settled that, "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory . . . In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint . . . and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated

one' " (*Leon v Martinez*, 84 NY2d 83, 87-88; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414).

With respect to the sufficiency of the complaint before us, we note that in New York " '[t]he standard of care which is imposed on a pharmacist is generally described as ordinary care in the conduct of his [or her] business. The rule of ordinary care as applied to the business of a druggist means the highest practicable degree of prudence, thoughtfulness and vigilance commensurate with the dangers involved and the consequences which may attend inattention' " (*Eberle v Hughes*, 77 AD3d 1398, 1399). "Generally, a pharmacist cannot be held liable for negligence in the absence of an allegation that he or she failed to fill a prescription precisely as directed by the physician or was aware that the customer had a condition that would render the prescription of the drug at issue contraindicated" (*Brumaghim v Eckel*, 94 AD3d 1391, 1392; *see Elliott v A.H. Robins Co.*, 262 AD2d 132, 132-133, *appeal dismissed* 94 NY2d 835, *lv dismissed in part and denied in part* 94 NY2d 895). Here, because plaintiff failed to allege that the dosage "fell below or exceeded the medically acceptable range of dosages that should be provided under any circumstance" (*Brumaghim*, 94 AD3d at 1393), that Rite Aid did not follow the prescribing physician's directions, or that Rite Aid was aware that the drug was contraindicated for plaintiff, the court properly concluded that the complaint fails to state a cause of action for negligence on the part of Rite Aid (*see id.* at 1393-1395).

Contrary to plaintiff's further contention, she failed to establish through an expert's affidavit that the pharmacy profession itself has created a different standard of care from that set forth herein. In support of that contention, plaintiff submitted the affidavit of a pharmacist who opined that "[t]he dose [of prednisone prescribed for plaintiff] triggers the need to contact the prescribing physician to double check the dosage and to notify the patient of the very high dose and risks associated with that dose." " '[O]rdinarily, the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would' [be sufficient to allege a violation of a professional standard of care] . . . Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to" establish a violation of a standard of care (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *see Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 9). Thus, an expert's affidavit is insufficient to establish that a standard of care exists where it is "devoid of any reference to a foundational scientific basis for its conclusions" (*Romano v Stanley*, 90 NY2d 444, 452). Here, the expert cites no industry standard, treatise or other authority in support of his opinion regarding the standard of care (*see Buchholz*, 5 NY3d at 8-9; *Nathan v Rochester Hous. Auth.*, 68 AD3d 1820, 1820-1821), and plaintiff therefore failed to establish that the pharmacy profession itself imposes a different

standard of care from that set forth in the applicable case law.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

849

KA 11-02049

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE SYKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 16, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, unlawful possession of marihuana, failure to display head lamps and improper license plates.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following 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]), criminal possession of a weapon in the third degree (§ 265.02 [1]), unlawful possession of marihuana (§ 221.05), failure to display head lamps (Vehicle and Traffic Law § 375 [2] [a] [1]), and improper license plates (§ 402 [1]). We agree with defendant that Supreme Court erred in refusing to suppress the gun recovered from the vehicle based upon the inevitable discovery doctrine. The testimony at the suppression hearing established that, during a lawful traffic stop, one of the police officers asked defendant whether there were any drugs or weapons in the vehicle before instructing defendant to exit the vehicle. After defendant admitted to having marihuana on his person, the police officer asked defendant to exit the vehicle and, following suspicious behavior by another occupant of the vehicle, searched the vehicle and found a gun in plain view. Notably, the court did not address whether the officer had the requisite founded suspicion of criminal activity to justify an inquiry concerning the presence of drugs or weapons in the vehicle (*see generally People v Garcia*, 20 NY3d 317, 322-323; *People v De Bour*, 40 NY2d 210, 223). Instead, the court refused to suppress the gun on the ground that the police “could” have taken various actions after the traffic stop that would have inevitably led to the discovery of the gun. The People,

however, did not raise the inevitable discovery doctrine as a ground for denying suppression of the gun, nor did they meet their burden of "demonstrat[ing] a very high degree of probability that normal police procedures would have uncovered the challenged evidence independently of [a] tainted source" (*People v Turriago*, 90 NY2d 77, 86, *rearg denied* 90 NY2d 77 [internal quotation marks omitted]; *see People v Fitzpatrick*, 32 NY2d 499, 507, *cert denied* 414 US 1033, 1050; *People v Walker*, 198 AD2d 785, 787; *cf. People v Watson*, 188 AD2d 501, 502).

Further, even if a founded suspicion of criminal activity supported the police officer's inquiry (*see Garcia*, 20 NY3d at 322-323), we are precluded from affirming with respect to the court's refusal to suppress the gun "on a theory not reached by the suppression court" (*People v Ingram*, 18 NY3d 948, 949; *see People v Concepcion*, 17 NY3d 192, 195; *People v LaFontaine*, 92 NY2d 470, 473-474, *rearg denied* 94 NY2d 849). We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine whether the police officer had a founded suspicion of criminal activity to justify his inquiry (*see generally People v Coles*, 105 AD3d 1360, 1363).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

856

CA 13-00357

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

EUGENE F. MASON AND PATRICIA ANN MASON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF NEWARK, DEFENDANT-RESPONDENT.

GREENE & REID, PLLC, SYRACUSE (EUGENE W. LANE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PETRONE & PETRONE, P.C., UTICA, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (GREGORY A. CASCINO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Wayne County (John J. Ark, J.), entered May 8, 2012. The judgment and order granted the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint insofar as it alleges that defendant was negligent in the maintenance of the sewer system and as modified the judgment and order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages resulting from a blockage of the sewer system that caused sewage to leak into the basement of their home. In their complaint, plaintiffs alleged, inter alia, that defendant was negligent in the design, manufacture and maintenance of the sewer system. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion.

We agree with plaintiffs that the court erred in granting that part of the motion with respect to their claim that defendant was negligent in the maintenance of the sewer system. We therefore modify the judgment and order accordingly. We conclude that issues of fact exist whether defendant "received 'notice of a dangerous condition or ha[d] reason to believe that the [sewer] pipes ha[d] shifted or deteriorated and [were] likely to cause injury' " and whether defendant neglected to " 'make reasonable efforts to inspect and repair the defect' " (*Holy Temple First Church of God in Christ v City of Hudson*, 17 AD3d 947, 947-948, quoting *De Witt Props. v City of New York*, 44 NY2d 417, 424; *cf. Azizi v Village of Croton-on-Hudson*, 79

AD3d 953, 955). The record establishes that plaintiffs made numerous complaints to defendant for many years prior to the incident at issue and that defendant did not consistently keep written records of the complaints it received with respect to the sewer lines. Finally, we note that plaintiffs have abandoned all other claims of negligence alleged in the complaint, as amplified by the bill of particulars (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984; *see generally Malachowski v Daly*, 87 AD3d 1321, 1323).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

862

CA 12-02161

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

IN THE MATTER OF WOODSIDE MANOR NURSING HOME, AVON NURSING HOME, THE BRIGHTONIAN, CONESUS LAKE NURSING HOME, ELM MANOR NURSING HOME, HORNELL NURSING HOME, HURLBUT NURSING HOME, NEWARK MANOR NURSING HOME, PENFIELD PLACE, SENECA NURSING AND REHABILITATION CENTER, SHOREWOODS NURSING HOME AND WEDGEWOOD NURSING HOME, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L. MEGNA, DIRECTOR OF BUDGET, STATE OF NEW YORK, OR THEIR SUCCESSORS, RESPONDENTS-APPELLANTS.

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

HARTER SECREST & EMERY LLP, ROCHESTER (THOMAS G. SMITH OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (William P. Polito, J.), entered June 28, 2012 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part by remitting the matter to the Department of Health for further proceedings.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition in its entirety and dismissing the proceeding and as modified the judgment is affirmed without costs.

Memorandum: Petitioners are 12 residential health care facilities, as defined in Public Health Law § 2801 (3), that participate in the Medicaid program (*see* 42 USC § 1396 *et seq.*). Pursuant to the Medicaid program, such facilities are entitled to reimbursement for services that are provided to eligible Medicaid recipients (*see* § 1396a *et seq.*). Each state participating in the program is required to adopt a method for reimbursing such facilities (*see* § 1396a [a] [13] [A]), as well as a procedure for providing facilities such as petitioners with administrative review of the payment rates (*see* 42 CFR 447.253 [e]). New York's method of determining the rates of payment and the administrative review

procedure are found in Public Health Law article 28 and 10 NYCRR part 86. Administrative challenges to rate determinations, also known as "rate appeals" (10 NYCRR 86-2.13 [b]), are governed in particular by Public Health Law § 2808 and 10 NYCRR 86-2.13 and 86-2.14.

Between the years 2000 and 2009, petitioners collectively filed 95 rate appeals with the New York State Department of Health (DOH). At the time the appeals were filed, 10 NYCRR 86-2.14 (b) mandated that the Commissioner of Health (Commissioner) act upon such appeals "within one year of the end of the 120-day period" within which facilities were obligated to file the rate appeal (*see* 10 NYCRR 86-2.13 [a]).

In 2010, the legislature enacted Public Health Law § 2808 (17) (b), which initially provided that, "for the state fiscal year beginning April [1, 2010] and ending March [31, 2011], the [C]ommissioner shall not be required to revise certified rates of payment established pursuant to [article 28] for rate periods prior to April [1, 2011], based on consideration of rate appeals filed by residential health care facilities . . . in excess of an aggregate annual amount of [80] million dollars for such state fiscal year" (§ 2808 former [17] [b]; *see* L 2010, ch 109, part B, § 30). In determining which rate appeals would be subject to the moratorium and which rate appeals would be processed pursuant to the statutory cap, the Commissioner was to prioritize the appeals and, in doing so, was to consider "which facilities . . . [were] facing significant financial hardship" (§ 2808 [17] [b]).

In 2011, section 2808 (17) (b) was amended to expand the time period of the rate appeal moratorium through March 31, 2015 and to reduce the rate appeal cap to 50 million dollars for the fiscal year April 1, 2011 through March 31, 2012 (*see* L 2011, ch 59, part H, § 98). In addition, section 2808 (17) (c) was added, which provided that "for periods on and after April [1, 2011] the [C]ommissioner shall promulgate regulations . . . establishing priorities and time frames for processing rate appeals, including rate appeals filed prior to April [1, 2011] . . . ; provided, however, that such regulations shall not be inconsistent with the provisions of [subdivision (17)] (b)" (*see* L 2011, ch 59, part H, § 98).

Respondents failed to act on any of the 95 rate appeals filed by petitioners between 2000 and 2009. By letters dated September 13, 2011, each petitioner demanded that the DOH "immediately resolve the [applicable] administrative rate appeals." When no response was given and no action was taken, petitioners commenced this CPLR article 78 mandamus proceeding seeking, inter alia, to compel respondents "to immediately address and resolve [p]etitioners' outstanding Medicaid rate appeals." Respondents moved to dismiss the petition, contending that petitioners had failed to exhaust their administrative remedies and that the proceeding was barred by the statute of limitations. Respondents also contended that petitioners' rate appeals were subject to the moratorium established by Public Health Law § 2808 (17) (b) and thus that petitioners were required to await an administrative determination of their rate appeals before seeking judicial

intervention.

Supreme Court denied respondents' motion and granted the petition in part by remitting the matter to the DOH "to complete resolution of the [rate] appeals in accordance with the laws in effect at the time of filing." The court concluded that section 2808 (17) (b) and (c) did not apply retroactively to rate appeals filed before the moratorium was enacted and thus that petitioners could properly seek mandamus to compel compliance with the mandated laws requiring reviews of rate appeals within a certain period of time. The court also concluded that the proceeding was not barred by the statute of limitations.

On appeal, respondents contend that, because section 2808 (17) (b) and (c) apply to petitioners' rate appeals, petitioners do not have a clear legal right to compel respondents to process their rate appeals. They therefore contend that mandamus does not lie and that petitioners must exhaust their administrative remedies before seeking judicial intervention. We note that respondents have not pursued in their brief the issue raised in their motion papers that the petition should be dismissed pursuant to the statute of limitations. We therefore deem that issue abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with respondents that section 2808 (17) (b) and (c) apply retroactively to petitioners' rate appeals. The seminal case on whether statutes are to be applied retroactively is *Majewski v Broadalbin-Perth Cent. Sch. Dist.* (91 NY2d 577, 584), which provides, in relevant part, that "[i]t is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]). We conclude that the language of the statute requires that it be applied retroactively. Public Health Law § 2808 (17) (b) states that, for the period from April 1, 2010 through March 31, 2015, "the [C]ommissioner shall not be required to revise certified rates of payment . . . for rate periods prior to April [1, 2015], based on consideration of rate appeals filed by residential health care facilities" in excess of the monetary cap. While there is no explicit statement that the moratorium and cap shall apply to rate appeals filed before April 1, 2010, the statute specifically states that no revisions are required for any period before April 1, 2015 where the revision would emanate from a rate appeal filed by a residential health care facility. In our view, the necessary implication of that language is that the statute applies to any rate appeal seeking a revision for any period before April 1, 2015, including any revisions resulting from rate appeals filed before the statute took effect.

Moreover, subdivision (17) (c), which was added in 2011, specifically states that the Commissioner is required to promulgate regulations establishing priorities and time frames "for processing rate appeals, including rate appeals filed prior to April [1, 2011] . . . ; provided, however, that such regulations shall not be

inconsistent with the provisions of [subdivision (17)] (b)." Even if we were to conclude that subdivision (17) (c) does not explicitly state that the statute applies to rate appeals filed before the moratorium and cap took effect, the necessary implication is that the moratorium and cap apply to all pending rate appeals inasmuch as there would be no need to prioritize the handling of those appeals unless they were encompassed by the moratorium and cap.

Even assuming, arguendo, that the language of the statute is ambiguous, "we [would] turn to legislative history to steer our analysis" (*Majewski*, 91 NY2d at 584). As noted, subdivision (17) (b) was initially enacted to provide the moratorium and cap for a one-year period: April 1, 2010 through March 31, 2011. The legislation was part of a larger bill that was deemed "necessary to provide enhanced fiscal management and generate savings for the 2010-11 State fiscal year" (Governor's Approval Mem, Bill Jacket, L 2010, ch 109 at 4). The intent of the entire legislation was to "maintain continuity in State services and financial management in the absence of an enacted 2010-11 Budget" and "to ensure the fiscal stability of the State" (Senate Introducer Mem in Support, Bill Jacket, L 2010, ch 109 at 8-9). Specifically, part B of the legislation, which included the moratorium and cap contained in Public Health Law § 2808 (17) (b), was deemed "necessary to achieve $270 million in savings in the 2010-11 State fiscal year" (*id.* at 8). In enacting the time-period extension and adding subdivision (17) (c), the Governor stated that "[t]he bill is necessary to enact the 2011-2012 State budget" (Governor's Approval Mem, Bill Jacket, L 2011, ch 59 at 8).

