SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 14, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1051

KA 12-02392

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

TODD R. HEATLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered November 9, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified as a matter of discretion in the interest of justice and on the law by reducing the conviction of murder in the second degree (Penal Law § 125.25 [1]) to manslaughter in the first degree (§ 125.20 [1]) and vacating the sentence and the matter is remitted to Erie County Court for sentencing on the conviction of manslaughter in the first degree.

Opinion by SCUDDER, P.J.: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) in connection with the stabbing death of the victim. It is undisputed that the altercation between defendant and the victim occurred outside the two-family residence where they each had attended separate parties and, although several other guests also were outside, there were no witnesses to the altercation.

I

Contrary to defendant's contention, County Court's determination that a prosecution witness was not an agent of the government when he spoke to defendant is supported by the record (*see People v Young*, 100 AD3d 1427, 1427-1428, *lv denied* 20 NY3d 1105).

Defendant failed to preserve for our review his contention that a prosecutor who participated with him in a demonstration of the altercation during cross-examination thereby provided unsworn testimony (*see* CPL 470.05 [2]; *see generally People v Hawkins*, 11 NY3d 484, 491-493). In any event, we note that the record establishes that

defendant portrayed the victim during the demonstration and directed the actions of the prosecutor, who portrayed defendant (*cf. People v Williams*, 90 AD2d 193, 196). We conclude that, "[u]nder the circumstances, . . . no undue prejudice resulted" (*People v Barnes*, 80 NY2d 867, 868; *see People v Jones*, 70 AD3d 1253, 1255; *cf. Williams*, 90 AD2d at 196). We further conclude that defendant's contention that he was denied effective assistance of counsel based upon the failure of defense counsel to object to the demonstration is without merit inasmuch as defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040).

Defendant failed to object to the court's charge to the jury on the justification defense and thus failed to preserve for our review his contention that the court improperly lowered the People's burden of proof to disprove the defense (*see People v Johnson*, 103 AD3d 1226, 1226, *lv denied* 21 NY3d 944). In any event, we conclude that the court's charge properly informed the jury that, if it determined that defendant was justified in using deadly force against the victim, it must acquit him of all counts (*see generally id.*). We therefore also reject defendant's contention that the failure of defense counsel to object to the charge deprived him of effective assistance of counsel (*see id.*).

II

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the justification defense. Defendant testified that the victim was holding defendant's neck under the victim's arm while he punched defendant and that defendant felt dizzy and was afraid that he would pass out and then "be demolished." Defendant testified that he therefore removed two "throwing" knives from a sheath on his belt and stabbed the victim in an effort to have the victim release him. The People established, however, that the victim was five inches shorter and only slightly heavier than defendant and that he was not armed. Thus, we conclude that, although a different verdict would not have been unreasonable, when viewing the elements of the justification defense as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349; *People v Bleakley*, 69 NY2d 490, 495), the jury did not fail to give the evidence the weight it should be accorded (*see People v Massey*, 61 AD3d 1433, 1433, *lv denied* 13 NY3d 746; *see also People v Heary*, 104 AD3d 1208, 1209, *lv denied* 21 NY3d 943, *reconsideration denied* 21 NY3d 1016).

III

Defendant further contends that the verdict is against the weight of the evidence because the People did not prove beyond a reasonable doubt that he had the requisite intent to kill the victim. We note that defendant does not separately contend that the evidence is legally insufficient to support the conviction (*cf. People v Rice*, 105 AD3d 1443, 1443-1444; *People v Stephenson*, 104 AD3d 1277, 1278, *lv denied* 21 NY3d 1020; *People v Stepney*, 93 AD3d 1297, 1298, *lv denied*

19 NY3d 968). In any event, defendant failed to renew his motion to dismiss at the close of proof and thus failed to preserve for our review a contention that the evidence is legally insufficient to support the conviction (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Nevertheless, it is now well established that, "in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*Danielson*, 9 NY3d at 349). Upon our review of the elements of the crime of murder in the second degree, we conclude that, viewing the facts in the light most favorable to the People, "a jury could [not] logically conclude that the People sustained [their] burden of proof" with respect to the element of intent to kill (*id.*).

It is undisputed that defendant stabbed the victim eight times with two "throwing" knives and then left the scene and discarded the knives, which were later recovered by the police. The knives were described by a police witness as having two- to three-inch blades, only the tips of which were sharp. Prosecution witnesses testified that the victim was angry and aggressive because he was asked to leave the party and that defendant, and others, attempted to diffuse the situation developing between the victim and his friend, and the host of the party. The People's evidence included photographs of defendant that depict extensive bruising on his back and side. The testimony of the Medical Examiner and photographs taken during the autopsy of the victim establish that the victim sustained five stab wounds to the front of the body: three wounds were located in the area of the victim's left underarm, one wound was located in the area of the victim's right underarm, and another wound was located to the left of the midline of the victim's chest. There also were three wounds located on the back of the victim's body: one wound was located in the upper back above the left arm, another wound was located in the upper midline area of the back, and the third wound was located in the lower right area of the back. Each lung had a single laceration. The Medical Examiner explained that the lacerations to the lungs had the potential to be life-threatening in the event that fluid entered the lungs, became infected, and resulted in a systemic infection. Only one of the eight wounds, however, was immediately life-threatening. The fatal wound occurred when defendant stabbed the victim in the midline area of the chest, penetrating the right ventricle of the heart. The Medical Examiner also testified that the victim's left arm was raised when he was stabbed, that there were no defensive wounds with the exception of a 1½-inch cut to the victim's right forearm, and that the short blade of the knife was able to penetrate the heart because the position of the victim's body caused the heart to be compressed closer to the skin.

Although defendant contends that the verdict is against the weight of the evidence with respect to the element of intent, he does not make an actual weight of the evidence argument, i.e., that the overall weight of the evidence, the conflicting testimony, and the inferences that may be drawn therefrom render the verdict against the weight of the evidence (*see generally Danielson*, 9 NY3d at 348; *People*

v Romero, 7 NY3d 633, 643-644; *Bleakley*, 69 NY2d at 495). Indeed, the facts themselves are essentially undisputed; the testimony of the People's witnesses and the physical evidence is consistent with defendant's testimony that he stabbed the victim in an effort to have the victim release him during an altercation that the victim initiated. Instead, defendant contends that the verdict is against the weight of the evidence because the credible testimony of the People's witnesses does not "prove the elements of the crime beyond a reasonable doubt" (*Danielson*, 9 NY3d at 349).

We agree with defendant that, despite the number of injuries the victim sustained, including a single fatal stab wound, the credible evidence is not sufficient to prove beyond a reasonable doubt that he intended to kill the victim. Upon our review of the credible evidence presented by the People (*see id.*), we conclude that the evidence is not sufficient to prove the element of intent to kill because the physical evidence, particularly the location of the stab wounds, supports the conclusion that defendant, during an altercation that the victim initiated, stabbed the victim in an effort to have the victim release him and not with an intent to kill him. Had defendant expressly contended that the evidence is legally insufficient to support the conviction, we would conclude that there is no "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial . . . and as a matter of law satisfy the proof and burden requirements for every element of the crime charged" (*Bleakley*, 69 NY2d at 495; *see Danielson*, 9 NY3d at 349).

IV

For the reasons that follow, we decline to dismiss the indictment pursuant to CPL 470.20 (5) on the ground that the verdict is against the weight of the evidence. Instead, we conclude that the conviction should be reduced pursuant to CPL 470.15 (2) (a) to the lesser included offense of manslaughter in the first degree (Penal Law § 125.20 [1]), and the matter should be remitted to County Court for sentencing on the lesser included offense pursuant to CPL 470.20 (4).

CPL 470.20 (5) provides that the determination by an intermediate appellate court that a verdict is against the weight of the evidence requires dismissal of the indictment. We respectfully disagree with our concurring colleague and our colleagues at the Second Department that CPL 470.15 (5) provides the authority to reduce a conviction to a lesser included offense upon a determination that the verdict is against the weight of the evidence (*see e.g. People v Santiago*, 97 AD3d 704, 706-707, *lv granted* 20 NY3d 935; *People v Haney*, 85 AD3d 816, 818-819, *lv denied* 17 NY3d 859). Rather, we agree with our dissenting colleague that CPL 470.15 (5) permits the judgment of a multi-count indictment to be modified in the event that the evidence with respect to one or more of those counts is against the weight of the evidence by dismissing the count or counts. In our view, the power to reduce a conviction to a lesser included offense is limited to cases in which it is determined that the evidence "is not legally sufficient to establish the defendant's guilt of an offense of which

he [or she] was convicted but is legally sufficient to establish his [or her] guilt of a lesser included offense" (CPL 470.15 [2] [a]).

We recognize, as our concurring colleague explains, that the legislature changed the remedy for reversal of a judgment on a weight of the evidence review from granting a new trial to dismissing the indictment (*see* L 1970, ch 996, § 470.20 [5]), thereby removing the distinction between a *reversal* on the ground of legal insufficiency and weight of the evidence review. We nevertheless disagree with our concurring colleague that the legislative action provided authority to *modify* a judgment by reducing a conviction to a lesser included offense if the weight of the evidence supported a lesser included offense, but not the offense of which defendant was convicted. The legislature explicitly provided the alternative remedy of reducing a conviction to a lesser included offense if the evidence was *legally insufficient* to support the conviction but was legally sufficient to support the conviction of a lesser included offense (*see* CPL 470.15 [2] [a]); however, the statute is silent with respect to that remedy if the verdict is against the weight of the evidence (*see id.*). In our view, if the legislature had intended to provide the same relief to modify a judgment in the event that the weight of the evidence failed to support the conviction but supported a lesser included offense, it would have done so.

We respectfully disagree with our concurring colleague that *People v Cahill* (2 NY3d 14) supports the conclusion that a judgment may be modified by reducing a conviction to a lesser included offense if the verdict is against the weight of the evidence. Instead, we agree with our dissenting colleague that the unique circumstances involved in *Cahill* do not apply here. In *Cahill*, defendant was convicted of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [v], [vii]), in connection with the murder of his wife, based upon two aggravating factors: witness elimination murder and intentional murder in the course of and in furtherance of a burglary (*Cahill*, 2 NY3d at 35). The Court of Appeals explained that the aggravating factors were established by the legislature "to create a subclass of defendants who, in contrast to others who commit intentional murder, it thought deserving of the death penalty. By this device, the lawmakers saw to it that the death penalty could not fall randomly on all murder defendants" (*id.* at 62). The Court further explained that the aggravating factor "elevates intentional murder to capital-eligible murder" (*id.*). In other words, the offense is intentional murder, but the aggravating factor must be proved in addition to the intentional murder in order to impose the death penalty on a particular defendant (*see id*. at 63). In *Cahill*, the Court of Appeals "vacated" the conviction of witness elimination murder because the proof at trial led the Court to conclude that defendant's motive to kill his wife was not related to eliminating her as a witness in a Family Court matter (*id.* at 62). The Court also concluded that the *additional and independent crime* of burglary was not proved but, rather, that the People improperly used the same mens rea, i.e., defendant's intent to kill, for both the murder and the burglary requirements of the offense of murder in the first degree (*id.* at 64).

Indeed, the Court described Penal Law § 125.27 (a) (1) as requiring a "double crime—murder 'plus' " (*id.* at 64). The Court determined that one of the two "crimes," i.e., the "plus crime," in each count of murder in the first degree was not proved and therefore modified the judgment accordingly (*id.* at 72). In our view, the resolution of *Cahill* was not a reduction to a lesser included offense because the verdict was against the weight of the evidence; instead, the resolution was a determination that the capital penalty was not available because only the discrete intentional murder, and not the discrete "plus crime," was proved. In our view, therefore, *Cahill* does not support the conclusion that here, the conviction of murder in the second degree may be reduced to a lesser included offense if the weight of the evidence supports a lesser included offense.

V

We conclude, as does our dissenting colleague, that CPL 470.20 (5) requires dismissal of the indictment if it is determined that the verdict is against the weight of the evidence. Where as here, however, there is no separate contention that the conviction is not supported by legally sufficient evidence, but instead the analysis of the legal sufficiency of the evidence is conducted solely in the context of a contention that the verdict is against the weight of the evidence (*see Danielson*, 9 NY3d at 349), we conclude that dismissal of the indictment is not the appropriate remedy. We note that, in *Danielson*, the Court of Appeals stated that it was called upon "to determine the scope of weight of the evidence review when a defendant has failed to preserve a challenge to the legal sufficiency of his conviction. In particular, we are asked whether weight of the evidence review requires assessment of the elements of the crime for which defendant was convicted, or whether such review would simply be tantamount to back-door sufficiency review" (*id.* at 346). Indeed, the Court concluded that "the Appellate Division incorrectly concluded that it was unnecessary to conduct an element-based review" (*id.* at 349). We interpret that language to require us to determine, in the first instance, whether the evidence was legally sufficient to support the conviction. We therefore conclude that, despite the fact that our review is in the context of a contention that the verdict is against the weight of the evidence, our assessment of the elements of the crime of murder in the second degree under these circumstances is not a determination on the facts (*see* CPL 470.15 [5]), i.e., a consideration of the "credible evidence, conflicting testimony and inferences that could be drawn from the evidence" (*Danielson*, 9 NY3d at 349). Instead, our assessment is a determination on the law that the evidence is legally insufficient with respect to the element of intent (*see* CPL 470.15 [4] [b]).

We respectfully disagree with our dissenting colleague's conclusion that our review is limited by defendant's "request for only a weight-based review" and that, based on that request, we must reverse the judgment as against the weight of the evidence and dismiss the indictment. Our conclusion that the judgment should be modified by reducing the conviction to a lesser included offense is supported by our reasoning that a defendant may not usurp our authority to

determine the appropriate statutory remedy as set forth in CPL 470.20 by the manner in which he or she challenges the legal sufficiency of the evidence, i.e., within the context of a weight of the evidence contention rather than by an express contention that the conviction is not supported by legally sufficient evidence (*see generally Bleakley*, 69 NY2d at 495). In other words, we conclude that we are not required to afford the remedy of dismissal of the indictment pursuant to CPL 470.20 (5) merely because defendant's contention that the evidence of the intent to kill was not proved beyond a reasonable doubt is made in the context of a request for a weight of the evidence review, rather than in the context of a contention that the conviction is not supported by legally sufficient evidence, even if that contention is not preserved for our review.