In our view, the intent of the 2010 and 2011 legislation was to decrease costs in order to maintain the financial stability of the State. If the statute were to apply only to rate appeals filed after the moratorium and cap were imposed, then the goal of the statute would not have been accomplished. There were approximately 7,500 rate appeals pending as of January 2012. Had the Commissioner been required to make revisions and payments on all of the rate appeals pending at the time of the moratorium, there would have been little, if any, savings. As unfair as it may appear to be to all those who had appeals pending for years, we conclude that the statute was intended to apply retroactively to all rate appeals, "including rate appeals filed prior to April [1, 2011]" (Public Health Law § 2808 [17] [c]).

Inasmuch as the moratorium applies retroactively to petitioners' rate appeals, petitioners do not have a clear legal right to relief, and their petition must be denied (*see e.g. Matter of Urban Strategies v Novello*, 297 AD2d 745, 746; *Matter of Jay Alexander Manor v Novello*, 285 AD2d 951, 953, *lv denied* 97 NY2d 610; *see generally Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757). We therefore modify the judgment by denying the petition in its entirety and dismissing the proceeding.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

870

KA 11-01505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARAK CORNELL, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (PATRICK SWANSON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered June 13, 2011. The judgment convicted defendant, upon a jury verdict, of arson in the second degree, criminal mischief in the second degree and reckless endangerment in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, arson in the second degree (Penal Law § 150.15). We agree with defendant that County Court committed a mode of proceedings error when it responded to a jury note off the record, in the jury room, and outside the presence of defendant, with no indication that defendant had waived his right to be present. CPL 310.30 provides that, upon receiving a request for further instruction or information from the jury during deliberations, "the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." It is beyond cavil that "[a] defendant has a fundamental right to be present at all material stages of a trial . . . [and] CPL 310.30 makes a defendant's right to be present during instructions to the jury absolute and unequivocal" (*People v Mehmedi*, 69 NY2d 759, 760, *rearg denied* 69 NY2d 985; *see People v Ciaccio*, 47 NY2d 431, 436-437). The court properly read the jury note on the record in the presence of defendant, defense counsel, and the prosecutor, and it then obtained a clear stipulation from both attorneys concerning the accuracy of its intended response to the jury's request for information. We nevertheless conclude that the court committed reversible error by subsequently instructing the jury off the record, in the jury room, and outside the presence of

defendant (*see* CPL 310.30; *see generally People v O'Rama*, 78 NY2d 270, 276-278).

Because there must be a retrial, we deem it appropriate to address defendant's contention that the court abused its discretion by permitting testimony concerning defendant's prior bad acts in the days, months, and years preceding the subject arson. "[A] defendant is not entitled as a matter of law to pretrial notice of the People's intention to offer evidence pursuant to *People v Molineux* (168 NY 264) or to a pretrial hearing on the admissibility of such evidence" (*People v Small*, 12 NY3d 732, 733). Nevertheless, "a prosecutor seeking to introduce *Molineux* evidence 'should ask for a ruling out of the presence of the jury' . . . and . . . any hearing with respect to the admissibility of such evidence should occur either before trial or, at the latest, 'just before the witness testifies' " (*id*., quoting *People v Ventimiglia*, 52 NY2d 350, 362).

Here, that procedure was not followed. Instead, the court improperly afforded defense counsel a standing objection with respect to testimony concerning defendant's prior bad acts while affording the prosecutor the opportunity to ask one of the victims of the arson, who was defendant's neighbor, about defendant's prior bad acts over a period as long as 10 years before the arson. It was particularly improper to allow that witness to testify that, as a result of defendant's prior bad acts, he had concerns about the safety of his children and pets. "It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged" (*People v Mateo*, 2 NY3d 383, 437, *cert denied* 542 US 946). Although defendant's bad acts within a few days of the arson could be deemed relevant to such issues as motive and intent, testimony concerning defendant's bad acts in the preceding weeks, months or years was irrelevant to any issue in the case and only could have prejudiced defendant by suggesting to the jury that he was an erratic and potentially dangerous person who had the propensity to commit the crime at issue (*see generally Molineux*, 168 NY at 291-294). In view of our determination to grant a new trial, we do not address defendant's remaining contentions.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

871

KA 09-02274

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MHINA, DEFENDANT-APPELLANT.

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

JAMES MHINA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 9, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (three counts), falsifying business records in the first degree (two counts) and scheme to defraud in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of three counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25), two counts of falsifying business records in the first degree (§ 175.10), and scheme to defraud in the second degree (§ 190.60 [1]). We reject defendant's contention that the evidence is legally insufficient to establish his knowledge that the checks at issue herein were forged (*see generally People v Bleakley*, 69 NY2d 490, 495). In a prosecution for criminal possession of a forged instrument, the element of knowledge "may be established circumstantially by conduct and events" (*People v Moore*, 41 AD3d 1202, 1203, *lv denied* 9 NY3d 879). Viewing the evidence in the light most favorable to the People, we conclude that the jury " 'had a sufficient evidentiary basis upon which to find defendant's knowledge of the forged character of the possessed instrument[s] beyond a reasonable doubt' " (*id.*, quoting *People v Johnson*, 65 NY2d 556, 561, *rearg denied* 66 NY2d 759). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the

evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that County Court's *Molineux* ruling constitutes reversible error. Before the trial, the court granted the People's motion to present *Molineux* evidence for the limited purpose of proving the absence of mistake in defendant's possession of the forged checks (*see People v Molineux*, 168 NY 264, 293-294). Pursuant to the court's ruling, the People presented evidence on their direct case concerning three of defendant's prior convictions as well as one investigation that did not result in criminal charges, arising from defendant's conduct in writing checks on his accounts with knowledge that those accounts either were closed or had insufficient funds. The court erred in ruling that such evidence was relevant to establish the absence of mistake. The disputed issues at trial were whether defendant knew that the checks were forged and whether defendant was a knowing participant in, or an innocent victim of, a fraudulent check scheme. Defendant's prior bad acts were not "directly relevant" to the absence of mistake in defendant's possession of the forged checks because those prior bad acts are not probative of defendant's ability to recognize that the checks were forgeries or that he had become knowingly involved in a fraudulent check scheme (*People v Cass*, 18 NY3d 553, 560). Contrary to the People's contention, the *Molineux* evidence was not admissible to prove defendant's "familiarity with check frauds and his ability to deceive individuals through banking schemes" inasmuch as such evidence "tends only to demonstrate the defendant's propensity to commit the crime charged" (*id.* at 559). Furthermore, the Court of Appeals has expressly declined to create a " 'specialized crime' exception to *Molineux*" when the charged crime is one "that require[s] unusual skills, knowledge and access to the means of committing it" (*People v Arafet*, 13 NY3d 460, 466). We therefore conclude that evidence of defendant's prior bad acts was inadmissible as a matter of law (*see People v Alvino*, 71 NY2d 233, 242).

We further conclude in any event with respect to the court's *Molineux* ruling that the probative value of the evidence did not outweigh its prejudicial effect (*see Cass*, 18 NY3d at 560; *People v Gamble*, 18 NY3d 386, 398, *rearg denied* 19 NY3d 833; *People v Drake*, 94 AD3d 1506, 1508, *lv denied* 20 NY3d 1010). The evidence was "of slight value when compared to the possible prejudice to [defendant]" and therefore should not have been admitted (*People v Allweiss*, 48 NY2d 40, 47; *see Alvino*, 71 NY2d at 242). We further conclude that the error in admitting the evidence is not harmless (*see People v Bradley*, 20 NY3d 128, 135-136; *cf. People v Bounds*, 100 AD3d 1523, 1524, *lv denied* 20 NY3d 1096; *see generally People v Crimmins*, 36 NY2d 230, 241-242), even in view of the court's limiting instruction. We therefore reverse the judgment and grant a new trial on counts one through six of the indictment.

In light of our determination to grant a new trial, we do not address defendant's remaining contentions in his main and pro se

supplemental briefs.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

875

CA 12-01909

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

WALTER J. NARY, II,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ROSEMARY JONIENTZ,
DEFENDANT-APPELLANT-RESPONDENT.
(APPEAL NO. 1.)

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 2, 2012. The order granted in part the motion of defendant to set aside the jury verdict.

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

Same Memorandum as in *Nary v Jonientz* ([appeal No. 2] ___ AD3d ___ [Oct. 4, 2013]).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

876

CA 12-02170

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

WALTER J. NARY, II, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROSEMARY JONIENTZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 10, 2012. The judgment, among other things, awarded plaintiff money damages against defendant.

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

Memorandum: In appeal No. 1, defendant appeals and plaintiff cross-appeals from an order that granted in part defendant's motion to set aside the jury verdict by reducing the award of damages in this motor vehicle accident case, and in appeal No. 2, defendant appeals from the judgment entered on the jury's verdict as reduced by Supreme Court. We note at the outset that defendant's appeal from the order in appeal No. 1 "must be dismissed because the right of direct appeal [from the order therein] terminated with the entry of judgment in the action" (*Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435; *see Doyle v City of Buffalo*, 56 AD3d 1133, 1133-1134; *see also* CPLR 5501 [a] [1]). In addition, although plaintiff did not cross-appeal from the judgment in appeal No. 2, "we exercise our discretion to treat [his] notice of appeal [in appeal No. 1] as valid and deem his appeal as taken from the . . . judgment" in appeal No. 2 (*National Fuel Gas Distrib. Corp. v Erie County Water Auth.*, 99 AD3d 1231, 1232; *see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988; *see also* CPLR 5520 [c]).

Defendant failed to preserve for our review her contention that the court erred in permitting plaintiff to cross-examine defendant's expert physician concerning compensation he had been paid in the past for performing medical examinations and providing testimony for defendants in other personal injury actions. Defendant's expert physician testified in a recorded video deposition. While defendant's

attorney made various objections during the recording of that video testimony, there is no indication that defendant ever made a timely and specific objection to the court or otherwise sought a ruling regarding the nature or scope of that cross-examination (*see* CPLR 4017, 5501 [a] [3]; *see generally Santillo v Thompson*, 71 AD3d 1587, 1589).

Defendant further contends that the court abused its discretion in redacting certain portions of the recorded testimony of defendant's expert physician (*see generally Feldsberg v Nitschke*, 49 NY2d 636, 643). All of the discussions and rulings regarding specific redactions to the recorded testimony of defendant's expert physician took place off the record, and defendant thereafter registered only a general objection to those redactions. Moreover, with respect to the redactions of testimony where defendant's expert physician read from medical records subsequently admitted in evidence at trial, the record establishes that defendant's attorney seemingly acquiesced in those redactions based on the court's ruling that defendant's attorney would be permitted to read from those records during summation. Thus, on this record, it cannot be said that the court abused it discretion in redacting portions of the recorded testimony of defendant's expert physician.

We reject defendant's contention that the awards of damages for past and future pain and suffering, as reduced by the court, "deviate[] materially from what would be reasonable compensation" (CPLR 5501 [c]; *see generally Caprara v Chrysler Corp.*, 52 NY2d 114, 126-127). We reject defendant's further contention that the award of damages for future medical expenses, also as reduced by the court, is speculative and was not established with reasonable certainty (*see Huff v Rodriguez*, 45 AD3d 1430, 1433; *Kirschhoffer v Van Dyke*, 173 AD2d 7, 9-10). We likewise reject plaintiff's contention on his cross appeal that the court erred in reducing the awards of damages for past and future pain and suffering, and for future medical expenses. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

884

CA 13-00149

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

LOUISE KROLIKOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLAN KROLIKOWSKI, DEFENDANT-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (JOEL R. KURTZHALTS OF COUNSEL), FOR DEFENDANT-APPELLANT.

PALMER, MURPHY & TRIPI, BUFFALO (THOMAS A. PALMER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Janice M. Rosa, J.), entered April 17, 2012 in a divorce action. The judgment, among other things, directed plaintiff to pay maintenance to defendant.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by increasing the duration of maintenance from five years to nine years and as modified the judgment is affirmed without costs.

Memorandum: Defendant husband appeals from a judgment that, among other things, ordered plaintiff wife to pay defendant maintenance of $200 per week for five years, ordered plaintiff to pay defendant $40,800.75 for his interest in the marital residence, and distributed other marital assets. We reject defendant's contention that Supreme Court abused its discretion in awarding him only $200 per week in maintenance, and that the award of maintenance should be substantially increased (*see Mayle v Mayle*, 299 AD2d 869, 869). "[T]he amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Reed v Reed*, 55 AD3d 1249, 1251 [internal quotation marks omitted]). Here, the record establishes that the court properly considered defendant's "reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" in Domestic Relations Law § 236 (B) (6) (a) (*Hartog v Hartog*, 85 NY2d 36, 52; *see Frost v Frost*, 49 AD3d 1150, 1151). We conclude, however, that the court abused its discretion with respect to the duration of maintenance, and we therefore modify the judgment by increasing the duration of maintenance from five years to nine years (*see generally Reed*, 55 AD3d at 1251).

Contrary to defendant's further contention, the court properly exercised its broad discretion in making an equitable distribution of

the marital property (*see Martinson v Martinson*, 32 AD3d 1276, 1277; *Bossard v Bossard*, 199 AD2d 971, 971), upon considering the requisite statutory factors (*see generally* Domestic Relations Law § 236 [B] [5] [d]). In particular, the court properly considered the fact that plaintiff used separate property received from the estates of her father and uncle to pay off indebtedness on the marital residence (*see Midy v Midy*, 45 AD3d 543, 544-545). We conclude that defendant's remaining contentions, concerning the equitable distribution of the value of an investment account, plaintiff's summer paychecks, and the parties' vehicles, are without merit.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

886

CA 13-00250

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

FELICIA DAWES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS E. DAWES, JR., DEFENDANT-APPELLANT.

HOGAN & WILLIG, PLLC, AMHERST (KEVIN S. MAHONEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

COTTER & COTTER, P.C., WILLIAMSVILLE (DAVID B. COTTER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Catherine Nugent Panepinto, J.), entered October 29, 2012. The order vacated the Separation and Property Settlement Agreement entered into by the parties.

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

Memorandum: The parties entered into a separation agreement (hereafter, agreement) on September 18, 2007 and, on December 19, 2011, plaintiff wife moved by order to show cause to rescind it. Following a hearing, Supreme Court vacated the agreement on the grounds that plaintiff signed it under duress and it was the product of defendant husband's overreaching. We affirm.

" 'Judicial review [of separation agreements] is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions' " (*Skotnicki v Skotnicki*, 237 AD2d 974, 974, quoting *Christian v Christian*, 42 NY2d 63, 71-72). "[S]eparation agreements will be scrutinized 'to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity' " (*Tchorzewski v Tchorzewksi*, 278 AD2d 869, 870; *see Skotnicki*, 237 AD2d at 974-975; *see also Christian*, 42 NY2d at 72). "A separation agreement 'may be vacated if it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable' " (*Tchorzewski*, 278 AD2d at 870).

We agree with defendant that plaintiff did not sign the agreement under duress. Plaintiff's allegations that defendant threatened to

evict her from the marital residence if she did not sign the agreement and that he threw the agreement at her are not substantiated by proof sufficient to justify setting it aside (*see Christian*, 42 NY2d at 71-73; *see also Weimer v Weimer*, 281 AD2d 989, 989). Further, even accepting plaintiff's allegation that defendant persistently urged her to sign the agreement, such conduct does not constitute duress, particularly inasmuch as plaintiff signed the agreement after defendant revised it in accordance with her suggested changes.

We conclude, however, that the court properly determined that the agreement was " 'one such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other' " (*Colello v Colello*, 9 AD3d 855, 859, quoting *Christian*, 42 NY2d at 71; *see Skotnicki*, 237 AD2d at 975). As defendant correctly concedes, the agreement gives him almost all of the marital property, including his pension and retirement assets, and we note that the value of the pension and retirement assets is not apparent from the record because defendant failed to include a copy of his net worth statement. The agreement further provides that plaintiff may not seek maintenance and, most troubling under the circumstances of this case, that plaintiff waived her right to seek child support.

Contrary to defendant's contention, we conclude that plaintiff did not ratify the agreement by complying with its provisions and failing to object to it for more than four years (*see Pippis v Pippis*, 69 AD3d 824, 825; *Arrow v Arrow*, 133 AD2d 960, 961). During those four years, plaintiff did not receive any of the limited benefits accorded to her under the agreement. The fact that defendant allowed plaintiff to live in the marital residence during that time was no benefit to plaintiff inasmuch as the marital residence constituted marital property and she had an equal right to live there.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

890

OP 13-00223

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

IN THE MATTER OF CHRISTIAN CURTS, PETITIONER,

V MEMORANDUM AND ORDER

HON. DOUGLAS A. RANDALL, JUDGE, COUNTY OF MONROE, RESPONDENT.

GALLO & IACOVANGELO, LLP, ROCHESTER (DAVID D. SPOTO OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul a determination of respondent. The determination revoked the pistol permit of petitioner.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs and the petition is granted.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, after a hearing, revoking his pistol permit. Respondent initially temporarily suspended petitioner's pistol permit after petitioner was arrested for menacing in the second degree (*see* Penal Law § 120.14 [1]). Petitioner was subsequently acquitted of the menacing charge, but respondent nevertheless permanently revoked the permit. We agree with petitioner that the determination is arbitrary and capricious, and constitutes an abuse of discretion inasmuch as the record from the hearing is devoid of any evidence upon which respondent could have based his determination (*see Matter of Papaioannou v Kelly*, 14 AD3d 459, 460; *see generally Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 240). We further agree with petitioner that his due process rights were violated inasmuch as the record from the hearing does not demonstrate that he was afforded the opportunity to review the alleged documentation upon which respondent based his determination (*see LaGrange v Bruhn*, 276 AD2d 974, 975). We therefore annul the determination. We note, however, that our determination does not preclude the commencement of a new revocation proceeding (*see*

Matter of Demchik v Hannigan, 182 AD2d 1133, 1133).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

895

KA 11-01667

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELBERT J. WELCH, DEFENDANT-APPELLANT.

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

ELBERT J. WELCH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Niagara County Court (Robert C. Noonan, A.J.), dated July 12, 2011. The order denied the application of defendant to be resentenced pursuant to CPL 440.46.

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

Memorandum: Defendant appeals from an order denying his application for resentencing pursuant to CPL 440.46. Contrary to defendant's contentions in his main and pro se supplemental briefs, we conclude that County Court properly considered the relevant facts and circumstances in determining that "[t]he evidence of the defendant's rehabilitation does not outweigh his criminal history, institutional record, and pattern of successive reoffenses while on parole" (*People v Cabrera*, 103 AD3d 748, 748-749). Thus, the court did not abuse its discretion in determining that "substantial justice dictate[d] that the application should be denied" (L 2004, ch 738, § 23; *see e.g. People v Milland*, 103 AD3d 669, 670, *lv denied* 21 NY3d 1017; *People v Benitez-Fernandez*, 96 AD3d 1665, 1666). We have considered defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or modification of the order.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

898

KA 11-02478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TANIECE E. BARNES, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered November 2, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree, petit larceny and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [1] [b]), petit larceny (§ 155.25) and criminal possession of stolen property in the fifth degree (§ 165.40). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that County Court erred in refusing to instruct the jury on the lesser included charge of burglary in the third degree. No reasonable view of the evidence supports a finding that defendant committed the lesser offense but not the greater (*see People v Ali*, 89 AD3d 1417, 1418, *lv denied* 18 NY3d 922). We likewise reject defendant's contention that the court erred in providing supplemental instructions to the jury on the issue whether defendant "defie[d] a lawful order not to enter or remain [on the premises], personally communicated to [her] by the owner of such premises or other authorized person" (§ 140.00 [5]). Pursuant to CPL 310.30, the trial court has an obligation to provide meaningful responses to all questions from the jury during deliberations (*see generally People v Almodovar*, 62 NY2d 126, 131-132), and the court fulfilled that duty here. We note that defendant does not contend that the supplemental instructions contained an erroneous statement of the law. Finally,

the sentence is not unduly harsh or severe.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

907

CA 13-00126

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

DIANCA ADAMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EVA I. DAUGHTERY, LISTON DAUGHTERY, KARTRINA L. JOHNSON (ALSO KNOWN AS KARTRINA L. WILSON), DANIEL C. ROBINSON AND JOHNSON & ROBINSON ENTERPRISES, INC., DEFENDANTS-RESPONDENTS.

ATHARI & ASSOCIATES, LLC, UTICA (ASH A. NELLUVELY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, ROCHESTER (GARY H. ABELSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS KARTRINA L. JOHNSON (ALSO KNOWN AS KARTRINA L. WILSON), DANIEL C. ROBINSON AND JOHNSON & ROBINSON ENTERPRISES, INC.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS EVA I. DAUGHTERY AND LISTON DAUGHTERY.

Appeal from an amended order of the Supreme Court, Monroe County (John J. Ark, J.), entered March 28, 2013 in a personal injury action. The amended order, inter alia, granted the motion and cross motion of defendants-respondents to compel disclosure and denied the cross motion of plaintiff for, inter alia, a protective order.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by denying defendants' motion and cross motion to the extent that they seek authorizations for the full disclosure of the records sought and by granting plaintiff's cross motion to the extent that it seeks an in camera review of those records and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained as a result of her exposure, during her childhood, to lead-based paint. She appeals from an order that granted the motion and cross motion of defendants-respondents (defendants) to compel disclosure and denied her cross motion for, inter alia, a protective order or, in the alternative, an in camera review of the records sought. We note at the outset that the order from which plaintiff appeals was superseded by an amended order entered after she perfected the instant appeal. There were no substantive changes made to the amended order and it was entered solely to allow one of the two sets of defendants in this

action to file a respondents' brief on this appeal. In the exercise of our discretion, we treat the appeal as taken from the amended order (*see* CPLR 5520 [c]; *Matter of Ruggieri v Bryan*, 23 AD3d 991, 991; *see also Matter of Mikia H. [Monique K.]*, 78 AD3d 1575, 1575, *lv dismissed in part and denied in part* 16 NY3d 760).

In view of the injuries alleged by plaintiff, we conclude that she waived her physician-patient privilege and any related privileges with respect to the records sought, and that those records may be material and necessary to the defense of the action (*see Donald v Ahern*, 96 AD3d 1608, 1610; *Rothstein v Huh*, 60 AD3d 839, 839-840). There may be information in plaintiff's records, however, that is irrelevant to this action, and there are legitimate concerns with respect to "the unfettered disclosure of sensitive and confidential information" contained in those records (*Cynthia B. v New Rochelle Hosp. Med. Ctr.*, 60 NY2d 452, 460; *see Donald*, 96 AD3d at 1610-1611). Thus, here, as in *Dominique D. v Koerntgen* (107 AD3d 1433, 1434), we modify the order by denying defendants' motion and cross motion to the extent that they seek authorizations for the full disclosure of the records sought and by granting plaintiff's cross motion to the extent that it seeks an in camera review of the records, and we remit the matter to Supreme Court for such in camera review and the redaction of any irrelevant information (*see Donald*, 96 AD3d at 1611; *Nichter v Erie County Med. Ctr. Corp.*, 93 AD3d 1337, 1338).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

914

CA 13-00175

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

IN THE MATTER OF ANDRES VEGA,
PETITIONER-APPELLANT,

V ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 23, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see Matter of Ansari v Travis*, 9 AD3d 901, *lv denied* 3 NY3d 610).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

915

CA 13-00228

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

CATHY TUMINNO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARJORIE WAITE, DEFENDANT-APPELLANT-RESPONDENT,
JAMES FLAGELLA, DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

JAMES FLAGELLA, DEFENDANT-RESPONDENT-APPELLANT PRO SE.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (LESLIE MARK GREENBAUM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered April 25, 2012. The order directed a sale of real property under certain circumstances.

It is hereby ORDERED that the order so appealed from is unanimously vacated on the law without costs and the matter is remitted to Supreme Court, Chautauqua County, for further proceedings in accordance with the following Memorandum: In this action seeking, inter alia, the partition and sale of real property and a determination that the sale of the property extinguishes a certain "option to purchase," defendant Marjorie Waite appeals and defendant James Flagella cross-appeals from an order that directed the sale of the property in the event that Flagella and the remaining defendants did not exercise their "option to purchase" the property within 60 days of entry of the order.

Plaintiff and Waite are tenants in common and acquired the property at issue by an executor's deed pursuant to the settlement of their mother's estate. In settling that estate, plaintiff, Waite and the other named defendants signed a settlement agreement providing that plaintiff and Waite "agree to grant to [each of the other named defendants] the option to purchase the . . . property, in the event that [plaintiff and Waite], either jointly or severally, determine to sell, assign or transfer the . . . property to someone other than each other. The option price shall be [$120,000] plus the costs of any improvements made by [plaintiff and Waite] to the premises subsequent to [their] purchase of the premises. Said option may be prepared in recordable form by any or all of the [other named defendants] at their

own cost and expense, and [plaintiff and Waite] will execute any said recordable option. Upon receipt of an offer to purchase the premises, except from [each other], [plaintiff and Waite] shall notify each of the [other named defendants] then living, in writing of the proposed sale of the premises, and the [other named defendants] shall have sixty (60) days to exercise their option as granted herein."

The settlement agreement thereafter was reduced to a document executed by plaintiff and Waite (hereafter, recorded document), and it provided that "[w]e give and grant to [each of the other named defendants] the option to purchase certain real property . . . The option price for the property will be [$80,000] plus any improvements made by . . . Waite and [plaintiff]. If at any time . . . Waite and [plaintiff] desire to sell the premises and receive an offer they shall communicate said offer to [each of the other named defendants,] who shall then have sixty (60) days to purchase the premises upon the same terms and conditions as the other offer."

We conclude that the right bestowed by the settlement agreement and the recorded document is a right of first refusal, not an option to purchase, despite the use of the term "option" therein (*see LIN Broadcasting Corp. v Metromedia, Inc.*, 74 NY2d 54, 60; *Metropolitan Transp. Auth. v Bruken Realty Corp.*, 67 NY2d 156, 163), and thus that Supreme Court mistakenly treated the contractual right as an option to purchase. "A right of first refusal is a dormant right that is triggered when an owner decides to sell the property to a third party at an agreed-upon price" (*Markan Corp. v Plane's Cayuga Vineyard, Inc.*, 24 AD3d 1264, 1265), and those are the applicable facts set forth in the settlement agreement.

We agree with Waite on her appeal that the court erred in determining that the contractual right was triggered upon plaintiff's commencement of the instant action, for partition and sale. It must first be determined in a partition action whether the property may be partitioned, i.e., divided among the owners in some fashion, without great prejudice to them, and "partition sale" is a secondary consideration only in the event that partition greatly prejudices the owners (*see* RPAPL 901 [1]; *Bentley v Dox*, 12 AD3d 1187, 1187; *Grossman v Baker*, 182 AD2d 1119, 1119). Thus, commencement of the partition action did not trigger the right of first refusal inasmuch as a partition, as opposed to a partition sale, would not result in a transfer of the property to a third party. Furthermore, no offer of purchase from a third party triggered either the right of first refusal or the contractual obligation of plaintiff or Waite pursuant to the settlement agreement or recorded document.

We further agree with Waite that, under the circumstances of this case, the court erred in ordering the sale of the property without first resolving the accounting issues and adjusting any equities (*see Colley v Romas*, 50 AD3d 1338, 1340; *Sampson v Delaney*, 34 AD3d 349, 349), thereby "ensur[ing] that the parties' rights are fixed in such manner that a decree 'may work full and complete justice between [them]' " (*Grossman v Baker*, 182 AD2d 1119, 1119).