V

Thus, based upon our determination that the evidence is not sufficient to establish beyond a reasonable doubt that defendant intended to kill the victim, but it is sufficient to establish beyond a reasonable doubt that he intended to cause serious physical injury to the victim, which resulted in the victim's death (*see* Penal Law § 125.20 [1]), we conclude that the conviction of murder in the second degree should be reduced to manslaughter in the first degree pursuant to CPL 470.15 (2) (a). Accordingly, we conclude that the judgment should be so modified, and the matter should be remitted to County Court for sentencing on the manslaughter conviction (*see* CPL 470.20 [4]).

We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

SCONIERS and VALENTINO, JJ., concur; SMITH, J., concurs in the following Opinion: I respectfully disagree with the majority's conclusions "that CPL 470.20 (5) requires dismissal of the indictment if it is determined that the verdict is against the weight of the evidence," and that we should review the legal sufficiency of the evidence in this case. To the contrary, I conclude that defendant does not seek review of the legal sufficiency of the evidence on appeal and, as noted by the majority, did not in any event preserve a legal sufficiency challenge for our review. In my view, we must, pursuant to defendant's request, review the weight of the evidence with respect to whether the People proved beyond a reasonable doubt that he had the requisite intent to kill the victim. I further conclude that the verdict convicting defendant of murder in the second degree (Penal Law § 125.25 [1] [intentional murder]) is against the weight of the evidence and that the conviction therefore should be reduced to manslaughter in the first degree (§ 125.20 [1]). Because this will yield the same result as that reached by the majority, I thus concur in the result. Furthermore, I agree with the majority's resolution of the remaining issues raised by defendant on appeal, and join in its determination to reject the remainder of defendant's contentions.

Turning to the issues upon which we disagree, I note that the majority concludes that we must review the legal sufficiency of the evidence as part of our weight of the evidence review. The majority further concludes that the evidence in this case is legally insufficient to establish that defendant acted with the requisite intent to cause the death of the victim despite, as noted, defendant's failure to preserve the issue for our review and the absence of a request by defendant on appeal for a sufficiency review.

Most importantly, although I agree with the majority that, in reviewing the weight of the evidence, we "must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349), I conclude that the evidence in this case is legally sufficient to support the conviction with respect to defendant's intent to cause the death of the victim. "The standard for reviewing the legal sufficiency of evidence in a criminal case is whether 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes*, 60 NY2d 620, 621, quoting *Jackson v Virginia*, 443 US 307, 319, *reh denied* 444 US 890), which, in turn, requires that we "determine whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495).

After conducting such a review, I respectfully disagree with the majority's conclusion that no rational jury could reach the conclusion that defendant intended to kill the victim. There was evidence establishing that defendant stabbed the victim in the chest and back, causing a total of eight wounds, including the fatal wound that penetrated the victim's chest cavity and pierced his heart. It is well settled that, when reviewing the legal sufficiency of the evidence in a criminal case, we must view the evidence in the light most favorable to the People (*see Contes*, 60 NY2d at 621), and "indulg[e] in all reasonable inferences in the People's favor" (*People v Ford*, 66 NY2d 428, 437; *see People v Delamota*, 18 NY3d 107, 113). Viewed in that light, I agree with the People that a rational jury could have concluded that defendant intended to kill the victim, based on the number of stab wounds and the fact that the fatal wound left a four-inch long track in the victim's chest and pierced his right ventricle (*see People v Massey*, 61 AD3d 1433, 1433-1434, *lv denied* 13 NY3d 746; *People v Gardella*, 5 AD3d 695, 695-696, *lv denied* 2 NY3d 799; *see also People v Johnson*, 20 AD3d 808, 811-812, *lv denied* 5 NY3d 853; *People v Self*, 239 AD2d 943, 943, *lv denied* 90 NY2d 910).

Notwithstanding the legal sufficiency of the evidence with respect to defendant's intent to cause the victim's death, however, I further conclude that the verdict is contrary to the weight of the evidence on that issue. All of the evidence indicates that defendant stabbed the victim with two knives, both of which had blades that were two to three inches long. The Medical Examiner who performed the autopsy testified that the fatal wound could have been caused by such

a knife if the victim's chest was compressed at the time that the wound was inflicted, which could result in a wound that is longer than the weapon that caused it. In his testimony concerning the stabbing, defendant described a fight in which the victim was holding defendant and striking him, and the wounds are consistent with defendant's testimony that he kept stabbing the victim until the victim released his grip on defendant. The expert medical testimony also established that the victim had only one wound that could be described as a defensive wound, and more such wounds would be expected if defendant were not truthfully describing the incident. In addition, the victim had stab wounds under his arm that were consistent with his being stabbed while that arm was raised or held away from his body, which comports with defendant's version of the events. Although defendant concedes that the victim was unarmed and thus defendant's acts were not justified, his description of the event is consistent with an intent to injure and inconsistent with an intent to kill.

In addition, the record contains evidence establishing that the victim was the aggressor, and there was evidence that defendant exhibited bruising that could have been caused by the victim holding and punching defendant, consistent with defendant's version of the events. The evidence introduced by the People also established that the victim had consumed the drug ecstasy and a significant amount of alcohol during the party that preceded this incident. The evidence further establishes that the incident began when the host of the party told the victim and his friends to leave, but they became belligerent and refused. The People introduced evidence that defendant had the knives at the party prior to the fight in which the victim was killed, but there is no evidence that defendant attempted to use them before he became involved in the fight with the victim. Finally, I agree with the majority and the dissent that the location of the victim's wounds are more consistent with defendant's version of the events and with an intent to injure the victim than with the intent to kill the victim. Therefore, I agree with the dissent that the verdict is against the weight of the evidence.

The majority and the dissent conclude that, if we determine that the conviction of murder in the second degree is contrary to the weight of the evidence, our only possible remedial action is to dismiss that count of the indictment. I disagree. It is true that the Criminal Procedure Law states that, "[u]pon a reversal or modification of a judgment after trial upon the ground that the verdict . . . with respect to a particular count . . . is against the weight of the trial evidence, the court must dismiss the . . . reversed count" (CPL 470.20 [5]). The majority and the dissent read the use of the word "must" in the statute to create a different rule for review of the weight of the evidence than exists for review of the legal sufficiency of the evidence. CPL 470.20 provides in the preamble, however, that, "[u]pon reversing or modifying a judgment . . . , an intermediate appellate court must take or direct such corrective action as is necessary and appropriate both to rectify any injustice to the appellant resulting from the error or defect which is the subject of the reversal or modification and to protect the rights of the respondent. The particular corrective action to be taken or

directed is governed *in part* by," e.g., CPL 470.20 (5) (emphasis added). Thus, although CPL 470.20 (5) uses the word "must," that subdivision must be read together with the preamble, and thus it in fact is only one of the possible corrective actions available to this Court. We may take other corrective action as "appropriate . . . to rectify [the] injustice to the appellant resulting from" the improper weighing of the evidence by the jury (CPL 470.20).

Furthermore, it is clear that the revision of the statute that occurred in 1971, when the Criminal Procedure Law became effective, was intended to create equality between appellate review of the weight of the evidence and of the legal sufficiency of the evidence. Prior to that date, there were cases decided pursuant to the former Criminal Code indicating that a new trial was required if a judgment was reversed on appeal because the verdict was against the weight of the evidence (*see e.g. People v Slaughter*, 34 AD2d 50, 52; *People v Stein*, 15 AD2d 961), but dismissal of the indictment was the remedy if the evidence was legally insufficient (*see e.g. People v Rice*, 35 AD2d 590, *affd* 28 NY2d 1, *cert denied sub nom. Colon v New York*, 402 US 905). In order to remove that distinction, the Temporary Commission on Revision of the Penal Law and the Criminal Code recommended a change in this law, as part of the enactment of the Criminal Procedure Law. Thus, it is long settled that subdivisions (2) and (5) of CPL 470.20 "definitely work[] a change [in the existing state of the law] by requiring a *dismissal* of the indictment or information upon any reversal for either legal insufficiency or lack of weight of trial evidence" (Richard G. Denzer, former Practice Commentaries to McKinney's Cons Laws of NY, Book 11A, CPL 470.20; *see* Temporary Commn on Revision of the Penal Law and the Criminal Code, 1967 Staff Comment to proposed CPL 240.40 [subsequently renumbered CPL 470.20]). Consequently, in an early case interpreting the statute, the Court of Appeals indicated that "the Legislature . . . in enacting the Criminal Procedure Law introduced the present requirement for dismissal of an accusatory instrument where a reversal is stated to be predicated on factual considerations (CPL 470.20 [(2) - (5)])" (*People v Mackell*, 40 NY2d 59, 63). As Professor Preiser noted, "[i]n the case of weight of the evidence, dismissal was chosen for the CPL rule on the theory that *as a matter of fairness no distinction should be made between the two grounds for reversal* (see original practice commentaries by Judge Denzer, the revision commission's director)" (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 470.20 at 248-249 [emphasis added]). Inasmuch as the statute was designed to equalize the results of both types of review, that same statute should not be read to require different treatment based on the type of review employed by the intermediate appellate court.

Moreover, in addition to requiring that the indictment or the relevant count thereof be dismissed when an appellate court determines that the verdict is against the weight of the evidence with respect to that charge, other subdivisions of CPL 470.20 state that, "[u]pon a reversal of a judgment after trial for legal insufficiency of trial evidence, the court must dismiss the accusatory instrument . . . [and u]pon a modification of a judgment after trial for legal insufficiency of trial evidence with respect to one or more but not all of the

offenses of which the defendant was convicted, the court must dismiss the count or counts of the accusatory instrument determined to be legally unsupported and must otherwise affirm the judgment" (CPL 470.20 [2], [3]). Thus, the express language of CPL 470.20 (2) through (5), read literally and without reference to other statutory sections, requires dismissal of the indictment when this Court concludes that a conviction is not supported by legally sufficient evidence or that the verdict is against the weight of the evidence. It is beyond question, however, that we may reduce a conviction to a lesser included charge if we find that the evidence is not legally sufficient to support it, and indeed the majority recommends that we do so in this case.

This Court's power to reduce a charge derives from CPL 470.15, which states in CPL 470.15 (2) (a) that, "[u]pon a determination that the trial evidence adduced in support of a verdict is not legally sufficient to establish the defendant's guilt of an offense of which he was convicted but is legally sufficient to establish his guilt of a lesser included offense, the court may modify the judgment by changing it to one of conviction for the lesser offense." That section also states, however, that an "intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to," reduction of the crime to a lesser included offense as set forth above (CPL 470.15 [2]). Here, I conclude that, although the evidence is legally sufficient to support the conviction, the verdict is contrary to the weight of the evidence. Given the statutory language affording us the power to take the action that will "rectify [the] injustice to the appellant resulting from" the improper weighing of the evidence by the jury (CPL 470.20), and the additional language indicating that we "are not limited to" the corrective actions listed in the statute (CPL 470.15 [2]), in my view we should modify the judgment by reducing the charge, as indicated herein.

It has long been the rule in New York that a weight of the evidence analysis in a homicide involves review of "the question as to the defendant's guilt, *as to the grade of his offense if he was guilty*, as to his claim that he acted in self-defense or that the homicide was the result of accident" (*People v Gaimari*, 176 NY 84, 94 [emphasis added]; *see People v Romero*, 7 NY3d 633, 640). This rule is clearly contrary to the majority's position that we may not reduce a crime to a lesser included offense, i.e., to a different grade of offense, upon our review of the weight of the evidence. Thus, I disagree with the majority's and dissent's interpretation of the statutory scheme.

Most importantly, there are numerous cases in which the appellate courts of New York have reduced convictions to lesser included offenses upon finding that all or part of a verdict is against the weight of the evidence (*see e.g. People v Freeman*, 98 AD3d 682, 683-684; *People v Grice*, 84 AD3d 1419, 1420, *lv denied* 17 NY3d 806; *People v Harvin*, 75 AD3d 559, 560-561; *People v Alvarez*, 38 AD3d 930, 934-935, *lv denied* 8 NY3d 981; *People v Molina*, 8 AD2d 930, 931), including reducing second-degree murder convictions to lesser included

offenses (*see e.g. People v Santiago*, 97 AD3d 704, 706-707, *lv granted* 20 NY3d 935; *People v Pickens*, 60 AD3d 699, 701-702, *lv denied* 12 NY3d 928; *see also People v Dudley*, 31 AD3d 264, 264-265, *lv denied* 7 NY3d 866). Moreover, in *People v Cahill* (2 NY3d 14, 57), the Court of Appeals reviewed the weight of the evidence in a case involving a first-degree murder conviction pursuant to CPL 470.30 (1), and concluded that "the evidence adduced on [the first-degree intentional murder] count is legally sufficient, but that the verdict is against the weight of the evidence." Based on that conclusion, the Court of Appeals reduced the conviction to second-degree murder (*id.* at 35). This unequivocally countenances the reduction of a charge upon a finding that the verdict with respect to it is contrary to the weight of the evidence.

Accordingly, based upon the broad wording of the statute, the legislative history, and the numerous cases in which the other New York State appellate courts have done so, I disagree with the majority and the dissent and instead conclude that we may reduce the conviction to manslaughter in the first degree based upon the conclusion that the conviction of murder in the second degree is not supported by the weight of the evidence. I further conclude that we should do so here. Inasmuch as the majority concludes that we should reach the same result, I concur in the result.

FAHEY, J., dissents and votes to reverse in accordance with the following Opinion: I respectfully dissent. The majority and my concurring colleague would effectively eliminate the distinction between legal sufficiency and weight on intermediate appellate review. The practical effect of the majority's position is that there would no longer be any reason to preserve the issue of legal sufficiency for at least intermediate appellate review because that issue could be raised in the context of a review based on weight of the evidence. Effectively, this means that the possible benefit of a legal sufficiency review, i.e., conviction of a reduced charge and possibly a reduced sentence, could be obtained without establishing any basis for such an action.