Moreover, in some circumstances the right to partition pursuant to RPAPL 901 (1) must yield to the well-recognized exception that "equity will not award partition to a party in violation of his [or her] own agreement" (*McNally v McNally*, 129 AD2d 686, 687; *see Chew v Sheldon*, 214 NY 344, 348-349). "[W]here an action for partition would tend to defeat the performance of a contract," an agreement not to partition is implied (24 NY Jur 2d, Cotenancy and Partition § 130; *see Tramontano v Catalano*, 23 AD2d 894, 894; *see generally Bessen v Glatt*, 170 AD2d 924, 925). Here, partition that results in plaintiff and Waite each having a portion of the property defeats the right of first refusal, which applies to the entire property. Thus, partition appears to be unavailable as a remedy (*see McNally*, 129 AD2d at 687), unless the equities are adjusted such that either plaintiff or Waite receives the entire property and the other is awarded owelty as compensation for the unequal division of the property (*see* RPAPL 943; 24 NY Jur 2d, Cotenancy and Partition § 116), if equity so requires given the claims of expenses and waste and the condition of the property. We therefore vacate the order and remit the matter to Supreme Court for an accounting and an adjustment of the equities between plaintiff and Waite in a manner consistent with our decision herein, prior to the entry of an order granting partition of the property. We note that, upon remittal, the court may appoint a referee.

On his cross appeal, Flagella contends that the court erred in determining that the purchase price was $120,000 without allowing further proof on the issue. Inasmuch as the record establishes that plaintiff and Waite relied on the recorded document signed only by them as opposed to the settlement agreement, which was signed by all of the parties, we conclude that plaintiff and Waite thereby reduced the purchase price of $120,000 in the settlement agreement to $80,000 in the recorded document. The reduced purchase price in the recorded document is an enforceable term against plaintiff and Waite (*see generally United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 14 AD3d 836, 838).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

922

KA 11-01287

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH N. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (Richard C. Kloch, Sr., A.J.), rendered May 20, 2011. The judgment convicted defendant, upon a nonjury verdict, of rape in the first degree, rape in the second degree and endangering the welfare of a child.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a nonjury trial of rape in the first degree (Penal Law § 130.35 [1]), rape in the second degree (§ 130.30 [1]), and endangering the welfare of a child (§ 260.10 [1]). In appeal No. 2, defendant appeals from the resentence imposed for that conviction.

In appeal No. 1, we conclude that defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the convictions of rape in the first degree and rape in the second degree inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the alleged error" asserted on appeal (*People v Gray*, 86 NY2d 10, 19). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*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). "Great deference is to be accorded to the fact[]finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]; *see People v Mosley*, 59 AD3d 961, 962, *lv denied* 12 NY3d 918, *reconsideration denied* 13 NY3d 861). Here, Supreme Court credited the

victim's testimony, and we see no basis for disturbing that determination (*see People v Maxwell*, 103 AD3d 1239, 1240, *lv denied* 21 NY3d 945).

We reject defendant's contention that he was denied the right to effective assistance of counsel based on defense counsel's performance during the cross-examination of prosecution witnesses. That contention involves "a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial" (*People v Flores*, 84 NY2d 184, 187), and "[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel" (*People v Bassett*, 55 AD3d 1434, 1438, *lv denied* 11 NY3d 922 [internal quotation marks omitted]; *see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the court properly denied his request for the victim's counseling records and the records from other criminal proceedings concerning unrelated crimes committed against the victim. "The court determined following an in camera inspection of the victim's counseling records that they did not relate to the crimes committed by defendant" (*Bassett*, 55 AD3d at 1437). Additionally, the contentions raised by defendant with respect to his request for records "concerned information that would be used to impeach the victim's general credibility[,]" and thus the request was properly denied (*People v Reddick*, 43 AD3d 1334, 1335, *lv denied* 10 NY3d 815; *see generally People v Gissendanner*, 48 NY2d 543, 548). Defendant failed to preserve for our review his contention that the order of protection issued by the court does not comport with CPL 530.13 (*see People v Nieves*, 2 NY3d 310, 315-317), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to appeal No. 2, we conclude that the sentence imposed at resentencing is not unduly harsh or severe. We note, however, that the certificate of conviction incorrectly reflects that defendant's resentence on the count of rape in the second degree included a seven-year period of postrelease supervision. The certificate of conviction must therefore be amended to reflect that the resentence did not include any postrelease supervision for that count inasmuch as the sentence imposed with respect to that count was for an indeterminate term of incarceration of 3½ to 7 years (*see* Penal Law § 70.45 [1]; *see generally People v Anderson*, 79 AD3d 1738, 1739, *lv denied* 16 NY3d 856).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

923

KA 11-01984

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALPH N. WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Supreme Court, Erie County (Richard C. Kloch, Sr., A.J.), rendered September 2, 2011. Defendant was resentenced upon his conviction of rape in the first degree, rape in the second degree and endangering the welfare of a child.

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

Same Memorandum as in *People v Williams* ([appeal No. 1] ___ AD3d ___ [Oct. 4, 2013]).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

928

CAF 12-00761

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

IN THE MATTER OF ALESHA P. AND MACKENZIE P.

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

AUDREY B., RESPONDENT,
AND MICHAEL B., RESPONDENT-APPELLANT.

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

NELSON LAW FIRM, MEXICO (ALLISON J. NELSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOHN G. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

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

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered April 3, 2012 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, determined that respondent Michael B. had abused his stepchildren.

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

Memorandum: Respondent-appellant (respondent) appeals from an order of fact-finding determining that he sexually abused his two stepdaughters. Contrary to respondent's contention, Family Court's findings of sexual abuse are supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *Matter of Teonia B.*, 37 AD3d 1101, 1101). "We accord great weight and deference to [the c]ourt's determinations, 'including its drawing of inferences and assessment of credibility,' and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* ___ NY3d ___ [Aug. 27, 2013]; *see Matter of Peter C.*, 278 AD2d 911, 911; *see generally Matter of Irene O.*, 38 NY2d 776, 777).

Respondent further contends that the court abused its discretion in excluding him from the courtroom during his stepdaughters' testimony. We reject that contention. "The court properly balanced the respective interests of the parties and, based upon the hearing testimony, reasonably concluded that the [stepdaughters] would suffer substantial emotional trauma if [they] were compelled to testify in

open court" (*Matter of Lynelle W.*, 177 AD2d 1008, 1009; *see Matter of Q.-L.H.*, 27 AD3d 738, 739). Moreover, the court properly based its decision to exclude respondent from the courtroom "on the social worker's affidavit that respondent's abuse of the child[ren] compromised [their] ability to give clear and accurate testimony in respondent's presence" (*Matter of Hadja B.*, 302 AD2d 226, 226; *see Matter of Moona C. [Charlotte K.]*, 107 AD3d 466, 467).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

936

CA 13-00119

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

THOMAS BURKE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (RYAN J. LUCINSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (JONATHAN M. GORSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 12, 2012. The order, among other things, denied the motion of defendant to compel and for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion to compel a second deposition of the nonparty witness and as modified the order is affirmed without costs.

Memorandum: In this Labor Law action, plaintiff's counsel served a nonparty witness subpoena on the only eyewitness to the accident demanding that he appear for a deposition. The nonparty witness had commenced a separate Labor Law action arising from a different construction site accident and retained plaintiff's counsel to represent him in that lawsuit. Plaintiff's counsel asked the nonparty witness various questions about plaintiff's accident, and then defendant's counsel asked the nonparty witness questions that established that plaintiff and the nonparty witness were both carpenters in the same union, they both had pending lawsuits involving the same employer, and they both retained the same attorneys. When defendant's counsel asked if plaintiff was going to be a witness in the nonparty witness's case, plaintiff's counsel objected and directed the nonparty witness not to answer. Plaintiff's counsel further objected and directed the nonparty witness not to answer when defendant's counsel asked the nonparty witness whether plaintiff's counsel was representing him in connection with the deposition. Thereafter, the deposition was discontinued.

Defendant moved, inter alia, for an order compelling a second deposition of the nonparty witness and prohibiting plaintiff's counsel

from interfering with that deposition. Supreme Court denied the motion, and we now modify the order by granting that part of the motion seeking to compel a second deposition of the nonparty witness. The questions asked by defendant's counsel were relevant with respect to the nonparty witness's bias or motive (*see generally* CPLR 3101 [a]; *Salm v Moses,* 13 NY3d 816, 818). Thus, the questions should have been " 'freely permitted and answered' " (*Roggow v Walker,* 303 AD2d 1003, 1004). In any event, we agree with defendant that it is entitled to a second deposition of the nonparty witness in order to cross-examine the witness regarding the circumstances of the accident.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

940

KA 11-02453

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYLE L. BOATMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 28, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the surcharge and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his guilty plea of two counts of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]) and, in appeal No. 2, he appeals from a judgment revoking the sentence of probation imposed upon his previous conviction of criminal possession of a weapon in the third degree (§ 265.02 [1]) and sentencing him to an indeterminate term of incarceration. In both appeals, defendant contends that his waiver of the right to appeal was invalid on the ground that County Court conflated the right to appeal with the rights automatically forfeited upon a plea of guilty. We reject that contention. The record establishes that the court, in the plea colloquy, properly " 'describ[ed] the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty' " (*People v Tabb*, 81 AD3d 1322, 1322, *lv denied* 16 NY3d 900, quoting *People v Lopez*, 6 NY3d 248, 257; *see People v Harris*, 94 AD3d 1484, 1485, *lv denied* 19 NY3d 961). Defendant's waiver of the right to appeal is therefore valid, and that waiver encompasses his challenge to the severity of the sentence in each appeal (*see Lopez*, 6 NY3d at 256; *Harris*, 94 AD3d at 1485; *see also People v Gordon*, 43 AD3d 1330, 1331, *lv denied* 9 NY3d 1006).

Conversely, with respect to appeal No. 1, "[d]efendant's waiver

of the right to appeal does not foreclose his [contention] that the restitution portion of the sentence was illegal" (*People v Pump*, 67 AD3d 1041, 1042, *lv denied* 13 NY3d 941; *see also People v Stachnik*, 101 AD3d 1590, 1592, *lv denied* 20 NY3d 1104) and, based upon "the 'essential nature' of the right to be sentenced as provided by law," we review that contention notwithstanding defendant's failure to raise it at sentencing (*People v Fuller*, 57 NY2d 152, 156; *see People v McCarthy*, 83 AD3d 1533, 1534-1535, *lv denied* 17 NY3d 819). Contrary to defendant's contention, however, a defendant convicted of, inter alia, a class C " 'felony involving the sale of a controlled substance' may be ordered to repay a law enforcement agency 'the amount of funds expended in the actual purchase' of a controlled substance" (*People v Diallo*, 88 AD3d 1152, 1154, *lv denied* 18 NY3d 993, quoting Penal Law § 60.27 [9]). Section 60.27 (9) was amended in 1991 "to authorize restitution to law enforcement agencies for unrecovered funds utilized to purchase narcotics as part of investigations leading to convictions" (*People v Logan*, 185 AD2d 994, 995). We therefore conclude in appeal No. 1 that the court properly directed defendant to pay restitution to the City of Oswego Police Department for the funds it expended in buying drugs from him.

The People correctly concede with respect to defendant's further contention in appeal No. 1 that the court erred in imposing a surcharge on that restitution order. Penal Law § 60.27 (9) further provides that "[a]ny restitution which may be required to be made to a law enforcement agency pursuant to this section . . . shall not include a designated surcharge." We therefore modify the judgment in appeal No. 1 by vacating the surcharge imposed.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

941

KA 11-02454

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYLE L. BOATMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO, FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered May 28, 2010. The judgment revoked defendant's sentence of probation imposed upon his previous conviction of criminal possession of a weapon in the third degree and sentenced him to an indeterminate term of incarceration.

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

Same Memorandum as in *People v Boatman* ([appeal No. 1] ___ AD3d ___ [Oct. 4, 2013]).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

943

KA 09-02340

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRANCE C. RAINEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 18, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and unlawful possession of marihuana.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), and unlawful possession of marihuana (§ 221.05).

Defendant contends that County Court erred in refusing to suppress evidence of his possession of drugs and his statement to the police inasmuch as the evidence and the statement were obtained as the result of an illegal pursuit by the police. At the suppression hearing, the People presented evidence that three police officers were on patrol near a multi-unit apartment building in Rochester at approximately 1:00 a.m. when they were approached by an unidentified male who told them that narcotics sales were occurring on the fourth floor. The officers entered the building and began climbing the stairs. When the officers reached the third floor, they saw a male, later identified as defendant, running down the fire escape. Defendant reentered the building on the second floor before exiting the building through the front door. The officers followed defendant as he jogged away from the building. After defendant jumped over a wall into a parking lot next to the building, he dropped a baggie containing drugs on the ground.

"[I]t is well settled that 'the police may pursue a fleeing defendant if they have a reasonable suspicion that defendant has committed or is about to commit a crime' " (*People v Cady*, 103 AD3d 1155, 1156; *see People v Martinez*, 80 NY2d 444, 446; *People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844). While flight alone is insufficient to justify pursuit, "defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929 [emphasis added]; *see Cady*, 103 AD3d at 1156). "Although 'a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to the burden of *going forward* to show the legality of the police conduct in the first instance' " (*People v Noah*, 107 AD3d 1411, 1413; *see People v Lazcano*, 66 AD3d 1474, 1475, *lv denied* 13 NY3d 940). Furthermore, a defendant's attempt to discard evidence generally constitutes "an independent act involving a calculated risk" and, based on that act of abandonment, a defendant "los[es] his [or her] right to object to the [police seizing the evidence]" (*People v Holland*, 221 AD2d 947, 948, *lv denied* 87 NY2d 922 [internal quotation marks omitted]). If, however, a defendant abandons evidence "in response to [an] illegal pursuit," it must be suppressed (*Sierra*, 83 NY2d at 930). Here, the court refused to suppress the evidence and the statement on the ground that the police had probable cause to arrest defendant, but the court did not rule on the threshold issues whether the police engaged in a pursuit and, if so, whether that pursuit was legal, i.e., supported by a reasonable suspicion that defendant had committed or was about to commit a crime (*see id.* at 929). If the pursuit was legal, then defendant abandoned the drugs as an "independent act involving a calculated risk" (*Holland*, 221 AD2d at 948), but if defendant abandoned the drugs "in response to [an] illegal pursuit" (*Sierra*, 83 NY2d at 930), then the drugs must be suppressed. Inasmuch as "[w]e have no power to 'review issues either decided in an appellant's favor, or not ruled upon, by the trial court' " (*People v Coles*, 105 AD3d 1360, 1363, quoting *People v Concepcion*, 17 NY3d 192, 195), we cannot rule on those issues in the first instance. We therefore hold the case, reserve decision and remit the matter to County Court to rule on those issues based on the evidence presented at the suppression hearing.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

945

KA 10-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROOSEVELT ROBERTS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 8, 2009. The judgment convicted defendant upon a jury verdict of, inter alia, criminal sale of a controlled substance in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court erred in denying his preclusion motion with respect to a second set of statements set forth in an allegedly untimely CPL 710.30 notice served on him after his arraignment on a superseding indictment. Defendant further contends that he was deprived of a full and fair opportunity to contest the admissibility of those additional statements at a hearing. Because we agree with defendant's latter contention, we hold the case, reserve decision, and remit the matter for a further *Huntley* hearing on the admissibility of those additional statements.

Initially, we reject the contention of the People that defendant failed to preserve his contentions for our review. The grand jury issued an indictment charging defendant with crimes similar to those contained in the indictment before us on this appeal, and the People provided a CPL 710.30 notice to defendant stating that they intended to use at trial a statement that defendant had made at the scene of his arrest. Defendant moved to preclude the admission of that statement at trial, and the court held a hearing on the motion. During that hearing, defendant also moved to preclude the additional statements on the ground that they had not been included in the CPL 710.30 notice. The prosecutor conceded that defendant had not been provided with a CPL 710.30 notice covering the additional statements.

After the hearing, the court granted defendant's motion to dismiss the indictment based on the legal insufficiency of the evidence before the grand jury.

The matter was re-presented to another grand jury that issued the superseding indictment at issue here and, in conjunction with that superseding indictment, the People served a new CPL 710.30 notice that included the additional statements. After defendant was arraigned on the superseding indictment, the court issued an order denying defendant's motion to preclude the statement included in the first CPL 710.30 notice and, two days later, the court issued an amended order denying defendant's motion to preclude the additional statements, determining, inter alia, that defendant had made those additional statements spontaneously. In response to the court's amended order, defendant requested "new or additional hearings to address th[e] admissibility of the[ ] additional statements." In addition, at oral argument on that request, defendant asserted that he had not been afforded a sufficient opportunity to contest the admissibility of the additional statements, particularly in light of the People's concession at the hearing that those additional statements had not been included in the first CPL 710.30 notice. The court denied defendant's request and adhered to its determination that the additional statements were admissible at trial. Consequently, defendant's contentions are preserved for our review because "the court 'was aware of, and expressly decided, the [issues] raised on appeal' " (*People v Collins*, 106 AD3d 1544, 1546, quoting *People v Hawkins*, 11 NY3d 484, 493; *see generally People v Poole*, 55 AD3d 1349, 1350, *lv denied* 11 NY3d 929).

With respect to the merits, we conclude that the court properly refused to preclude the additional statements included in the CPL 710.30 notice served by the People after the superseding indictment was filed (*see People v Rivers*, 67 AD3d 1435, 1436, *lv denied* 14 NY3d 773, *reconsideration denied* 14 NY3d 892; *see People v Littlejohn*, 184 AD2d 790, 790-791, *lv denied* 81 NY2d 842). "Those [statements] were not referenced in the CPL 710.30 notice that was served in connection with the original indictment, but the record establishes that the People filed the superseding indictment out of necessity after the court dismissed . . . the original indictment" (*Rivers*, 67 AD3d at 1436). We agree with defendant, however, that the court erred in determining the admissibility of the additional statements without reopening the *Huntley* hearing and affording defendant a further opportunity to contest their admissibility. The court concluded that the statements were spontaneously made and therefore not subject to suppression. At the time of the *Huntley* hearing conducted in conjunction with the initial indictment, however, the only issue before the court with respect to the additional statements was whether they should be precluded on the ground that they had not been included in the first CPL 710.30 notice. Consequently, inasmuch as the voluntariness of the additional statements was not at issue at that time, defendant had no reason or opportunity to explore the issues of spontaneity or the effect of the previously-given *Miranda* warnings, or to raise any other issues regarding the admissibility of those statements. Thus, "the hearing must be reopened" to afford him that

opportunity (*People v McGee*, 155 AD2d 878, 879; *see People v Tindal*, 92 AD2d 717, 717).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

948

KA 11-01987

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CIRITO M. CORDERO, DEFENDANT-APPELLANT.

KEVIN J. BAUER, ALBANY, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered August 30, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96). Insofar as relevant herein, a defendant commits the crime of predatory sexual assault against a child under section 130.96 when, being 18 years old or more, he or she commits the crime of aggravated sexual abuse in the first degree and the victim is less than 13 years old. A person is guilty of aggravated sexual abuse in the first degree when "he or she inserts a foreign object in the . . . rectum or anus of another person causing physical injury to such person . . . [w]hen the other person is less than [11] years old" (§ 130.70 [1] [c]). We reject defendant's contention that the evidence is legally insufficient to support the conviction because the sworn trial testimony of the six-year-old victim was not corroborated. Following a competency hearing, County Court determined that the victim understood the nature of an oath and thereafter permitted him to give sworn testimony. Thus, there was no requirement that the victim's testimony be corroborated (*see* CPL 60.20 [2], [3]). We reject defendant's further contention that the evidence is legally insufficient because the pediatric trauma surgeon who repaired the victim's bowel did not testify that the instrument used to penetrate the victim's anus and rectum was a fork. The victim testified that defendant used a fork to penetrate him, and the surgeon testified that the instrument used was at least 6 centimeters long and had a sharp edge. We conclude that such testimony constitutes legally sufficient evidence to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495).

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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[N]othing in the record suggests that the victim was 'so unworthy of belief as to be incredible as a matter of law' or otherwise tends to establish defendant's innocence of [the] crime[] . . . , and thus it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Woods*, 26 AD3d 818, 819, *lv denied* 7 NY3d 765).

Contrary to defendant's contention, the court did not abuse its discretion in permitting the prosecutor to use leading questions on direct examination of the child victim, particularly in view of the " 'intimate and embarrassing nature of the crime[]' " (*People v Cuttler*, 270 AD2d 654, 655, *lv denied* 95 NY2d 795; *see People v Martina*, 48 AD3d 1271, 1272, *lv denied* 10 NY3d 961). Also contrary to defendant's contention, the court properly denied his request for a missing witness charge with respect to a sexual assault nurse examiner because " 'any testimony that [she] might have been expected to give was already before the jury through medical records and other expert testimony' " (*Stevens v Brown*, 249 AD2d 909, 910; *see People v Wright*, 192 AD2d 875, 877, *lv denied* 82 NY2d 809).

We conclude that the court did not abuse its discretion in permitting the prosecutor to cross-examine defendant regarding his participation in an insurance fraud scheme (*see People v Rivera*, 70 AD3d 1177, 1178-1179, *lv denied* 14 NY3d 891, 15 NY3d 855). Contrary to defendant's further contention, the court did not err in permitting the prosecutor to cross-examine him concerning the circumstances underlying his youthful offender adjudication (*see People v Gray*, 84 NY2d 709, 712; *cf. People v Dizak*, 93 AD3d 1182, 1183, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932). We reject defendant's contention that the court erred in permitting the prosecutor to cross-examine him concerning his invocation of the right to counsel. Defendant opened the door to that line of questioning during his testimony on direct examination by creating the misleading impression that he had been arrested without the opportunity to tell his side of the story (*see Leecan v Lopes*, 893 F2d 1434, 1442, *cert denied* 496 US 929; *see generally People v Reid*, 19 NY3d 382, 388-389). To the extent that the prosecutor during summation referred to the victim's stuffed animal, i.e., a "little green frog," and commented that the victim stood up to testify with all the "might of a 45[-]pound boy" and that "the law recognizes that children make the best victims," we conclude that such conduct, although improper, was not so egregious as to deprive defendant of a fair trial (*see People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998). Defendant's sentence is not unduly harsh or severe.

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

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

956

CA 13-00262

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

JOSEPH SAINT AND SHEILA SAINT,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SYRACUSE SUPPLY COMPANY, DEFENDANT-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (BRIAN P. CROSBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered April 20, 2012. The order, among other things, denied the motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Joseph Saint (plaintiff) when he fell from an elevated billboard structure during the course of changing the advertisement thereon. We note at the outset that plaintiffs conceded that they had no viable claim under Labor Law § 200 or common-law negligence, and thus the only remaining Labor Law claims are under sections 240 and 241 (6).

Supreme Court erred in denying the motion of defendant for summary judgment dismissing the amended complaint. We agree with defendant that applying a new advertisement to the face of a billboard does not constitute the "altering" of a building or structure for purposes of section 240 (*see Joblon v Solow*, 91 NY2d 457, 465; *see also Bodtman v Living Manor Love, Inc.*, 105 AD3d 434, 434; *Zolfaghari v Hughes Network Sys., LLC*, 99 AD3d 1234, 1235, *lv denied* 20 NY3d 861). Rather, that activity is "more akin to cosmetic maintenance or decorative modification," and is thus not an activity protected under section 240 (*Munoz v DJZ Realty, LLC*, 5 NY3d 747, 748). We further agree with defendant that, because plaintiff was not engaged in construction work, section 241 (6) does not apply to this case (*see*

Hatfield v Bridgedale, LLC, 28 AD3d 608, 610).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

968

KA 10-00463

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. CAMPBELL, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered May 8, 2009. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and affording deference to the jury's credibility determinations (*see People v Wedlington*, 67 AD3d 1472, 1473, *lv denied* 14 NY3d 807), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Although there was conflicting testimony and thus 'an acquittal would not have been unreasonable' " (*People v Burroughs*, 57 AD3d 1459, 1460, *lv denied* 12 NY3d 756, quoting *Danielson*, 9 NY3d at 348), the verdict is supported by the weight of the credible evidence, i.e., the testimony of the evidence technician, security guard, and two police officers that defendant was found shortly after the shooting, albeit unconscious from a gunshot wound to the head, with a fully loaded defaced pistol on his lap.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

970

CA 13-00254

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

RICHARD POTTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEVENS VAN LINES, INC. AND DAVID J. FISK,
DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KRISTEN M. BENSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (JAN S. KUBLICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered November 7, 2012. The order granted the motion of plaintiff for summary judgment on the issues of liability and negligence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking a determination that defendants' negligence was the sole proximate cause of the accident and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries he sustained in a motor vehicle accident. It is undisputed that plaintiff's vehicle collided with a vehicle operated by David J. Fisk (defendant) and owned by defendant Stevens Van Lines, Inc. when plaintiff swerved to avoid Fisk's vehicle that was entering the roadway from a driveway. Supreme Court properly granted plaintiff's motion to the extent that he sought summary judgment on the issues of defendants' liability (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The court erred, however, in granting that part of the motion insofar as plaintiff sought summary judgment on the issue of his own negligence inasmuch as defendant, by his expert's affidavit, raised an issue of fact whether plaintiff had ample time in which to stop his vehicle and avoid the collision (*see Tiwari v Tyo*, 106 AD3d 1462, 1463; *see generally Richards v Bartholomew*, 60 AD3d 1405, 1406). We therefore modify the order accordingly.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

974

CA 13-00292

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

ELIZABETH COSTANZO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF CHAUTAUQUA, DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANT-APPELLANT.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (James H. Dillon, J.), entered September 14, 2012 in a personal injury action. The order denied the cross motion of defendant County of Chautauqua for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her vehicle was struck by a vehicle operated by Paul L. Rosage (decedent) at the intersection of Route 5, a state road, and Van Buren Road, a county road, in Chautauqua County. Decedent's vehicle hit the driver's side of plaintiff's vehicle when plaintiff, after stopping at a stop sign on Van Buren Road, drove the vehicle through the intersection and into the path of decedent's vehicle, which was traveling eastbound on Route 5. It is undisputed that decedent was not subject to any traffic control devices at the intersection and thus had the right-of-way. According to plaintiff, defendant County of Chautauqua (County) was negligent in, inter alia, "causing and creating an unsafe intersection." We conclude that Supreme Court properly denied the County's cross motion for summary judgment dismissing the complaint against it inasmuch as it failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). The County's cross motion was based in part on the affidavit of a transportation engineer who offered his opinion as an accident reconstruction expert. We conclude that the affidavit was speculative and conclusory inasmuch as the expert failed to submit the data upon which he based his opinions, and thus the affidavit had no probative value (*see Lillie v Wilmorite, Inc.*, 92 AD3d 1221, 1222; *Schuster v Dukarm*, 38 AD3d 1358, 1359). We reject the County's

further contention that it cannot be held liable as a matter of law for this accident because it does not control the intersection of a county road and a state road (*see* Vehicle and Traffic Law § 1621 [a]). Lastly, the County's contention that it cannot be held liable because it did not have prior written notice of the allegedly defective intersection is without merit given that plaintiff alleges that the County created the allegedly unsafe condition (*see generally Amabile v City of Buffalo*, 93 NY2d 471, 474).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

984

KA 09-02478

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM CULLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 11, 2009. The judgment convicted defendant, upon a jury verdict, of rape in the second degree (two counts), criminal sexual act in the second degree and incest in the second degree (three 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 rape in the second degree (Penal Law § 130.30 [1]), one count of criminal sexual act in the second degree (§ 130.45 [1]) and three counts of incest in the second degree (§ 255.26). Contrary to defendant's contention, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's challenge to the weight of the evidence is based largely upon the alleged incredibility of the victim, and we conclude that there is no basis in the record for us to disturb the jury's credibility determinations (*see People v Johnson*, 94 AD3d 1563, 1564, *lv denied* 19 NY3d 962; *People v Ellison*, 302 AD2d 955, 955, *lv denied* 99 NY2d 654). Indeed, the letters written by defendant to the victim provide "compelling corroboration of the victim's testimony as to the nature of their relationship" (*People v Hopkins*, 56 AD3d 820, 823).

Defendant further contends that Supreme Court erred in permitting the prosecutor to improperly bolster the victim's testimony by eliciting testimony from two witnesses concerning the victim's prior consistent statements. We conclude that the testimony of the witnesses at issue did not constitute improper bolstering inasmuch as

it was not admitted for its truth (*see People v Ludwig*, 104 AD3d 1162, 1163). Defendant failed to preserve for our review his contention that certain remarks made by the prosecutor during opening statements and on summation constituted prosecutorial misconduct that deprived him of a fair trial inasmuch as he failed to object to those remarks (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, reversal is not required based upon the alleged misconduct (*see People v Sweeney*, 15 AD3d 917, 917, *lv denied* 4 NY3d 891; *see generally People v Galloway*, 54 NY2d 396, 401).