I

The framework for this discussion is set out in CPL 470.15 (scope of review) and 470.20 (corrective action). Legal sufficiency means that, when viewed in the light most favorable to the People, the facts support the charge as a matter of law. By contrast, review based on the weight of the evidence means that, in viewing and comparing all the facts when sitting as the thirteenth juror, a conclusion may be reached beyond a reasonable doubt. The statutory framework provides for different corrective actions for each basis of review. The issue of legal sufficiency must be preserved (*see* CPL 470.05 [2]), and corrective action ranges from reversal and dismissal to a modification to a lesser included offense (*see* CPL 470.15 [2] [a]). Although weight review requires no preservation (*cf.* CPL 470.05 [2]), the court is limited to reversal and dismissal as its only remedy (*see* CPL 470.20 [5]).

Recently, the Court of Appeals clearly set out the difference between these two forms of review in *People v Danielson* (9 NY3d 342, 348-349 [Kaye, Ch. J.]):

> "As we recently made clear in [*People v Romero*, 7 NY3d 633, 636], weight of the evidence review requires a court first to determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt (*People v Crum*, 272 NY 348 [1936]).
>
> "Essentially, the court sits as a thirteenth juror and decides which facts were proven at trial (*see Tibbs v Florida*, 457 US 31, 42 [1982]). Necessarily, in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt. Sitting as the thirteenth juror, moreover, the reviewing court must weigh the evidence in light of the elements of the crime as charged to the other jurors, even when the law has changed between the time of trial and the time of appeal (*People v Noble*, 86 NY2d 814, 815 [1995]).
>
> "A verdict is legally sufficient when, viewing the facts in [the] light most favorable to the People, 'there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' (*People v Acosta*, 80 NY2d 665, 672 [1993], quoting *People v Steinberg*, 79 NY2d 673, 681-682 [1992]). A sufficiency inquiry requires a court to marshal competent facts most favorable to the People and determine whether, as a matter of law, a jury could logically conclude that the People sustained [their] burden of proof."

II

Here we are presented with a request for only a weight-based review. Indeed, as the majority recognizes, defendant failed to preserve for our review any contention that the evidence is legally insufficient to support the conviction, and he does not separately contend on appeal that the evidence is legally insufficient to support

the conviction. As a result, we are clearly limited to the framework set out for weight-based review. We are not determining whether or not the facts, when viewed in the light most favorable to the People, are legally sufficient to support the conviction. Instead, we are sitting as a thirteenth juror and weighing all of the credible evidence to decide whether the jury, in this instance, was justified in finding defendant guilty beyond a reasonable doubt.

I agree with the majority's recitation of the facts and analysis of the evidence in this case. The People have not proved the charge of murder in the second degree beyond a reasonable doubt. The evidence is particularly deficient on the element of intent.

III

In view of these independent tests and conceptual distinctions, I cannot conclude that a court, when asked to determine whether a verdict is justified on the *facts* (*see People v Bleakley*, 69 NY2d 490, 493; *see also* CPL 470.15 [5]), may, on the *law*, reduce a verdict it deems to be against the weight of the evidence to one convicting a defendant of a lesser included offense. Weight of the evidence review is an all-or-nothing analysis of what the verdict was, not an analysis of what the verdict could have been. Conversely, legal sufficiency requires an analysis of the adequacy of the proof, in establishing a prima facie case.

Our options are limited. There is no basis upon which to create a new third option.

IV

This writing would be incomplete without a few additional points.

First, I join the majority in respectfully disagreeing with the Second Department's conclusion that CPL 470.15 (5) authorizes the reduction of a conviction to a lesser included offense upon a determination that the verdict is against the weight of the evidence. CPL 470.20 (5) specifically and plainly provides that, "[u]pon a reversal or a modification of a judgment after trial upon the ground that the verdict, either in its entirety or with respect to a particular count or counts, is against the weight of the trial evidence, the court *must dismiss* the accusatory instrument or any reversed count" (emphasis added). CPL 470.15 (5), in turn, provides that "[t]he kinds of determinations of reversal or modification deemed to be on the facts include . . . a determination that a verdict of conviction resulting in a judgment was, in whole or in part, against the weight of the evidence." Reading CPL 470.15 (5) in conjunction with the entirety of CPL article 470, including CPL 470.20 (5), leads me to conclude that the reference to modification in section 470.15 (5) involves circumstances in which an intermediate appellate court considers a *multi-count indictment* and determines that only one count, rather than the entirety of the indictment, must be dismissed.

Second, the decision of the Court of Appeals in *People v Cahill*

(2 NY3d 14) does not change my view of the relevant paradigm of CPL article 470. In *Cahill*, the Court of Appeals, inter alia, reviewed two capital murder counts and concluded that the weight of the evidence did not support the aggravating or "plus" factors required to elevate murder in the second degree to murder in the first degree (*id.*; *compare* Penal Law § 125.25 [1] *with* § 125.27 [1]), and it thus reduced the conviction of two counts of capital murder to one count of murder in the second degree (*Cahill*, 2 NY3d at 72). The circumstances of that case, however, were unusual inasmuch as there the Court, in relevant part, considered evidence relative to circumstances in which a "typical" intentional murder under Penal Law § 125.25 (1) punishable by a significant indeterminate sentence leaving open the possibility of parole (*see* § 70.00 [3] [a] [i]) may be elevated to an "atypical" intentional murder under section 125.27 (1) punishable by, inter alia, death or life imprisonment without parole (§ 60.06). Indeed, in my view, *Cahill*'s result is borne of its peculiarity, and the Court's determination that the defendant there committed intentional murder but that the jury was not justified in concluding that he was eligible for the enhanced sentencing (*id.* at 37-38) does not lead me to believe that we may here reduce a conviction that is against the weight of the evidence to one of a lesser included offense.

V

Accordingly, for the reasons set forth above, I conclude that the judgment should be reversed, the indictment should be dismissed, and the matter should be remitted to County Court for further proceedings pursuant to CPL 470.45.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1115

KA 13-00437

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

ROBERT L. INGRAM, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), dated November 30, 2012. The order granted that part of the omnibus motion of defendant to suppress physical evidence and his oral statements to the police.

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

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion to suppress physical evidence, i.e., a handgun, and defendant's oral statements to the police. The People contend that the police had the requisite reasonable suspicion to justify their pursuit of defendant, and that suppression of the evidence and oral statements thereafter obtained from defendant is not warranted. We reject that contention and, inasmuch as Supreme Court's suppression determination is supported by the record (*see People v Martinez*, 105 AD3d 1458, 1459; *see generally People v Prochilo*, 41 NY2d 759, 761), we affirm the order.

The testimony at the suppression hearing established that, on March 25, 2012, a housing officer of the Buffalo Police Department received a tip from an unnamed arrestee that there were two guns "stashed behind" a house located at 118 Montana Avenue in the City of Buffalo. The area in which the house was located was known to the officer and his partner as a high-crime area. At approximately 4:40 p.m. on that date, the two officers drove their patrol vehicle to that house to investigate the tip. Upon turning onto Montana Avenue, the officers saw two men near the curb in front of house number 116 or 118, crossing the street toward house number 119. The officer driving the patrol vehicle recognized one of the men as the victim of a recent shooting, and he stopped the patrol vehicle to speak with him. That man stopped to talk to the officer, but his companion—defendant—began walking away "swiftly." The second officer, curious as to why

defendant was "going away so fast," exited the patrol vehicle and asked defendant his name. According to the testimony of the second officer, defendant did not respond, but turned around, "grabbed the right side of his jacket," and "tried to pull something out of it." The second officer yelled at defendant, "don't do it," but defendant continued to pull at his jacket pocket. The second officer drew his pistol and pointed it at defendant, while continuing to yell, "don't do it." Defendant then began to run away, although we note that the second officer provided conflicting testimony whether defendant had begun to run away before he yelled at defendant. The two officers pursued defendant, ultimately apprehending him and recovering a loaded handgun from his jacket pocket. Notably, the officers testified that defendant and his companion were doing nothing illegal when they first saw them, and that they became suspicious only because defendant and his companion were in the vicinity of the house identified in the tip. Furthermore, the first officer testified that, although defendant's jacket was "thin," he did not see the outline of a weapon in defendant's jacket, and the second officer testified that he did not see a bulge or the outline of a weapon in defendant's jacket until after he began to pursue defendant.

The People contend that the court erred in determining that the tip the officer received from the unnamed arrestee was unreliable. According to the People, the record establishes that the tip was reliable and the court therefore should have considered the tip as a factor in support of a determination that the officers had the requisite reasonable suspicion to justify their pursuit of defendant, particularly inasmuch as defendant was standing near the house identified in the tip (*see generally People v De Bour*, 40 NY2d 210, 222-223). We reject that contention. The People contend that the tip was reliable because it was based upon the arrestee's personal knowledge and because "it is against the law to provide the police with false information about a crime." Even assuming, arguendo, that the arrestee's basis of knowledge was sufficient because he had personally observed guns "stashed" behind house number 118, we conclude that the People did not establish "that the specific information given [by the arrestee was] reliable" (*People v DiFalco*, 80 NY2d 693, 697; *see generally People v Johnson*, 66 NY2d 398, 402-402). The arrestee did not provide the officer with any information about who placed the guns behind house number 118, the precise location of the guns behind the house, or the type of guns. Moreover, the officer previously had never met the arrestee or received reliable information from him.

We further conclude that the court properly determined that, when the officers initially approached defendant, they had no more than an "objective, credible reason" to request information (*People v Moore*, 6 NY3d 496, 498-499, citing *De Bour*, 40 NY2d at 223). The officers acknowledged at the suppression hearing that there was nothing about the behavior of defendant or his companion that the officers found suspicious other than their proximity to house number 118. Although there was some testimony that defendant was standing in front of house number 118 when the officers first saw him, the court did not find that testimony credible but, rather, credited other testimony that

defendant was standing in front of house number 116. That credibility determination is entitled to great deference (*see Prochilo*, 41 NY2d at 761; *Martinez*, 105 AD3d at 1459). Furthermore, the first officer testified that he did not ask defendant's companion from where he was coming, nor did either officer testify that he saw the direction from which defendant was coming, and thus there is no credible evidence in the record supporting the claim that defendant was connected with the guns allegedly "stashed behind" house number 118. Defendant's presence on the curb in the general vicinity of house number 116 was " 'readily susceptible of an innocent interpretation,' " i.e., that defendant was simply crossing the street (*People v Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844), and "[t]he fact that defendant was located in a high[-]crime area does not by itself justify the police conduct where, as here, there were no other objective indicia of criminality" (*People v Stevenson*, 273 AD2d 826, 827). We therefore conclude that, at the time the officers approached defendant and his companion, they were limited to a level one intrusion, i.e., a request for information (*see generally De Bour*, 40 NY2d at 223). Thus, the second officer's request for defendant to give his name was permissible.

We reject the People's contention that subsequent events gave rise to a reasonable suspicion that defendant had committed or was about to commit a crime, as was required to justify the police pursuit of defendant when defendant did not respond to the officer's question (*see People v Cady*, 103 AD3d 1155, 1156; *Riddick*, 70 AD3d at 1422). We have previously held that " 'the fact that defendant reached for his waistband, absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant had committed or was about to commit a crime' " (*Cady*, 103 AD3d at 1156; *see Riddick*, 70 AD3d at 1422-1423). Here, although defendant was reaching for his jacket pocket as he walked or ran away from the second officer, neither officer testified that he saw a bulge or the outline of a weapon in defendant's jacket. Rather, the second officer believed that defendant had a gun only because, in his experience, if an individual pulled vigorously at an object in his or her pocket, but the object did not come out easily, that object usually was a weapon. While we are mindful that an officer may rely on his or her knowledge and experience in determining whether reasonable suspicion exists, we respectfully disagree with our dissenting colleagues that the above circumstances were sufficient to establish the requisite reasonable suspicion "in the absence of other objective indicia of criminality" (*Cady*, 103 AD3d at 1156 [internal quotation marks omitted]; *see Riddick*, 70 AD3d at 1423). Here, before pursuing defendant, the second officer knew only that defendant was walking across the street in a high-crime area, in the general vicinity of a house where an unnamed person of unestablished reliability claimed to have seen guns, and that, when the police approached, defendant walked or ran away while grabbing at his jacket pocket. We cannot conclude, based on the totality of those circumstances, that the police were justified in pursuing defendant (*see People v Holmes*, 81 NY2d 1056, 1058; *Cady*, 103 AD3d at 1155-1156; *Riddick*, 70 AD3d at 1421-1423).

We note that, although it appears from the dissent that there was testimony at the suppression hearing that defendant took an "aggressive fighter stance," there was no such testimony. Rather, that phrase was used only by defense counsel, when reading the second officer's testimony from the transcript of the felony hearing, in an attempt to impeach the officer regarding when he drew his service revolver. Thus, there was no evidence before the suppression court that defendant took an "aggressive fighter stance" (*see People v Hall*, 208 AD2d 1044, 1046; *People v Blanchard*, 177 AD2d 854, 856, *lv denied* 79 NY2d 918; *People v Gilman*, 135 AD2d 951, 952-953, *lv denied* 71 NY2d 896).

The People's reliance on *People v Bachiller* (93 AD3d 1196, 1196-1198, *lv dismissed* 19 NY3d 861) is misplaced. In that case, the police were responding to a report of a possible stabbing when they noticed the defendant in a "heated argument" with another man and then saw the defendant chase that man through adjacent backyards (*id.* at 1196). The defendant conceded that "the report of a possible stabbing coupled with the responding officer's observations at the scene furnished the police with the requisite 'founded suspicion that criminal activity [was] afoot' sufficient to justify the common-law right of inquiry" (*id.*, quoting *Moore*, 6 NY3d at 498). Having obtained the requisite founded suspicion, the police then observed the defendant walk briskly away from them and "grab and hold onto an object in his waistband area" (*id.* at 1197). In determining that suppression was not warranted, we noted that the defendant "was not simply reaching in the direction of his waistband. Rather, the two officers as well as the initial responding officer, who was also pursuing defendant, testified that defendant was *clutching an object that appeared to be a gun* at his waistband" (*id.* at 1198 [emphasis added]). Here, neither officer testified that he observed any object—let alone an object that appeared to be a gun—in defendant's pocket before beginning to pursue defendant.