Defendant also contends that the court erred in allowing the People to present evidence of various uncharged acts of sexual misconduct and violence committed against the victim. Defendant failed to preserve for our review his contention with respect to many of the instances of alleged error (*see People v Hunt*, 74 AD3d 1741, 1742*, lv denied*, 15 NY3d 806*; People v Williams*, 26 AD3d 772, 773, *lv denied* 6 NY3d 840), and we decline to exercise our power to review his contention regarding those alleged errors as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention with respect to the remaining alleged errors, and we conclude that the challenged evidence was properly admitted because it placed the " 'charged conduct in context' " and " 'provided necessary background information on the nature of the relationship' between defendant and the victim" (*People v Leeson*, 12 NY3d 823, 827, quoting *People v Dorm*, 12 NY3d 16, 19; *see People v Shofkom*, 63 AD3d 1286, 1287, *lv denied* 13 NY3d 799, *appeal dismissed* 13 NY3d 933).

Defendant contends that the court erred in admitting letters he wrote to the victim because their prejudicial effect outweighed their probative value. Defendant failed to preserve his present contention for our review because it differs from that raised before the trial court (*see People v Marra*, 96 AD3d 1623, 1625, *affd* 21 NY3d 979), 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 also failed to preserve for our review his contention that the court erred in constructively amending the indictment (*see generally People v Little*, 23 AD3d 1117, 1118, *lv denied* 6 NY3d 777). In any event, defendant's contention lacks merit inasmuch as defendant conceded that he was not prejudiced by the constructive amendment, and the amendment did not change the theory of the prosecution (*see People v Williams*, 24 AD3d 882, 883-884, *lv denied* 6 NY3d 854).

Contrary to defendant's further contention, his sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention concerning the alleged ineffective assistance of counsel and conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

994

CA 13-00061

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

VINCENT MAISANO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MCDONALD'S CORPORATION, DOING BUSINESS AS MCDONALD'S RESTAURANT, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

ANDREWS, BERNSTEIN & MARANTO, LLP, BUFFALO (KENNETH A. SZYSZKOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF BRADY & CARAFA, LIVERPOOL (JAMES C. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 21, 2012 in a personal injury action. The order, inter alia, granted that part of the motion of defendants for summary judgment dismissing the complaint with respect to defendant McDonald's Corporation, doing business as McDonald's Restaurant.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by dismissing the second amended complaint against defendant McDonald's Corporation, doing business as McDonald's Restaurant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained when he slipped and fell on snow and ice on the sidewalk at a McDonald's franchise in Buffalo, New York. After plaintiff filed a complaint, an amended complaint, and a second amended complaint, defendants moved for summary judgment dismissing the complaint. The order, inter alia, granted that part of the motion with respect to defendant McDonald's Corporation, doing business as McDonald's Restaurant (McDonald's), and dismissed the complaint and amended complaint against it.

Contrary to plaintiff's contention, McDonald's met its initial burden of establishing its entitlement to judgment as a matter of law, and plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). McDonald's submitted evidence demonstrating that it, as a franchisor, lacked day-to-day control over the franchisee (*see Martinez v Higher Powered Pizza, Inc.*, 43 AD3d 670, 671-672), and that it was an out-of-possession landlord who did not retain control over the premises and was not

contractually obligated to repair or maintain the premises (*see Sexton v Resinger*, 70 AD3d 1360, 1361; *Dalzell v McDonald's Corp.*, 220 AD2d 638, 639, *lv denied* 88 NY2d 815). Thus, Supreme Court properly granted the motion with respect to McDonald's. We note, however, that the court failed to dismiss plaintiff's second amended complaint, and we therefore modify the order accordingly.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1002

KA 13-00052

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH ELIOFF, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Onondaga County Court (Donald E. Todd, A.J.), dated August 7, 2012. The order, insofar as appealed from, granted without prejudice that part of the motion of defendant seeking to dismiss the indictment on the grounds of defective grand jury proceedings.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to dismiss the indictment is denied, the indictment is reinstated and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: On appeal from an order granting that part of defendant's omnibus motion seeking to dismiss the indictment pursuant to CPL 210.35 (5), the People contend that County Court erred in determining that the integrity of the grand jury proceedings had been compromised by prosecutorial misconduct and in dismissing the indictment on that ground. We agree.

" '[D]ismissal of an indictment under CPL 210.35 (5) must meet a high test and is limited to instances of prosecutorial misconduct, fraudulent conduct or errors which potentially prejudice the ultimate decision reached by the [g]rand [j]ury' " (*People v Sheltray*, 244 AD2d 854, 855, *lv denied* 91 NY2d 897; *see People v Huston*, 88 NY2d 400, 409). As the Court of Appeals has stated, "not every improper comment, elicitation of inadmissible testimony, impermissible question or mere mistake renders an indictment defective. Typically, the submission of some inadmissible evidence will be deemed fatal only when the remaining evidence is insufficient to sustain the indictment" (*Huston*, 88 NY2d at 409; *see People v Jeffery*, 70 AD3d 1512, 1513; *People v Butcher*, 11 AD3d 956, 958, *lv denied* 3 NY3d 755).

Here, the prosecutor was required to establish that the four-year-old victim could provide unsworn testimony, but failed to do so (*cf. People v Raymond*, 60 AD3d 1388, 1388, *lv denied* 12 NY3d 919). The prosecutor also violated the unsworn witness rule during an attempt to persuade the child to testify about the incident (*see generally People v Paperno*, 54 NY2d 294, 300-301). Nevertheless, we conclude that the prosecutor did not thereby engage in conduct that was fraudulent in nature, nor was the prosecutor's conduct so egregious as to impair the integrity of the grand jury proceedings (*see People v Conklin*, 105 AD3d 1387, 1389; *People v Carey*, 241 AD2d 748, 751, *lv denied* 90 NY2d 1010; *cf. Huston*, 88 NY2d at 409-410). We further conclude that the remaining evidence is legally sufficient to sustain the indictment. Contrary to defendant's contention, the lack of direct testimony of penetration does not compel the conclusion that the evidence is legally insufficient to support the count of the indictment charging him with predatory sexual assault against a child (Penal Law § 130.96), insofar as that count is based upon commission of the crime of rape in the first degree (§ 130.35 [2]). Although we disregard the evidence provided by the victim due to the prosecutor's failure to establish that the victim had the capacity to provide unsworn testimony, we note that "[t]he girl's inability to testify with respect to penetration is not . . . conclusive . . . [where, as here,] other evidence existed from which that fact could be established" (*People v Carroll*, 95 NY2d 375, 383; *see People v McDade*, 64 AD3d 884, 886-887, *affd* 14 NY3d 760). Here, witnesses testified that the victim made a prompt complaint, that her vaginal area was bruised and had abrasions and a tear, and that semen with DNA consistent with defendant's DNA was found in her underwear. Inasmuch as the admissible evidence is legally sufficient with respect to all three counts, the court erred in dismissing the indictment.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1003

KA 12-00426

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD E. SHINEBARGER, DEFENDANT-APPELLANT.

KELIANN M. ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered July 14, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [4]) and course of sexual conduct against a child in the first degree (§ 130.75 [1] [b]). Defendant failed to preserve for our review his contention that the People did not establish an adequate chain of custody with respect to the underwear collected from defendant's home and the rape kit performed on the victim (*see People v Alexander*, 48 AD3d 1225, 1226, *lv denied* 10 NY3d 859). In any event, that contention lacks merit. "The police provided sufficient assurances of the identity and unchanged condition of th[at] evidence . . . , and thus any alleged gaps in the chain of custody went to [its] weight . . . , not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; *see People v Hawkins*, 11 NY3d 484, 494; *People v Julian*, 41 NY2d 340, 343).

Defendant raises several points in support of his challenge to the verdict as against the weight of the evidence. First, defendant contends that County Court erred in admitting hearsay evidence in the form of the victim's verbal disclosure of the rape. We reject that contention on the ground that the victim's statements were admissible under the prompt outcry exception to the rule against hearsay (*see generally People v Shelton*, 1 NY3d 614, 615). Defendant further contends that the court erred in overruling his objection to certain testimony of a police officer as "oblique" or indirect hearsay. We reject that contention on the ground that the officer's testimony "did not implicate acts that were intended as or could be interpreted as .

. . assertion[s]" (*People v Carpenter*, 52 AD3d 1050, 1051, *lv denied* 11 NY3d 735, *cert denied* ___ US ___, 129 S Ct 1613; *see People v Salko*, 47 NY2d 230, 239, *remittitur amended* 47 NY2d 1010). Defendant also challenges the credibility of the People's witnesses, but we cannot conclude that the testimony of those witnesses was "so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). We note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Thus, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, the court properly exercised its discretion in denying his motion for new assigned counsel. "The court conducted the requisite inquiry when defendant made his . . . request for substitution of counsel and concluded that defendant's objections[, which concerned defense counsel's lack of candor in advising him,] were without merit" (*People v Johnson*, 103 AD3d 1251, 1251, *lv denied* 21 NY3d 1005; *see People v Barber*, 66 AD3d 1370, 1371, *lv denied* 13 NY3d 937; *see generally People v Porto*, 16 NY3d 93, 99-100). Finally, although not raised by defendant, we note that the prosecutor improperly asked defendant on cross-examination whether the prosecution witnesses were lying. We again forcefully condemn such questions (*see People v Washington*, 89 AD3d 1516, 1516-1517, *lv denied* 18 NY3d 963), although we note that the issue would not require reversal of the judgment herein inasmuch as the prosecutor's misconduct did not substantially prejudice defendant (*see People v Paul*, 212 AD2d 1020, 1021, *lv denied* 85 NY2d 912).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1004

KA 12-01406

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCISCO DEJESUS, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (TIMOTHY P. MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Ronald H. Tills, A.J.), rendered July 9, 1999. The judgment convicted defendant, upon two jury verdicts, of criminal possession of a controlled substance in the second degree, criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia 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 two jury verdicts, of criminal possession of a controlled substance (CPCS) in the second degree (Penal Law § 220.18 [former (1)]), CPCS in the third degree (§ 220.16 [1]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]). We note that the People retried defendant on the CPCS counts when the jury at the first trial could not reach a unanimous verdict on those counts, and that Supreme Court entered a single judgment covering both trials at the time of sentencing. We reject defendant's contention that the court erred in allowing the People to read into evidence at the second trial the testimony of defendant's girlfriend from the first trial. CPL 670.10 (1) provides that a witness's testimony from a previous proceeding may be used in a subsequent criminal proceeding "when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found." After defendant's girlfriend suddenly became unavailable in the middle of the second trial, the People attempted to locate her but were unsuccessful, and they thereafter established that they had exercised the due diligence required by the statute (*see* CPL 670.10 [1] [a]; *People v Arroyo*, 54 NY2d 567, 569-570, *cert denied* 456 US 979; *People v Manning*, 67 AD3d 1378, 1379-1380, *lv denied* 14 NY3d 803).

We reject defendant's further contention that the evidence is legally insufficient to establish that he constructively possessed either the controlled substance or the drug paraphernalia. Where, as here, "there is no evidence that defendant actually possessed [such contraband], the People must establish that defendant exercised dominion or control over the property by a sufficient level of control over the area in which the contraband [was] found or over the person from whom the contraband [was] seized" (*People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926 [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573; *see also* Penal Law § 10.00 [8]). Here, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678; *People v Williams*, 84 NY2d 925, 926), is legally sufficient to establish that defendant constructively possessed both the controlled substance and the drug paraphernalia (*see generally People v Bleakley*, 69 NY2d 490, 495).

With respect to defendant's contention that the court erred in denying his motion for a mistrial when a lieutenant in the Buffalo Police Department testified that defendant was a known drug dealer, we note that "the decision to grant or deny a motion for a mistrial is within the trial court's discretion" (*People v Ortiz*, 54 NY2d 288, 292), and it cannot be said that the court abused its discretion in denying defendant's motion (*see People v Ward*, 107 AD3d 1605, 1606). Moreover, the court promptly instructed the jury to disregard the improper testimony, and the jury is presumed to have followed that curative instruction (*see People v Hawkes*, 39 AD3d 1209, 1210, *lv denied* 9 NY3d 845; *People v Ochoa*, 19 AD3d 302, 302, *lv denied* 5 NY3d 855). Defendant's further contention that there was a *Brady* violation based on the People's failure to disclose that a prosecution witness was the confidential informant who provided the information used to obtain a warrant to search the premises where the contraband was found is based on matters outside the record on appeal and thus may properly be raised by way of a motion pursuant to CPL article 440 (*see People v Johnson*, 88 AD3d 1293, 1294, *following remittal* 96 AD3d 1586, *lv denied* 19 NY3d 1027; *People v Ellis*, 73 AD3d 1433, 1434, *lv denied* 15 NY3d 851). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1005

KA 10-01048

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BELTON L. LEE, DEFENDANT-APPELLANT.

MICHAEL BALLMAN, CANANDAIGUA, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered April 30, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and facts, the plea is vacated, those parts of the omnibus motion seeking to suppress tangible evidence and defendant's statement are granted, the indictment is dismissed, and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]), defendant contends that County Court erred in refusing to suppress tangible evidence found in the vehicle that he was driving and his subsequent statement to the police because the police arrested him without probable cause. We agree. Inasmuch as the record does not support certain of the court's findings, including the finding that the police discovered tangible evidence consisting of a dagger and one baggie containing a powdery white residue substance in plain view prior to arresting defendant, we make our own findings of fact.

Upon our review of the suppression hearing testimony, we find that, at approximately 10:00 p.m. on August 7, 2009, two police detectives, a police officer, and the police chief were conducting surveillance of an area outside of a bar known for illegal drug activity. Over the course of a half-hour, the police observed a man with a satchel walk to a parked vehicle in which defendant and another man were seated and then return to an area outside the bar where about 10 to 20 people were standing. According to the police, that sequence occurred between three and five times. When the man with the satchel was at the vehicle, he would reach "well into" the vehicle and, when

he was talking to the people outside the bar, he would shake hands with them in a manner consistent with hand-to-hand drug transactions. The police also observed the man with the satchel use his cell phone and reach into the satchel multiple times. In addition, the vehicle's headlights would occasionally flash on and off. The officers, who were experienced in the detection and sale of illegal drugs, concluded that illegal drug transactions were occurring from the vehicle.