All concur except SCUDDER, P.J., and PERADOTTO, J., who dissent and vote to reverse in accordance with the following Memorandum: We respectfully dissent. In our view, the two Buffalo Police Department Housing Officers (officers) had the requisite reasonable suspicion to pursue defendant. We would therefore reverse the order, deny that part of the omnibus motion seeking suppression of physical evidence and defendant's oral statements to the police, and remit the matter for further proceedings on the indictment.

After he was indicted on a charge of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant sought suppression of the handgun that had been seized from his jacket pocket on the ground that the officers lacked reasonable suspicion to pursue him. At the suppression hearing, the officers testified that they had received information from a person one of the officers had arrested earlier in the day concerning "possible weapons stashed behind a house" on Montana Avenue. The area around Montana Avenue was a high-crime area where there had been numerous arrests for narcotics and gun violence. Moreover, several people had been murdered in that area during the year in which this incident took place. Upon approaching

the area, the officers observed defendant and a second man standing on a curb near the house in question. The man with defendant had recently been the victim of a shooting, and the officers stopped their patrol vehicle so the first officer could ask defendant's companion if he had any new information concerning that shooting. At that point, defendant "glanced in [the officers'] direction, his eyes got very big, and then he looked down and walked away . . . very swiftly." Defendant's pace then escalated to a run. The second officer exited the patrol vehicle "just to see why [defendant] was going away so fast." Defendant did not respond when asked for his name, but turned toward the second officer in an "aggressive fighter stance," grabbed the right side of his jacket, and "vigorously" struggled to pull something out of it. The second officer yelled at defendant, "don't do it," because the officer "believed that [defendant] had a weapon and he was trying to pull it out of his jacket." The second officer testified that his belief was based on having been "involved in numerous weapons arrest[s] and most likely every single time when they're vigorously pulling something out of their coat[and] it doesn't come out easily, it's normally a weapon." As defendant continued trying to pull something out of his coat, the second officer "pulled out [his] pistol, pointed it at [defendant], [and] told him again, don't do it." When defendant started running, the officers pursued him, caught him, and recovered a handgun from his coat pocket.

"[I]t is well settled that the police may pursue a fleeing defendant if they have a reasonable suspicion that [the] defendant has committed or is about to commit a crime . . . Flight alone is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry . . . However, a 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 Riddick*, 70 AD3d 1421, 1422, *lv denied* 14 NY3d 844 [internal quotation marks omitted]; *see People v Holmes*, 81 NY2d 1056, 1058; *People v Martinez*, 80 NY2d 444, 446). "Reasonable suspicion represents that 'quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand' " (*Martinez*, 80 NY2d at 448).

While each individual act of defendant was insufficient on its own to provide the officers with the reasonable suspicion necessary to pursue and to detain him forcibly, we note that the Court of Appeals has recognized that it is the combination of flight and "other specific circumstances indicating that [a] suspect may be engaged in criminal activity" that may give rise to reasonable suspicion (*People v Sierra*, 83 NY2d 928, 929; *see People v Cady*, 103 AD3d 1155, 1156). "In determining whether a police officer has reasonable suspicion to justify his [or her] actions, 'the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather should be] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer' " (*People v Stephens*, 47 AD3d 586, 589, *lv denied* 10 NY3d 940).

We agree with the majority that " '[t]he [suppression] court's determination is entitled to great deference and will not be disturbed where it is supported by the record' " (*People v Martinez*, 105 AD3d 1458, 1459; *see People v Howington*, 96 AD3d 1440, 1441; *People v Davis*, 48 AD3d 1120, 1122, *lv denied* 10 NY3d 957), but we find it disturbing that Supreme Court failed to consider the testimony of the second officer that, based on his prior experience, when someone is vigorously trying to pull an object out of a coat pocket and the object does not come out easily, that object is "normally a weapon." It is well settled that the police "are allowed to 'draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person' " (*People v Hall*, 10 NY3d 303, 311, *cert denied* 555 US 938; *see People v Brown*, 151 AD2d 199, 203, *lv denied* 75 NY2d 768). Although we have consistently held that the mere fact that a person reaches for his waistband, "absent any indication of a weapon such as the visible outline of a gun or the audible click of the magazine of a weapon, does not establish the requisite reasonable suspicion that defendant ha[s] committed or [is] about to commit a crime" (*Riddick*, 70 AD3d at 1422-1423; *see Sierra*, 83 NY3d at 929-930; *Cady*, 103 AD3d at 1156), we conclude that here, based on the experience of the second officer, there was an indication of a weapon, i.e., defendant took an "aggressive fighter stance" and was "vigorously" struggling to remove something from his coat pocket. Moreover, the facts in *Riddick*, a case relied on by the majority, are distinguishable. In that case, the officers were in an unmarked car and were on a routine patrol. There was no specific tip concerning weapons, and there was no evidence that the defendant knew that the officers were police officers when he walked away from their unmarked van. While the defendant in *Riddick* made a "gesture" toward his waistband, there was no testimony that the gesture was aggressive or vigorous or that such a gesture was indicative of a weapon (*id.* at 1422-1424). Although a coat pocket may not be as common a location for a weapon, we conclude that the second officer's experience with weapons in coat pockets should have been considered by the court (*see People v Benjamin*, 51 NY2d 267, 271; *People v Bachiller*, 93 AD3d 1196, 1198, *lv dismissed* 19 NY3d 861). Indeed, in *People v Pines* (281 AD2d 311, 311-312, *affd* 99 NY2d 525), the defendant, who was walking in the street with a companion, noticed the officers' unmarked but recognizable vehicle, after which "his eyes bulged out" (*id.* at 311). As the officers approached, the "defendant 'bunched up' his bubble jacket on the right side, at the waist area, with his hand cupped underneath it' " (*id.* at 312). The officer in *Pines* stated that the defendant's action "remind[ed him] of how he himself, when off-duty, sometimes adjusted his gun in a similar manner" (*id.*). The Appellate Court relied upon that testimony in holding that the pursuit was justified (*id.*). In both *Pines* and the instant case, the knowledgeable and experienced officer observed conduct by the defendant that was indicative of a weapon.

In addition, the officers in this case had received a tip from an arrestee, i.e., an identified citizen informant, that there were guns stashed in the area where they observed defendant and his companion.

While we agree with the majority that there was no information establishing the reliability of the tip, such information may still be relied upon in a *De Bour* analysis. "Regardless of whether . . . the citizen-informant's basis of knowledge was sufficiently established . . . , the combination of his report to the police and the officers' observations . . . provided the requisite reasonable suspicion" (*Matter of Shallany S.*, 11 AD3d 414, 414; *see People v Gresty*, 237 AD2d 931, 932).

We therefore conclude that, based on the combination of the tip, the high-crime location, the presence of a recent shooting victim, defendant's initial behavior and his conduct indicative of a weapon, the officers had the requisite reasonable suspicion for the pursuit.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1298

CA 13-00351

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

VIVIAN M. AUSTIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CDGA NATIONAL BANK TRUST AND CANANDAIGUA NATIONAL CORPORATION, DOING BUSINESS AS CANANDAIGUA NATIONAL BANK AND TRUST COMPANY, DEFENDANTS-RESPONDENTS.

WILLIAM K. MATTAR, P.C., WILLIAMSVILLE (SARA T. WALLITT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered October 29, 2012 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she allegedly slipped and fell on an icy step while exiting defendants' bank. Defendants thereafter moved for summary judgment dismissing the complaint on the grounds that there was no dangerous condition and that they had no notice of any allegedly dangerous condition. Supreme Court properly granted defendants' motion. Although defendants' own submissions, which include the deposition testimony of plaintiff that she saw ice on the step, raise an issue of fact concerning the presence of a dangerous condition (*see generally Acevedo v New York City Tr. Auth.*, 97 AD3d 515, 516), we conclude that defendants met their burden of establishing that they lacked notice of the allegedly dangerous condition, and plaintiff failed to raise a triable issue of fact in opposition (*see Costanzo v Woman's Christian Assn. of Jamestown*, 92 AD3d 1256, 1258; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Here, plaintiff relies upon a theory of constructive notice, and it is well settled that, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees

to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *see Smith v May Dept. Store, Co.*, 270 AD2d 870, 870; *see also O'Neil v Holiday Health & Fitness Ctrs. of N.Y.*, 5 AD3d 1009, 1010). In support of the motion, defendants submitted the deposition testimony of their facilities supervisor, who is in charge of snow and ice maintenance at the bank. The facilities supervisor testified that he routinely inspects the bank's steps and sidewalk upon his arrival at the bank between 6:30 a.m. and 7:30 a.m. He or his employees salt or shovel "first thing" in the morning, if the conditions require such action. In addition to inspecting the property upon their arrival, facilities personnel regularly monitor conditions throughout the day and "re-salt or re-shovel" as needed, and do so more frequently during inclement weather or if a customer complains. Defendants did not receive any complaints about snow, ice, or any other dangerous condition on the step prior to the accident. After the accident, which occurred at approximately 12:15 p.m., the facilities supervisor did not salt the steps or direct an employee to do so because he saw nothing to salt. Defendants also submitted the deposition testimony of their regional manager, who testified that there was no ice on the step when he arrived at the bank between 8 a.m. and 8:30 a.m. on the morning of the accident and that, after the accident, he inspected the step and the surrounding area and did not observe any snow or ice. A bank security officer testified that he photographed the step approximately two hours after the accident, at which time there was no snow or ice on the step. The security officer testified that he was "perplex[ed]" when he viewed the accident scene because he observed "nothing . . . to slip or fall on." The postaccident photographs of the step depict what appears to be salt residue, but no ice.

We cannot agree with the dissent that defendants failed to meet their burden relative to constructive notice because they did not establish when the step was last inspected and salted prior to the accident. Although "a defendant *may* meet its burden of affirmatively demonstrating a lack of [constructive] notice by offering proof of regularly recurring maintenance or inspection of the premises" (*Kropp v Corning, Inc.*, 69 AD3d 1211, 1212 [emphasis added]; *see Webb v Salvation Army*, 83 AD3d 1453, 1454), such evidence is not required where, as here, defendants submitted the deposition testimony from their employees who were at the bank on the day of the accident concerning the condition of the step in the hours prior to and at the time of the accident (*see Evangelista v Church of St. Patrick*, 103 AD3d 571, 571; *cf. Spector v Cushman & Wakefield, Inc.*, 87 AD3d 422, 423; *De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566-567; *Kropp*, 69 AD3d at 1212-1213; *see generally Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412, 412).

The burden thus shifted to plaintiff to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for [her] failure so to do" (*Zuckerman*, 49 NY2d at 560; *see Rodriguez v 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519). Contrary to the contention of plaintiff, the unsworn expert reports that she submitted in opposition to the motion were not in admissible form and thus were

insufficient to raise a triable issue of fact (*see generally Arce v 1704 Seddon Realty Corp.*, 89 AD3d 602, 603; *Woodard v City of New York*, 262 AD2d 405, 405; *Stowell v Safee*, 251 AD2d 1026, 1026; *see also Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1276-1277). In any event, the report of plaintiff's expert meteorologist was insufficient to raise an issue of fact because it " 'was completely speculative and conclusory, failed to set forth foundational facts, assumed facts not supported by the evidence, and failed to recite the manner in which . . . [he] came to his conclusions' " (*Ciccarelli*, 24 AD3d at 1277). The report of plaintiff's expert engineer was likewise insufficient to defeat defendants' motion because it improperly raised for the first time the allegation that the structure of the step itself was defective (*see Wilson v Prazza*, 306 AD2d 466, 467). Although plaintiff's deposition testimony raises an issue of fact relative to the presence of ice on the step, we conclude that it is insufficient to raise an issue of fact with respect to constructive notice (*see Hyna v Reese*, 52 AD3d 1254, 1255-1256).

Finally, there is no merit to plaintiff's contention that summary judgment is premature because she has not yet deposed defendants' janitorial staff or reviewed defendants' records to identify all employees who were working on the date of the accident. Plaintiff has not presented any evidence tending to show that she requested, and was denied, the opportunity to depose additional employees during the relevant time period, or that she requested, but was not provided, the records sought (*cf. Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637-638; *see generally* CPLR 3212 [f]). Moreover, inasmuch as the accident occurred during business hours, we fail to see how deposing the janitorial staff, which is responsible for maintenance after the bank's business hours and on the weekends, would yield any information that would lead to relevant evidence (*see Peerless Ins. Co. v Micro Fibertek, Inc.*, 67 AD3d 978, 979). There is likewise no basis for plaintiff's assertion that deposing additional employees would reveal pertinent information about the existence of ice on the premises, particularly given that she has already deposed three employees who were working on the date of plaintiff's accident. We thus conclude that "[p]laintiff's 'mere hope or speculation' that further discovery will lead to evidence sufficient to defeat defendant[s'] . . . motion is insufficient to warrant denial thereof" (*Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP*, 87 AD3d 1343, 1345, *lv dismissed* 18 NY3d 975).

All concur except WHALEN, J., who dissents in part and votes to modify in accordance with the following Memorandum: I respectfully dissent in part because I cannot agree with the majority's conclusion that defendants met their burden of establishing on their motion for summary judgment dismissing the complaint that they did not have constructive notice of the alleged icy condition. I would therefore modify the order by denying defendants' motion with respect to constructive notice, and reinstating the complaint to that extent.

We have held that a defendant failed to meet its burden on its motion for summary judgment in slip and fall cases where, as here,

there was no proof when the surface on which the plaintiff fell was last inspected (*see Bailey v Curry*, 1 AD3d 1059, 1059-1060; *Mancini v Quality Mkts.*, 256 AD2d 1177, 1177-1178). Here, as in *Bailey* and *Mancini*, there was deposition testimony that the steps and sidewalk are routinely inspected, but there is no evidence in the record that those inspections occurred on the day of plaintiff's accident, before her fall (*see Bailey*, 1 AD3d at 1059; *Mancini*, 256 AD2d at 1177-1178). Rather, there was only general deposition testimony from bank employees that they did not recall seeing snow or ice on the step in the surrounding area. Given such general deposition testimony, and mindful that discovery has not yet been completed, I disagree with the majority's speculation that affording plaintiff the opportunity to depose defendants' janitorial staff could not lead to any relevant evidence (*see generally* CPLR 3212 [f]). Rather, the deposition testimony of the janitorial staff may reveal when the steps were actually last inspected, as opposed to when defendants believe the steps were last inspected based on routine practices. In support of their motion, defendants submitted photographs taken two hours after the accident that depict salt residue in the area where plaintiff fell. Thus, there is evidence that someone—possibly a member of defendants' janitorial staff—salted the step at some point before plaintiff's fall. If a member of defendants' janitorial staff salted the step the night before plaintiff's fall or before the bank opened on the morning of plaintiff's fall, a trier of fact could infer that defendants should have had notice that the steps were icy at some point before plaintiff's fall, thus raising an issue of fact whether defendants had constructive notice of the alleged icy condition (*see generally id.*; *Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1302

CA 13-00760

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

FREDERICK INGUTTI AND MARY INGUTTI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, DEFENDANT-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (JENNIFER M. SCHWARTZOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas M. Van Strydonck, J.), entered September 18, 2012. The order, among other things, denied the motion of defendant for partial summary judgment seeking dismissal of the first cause of action.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, the motion is granted and the first cause of action is dismissed.

Memorandum: Plaintiffs commenced this negligence and medical malpractice action seeking damages for injuries sustained by Frederick Ingutti (plaintiff) when he left defendant hospital against medical advice and was found approximately two hours later by the police, disoriented and with frostbitten fingers that required partial amputation. We conclude that Supreme Court erred in denying defendant's motion for partial summary judgment seeking dismissal of the first cause of action. In that cause of action, plaintiffs alleged that defendant was negligent in failing to prevent plaintiff from leaving the hospital and in failing to ensure plaintiff's safety when he left the hospital inasmuch as defendant's staff did not contact plaintiff's wife or make arrangements for someone to pick him up. We agree with defendant that, pursuant to *Kowalski v St. Francis Hosp. & Health Ctrs.* (21 NY3d 480, 484-485), which was decided after the court rendered its decision (*see generally Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 191, *rearg denied* 56 NY2d 567, *cert denied* 459 US 837; *Matter of Elsa R. [Gloria R.]*, 101 AD3d 1688, 1688-1689, *lv denied* 20 NY3d 862; *Klepper v Klepper*, 120 AD2d 154, 157), it did not have a duty to prevent plaintiff from leaving the hospital against medical advice. We further agree with defendant that it did not have the concomitant duty to ensure plaintiff's safe return home (*see Kowalski*, 21 NY3d at 484-485).

We disagree with our dissenting colleagues that *Kowalski* does not apply to the facts of this case because plaintiff herein was admitted to the hospital, whereas the plaintiff in *Kowalski* was not. Indeed, we note that the Court began its analysis by stating that "[t]here are surely few principles more basic than that the members of a free society may, with limited exceptions, come and go as they please" (*id.* at 485). The Court also stated that "[t]o restrain plaintiff on these facts would have exposed defendants to liability for false imprisonment" (*id.* at 486). We conclude that those statements also apply to the facts here. Although plaintiff had been admitted to the hospital for medical treatment, there is no statute or principle of common law that would permit the hospital to force plaintiff to remain in the hospital when he decided to leave (*see id.* at 486). We further conclude that the dissent's reliance on *Horton v Niagara Falls Mem. Med. Ctr.* (51 AD2d 152, 154, *lv denied* 39 NY2d 709) and *Papa v Brunswick Gen. Hosp.* (132 AD2d 601, 603) is misplaced inasmuch as the issue in those cases was the scope of a hospital's duty to a patient while the patient was in its care *in the hospital*. Those cases did not hold that the hospital had a duty to prevent the patient from leaving the hospital and, under *Kowalski*, there is no such duty.

All concur except SCONIERS and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent because we cannot agree with the majority's conclusion that *Kowalski v St. Francis Hosp. & Health Ctrs.* (21 NY3d 480, 484-485) compels the award of partial summary judgment dismissing the first of cause of action, for negligence, under the circumstances of this case. Rather, we would conclude that Supreme Court properly denied defendant's motion for partial summary judgment seeking dismissal of the first cause of action.

In *Kowalski*, the Court of Appeals held that defendants did not have a duty to prevent the plaintiff from leaving the defendant hospital's emergency room because Mental Hygiene Law § 22.09 prohibits the involuntary retention of people who come in voluntarily (*see id.* at 485-486), and "there can be no duty to do that which the law forbids" (*id.* at 486). Here, however, Frederick Ingutti (plaintiff) had been admitted to the hospital and was no longer in the emergency room, thus rendering Mental Hygiene Law § 22.09 inapplicable (*see* 14 NYCRR 304.3 [c]). Notably, the Court in *Kowalski* limited its holding to "the facts of this case" (*id.* at 483).

Contrary to the view of the majority, we conclude that, because plaintiff was admitted to the hospital, defendant had the duty "to exercise reasonable care and diligence in safeguarding [plaintiff], measured by the capacity of [plaintiff] to provide for his own safety" (*Horton v Niagara Falls Mem. Med. Ctr.*, 51 AD2d 152, 154, *lv denied* 39 NY2d 709; *see Papa v Brunswick Gen. Hosp.*, 132 AD2d 601, 603). We conclude that there are issues of fact whether defendant failed to meet that duty. Plaintiff was admitted to the hospital for acute pancreatitis, acute alcohol intoxication, alcohol withdrawal, and delirium tremors (DTs). Plaintiff's wife informed the hospital staff that plaintiff had a history of altered mental status during

withdrawal. Indeed, during a stay at the same hospital a year and a half earlier, plaintiff similarly experienced DTs and severe confusion. As a result of his present condition, plaintiff's wife thought that plaintiff might attempt to discharge himself and leave the facility. Plaintiff's wife therefore requested that hospital staff contact her if plaintiff tried to leave, and a nurse manager assured her that she would watch plaintiff and indicate on his chart that he was an escape risk. Although plaintiff filled out a release indicating that he was leaving the hospital against medical advice at 11:00 p.m. on February 6, 2007, he wrote the date as "5-07" and the time as 2:00 p.m., thereby suggesting that he did not know the date or time of day. In addition there was a notation in plaintiff's medical chart that he was "confused with direction." In light of those facts, we cannot conclude that defendant met its burden of establishing that it was not negligent as a matter of law when it failed to prevent plaintiff from leaving the hospital and failed to ensure plaintiff's safety when he left the hospital.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1303

CA 13-00348

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

DAWN CALHOUN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF HERKIMER, HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, HERKIMER COUNTY OFFICE OF EMPLOYMENT AND TRAINING ADMINISTRATION, KARIN ZIPKO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, JEFF WHITTEMORE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, STEVEN BILLINGS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BOSMAN LAW FIRM, L.L.C., ROME (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEMIRE JOHNSON, LLC, MALTA (GREGG T. JOHNSON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered October 30, 2012. The order and judgment, among other things, granted the motion of defendants for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying that part of the motion seeking to dismiss the retaliation claims and reinstating those claims, and as modified the order and judgment is affirmed without costs.

Memorandum: This retaliation action arises from plaintiff's employment with defendant Herkimer County Office of Employment and Training Administration (Employment and Training Office) pursuant to a contract between the Employment and Training Office and a nonprofit service agency. Plaintiff worked for defendant County of Herkimer (County) in the Employment and Training Office for approximately six years. Defendant Steven Billings, who was then the County's Director of Employment and Training, was plaintiff's supervisor. In 2005, Billings's wife (Mrs. Billings), a special education teacher, was assigned to work with plaintiff's son, who had been classified as learning disabled. Beginning in October 2005, plaintiff expressed dissatisfaction with the special education services provided to her son by the school district generally and Mrs. Billings in particular. In March 2006, plaintiff and her husband attended a contentious

meeting at the school with various parties, including Mrs. Billings. According to plaintiff, less than a week after that meeting, Billings advised plaintiff that her contract might not be renewed upon its expiration in April 2006 because of impending federal funding cuts. In a follow-up email to the school principal and a subsequent telephone conference with the principal and Mrs. Billings, plaintiff continued to object to the alleged failure of Mrs. Billings to provide services to plaintiff's son in accordance with his individualized education plan. Shortly thereafter, Billings notified plaintiff that her contract would not be renewed.

Plaintiff subsequently commenced this action alleging, inter alia, that defendants subjected her to unlawful retaliation based upon her advocacy on behalf of her son, alleging violations of, inter alia, the Americans with Disabilities Act (42 USC § 12101 *et seq*.) and the Human Rights Law (Executive Law § 290 *et seq.*). Defendants moved for summary judgment dismissing the amended complaint, and Supreme Court granted the motion. We note at the outset that plaintiff abandoned any claims not related to retaliation by failing to advance any contentions with respect to the merits thereof in her brief on appeal (*see Inter-Community Mem. Hosp. of Newfane v Hamilton Wharton Group, Inc.*, 93 AD3d 1176, 1177; *Davis v School Dist. of City of Niagara Falls*, 4 AD3d 866, 867). We conclude, however, that the court erred in granting that part of the motion with respect to plaintiff's retaliation claims, and we therefore modify the order and judgment accordingly.

In order to make out a claim for unlawful retaliation under state or federal law, a plaintiff must show that "(1) she has engaged in protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 313; *see Adeniran v State of New York*, 106 AD3d 844, 844-845; *see also Treglia v Town of Manlius*, 313 F3d 713, 719).

In order to establish entitlement to summary judgment in a retaliation case, a defendant may "demonstrate that the plaintiff cannot make out a prima facie claim of retaliation" or, alternatively, a defendant may "offer legitimate, nonretaliatory reasons for the challenged actions," and show that there are "no triable issue[s] of fact . . . whether the . . . [reasons are] pretextual" (*Delrio v City of New York*, 91 AD3d 900, 901; *see generally Forrest*, 3 NY3d at 305). Here, although we agree with the court that defendants met their initial burden on the motion under the first of the two tests set forth in *Delrio* by submitting evidence that they were not aware of plaintiff's protected activity and that, in any event, there was no causal connection between her protected activity and the failure to renew her contract (*see Brightman v Prison Health Serv., Inc.*, 108 AD3d 739, 741), we conclude that plaintiff raised an issue of fact with respect to each of those two elements of her prima facie case (*cf. id.* at 742).

With respect to the element of defendants' awareness of plaintiff's protected activity, plaintiff submitted Billings's deposition testimony, in which Billings acknowledged that, during the course of plaintiff's employment, he became aware that plaintiff's son was a student of his wife and that plaintiff was "not happy with things that were happening at the school." Billings further acknowledged that, at some point, he specifically learned that "there was an issue" between plaintiff and his wife concerning plaintiff's son. Plaintiff also submitted her own deposition testimony, in which she testified that, after the dispute with the school escalated, "all of a sudden [Billings] started making little comments" to her that suggested that he had discussed plaintiff's son with his wife. On one occasion, for example, plaintiff told Billings that she had a meeting at the school, and Billings made a comment to the effect of "going up to fight with the school again[?]" or "[g]o get them." Plaintiff's husband similarly testified at his deposition that, after the March 2006 meeting at the school, Billings became "very hostile" toward him and told him that, "by pursuing this, [plaintiff] made it really uncomfortable for [Billings's] wife." We thus conclude that plaintiff set forth sufficient circumstantial evidence from which a trier of fact could reasonably infer that Billings was aware of plaintiff's advocacy on behalf of her son (*see generally Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117).

With respect to the element of a causal connection, we note that such element "may be established either '*indirectly* by showing that the protected activity was followed closely by [retaliatory] treatment, . . . or *directly* through evidence of retaliatory animus directed against a plaintiff by the defendant' " (*Johnson v Palma*, 931 F2d 203, 207, quoting *DeCintio v Westchester County Med. Ctr.*, 821 F2d 111, 115, *cert denied* 484 US 965; *see Gordon*, 232 F3d at 117; *Sumner v U.S. Postal Serv.*, 899 F2d 203, 209). Here, plaintiff's submissions raise an issue of fact relative to causal connection both indirectly and directly. Plaintiff established a causal connection indirectly by submitting evidence that her protected activity was followed closely, i.e., within a few days or weeks, by Billings's decision to terminate her contract, thus raising an issue of fact based upon temporal proximity (*see Cioffi v Averill Park Cent. Sch. Dist. Bd. of Ed.*, 444 F3d 158, 168, *cert denied* 549 US 953; *cf. Matter of Pace Univ. v New York City Commn. on Human Rights*, 85 NY2d 125, 129). In addition, plaintiff established a causal connection directly by submitting evidence of retaliatory animus on the part of Billings through her own testimony and that of her husband (*see DeCintio*, 821 F2d at 115).