When the police announced their presence, approached the vehicle, and told the men to stop, the man with the satchel ran in the opposite direction and defendant, who had been standing outside the vehicle, ran to the vehicle and drove away. The police pursued the vehicle and stopped it, whereupon defendant was ordered to exit the vehicle and to lie on the ground, while the police chief and a detective had their guns drawn. Defendant was then handcuffed, searched, and placed in the back seat of a police car, and one police witness testified that defendant was arrested at that time. The police chief subsequently observed a dagger and a baggie containing a white residue in the vehicle, in plain view, and an inventory search of the vehicle uncovered another baggie with cocaine residue.

As an initial matter, we agree with the court that the police were justified in approaching the vehicle outside the bar because they had a "founded suspicion that criminal activity [was] afoot," rendering the police encounter lawful at its inception (*People v Moore*, 6 NY3d 496, 498; *see People v De Bour*, 40 NY2d 210, 222-223). We further conclude that the police were justified in pursuing the vehicle inasmuch as "defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that [he] may be engaged in criminal activity, [gave] rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; *see People v Martinez*, 80 NY2d 444, 447-448; *People v Cady*, 103 AD3d 1155, 1156). Such reasonable suspicion also gave the police the authority to stop the vehicle (*see People v Rose*, 67 AD3d 1447, 1448).

Contrary to the court's conclusion, however, we conclude that the police lacked probable cause to arrest defendant before finding the evidence in plain view in the vehicle. Although "[i]t is well established that not every forcible detention constitutes an arrest" (*People v Drake*, 93 AD3d 1158, 1159, *lv denied* 19 NY3d 1102), we conclude that an arrest occurred here when defendant was handcuffed and placed in the back of a police car. Under such circumstances, "a reasonable man innocent of any crime, would have thought" that he was under arrest (*People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). "[V]arious factors, when combined with the street exchange of a 'telltale sign' of narcotics, may give rise to probable cause that a narcotics offense has occurred. Those factors relevant to assessing probable cause include the exchange of currency; whether the particular community has a high incidence of drug trafficking; the police officer's experience and training in drug investigations; and any 'additional evidence of furtive or evasive behavior on the part of the participants' " (*People v Jones*, 90 NY2d 835, 837). Here, the police observed neither a " 'telltale sign' " of narcotics, such as a

glassine baggie, nor the exchange of currency (*id.*; *cf. People v Wade*, 236 AD2d 777, 778, *lv denied* 89 NY2d 1016). Thus, despite the observations of the police outside the bar, their experience in drug investigations, and defendant's flight, we conclude that the police did not have probable cause to arrest defendant before the dagger and first baggie were observed.

Because the arrest of defendant was unlawful, the tangible evidence subsequently discovered and defendant's statement should have been suppressed (*see Cady*, 103 AD3d at 1157). We therefore vacate defendant's plea of guilty and, "because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed" (*id.*). In view of our determination, we do not address defendant's remaining contentions.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1006

KA 11-02320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY A. JONES, DEFENDANT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), rendered November 15, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law § 130.96). We reject defendant's contention that Supreme Court erred in refusing to suppress statements that he made to the police on the ground that he was in custody at the time and had not been administered *Miranda* warnings. The court properly determined that "a reasonable person in defendant's position, innocent of any crime, would not have believed that he or she was in custody, and thus *Miranda* warnings were not required" (*People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d 830; *see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Even assuming, arguendo, that defendant preserved for our review his further contention that his statements to the police were obtained in violation of his right to counsel, we conclude that he thereafter waived that contention inasmuch as he conceded during the suppression hearing that the police ceased questioning him immediately after he requested a lawyer (*see generally People v Harris*, 97 AD3d 1111, 1112, *lv denied* 19 NY3d 1026).

Contrary to defendant's contention, the unsworn testimony of the seven-year-old victim was sufficiently corroborated by "evidence tending to establish the crime and connecting defendant with its commission" (*People v Groff*, 71 NY2d 101, 104), including evidence of defendant's opportunity to commit the crime, the testimony of other witnesses, and the victim's description of a pornographic video that was found on defendant's computer. "Strict corroboration of every

material element of the charged crime is not required, as the purpose of corroboration is to ensure the trustworthiness of the unsworn testimony rather than [to] prove the charge itself" (*People v Kolupa*, 59 AD3d 1134, 1135, *affd* 13 NY3d 786 [internal quotation marks omitted]; *see People v Petrie*, 3 AD3d 665, 667).

Finally, we reject defendant's contention that he was denied effective assistance of counsel. "[T]he evidence, the law and the circumstances of [this] case, viewed together and as of the time of representation, reveal that meaningful representation was provided" (*People v Satterfield*, 66 NY2d 796, 798-799; *see generally People v Baldi*, 54 NY2d 137, 146-147).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1007

KA 10-00856

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS ROSARIO-BORIA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered January 13, 2010. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree and intimidating a victim or witness in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, count four of the superseding indictment is dismissed, and a new trial is granted on count three of that indictment.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of kidnapping in the second degree (Penal Law § 135.20) and intimidating a victim or witness in the third degree (§ 215.15 [1]), defendant contends that County Court abused its discretion in refusing to permit him to exercise a peremptory challenge against a prospective juror. We agree, and we therefore reverse the judgment.

Initially, we reject the contention of the People that defendant failed to preserve this issue for our review. Defendant specifically sought to exercise a peremptory challenge against the prospective juror in question, and the court refused to permit him to do so. Consequently, "the record establishes that 'the trial judge was made aware, before he ruled on the issue, that the defense wanted him to rule otherwise, [and thus] preservation was adequate' " (*People v Torres* [appeal No. 1], 97 AD3d 1125, 1126, *affd* 20 NY3d 890, quoting *People v Caban*, 14 NY3d 369, 373; *see* CPL 470.05 [2]; *People v Hawkins*, 11 NY3d 484, 493).

With respect to the merits, the record establishes that the court directed the attorneys to exercise their challenges in strict order according to the position in which the prospective juror was seated in the jury box for questioning, and the court indicated that it would

not permit the attorneys to return to a prospective juror after the process had moved on to the next prospective juror. After several prospective jurors had been excused for cause, the court directed the attorneys to exercise their peremptory challenges to the first group of prospective jurors in the panel. The prosecutor exercised several challenges, followed by defense counsel. As the court began to indicate the number of challenges that remained for each side, defense counsel immediately asked if he could exercise a peremptory challenge to the prospective juror in question on appeal. When the court said no, defense counsel indicated that he had "crossed [the prospective juror's name] out by mistake." The court reiterated that it would not permit the challenge, indicating that it had warned the attorneys about adhering to the court's procedures.

"Under these circumstances, 'we can detect no discernable interference or undue delay caused by [defense counsel's] momentary oversight . . . that would justify [the court's] hasty refusal to entertain [his] challenge,' " and we thus conclude that the court's refusal to permit the challenge was an abuse of discretion (*People v McGrew*, 103 AD3d 1170, 1173; *see People v Jabot*, 93 AD3d 1079, 1081-1082). Inasmuch as "the right to exercise a peremptory challenge against a specific prospective juror is a 'substantial right' . . . , reversal is mandated" (*Jabot*, 93 AD3d at 1081-1082; *see McGrew*, 103 AD3d at 1173; *cf. People v Williams*, 107 AD3d 1391, 1393).

We further agree with defendant that the conviction under count four, i.e., intimidating a victim or witness in the third degree, is not supported by legally sufficient evidence. We therefore dismiss that count of the superseding indictment and grant a new trial only with respect to count three, charging kidnapping in the second degree. The People presented evidence at trial establishing that defendant approached the witness in a grocery store and said, "I'm not that stupid as you may think." There was no evidence tending to support the inference that defendant's statement was a threat intended to prevent the witness from communicating with the police, the courts or the grand jury, and the evidence therefore is legally insufficient to support the conviction with respect to that count (*see* Penal Law § 215.15 [1]; *see generally People v Oberlander*, 60 AD3d 1288, 1289-1291).

Contrary to defendant's further contention, the court properly denied his request for a jury charge on the justification defense in Penal Law § 35.05, and instead charged the jury on the affirmative defense of duress. "Here, . . . the only defense raised was that defendant lacked the requisite intent to commit [kidnapping] and was acting out of fear of the [kidnappers], who had threatened him with a gun. The only theory of the defense [was] duress, and 'there is simply no basis for justifying defendant's conduct by any other standard' " (*People v Crumpler*, 242 AD2d 956, 958, *lv denied* 91 NY2d 871, quoting *People v Magliato*, 68 NY2d 24, 31).

In light of our determination, we do not address defendant's

remaining contentions.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1008

KA 11-01630

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. HICKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 19, 2011. 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 the verdict is against the weight of the evidence because he had only temporary innocent possession of the weapon. We reject that contention. Although a person may be found to have had temporary and lawful possession of a weapon if he or she took the weapon from an assailant in the course of a fight (*see People v Almodovar*, 62 NY2d 126, 130), here the jury reasonably could have found that defendant, after taking the gun at issue from another person, retained possession of it despite the opportunity to turn it over to lawful authorities (*see People v Snyder*, 73 NY2d 900, 901-902; *see also People v Gonzalez*, 262 AD2d 1061, 1061-1062, *lv denied* 93 NY2d 1018). Specifically, the record establishes that defendant fled from the police on a bicycle and disposed of the gun in a garbage can. Defendant's purposeful avoidance of the police is "utterly at odds with [his] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor" (*Snyder*, 73 NY2d at 902 [internal quotation marks omitted]; *see Gonzalez*, 262 AD2d at 1062). Thus, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's contention, "defense counsel's failure to make a specific motion for a trial order of dismissal at the close of the People's case [does] not constitute ineffective assistance of counsel, inasmuch as any such motion would have had no chance of success" (*People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859; *see generally People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Indeed, we note that defendant does not contend on appeal that the evidence at trial is legally insufficient to support the conviction. Defendant also failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's alleged ineffectiveness in failing to request a charge on the lesser included offense of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [1]), or in failing to request a missing witness charge (*see People v Benevento*, 91 NY2d 708, 712-713). Further, "[a]bsent proof that such witness would have provided noncumulative testimony which was favorable to [the prosecution], there was no basis for such a charge" (*People v Myers* [appeal No. 1], 87 AD3d 826, 828, *lv denied* 17 NY3d 954 [internal quotation marks omitted]). We have reviewed the remaining alleged deficiencies in defense counsel's performance and conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's further contention that the photo array was unduly suggestive (*see generally People v Chipp*, 75 NY2d 327, 335, *cert denied* 498 US 833). The individuals depicted in the photo array were "sufficiently similar in appearance so that the viewer's attention [was] not drawn to any one photograph in such a way as to indicate that the police were urging a particular selection" (*People v Quinones*, 5 AD3d 1093, 1093, *lv denied* 3 NY3d 646; *see Chipp*, 75 NY2d at 336). Although we conclude upon our review of a copy of the photo array that defendant appears to have a darker skin tone than the other African-American males depicted therein, we note that the witnesses were instructed that the photographs in the array "may not depict the true complexion of a person." Moreover, "differences in skin tone alone will not render a lineup unduly suggestive" (*People v Fewell*, 43 AD3d 1293, 1294, *lv denied* 9 NY3d 1033, *reconsideration denied* 10 NY3d 862 [internal quotation marks omitted]; *see Quinones*, 5 AD3d at 1093). Finally, the sentence is not unduly harsh or severe.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1010

KA 11-01836

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK E. MCDONALD, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 7, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of four counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant's contention that his plea was not knowingly, voluntarily, and intelligently entered is unpreserved for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010). Defendant's further contention that County Court erred in refusing to suppress the identification made by a confidential informant from a photo array is also unpreserved for our review (*see People v Cruz*, 89 AD3d 1464, 1465, *lv denied* 18 NY3d 993), and in any event that contention is without merit.

We reject defendant's contention that the bargained-for sentence is unduly harsh and severe (*see generally People v Santiago*, 1 AD3d 957, 957, *lv denied* 1 NY3d 601). Defendant correctly contends, however, that the uniform sentence and commitment sheet fails to specify whether that sentence is to run concurrently with or consecutively to the sentences imposed for crimes charged in a separate superior court information (SCI), to which he also pleaded guilty. The uniform sentence and commitment sheet therefore must be amended in accordance with the court's directive at sentencing, i.e., to reflect that the sentence pertaining to the SCI is to be served consecutively to the sentence imposed herein (*see People v Jackson*,

108 AD3d 1079, 1081).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1011

CAF 12-01061

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

IN THE MATTER OF STARR L. ROSHIA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. THIEL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KRISTEN M. MARICLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 9, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

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

Memorandum: In appeal No. 1, respondent father appeals from an order denying his objections to the order of the Support Magistrate, which denied his motions to vacate the underlying support order entered upon his default and to cap his unpaid child support arrears at $500 pursuant to Family Court Act § 413 (1) (g). In appeal No. 2, the father appeals from an order confirming the Support Magistrate's determination that he willfully failed to obey the support order and, in appeal No. 3, the father appeals from an order that committed him to a term of incarceration of three months.

We reject the father's contention in appeal No. 1 that Family Court erred in denying his objections to the Support Magistrate's order insofar as it denied his motion to vacate the underlying support order entered upon his default. Although default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are " 'not to be applied as rigorously' " in those cases (*Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965; *see Matter of Gabriel v Cooper*, 26 AD3d 493, 494; *Matter of Patricia J. v Lionel S.*, 203 AD2d 979, 979), "that policy does not relieve the defaulting party of the burden of establishing a reasonable excuse for the default" (*Calle v Calle*, 28 AD3d 1209, 1209). Here, the father's proffered excuse for the default was that he and the child's mother

agreed that neither of them would pay child support for either child of their marriage, and he therefore did not appear in court because he believed that the court proceedings to determine his child support obligation were scheduled in error. That excuse is not reasonable, considering that the father consistently paid child support for the subject child, as directed by the underlying support order, for two years after the order was entered.

The father also has not demonstrated that he has a meritorious defense (*see Troy D.B.*, 42 AD3d at 965). His contention that the underlying support order was invalid because it did not comply with Family Court Act § 413 (1) (h) is without merit. That statute applies only to "[a] validly executed agreement or stipulation voluntarily entered into between the parties . . . [and] presented to the court for incorporation in an order or judgment" (§ 413 [1] [h]), and here the underlying support order was entered upon the father's default, not pursuant to any agreement or stipulation between the parties. We further reject the father's contention that the underlying support order is invalid because it imputed income to him without providing any calculations. Pursuant to Family Court Act § 413 (1) (k), "[w]hen a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater."