Defendants also established their entitlement to summary judgment under the second of the two tests set forth in *Delrio*, by articulating legitimate, nonretaliatory reasons for the challenged employment action. The burden thereby shifted to plaintiff to produce evidence that the reasons put forth by defendants were merely pretextual or that, "regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive" (*Brightman*, 108 AD3d at 741; *see Treglia*, 313 F3d at 721; *Johnson*, 931 F2d at 207; *see generally Gordon*, 232 F3d at 118; *Sumner*,

899 F2d at 208-209). Viewing the evidence in the light most favorable to the plaintiff, as we must, we conclude that "a reasonable jury could find that the [nonretaliatory] reasons given by [defendants] were pretextual explanations meant to hide [their] unlawful motive" (*Treglia*, 313 F3d at 721; *see Cioffi*, 444 F3d at 168). Although defendants assert that they did not renew plaintiff's contract for financial reasons, i.e., anticipated federal budget cuts, plaintiff presented evidence that her position was funded in substantial part by defendant Herkimer County Department of Social Services, which did not reduce its funding for the position; that the actual funding cuts were much lower than anticipated, i.e., 14% compared to 28%; and that she was the only person affected by the funding cuts. Even if the loss of federal funding were one of the reasons for the decision not to renew plaintiff's contract, we conclude that the timing and circumstances of the nonrenewal suggest that impermissible retaliation may have played a part in the decision (*see Gordon*, 232 F3d at 117-118; *Sumner*, 899 F2d at 208-209; *Brightman*, 108 AD3d at 741). Although the possibility of federal funding cuts loomed as early as January 2006, plaintiff testified that Billings had always assured her that, if funding were lost, the County would find a place for her. It was not until shortly after the situation at the school escalated in March 2006 that Billings informed plaintiff that her contract might not be renewed. Billings ultimately advised plaintiff that her contract had been terminated shortly after she participated in a tense telephone conference with Mrs. Billings and the school principal. We thus conclude that plaintiff set forth sufficient evidence of pretext or mixed motives to survive defendants' motion for summary judgment (*see Sandiford v City of N.Y. Dept. of Educ.*, 22 NY3d 914, 916), and that "[i]t is the province of a jury to weigh the evidence, assess credibility, and ultimately determine whether defendants' actions were retaliatory" (*Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 529).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1310

KA 12-01342

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHELE A. CASE, ALSO KNOWN AS MICHELE CASE, ALSO KNOWN AS MICHELLE A. CASE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 22, 2012. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of grand larceny in the third degree (Penal Law § 155.35 [1]) pursuant to a theory of larceny by false pretense. The charge arose from defendant's alleged submission to her employer of time sheets and mileage vouchers that inflated the amount of compensation to which she was entitled. 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).

Defendant failed to preserve for our review her contention that County Court erred in admitting certain documents in evidence (*see* CPL 470.05 [2]). We exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), however, and we conclude that the error in the admission of exhibits 1 through 7 (summary exhibits) deprived defendant of a fair trial. We therefore reverse the judgment of conviction and grant a new trial. We conclude that the summary exhibits were improperly admitted under the voluminous writings exception to the best evidence rule inasmuch as defendant was not provided with the data underlying those exhibits prior to trial (*cf. People v Ash*, 71 AD3d 688, 689, *lv denied* 14 NY3d 885; *People v Weinberg*, 183 AD2d 932, 934, *lv denied* 80 NY2d 977; *see generally Ed Guth Realty v Gingold*, 34 NY2d 440, 452),

nor were those exhibits based solely upon information already in evidence (*cf. People v Potter*, 255 AD2d 763, 767; *People v Ferraioli*, 101 AD2d 629, 630-631). Defendant was thus denied "a full and fair opportunity" to challenge the accuracy of the summary exhibits (*Weinberg*, 183 AD2d at 934). Because the evidence against defendant is not overwhelming, the error in admitting those exhibits is not harmless (*see People v Santiago*, 17 NY3d 661, 673-674; *People v Williams*, 101 AD3d 1728, 1729, *lv denied* 21 NY3d 1021). We note, however, that we reject that part of defendant's contention concerning the court's alleged error in admitting exhibit 10 in evidence. Contrary to defendant's contention, the People provided a sufficient foundation for the admission of that exhibit, which consisted of computer printouts of data recorded in the medical records database maintained by defendant's employer (*see generally People v Cratsley*, 86 NY2d 81, 89).

We further agree with defendant that she was denied effective assistance of counsel based upon defense counsel's failure to review the summary exhibits or object to their admission in evidence (*see generally People v Benevento*, 91 NY2d 708, 712-713), and thus a new trial is warranted on that ground as well. Although "[i]solated errors in counsel's representation generally will not rise to the level of ineffectiveness" (*People v Henry*, 95 NY2d 563, 565-566), here defense counsel's failures were "so serious, and resulted in such prejudice to the defendant, that [s]he was denied a fair trial thereby" (*People v Alford*, 33 AD3d 1014, 1016; *see People v Turner*, 5 NY3d 476, 480-481).

In view of our decision, we do not address defendant's remaining contention.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1334

KA 12-00042

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOEL A. LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered December 1, 2011. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant was convicted upon a plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), and was sentenced to a determinate term of incarceration of seven years with five years of postrelease supervision. He was also ordered to pay restitution in the amount of $1,102.50. On defendant's appeal from that judgment of conviction, we modified the judgment by vacating the sentence on the grounds that restitution had not been part of the plea agreement and that "the record [was] devoid of any evidence supporting the amount of restitution that defendant was required to pay" (*People v Lewis*, 89 AD3d 1485, 1486). We remitted the matter to County Court "to impose the sentence promised or to afford defendant the opportunity to move to withdraw his plea" (*id.*).

On remittal, the court afforded defendant the opportunity to withdraw his guilty plea, which he declined to do. Rather, defendant advised the court that he was "choosing to be sentenced to the sentence promised," which did not include restitution. The court, however, determined that it could not impose the sentence promised at the time that the plea was entered because the People had requested restitution, which they were entitled to do "at or before the time of sentencing" (Penal Law § 60.27 [1]; *see People v Naumowicz*, 76 AD3d 747, 749; *see generally People v Horne*, 97 NY2d 404, 410-412). The court therefore vacated defendant's plea over his objection. After conferring with defense counsel, defendant again pleaded guilty to burglary in the second degree in exchange for the previously agreed-

upon sentence, i.e., a determinate term of incarceration of seven years and five years of postrelease supervision, but with the addition of restitution in the amount of $1,102.50.

On appeal from the ensuing judgment of conviction, defendant contends that his guilty plea was not knowingly, voluntarily, and intelligently entered. That contention is unpreserved for our review inasmuch as defendant did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lugg*, 108 AD3d 1074, 1075; *People v Sherman*, 8 AD3d 1026, 1026, *lv denied* 3 NY3d 681). In any event, it is without merit. The record establishes that defendant's plea was knowingly, voluntarily, and intelligently entered even though some of defendant's responses to the court's inquiries were monosyllabic (*see People v VanDeViver*, 56 AD3d 1118, 1118, *lv denied* 11 NY3d 931, *reconsideration denied* 12 NY3d 788; *cf. People v Brown*, 41 AD3d 1234, 1234, *lv denied* 9 NY3d 873), and further establishes that " 'defendant was rational and coherent during the entire plea proceeding' " (*VanDeViver*, 56 AD3d at 1118; *see generally People v Knoxsah*, 94 AD3d 1505, 1505-1506).

Defendant's challenge to the amount of restitution is likewise unpreserved for our review inasmuch as he "did not request a hearing to determine the [amount of restitution] or otherwise challenge the amount of restitution order[ed] during the sentencing proceeding" (*People v Jones*, 108 AD3d 1206, 1207 [internal quotation marks omitted]; *see People v Aucter*, 85 AD3d 1551, 1552, *lv denied* 18 NY3d 922). Indeed, defendant expressly consented to the amount of restitution twice during the plea colloquy (*see People v Brown*, 70 AD3d 1378, 1379; *People v McElrath*, 241 AD2d 932, 932). We further note that the present record contains evidence supporting the amount of restitution ordered, i.e., a victim impact statement included in the presentence report, and supporting documentation from the victims' insurance carrier (*see People v LaVilla*, 87 AD3d 1369, 1370; *McElrath*, 241 AD2d at 932; *cf. Lewis*, 89 AD3d at 1485). We therefore see no basis to disturb the amount of restitution ordered.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1346

KA 12-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELLIOTT I. JAMES, ALSO KNOWN AS PIG,
DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Cattaraugus County Court (Larry M. Himelein, J.), rendered April 9, 2012. Defendant was resentenced upon his conviction of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the resentence so appealed from is unanimously vacated on the law and the matter is remitted to Cattaraugus County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a resentence imposed upon his conviction of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). On appeal, defendant contends that County Court erred in denying his request to redact the presentence report to correct alleged inaccuracies therein, and in failing to conduct a conference or summary hearing to address the alleged inaccuracies. Specifically, defendant contends that the presentence report contained errors with respect to his criminal history. In addition, he contends that the presentence report erroneously included statements that he has a history of assault toward women and that he is at the highest possible risk for violent recidivism, when in fact his criminal history does not contain any convictions based on violent crimes. " 'If the investigation report contains incorrect information, [defendant] should object at sentencing to the inclusion of the erroneous information and move to strike it . . . The court may conduct a conference or a summary hearing to resolve discrepancies in sentencing information' " (*People v Boice*, 6 Misc 3d 1014[A], 2004 NY Slip Op 51788[U], *4-5). When defendant herein objected to the contents of the presentence report and sought redaction, the court stated that it did not know the procedure by which to correct the information. We thus conclude that defendant was not properly afforded an opportunity to challenge the contents of the presentence report (*cf. People v Thomas*, 2 AD3d 982,

984, *lv denied* 1 NY3d 602). We therefore vacate the resentence and remit the matter to County Court for further proceedings in accordance with our decision.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1361.1

CA 13-00041

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

FIVE STAR BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARK LEWANDOWSKI, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

WESTERN NEW YORK LAW CENTER, BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (F. MICHAEL OSTRANDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered April 13, 2012. The order denied the application of defendant Mark Lewandowski for a residential foreclosure settlement conference and directed that plaintiff may proceed with this foreclosure action.

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

Memorandum: Defendant Mark Lewandowski appeals from an order that denied his application for a residential foreclosure settlement conference pursuant to CPLR 3408 and allowed plaintiff to proceed with this foreclosure action. It is undisputed, however, that the mortgage has now been foreclosed and the property has since been sold to a third-party buyer. Thus, as a result of the sale, this appeal has been rendered moot inasmuch as no purpose would be served by a settlement conference at this time (*see generally Homeowners Assn. of Victoria Woods, III v Incarnato*, 4 AD3d 814, 815).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1375

CA 13-00784

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

TAUSHIEYA KEENE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE MARKETPLACE AND WILMORITE MANAGEMENT GROUP, LLC, DEFENDANTS-RESPONDENTS.

PARISI & BELLAVIA, LLP, ROCHESTER (TIMOTHY C. BELLAVIA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered February 13, 2013 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on the issue of liability and granted 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 denying that part of the motion of defendants The Marketplace and Wilmorite Management Group, LLC with respect to the first cause of action and reinstating the complaint to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when a mirror fell from a wall in vacant retail space in the Marketplace Mall, where plaintiff was working at a blood drive. Defendant The Marketplace owned the property, and defendant Wilmorite Management Group, LLC managed the property (collectively, defendants). The retail space was previously occupied by a Bath & Body Works store (BBW), and mirrors had been installed along the walls in 1993 by a contractor employed by BBW. The retail space was "debranded" by BBW and turned over to The Marketplace in June 2006, and plaintiff was injured in August 2006. Plaintiff appeals from an order denying her motion seeking partial summary judgment on the issue of liability and granting defendants' motion seeking summary judgment dismissing the complaint.

As a preliminary matter, we conclude that Supreme Court properly denied plaintiff's motion seeking partial summary judgment on the issue of liability inasmuch as she failed to establish her entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude that the court properly

granted that part of defendant's motion seeking to dismiss the second cause of action alleging res ipsa loquitur inasmuch as res ipsa loquitur is an evidentiary doctrine, rather than a cause of action (*see Abbott v Page Airways*, 23 NY2d 502, 512; *Herbst v Lakewood Shores Condominium Assn.*, 112 AD3d 1373, 1374). To the extent that the second cause of action, as amplified by the bill of particulars, may be read to allege common-law negligence, we conclude that the court properly determined that defendants met their burden on their motion by establishing that they did not have exclusive control of the mirror, i.e., one of the necessary conditions for the applicability of the doctrine of res ipsa loquitur, and that plaintiff failed to raise an issue of fact (*cf. Herbst*, 112 AD3d at 1374; *see generally Zuckerman*, 49 NY2d at 562).

We agree with plaintiff, however, that the court erred in granting that part of defendants' motion with respect to the first cause of action, which alleges, inter alia, that defendants had constructive notice of the dangerous condition of the unsecured mirror. We therefore modify the order accordingly. It is well established that "[a] landowner is liable for a dangerous or defective condition on [its] property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Anderson v Weinberg*, 70 AD3d 1438, 1439). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837). Here, defendants established that when the mirrors were installed in the retail space in 1993 they were secured with a substance called "mirror mastic," and that shelves and brackets were installed in front of the mirrors to prevent them from falling. Defendants' agents walked through the retail space after BBW vacated it and again prior to the blood drive and, although the shelves and brackets had been removed, they did not observe that any mirrors were not securely attached to the wall. We therefore conclude that defendants met their burden of establishing that they lacked constructive notice of a dangerous condition. We further conclude, however, that plaintiff raised an issue of fact in opposition to defendants' motion. Plaintiff submitted evidence establishing that the mirror that fell and struck her had duct tape across the top of it, and she also submitted the deposition testimony of her coworker, who testified that she had observed two other mirrors that were "leaning" and had folded masking tape affixed on the back. Viewing that evidence in the light most favorable to plaintiff (*see Esposito v Wright*, 28 AD3d 1142, 1143), we conclude that there is an issue of fact whether defendants had constructive notice of the dangerous condition presented by the unsecured mirror (*see generally Zuckerman*, 49 NY2d at 562).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1380

CA 13-00642

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

IRA HALFOND, ARTHUR T. LYNCH, SANDRA KNOBLOCK, PAUL J. BULINSKI, JOHN J. GRECO AND DONNA M. LAWRENCE, ADJACENT UPLAND LAND OWNERS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WHITE LAKE SHORES ASSOCIATION, INC., DEFENDANT-APPELLANT. (APPEAL NO. 1.)

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF IRA HALFOND, P.C., CRARYVILLE (IRA HALFOND OF COUNSEL), PLAINTIFF-RESPONDENT PRO SE, AND FOR ARTHUR T. LYNCH, SANDRA KNOBLOCK, PAUL J. BULINSKI, JOHN J. GRECO AND DONNA M. LAWRENCE, ADJACENT UPLAND LAND OWNERS, PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered July 9, 2012. The order, inter alia, granted that part of the motion of plaintiffs for an order adjudging defendant in contempt for violating orders from 1981 and 1982; granted the cross motion of plaintiffs seeking summary judgment on the complaint and seeking dismissal of the counterclaims; and denied the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' motion in its entirety and vacating the first and second ordering paragraphs, and denying that part of plaintiffs' cross motion seeking summary judgment, and plaintiffs are directed to join as parties Forestville Fire Fighters, Inc. and Woodgate Volunteer Fire Department, Inc., and as modified the order is affirmed without costs.

Memorandum: Defendant owns a parcel of vacant land situated in Oneida County between White Lake and Route 28 that includes an area known as Beach A. Plaintiffs own property within a 400-acre tract adjacent to White Lake. By virtue of certain covenants, restrictions, and easements running in their favor, plaintiffs enjoy rights of access to White Lake over Beach A. Plaintiffs commenced the instant action after defendant erected a structure on Beach A. Plaintiffs alleged, inter alia, that the structure violates covenants prohibiting

the erection or maintenance of a fence without their written consent, and the obstruction of any established roads or trails without their permission. Plaintiffs further alleged that the structure violates their rights of access to White Lake over Beach A. According to defendant, it erected a gate, not a fence, on Beach A, and it denied that the gate obstructs any roads or trails or impairs plaintiffs' rights of access to White Lake.

In appeal No. 1, defendant appeals from an order that, inter alia, granted that part of plaintiffs' motion seeking an order adjudging defendant in contempt for violating orders from 1981 and 1982 concerning Beach A; granted plaintiffs' cross motion seeking summary judgment on the causes of action in the complaint and, specifically, removal of the structure, and seeking dismissal of defendant's counterclaims; and denied defendant's cross motion seeking summary judgment dismissing the complaint. In appeal No. 2, defendant appeals from a judgment awarding attorney fees and expenses to plaintiffs.

We reject defendant's contention in appeal No. 1 that Supreme Court erred in denying its cross motion inasmuch as we conclude that defendant failed to establish its entitlement to judgment as a matter of law (*see generally* CPLR 3212 [b]). We agree with defendant, however, that the court erred in granting that part of plaintiffs' motion seeking an order adjudging defendant in contempt of the 1981 and 1982 orders. We therefore modify the order in appeal No. 1 accordingly. "To succeed on a motion to punish for civil contempt, the moving party must show that the alleged contemnor violated a clear and unequivocal court order and that the violation prejudiced a right of a party to the litigation" (*Giano v Ioannou*, 41 AD3d 427, 427; *see* Judiciary Law § 753 [A] [3]). "Contempt should not be granted unless the order or judgment allegedly violated is clear and explicit and unless the act complained of is clearly proscribed" (*Aison v Hudson Riv. Black Riv. Regulating Dist.*, 54 AD3d 457, 458). Here, neither of the prior orders contains a clear mandate proscribing the erection of the structure at issue, and plaintiffs failed to establish that defendant's conduct prejudiced their rights (*see Ketchum v Edwards*, 153 NY 534, 539-540). In view of that determination, we further conclude that the court erred in granting that part of plaintiffs' cross motion seeking summary judgment on the third cause of action, which alleges that defendant is in violation of the 1981 and 1982 orders. We therefore further modify the order in appeal No. 1 accordingly. Inasmuch as the court's finding of contempt is erroneous, we conclude that plaintiffs are not entitled to attorney fees flowing from defendant's allegedly contemptuous conduct, and we therefore vacate the judgment in appeal No. 2 awarding such fees (*see Moore v Davidson*, 57 AD3d 862, 863).

We further agree with defendant in appeal No. 1 that the court erred in granting that part of plaintiffs' cross motion seeking summary judgment on the first cause of action, which alleges that defendant violated the covenants prohibiting erection and maintenance of a fence and obstruction of established roads or trails, and the

second cause of action, which alleges that defendant interfered with plaintiffs' rights of access to White Lake. The law favors the free and unrestricted use of real property, and therefore covenants restricting such use are strictly construed against those seeking to enforce them (*see Huggins v Castle Estates*, 36 NY2d 427, 430; *Ludwig v Chautauqua Shore Improvement Assn.*, 5 AD3d 1119, 1120, *lv denied* 3 NY3d 601). Plaintiffs, as the parties seeking to enforce the covenants at issue, were required to "prove, by clear and convincing evidence, the scope . . . of the restriction" (*Greek Peak v Grodner*, 75 NY2d 981, 982). In addition, "where the language used in a restrictive covenant is equally susceptible of two interpretations, the less restrictive interpretation must be adopted" (*Ludwig*, 5 AD3d at 1120). Viewing the language of the covenants in light of those rules, we conclude that plaintiffs failed to establish that the structure erected by defendant violates the covenant prohibiting erection or maintenance of a fence (*see generally Huggins*, 36 NY2d at 430; *Liebowitz v Forman*, 22 AD3d 530, 531). We further conclude that plaintiffs failed to establish that the structure violates the covenant prohibiting the obstruction of established trails or roads or otherwise interferes with plaintiffs' rights of access to White Lake (*see Sargent v Brunner Housing Corp.*, 31 AD2d 823, 823-824, *affd* 27 NY2d 513; *Mester v Roman*, 25 AD3d 907, 908; *see generally Lewis v Young*, 92 NY2d 443, 449-450). Rather, triable issues of fact remain whether the covenants at issue were intended to prohibit the structure in question and thus whether defendant violated those covenants (*see Brill v Brill*, 108 NY 511, 516; *Birch Tree Partners, LLC v Windsor Digital Studio, LLC*, 95 AD3d 1154, 1156; *Melrose Waterway v Peacock*, 229 AD2d 1000, 1001). We therefore further modify the order in appeal No. 1 accordingly.

We agree with defendant with respect to appeal No. 1 that Forestport Firefighters, Inc. (Forestport) and Woodgate Volunteer Fire Department, Inc. are necessary parties to this action by virtue of the easement across Beach A that was granted to Forestport for firefighting purposes in the 1982 order (*see* CPLR 1001 [a]; *Loree v Barnes*, 59 AD3d 965, 965; *Hitchcock v Boyack*, 256 AD2d 842, 844). We therefore further modify the order in appeal No. 1 by directing plaintiffs to join those parties to this action (*see Sorbello v Birchez Assoc., LLC*, 61 AD3d 1225, 1226; *Dunkin Donuts of N.Y., Inc. v Mid-Valley Oil Co.*, 14 AD3d 590, 592). Finally, we note that defendant raises no contentions in its brief concerning that part of the order granting plaintiffs' cross motion to the extent that it sought dismissal of the counterclaims, and thus defendant has abandoned any such contentions (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

1381

CA 13-00644

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

IRA HALFOND, ARTHUR T. LYNCH, SANDRA KNOBLOCK, PAUL J. BULINSKI, JOHN J. GRECO AND DONNA M. LAWRENCE, ADJACENT UPLAND LAND OWNERS, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WHITE LAKE SHORES ASSOCIATION, INC., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

GORMAN, WASZKIEWICZ, GORMAN & SCHMITT, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAW OFFICES OF IRA HALFOND, P.C., CRARYVILLE (IRA HALFOND OF COUNSEL), PLAINTIFF-RESPONDENT PRO SE, AND FOR ARTHUR T. LYNCH, SANDRA KNOBLOCK, PAUL J. BULINSKI, JOHN J. GRECO AND DONNA M. LAWRENCE, ADJACENT UPLAND LAND OWNERS, PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 29, 2012. The judgment awarded attorney fees and expenses to plaintiffs.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated on the law without costs.

Same Memorandum as in *Halfond v White Lake Shores Assoc., Inc.* ([appeal No. 1] ___ AD3d ___ [Feb. 14, 2014]).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

4

KA 10-01466

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MIZRAIN TRINIDAD-AYALA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered July 7, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant that his waiver of the right to appeal is not valid. During the plea colloquy, County Court informed defendant that, if he did not sign a written waiver of the right to appeal, it would not be bound to honor the sentence promise of 15 years. Inasmuch as the maximum sentence defendant faced was 25 years, we conclude that the court thereby implicitly threatened a penalty of 10 years of additional incarceration in the event that defendant did not sign the waiver. That language rendered the court's colloquy concerning the waiver impermissibly coercive (*see generally People v Fisher*, 70 AD3d 114, 117-118). Although defendant's contention with respect to the severity of the sentence therefore is not encompassed by the invalid waiver, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

9

KA 10-01372

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAYSON M. KELLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 3, 2010. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Onondaga County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [2]) and robbery in the first degree (§ 160.15 [3]). Pursuant to the terms of the plea agreement, County Court imposed concurrent, determinate terms of incarceration of 20 years. Defendant contends that the court erred in denying his motion to withdraw his guilty plea on the ground that it was coerced by the court's statements concerning the potential terms of incarceration in the event that he was convicted following a trial. We agree with defendant that "the court's statements do not amount to a description of the range of potential sentences but, rather, they constitute impermissible coercion, 'rendering the plea involuntary and requiring its vacatur' " (*People v Flinn*, 60 AD3d 1304, 1305; *see People v Fanini*, 222 AD2d 1111, 1111). In light of our decision, we do not address defendant's remaining contentions.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

14

CA 13-00406

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

GEOFFREY BOND AND SALLY T. BOOTEY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THOMAS A. TURNER, MICHELLE M. TURNER,
DEFENDANTS-APPELLANTS,
AND VILLAGE OF LAKEWOOD, DEFENDANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

GOODELL & RANKIN, JAMESTOWN (ANDREW W. GOODELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Chautauqua County (Timothy J. Walker, A.J.), entered July 26, 2012. The judgment, inter alia, directed defendants Thomas A. Turner and Michelle M. Turner to remove certain improvements from a right-of-way and awarded money damages to plaintiff Sally T. Bootey.

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

Memorandum: This Court issued an order on a prior appeal in this case (*Bond v Turner*, 78 AD3d 1490, *rearg denied* 81 AD3d 1387), and Thomas A. Turner and Michelle M. Turner (defendants) now appeal from the ensuing judgment issued by Supreme Court. Defendants simultaneously moved in the Court of Appeals for leave to appeal from the judgment, which would bring up for review our nonfinal order on the prior appeal, and the Court of Appeals dismissed the motion for leave to appeal "upon the ground that simultaneous appeals do not lie to both the Appellate Division and the Court of Appeals" (20 NY3d 904, 904). The Court of Appeals thereafter denied defendants' application for leave to reargue that motion (20 NY3d 1021). Defendants fail to raise any challenge to the judgment, however, and contend only that this Court erred with respect to our order in the prior appeal. Thus, defendants are in effect *again* moving for leave to reargue with respect to the prior order by which they were aggrieved (*see Bond*, 78 AD3d 1490, *rearg denied* 81 AD3d 1387), inasmuch as they are not further aggrieved by the judgment (*see generally Utility Servs.*

Contr., Inc. v Monroe County Water Auth., 90 AD3d 1661, 1663, *lv denied* 19 NY3d 803). We therefore dismiss defendants' appeal from the judgment (*see* CPLR 5511).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

15

CA 13-01326

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

IN THE MATTER OF THE APPLICATION OF ERIC WEYAND, PETITIONER-RESPONDENT, FOR JUDICIAL DISSOLUTION OF TRIPLE H RANCH, INC., RESPONDENT-APPELLANT, ET AL., RESPONDENT.

ORDER

KEYSER, MALONEY & WINNER, LLP, ELMIRA (GEORGE H. WINNER, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT.

BRIAN C. SCHU, HORNELL, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered October 5, 2012. The order granted the petition for judicial dissolution of respondent Triple H Ranch, Inc.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on January 16, 2014,

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

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

22

KA 12-02151

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAYSON M. CONNOLLY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 5, 2012. The judgment convicted defendant, upon his plea of guilty, of falsifying business records in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of falsifying business records in the first degree (Penal Law § 175.10). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

24

KA 12-00040

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAUN BLACK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered November 16, 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: 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]). We reject defendant's contention that the evidence is legally insufficient to establish that he constructively possessed the weapon. Where, as here, "there is no evidence that defendant actually possessed the [weapon], 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* § 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 the subject weapon (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was deprived of a fair trial by prosecutorial misconduct based on two comments made by the prosecutor on summation. When defendant objected to the first comment, Supreme Court gave a curative instruction and then overruled the objection. Defendant did not thereafter request a further curative instruction or move for a mistrial. Under those

circumstances, defendant's contention with respect to the prosecutor's first comment is properly before us only insofar as his objection was overruled because " 'the curative instruction[] [would] be deemed to have corrected the error to the defendant's satisfaction' " (*People v Lane*, 106 AD3d 1478, 1480-1481, *lv denied* 21 NY3d 1043). Defendant did not object to the second comment, however, and thus that part of his contention is unpreserved for our review (*see People v Young*, 100 AD3d 1427, 1428, *lv denied* 20 NY3d 1105; *see also* CPL 470.05 [2]). In any event, we conclude that reversal is not required based upon those two instances of alleged misconduct (*see People v Sweeney*, 15 AD3d 917, 917, *lv denied* 4 NY3d 891; *see generally People v Galloway*, 54 NY2d 396, 401). Finally, the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

33

CA 12-02398

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NICHOLAS GIANGUALANO, MARY ANN ALLAN,
RICHARD S. ALLAN, GARY L. ALLAN, KENNETH N.
ALLAN, JEFFREY R. ALLAN AND ELIZABETH E.
CHAIRES, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

JAY B. BIRNBAUM AND ILENE L. FLAUM, AS
CO-TRUSTEES OF TRUST “B” UNDER THE LAST WILL
AND TESTAMENT OF BERNARD B. BIRNBAUM, DECEASED,
RESPONDENTS-APPELLANTS.
(ACTION NO. 1.)