Contrary to the father's further contention in appeal No. 1, the court properly denied his objections to the Support Magistrate's order insofar as it denied his motion to cap his unpaid child support arrears at $500 pursuant to Family Court Act § 413 (1) (g). The father should not be " 'financially rewarded for failing either to pay the order or to seek its modification' " (*Matter of Dox v Tynon*, 90 NY2d 166, 173; *see Matter of Onondaga County Dept. of Social Servs. v Timothy S.*, 294 AD2d 27, 29-30; *Matter of Sutkowy v J.B.*, 196 Misc 2d 1005, 1008-1009; *cf. Matter of Commissioner of Social Servs. v Campos*, 291 AD2d 203, 205; *Matter of Blake v Syck*, 230 AD2d 596, 597-599, *lv denied* 90 NY2d 811).

We reject the father's contention in appeal No. 2 that the court erred in confirming the Support Magistrate's finding that he willfully violated the support order. There is a statutory presumption that the father had sufficient means to support his child (*see* Family Ct Act § 437; *Matter of Powers v Powers*, 86 NY2d 63, 68-69), and the evidence that the father failed to pay support as ordered constitutes "prima facie evidence of a willful violation" (§ 454 [3] [a]). The burden then shifted to the father to present "some competent, credible evidence of his inability to make the required payments" (*Powers*, 86 NY2d at 70). The father failed to meet that burden because he "failed to present evidence establishing that he made 'reasonable efforts to obtain gainful employment' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452). The Support Magistrate found that, although the father was capable of being employed, he did not make diligent efforts to obtain employment after he was terminated from his job. The Support Magistrate was in the best position to evaluate the father's credibility, and her determination is entitled to great deference (*see*

Matter of Kasprowicz v Osgood, 101 AD3d 1760, 1761, *lv denied* 20 NY3d 863). The father raises no contentions on appeal with respect to the order in appeal No. 3, committing him to a term of incarceration based on his willful violation of the support order. In view of our determination to affirm the order in appeal No. 2 concerning the willful violation, we likewise affirm the order in appeal No. 3.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1012

CAF 12-01062

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

IN THE MATTER OF STARR L. ROSHIA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. THIEL, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KRISTEN M. MARICLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 16, 2012 in a proceeding pursuant to Family Court Act article 4. The order confirmed the finding of the Support Magistrate that respondent willfully failed to obey an order of the Court.

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

Same Memorandum as in *Matter of Roshia v Thiel* ([appeal No. 1] ___ AD3d ___ [Oct. 4, 2013).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1013

CAF 12-01063

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

IN THE MATTER OF STARR L. ROSHIA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. THIEL, RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (KRISTEN M. MARICLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 16, 2012 in a proceeding pursuant to Family Court Act article 4. The order committed respondent to the Erie County Correctional Facility for a term of three months.

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

Same Memorandum as in *Matter of Roshia v Thiel* ([appeal No. 1] ___ AD3d ___ [Oct. 4, 2013]).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1017

CA 13-00389

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

ANTHONY P. FANTI AND DEBORAH FANTI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RYAN L. MCLAREN AND STACY MCLAREN,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FREID AND KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered October 23, 2012. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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 complaint, as amplified by the bill of particulars, with respect to the permanent loss of use category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: In this action commenced by plaintiffs to recover damages for injuries allegedly sustained by Anthony P. Fanti (plaintiff) in an automobile accident, defendants appeal from an order denying their motion seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We conclude that Supreme Court properly denied the motion with respect to the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury. "It is well settled that the aggravation of an asymptomatic condition can constitute a serious injury" (*Verkey v Hebard*, 99 AD3d 1205, 1206). Here, defendants' own submissions, including plaintiff's deposition testimony, raise triable issues of fact whether, under those three categories, "the accident aggravated and exacerbated plaintiff's pre-existing, asymptomatic degenerative disease in his [lumbosacral] spine" (*Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543; *see Hint v Vaugh*, 100 AD3d 1519, 1520). Finally, plaintiffs have abandoned the permanent loss of use category of serious injury alleged in their bill of particulars (*see Austin*, 90

AD3d at 1543; *see also Yoonessi v Givens*, 39 AD3d 1164, 1165), and we therefore modify the order accordingly.

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1019

CA 12-02163

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

IN THE MATTER OF THE ARBITRATION BETWEEN
KENMORE-TOWN OF TONAWANDA UNION FREE SCHOOL
DISTRICT, PETITIONER-APPELLANT-RESPONDENT,

AND MEMORANDUM AND ORDER

KEN-TON SCHOOL EMPLOYEES ASSOCIATION,
RESPONDENT-RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR PETITIONER-APPELLANT-RESPONDENT.

RICHARD E. CASAGRANDE, LATHAM (TIMOTHY CONNICK OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 11, 2012 in a proceeding pursuant to CPLR article 75. The order, among other things, dismissed the petition.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration with respect to a grievance arising from petitioner's termination of an employee. Petitioner appeals and respondent cross-appeals from an order that, inter alia, dismissed the petition.

Contrary to petitioner's contention, we conclude that Supreme Court properly dismissed the petition. In determining whether an issue is subject to arbitration under a collective bargaining agreement (CBA), a court must apply the two-step analysis set forth in *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist.* (*United Liverpool Faculty Assn.*) (42 NY2d 509, 513). "First, a court must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [internal quotation marks omitted]; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL–CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 79). If the court determines that there is no such prohibition and thus that the parties have the authority to arbitrate the grievance, it proceeds to the second step, in which it must determine whether that authority was in fact exercised, i.e., whether the CBA

demonstrates that the parties agreed to refer this type of dispute to arbitration (*see Acting Supt. of Schs. of Liverpool Cent. Sch. Dist.*, 42 NY2d at 513). With respect to the second step, where there is a broad arbitration clause such as the one in the CBA at issue, "[a] determination of arbitrability is limited to 'whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA' " (*Matter of Haessig [Oswego City Sch. Dist.]*, 90 AD3d 1657, 1657, quoting *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143). "Succinctly, the test centers on two distinct inquiries as to the public parties' purported entry into the arbitral forum: may they do so and, if yes, did they do so" (*Board of Educ. of Watertown City Sch. Dist.*, 93 NY2d at 138). Here, with respect to the issue whether petitioner properly followed the procedures mandated by the CBA in terminating the employee in question, we conclude that the court properly determined that the parties had the authority to agree to arbitrate this grievance, and that they in fact agreed to do so.

Petitioner's contention that the provisions of the CBA violate public policy and the Civil Service Law, which concerns the first step of the test, is raised for the first time on appeal. We nevertheless review that contention inasmuch as it involves "[a] question of law appearing on the face of the record . . . [that] could not have been avoided by the opposing party if brought to that party's attention in a timely manner" (*Oram v Capone*, 206 AD2d 839, 840). We reject petitioner's contention, however, and conclude that Civil Service Law § 75 "may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter" (§ 76 [4]; *cf. Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.–Long Beach Unit*, 8 NY3d 465, 470).

We reject petitioner's further contention that strict compliance with the three-step grievance procedure set forth in the CBA is a condition precedent to arbitration. "Questions concerning compliance with a contractual step-by-step grievance process have been recognized as matters of procedural arbitrability to be resolved by the arbitrators, particularly in the absence of a very narrow arbitration clause or a provision expressly making compliance with the time limitations a condition precedent to arbitration" (*Matter of Enlarged City Sch. Dist. of Troy [Troy Teachers Assn.]*, 69 NY2d 905, 907; *see Matter of Kachris [Sterling]*, 239 AD2d 887, 888).

Finally, we note that respondent cross-appeals from the order "insofar as it held that whether the steps to reach arbitration were complied with [is] for the Court to decide." The cross appeal must be dismissed. "The fact that the . . . order contains language or reasoning that [respondent] deems adverse to its interests does not furnish a basis for standing to take a[] [cross] appeal" (*Pramco III, LLC v Partners Trust Bank*, 52 AD3d 1224, 1225 [internal quotation marks omitted]; *see Matter of El-Roh Realty Corp.*, 55 AD3d 1431, 1434). Consequently, even assuming, arguendo, that the notice of cross appeal was timely filed (*see* CPLR 2103 [b] [2]; 5513 [a]; *cf. AXA Equit. Life Ins. Co. v Kalina*, 101 AD3d 1655, 1657), we conclude

that respondent is not an aggrieved party (*see generally* CPLR 5511).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1020

CA 13-00177

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

IN THE MATTER OF JAMAR MARTIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANDREA W. EVANS, CHAIRWOMAN, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 4, 2012 in a proceeding pursuant to CPLR article 78. The amended judgment denied the petition.

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

Memorandum: Inasmuch as petitioner's attorney has advised this Court that petitioner has been conditionally released to parole supervision, petitioner's appeal from the amended judgment denying his CPLR article 78 petition seeking release to parole has been rendered moot (*see Matter of Velez v Evans*, 101 AD3d 1642, 1642; *see also People ex rel. Baron v New York State Dept. of Corrections*, 94 AD3d 1410, 1410, *lv denied* 19 NY3d 807). The exception to the mootness doctrine does not apply herein (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1021

CA 12-01793

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

PATRICIA J. SCHROECK AND GARY SCHROECK,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

DARRYL C. GIES AND DAWN M. GIES,
DEFENDANTS-RESPONDENTS.

GRECO TRAPP, PLLC, BUFFALO (DUANE D. SCHOONMAKER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 31, 2012. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries that plaintiff Patricia J. Schroeck sustained when she tripped and fell on an allegedly uneven sidewalk that crossed the driveway of defendants, the abutting landowners. Supreme Court properly granted defendants' motion for summary judgment dismissing the amended complaint.

"Generally, liability for injuries sustained as a result of negligent maintenance of or the existence of dangerous and defective conditions [on a] public sidewalk[] is placed on the municipality and not the abutting landowner" (*Hausser v Giunta*, 88 NY2d 449, 452-453; *see Davison v City of Buffalo*, 96 AD3d 1516, 1517). That rule does not apply, however, if there is an ordinance or municipal charter that specifically imposes a duty on the abutting landowner to maintain and repair the public sidewalk and provides that a breach of that duty will result in liability for injuries to the users of the sidewalk; the sidewalk was constructed in a special manner for the use of the abutting landowner; the abutting landowner affirmatively created the defect; or the abutting landowner negligently constructed or repaired the sidewalk (*see Hausser*, 88 NY2d at 453; *Oswald v City of Niagara Falls*, 13 AD3d 1155, 1156; *Schiavone v Palumbo*, 177 AD2d 1045, 1045-1046).

We conclude that defendants met their initial burden on their motion by establishing their entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). It is undisputed that the applicable town code does not impose liability on defendants for injuries to users of the public sidewalk abutting their property. Furthermore, the testimony and affidavits submitted by defendants in support of their motion established that the sidewalk was not constructed in a special manner for their benefit, that they did not affirmatively create the defect, and that they did not negligently construct or repair the sidewalk. Notably, defendants' submissions established that the sidewalk was constructed by the builder of defendants' development, who laid it in continuation of the sidewalk on the properties neighboring defendants' property in both directions, and that defendants did not request that the sidewalk be constructed and had no input into its construction. Contrary to plaintiffs' further contention, defendants established that they did not affirmatively create the defect by any alleged special use of the sidewalk as a driveway (*see Guadagno v City of Niagara Falls*, 38 AD3d 1310, 1311; *see also Campos v Midway Cabinets, Inc.*, 51 AD3d 843, 844; *Katz v City of New York*, 18 AD3d 818, 819; *Dufrane v Robideau*, 214 AD2d 913, 914). In opposition, plaintiffs failed to raise an issue of fact sufficient to defeat the motion (*see Zuckerman*, 49 NY2d at 562).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1022

CA 13-00432

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

KIMBERLY TRATT,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA, CAYUGA COUNTY TREASURER'S OFFICE, DEFENDANTS-APPELLANTS-RESPONDENTS, ET AL., DEFENDANT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 13, 2012. The order, among other things, denied the motion of defendants County of Cayuga and Cayuga County Treasurer's Office for summary judgment dismissing plaintiff's 10th cause of action against them and denied that part of the cross motion of plaintiff for summary judgment dismissing certain affirmative defenses.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that plaintiff failed to meet her burden of establishing her entitlement to partial summary judgment on liability on the 10th cause of action, for quid pro quo sexual harassment (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Mauro v Orville*, 259 AD2d 89, 91-93, *lv denied* 94 NY2d 759).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court

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

1023

CA 13-00429

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

IN THE MATTER OF KAMLEH S. TEHAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ROBERT J. TEHAN, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TEHAN'S CATALOG SHOWROOMS, INC., RESPONDENT-APPELLANT.

STEATES, REMMELL, STEATES & DZIEKAN, UTICA (RALPH W. FUSCO OF COUNSEL), FOR RESPONDENT-APPELLANT.

HISCOCK & BARCLAY, LLP, SYRACUSE (JON P. DEVENDORF OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered September 21, 2012. The order denied the motion of respondent for summary judgment.

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

Memorandum: Petitioner, in her capacity as the executor of the estate of her husband (decedent), commenced this proceeding pursuant to Business Corporation Law § 1104-a seeking, inter alia, a determination that she is the owner of shares in respondent corporation held by decedent at the time of his death and dissolution of respondent. As relevant on appeal, Supreme Court denied that part of respondent's motion for summary judgment dismissing the petition based on petitioner's lack of standing (*see* CPLR 3211 [a] [3]; 3212), without prejudice to renew upon completion of discovery. Based on the record before us, we conclude that the court properly denied respondent's motion to that extent. There are issues of fact whether and to what extent the parties performed their obligations under the applicable shareholders' agreement or whether the parties elected to abandon that agreement (*see Carver v Apple Rubber Prods. Corp.*, 163 AD2d 849, 850; *Staebell v Bennie*, 83 AD2d 765, 765-766; *see generally* CPLR 3212 [f]). Finally, respondent's contention that the court should have conducted an immediate trial pursuant to CPLR 3212 (c) to resolve all issues related to standing is raised for the first time on appeal and is therefore not properly before us (*see generally*

Ciesinski v Town of Aurora, 202 AD2d 984, 984).

Entered: October 4, 2013

Frances E. Cafarell
Clerk of the Court