IN THE MATTER OF THE APPLICATION OF JAY B.
BIRNBAUM AND ILENE L. FLAUM, AS CO-TRUSTEES OF
TRUST “B” UNDER THE LAST WILL AND TESTAMENT OF
BERNARD B. BIRNBAUM, DECEASED,
PETITIONERS-APPELLANTS,

V

NICHOLAS GIANGUALANO, MARY ANN ALLAN, RICHARD S.
ALLAN, GARY L. ALLAN, KENNETH N. ALLAN, JEFFREY R.
ALLAN AND ELIZABETH E. CHAIRES,
RESPONDENTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 1.)

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), AND BOND, SCHOENECK & KING, PLLC, ROCHESTER, FOR RESPONDENTS-APPELLANTS AND PETITIONERS-APPELLANTS.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), ATTEA & ATTEA, NORTH BOSTON, AND FREID AND KLAWON, WILLIAMSVILLE, FOR PETITIONERS-RESPONDENTS AND RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered September 28, 2012. The order, among other things, granted petitioner-respondent Nicholas Giangualano’s motion to consolidate the proceeding commenced by petitioners-respondents in Supreme Court, Erie County with the proceeding commenced by respondents-petitioners in Surrogate’s Court, Monroe County.

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

Memorandum: In appeal No. 1, respondents-petitioners (respondents) appeal from an order granting the motion of petitioner-respondent Nicholas Giangualano (petitioner) to consolidate this proceeding, commenced by petitioners-respondents (petitioners) in Supreme Court, Erie County (Supreme Court), to compel arbitration pursuant to CPLR article 75, with a proceeding commenced by respondents in Surrogate's Court, Monroe County (Surrogate's Court), and denying respondents' cross motion to consolidate the proceedings in Surrogate's Court. In appeal No. 2, respondents appeal from an order that denied their motion for leave to reargue and renew their cross motion to consolidate the proceedings in Surrogate's Court. The appeal from the order in appeal No. 2 insofar as it denied that part of respondents' motion seeking leave to reargue must be dismissed because no appeal lies from an order denying leave to reargue (*see Hill v Milan*, 89 AD3d 1458, 1458). Although the appeal from the order in appeal No. 2, insofar as it denied that part of respondents' motion seeking leave to renew, is properly before us (*see Kirchmeyer v Subramanian*, 167 AD2d 851, 851), respondents fail to raise any issues in their brief with respect to that order. We therefore deem abandoned any contentions with respect that appeal (*see New York Cent. Mut. Fire Ins. Co. v Glider Oil Co., Inc.*, 90 AD3d 1638, 1640; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Respondents contend in appeal No. 1 that the court erred in consolidating the proceedings in Supreme Court because Surrogate's Court has "preferred jurisdiction" over the parties' disputes inasmuch as they involve a testamentary trust that arose out of an estate probated by the Surrogate. We reject that contention.

The relevant legal principles are well settled. Actions may be consolidated when they involve "a common question of law or fact" (CPLR 602 [a]). "Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court" (CPLR 602 [b]). "A motion to consolidate is directed to the sound discretion of the court, and the court is afforded wide latitude in the exercise thereof" (*Flower City Interiors v Rochester Gen. Hosp.*, 184 AD2d 998, 999). A party opposing consolidation of actions that involve common questions of law or fact must "demonstrate prejudice to a substantial right" (*Arnheim v Prozeralik*, 191 AD2d 1026, 1026).

Here, respondents failed to demonstrate substantial prejudice arising from consolidation of the proceedings in Supreme Court. Although respondents reside in Monroe County, we conclude that it will not be unduly burdensome for them to travel to Erie County for trial. We note that the parties' disputes relate to real property located in Erie County, respondents have counsel with an office in Erie County, and respondents initially consented to jurisdiction in Supreme Court. Under the circumstances, it cannot be said that the court abused its discretion in granting petitioner's motion for consolidation.

Although respondents concede that Supreme Court and Surrogate's Court have concurrent jurisdiction over the proceedings, they nevertheless contend in appeal No. 1 that Surrogate's Court has preferred jurisdiction because, " '[w]herever possible, all litigation involving the property and funds of a decedent's estate should be disposed of in the Surrogate's Court' " (*Cipo v Van Blerkom*, 28 AD3d 602, 602; *see Nichols v Kruger*, 113 AD2d 878, 878-879; *Hollander v Hollander*, 42 AD2d 701, 701). We reject that contention as well. The prior involvement of the Surrogate occurred decades ago, when the original tenant of the subject real property died. At that time, the Surrogate probated the original tenant's will and disposed of all property and funds of the estate. The current disputes—regarding the value of the subject real property and whether petitioners are entitled to an award of back rent against respondents—are only tangentially related to the administration of the trust set up by the original tenant's will. Moreover, resolution of the parties' disputes does not require the interpretation of the trust documents; instead, the disputes concern an interpretation of the parties' lease and Stand Still Agreement. We thus conclude that Supreme Court properly denied respondents' cross motion to consolidate the proceedings in Surrogate's Court.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

34

CA 13-00360

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NICHOLAS GIANGUALANO, MARY ANN ALLAN,
RICHARD S. ALLAN, GARY L. ALLAN, KENNETH N.
ALLAN, JEFFREY R. ALLAN AND ELIZABETH E.
CHAIRES, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

JAY B. BIRNBAUM AND ILENE L. FLAUM, AS
CO-TRUSTEES OF TRUST "B" UNDER THE LAST WILL
AND TESTAMENT OF BERNARD B. BIRNBAUM, DECEASED,
RESPONDENTS-APPELLANTS.
(ACTION NO. 1.)

IN THE MATTER OF THE APPLICATION OF JAY B.
BIRNBAUM AND ILENE L. FLAUM, AS CO-TRUSTEES OF
TRUST "B" UNDER THE LAST WILL AND TESTAMENT OF
BERNARD B. BIRNBAUM, DECEASED,
PETITIONERS-APPELLANTS,

V

NICHOLAS GIANGUALANO, MARY ANN ALLAN, RICHARD S.
ALLAN, GARY L. ALLAN, KENNETH N. ALLAN, JEFFREY R.
ALLAN AND ELIZABETH E. CHAIRES,
RESPONDENTS-RESPONDENTS.
(ACTION NO. 2.)
(APPEAL NO. 2.)

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (DENNIS C. VACCO OF COUNSEL), AND BOND, SCHOENECK & KING, PLLC, ROCHESTER, FOR RESPONDENTS-APPELLANTS AND PETITIONERS-APPELLANTS.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), ATTEA & ATTEA, NORTH BOSTON, AND FREID AND KLAWON, WILLIAMSVILLE, FOR PETITIONERS-RESPONDENTS AND RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 6, 2013. The order denied the motion of respondents-petitioners for leave to reargue and renew their cross motion to consolidate certain proceedings in Surrogate's Court, Monroe County.

It is hereby ORDERED that said appeal from the order insofar as

it denied leave to reargue is unanimously dismissed, and the order is affirmed without costs.

Same Memorandum as in *Matter of Giangualano v Birnbaum* ([appeal No. 1] ___ AD3d ___ [Feb. 14, 2014]).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

38

CA 12-02233

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

IN THE MATTER OF THE ESTATE OF STANLEY A. WAGNER, DECEASED.

JAAN AARISMAA, IV, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

JOHN L. WAGNER, AS EXECUTOR OF THE ESTATE OF STANLEY A. WAGNER, DECEASED, RESPONDENT-RESPONDENT.

JAAN AARISMAA, IV, PETITIONER-APPELLANT PRO SE.

HARRIS BEACH PLLC, ITHACA (MARK B. WHEELER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Seneca County (Dennis F. Bender, S.), dated August 31, 2012. The order, inter alia, denied the motion of petitioner to vacate a judgment and decree entered in October 2011 and enjoined petitioner from bringing further pro se applications in this estate matter without the approval of Surrogate's Court.

It is hereby ORDERED that the order so appealed from is unanimously affirmed with costs and the matter is remitted to Surrogate's Court, Seneca County, for further proceedings in accordance with the following Memorandum: Petitioner appeals from an order that, inter alia, denied his motion pursuant to CPLR 5015 (a) to vacate a judgment and decree entered in October 2011 and enjoined petitioner from bringing any further pro se applications in this estate matter without the approval of Surrogate's Court. The judgment and decree, inter alia, granted the motion of respondent, the executor of decedent's estate, for summary judgment dismissing the petition. We affirm.

Petitioner contends that the Surrogate should have granted his motion because the judgment and decree was procured through "fraud, misrepresentation, or other misconduct of an adverse party," and because the Surrogate "lack[ed] . . . jurisdiction to render" the judgment and decree (CPLR 5015 [a] [3], [4]). Both of those contentions are based on petitioner's position that respondent's motion for summary judgment dismissing the petition was premature because issue had not been joined and a note of issue had not been filed. We reject both contentions. CPLR 3212 (a) provides that "[a]ny party may move for summary judgment in any action[] after issue has been joined; provided however, that the court may set a date after

which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue." Here, issue was joined on or about October 5, 2011, when respondent served his answer with counterclaims (*see generally Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 75) and, therefore, respondent's contemporaneous summary judgment motion was not premature (*see* CPLR 3212 [a]; *cf. Coolidge Equities Ltd. v Falls Ct. Props. Co.*, 45 AD3d 1289, 1289; *C.S. Behler, Inc. v Daly & Zilch*, 277 AD2d 1002, 1003). Further, pursuant to the plain language of CPLR 3212 (a), there is no merit to petitioner's position that a note of issue must be filed before a party moves for summary judgment or before a court grants such a motion. We thus conclude that the Surrogate did not abuse his discretion in denying the motion pursuant to CPLR 5015 (a) inasmuch as petitioner failed to set forth any factual or legal basis for his contentions concerning fraud, misrepresentation, or other misconduct on the part of respondent, or for lack of jurisdiction on the part of the Surrogate (*see Abbott v Crown Mill Restoration Dev., LLC*, 109 AD3d 1097, 1100; *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018, 1020, *lv dismissed* 16 NY3d 783; *Pollock v Wilson*, 26 AD3d 772, 772; *Utica Mut. Ins. Co. v East End Pools & Cts.*, 271 AD2d 526, 527, *lv dismissed* 95 NY2d 902).

Petitioner further contends that he should have been granted a default judgment for a sum certain pursuant to CPLR 3215 (a) inasmuch as respondent failed to appear in this matter. As noted above, however, respondent did not fail to appear but, rather, filed an answer with counterclaims. Petitioner therefore is not entitled to a default judgment for a sum certain (*see id.*).

We conclude that the Surrogate did not abuse his discretion in ordering that petitioner obtain court approval before filing any further pro se applications against respondent, the estate, or the attorney for the estate (*see Bikman v 595 Broadway Assoc.*, 88 AD3d 455, 455-456, *lv denied* 21 NY3d 856; *Jones v Maples*, 286 AD2d 639, 639, *lv dismissed* 97 NY2d 716). Although "public policy mandates free access to the courts[,] . . . when a litigant is 'abusing the judicial process by hagriding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation' " (*Matter of Shreve v Shreve*, 229 AD2d 1005, 1006, quoting *Sassower v Signorelli*, 99 AD2d 358, 359; *see Breytman v Schechter*, 101 AD3d 783, 785, *lv dismissed* 21 NY3d 974). Here, despite numerous adverse determinations and repeated warnings by the Surrogate and, more recently, by this Court (*Matter of Aarismaa v Bender*, 108 AD3d 1203, 1205), petitioner continues to file frivolous and largely incomprehensible applications, based on his erroneous beliefs that issue was never joined and that a note of issue must be filed before a summary judgment motion may be made and granted. We therefore conclude that the Surrogate properly enjoined petitioner from continuing to use the legal system to harass respondent, to deplete the assets of the estate, and to waste the time of the Surrogate and this Court (*see Ram v Torto*, 111 AD3d 814, 815-816, *lv denied* ___ NY3d ___ [Jan. 21, 2014]; *Bikman*, 88 AD3d at 455-456; *Jones*, 286 AD2d at 639).

In light of the frivolous nature of this appeal and petitioner's continued abuse of the judicial system, we conclude that the imposition of costs is appropriate (*see Burkhart v Modica*, 81 AD3d 1356, 1358, *lv dismissed* 17 NY3d 850, *lv denied* 18 NY3d 853; *Ginther v Jones*, 35 AD3d 1224, 1224, *lv denied* 8 NY3d 810). Finally, we conclude that, under the circumstances of this case, sanctions are warranted (*see* 22 NYCRR 130-1.1; *Ram*, 111 AD3d at 816; *Matter of Hirschfeld v Friedman*, 307 AD2d 856, 859). We therefore remit the matter to the Surrogate to determine the amount of sanctions to be imposed, following a hearing if necessary (*see Burkhart*, 81 AD3d at 1358; *Charles & Boudin v Meyer*, 307 AD2d 272, 274).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01105

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

KALEIDA HEALTH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UNIVERA HEALTHCARE, DEFENDANT-RESPONDENT,
AND UTICA MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (MICHELLE L. MEROLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HINMAN STRAUB P.C., ALBANY (JAMES T. POTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered August 22, 2012. The judgment, among other things, denied the motion of defendant Utica Mutual Insurance Company for summary judgment dismissing the complaint and cross claim against it.

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

Memorandum: Defendant Utica Mutual Insurance Company (Utica) appeals from a judgment denying its motion for summary judgment seeking dismissal of the complaint and the cross claim against it, granting the motions for summary judgment of plaintiff and defendant Univera Healthcare (Univera), and declaring that Utica is obligated to pay an outstanding hospital bill to plaintiff pursuant to Public Health Law § 2807-c (1) (b-2) for care that plaintiff provided to a certain patient who is now deceased. We reject Utica's contention that plaintiff and Univera are barred by collateral estoppel from asserting that Utica was obligated to pay the outstanding hospital bill as the result of a determination of the Workers' Compensation Board. While collateral estoppel is applicable to determinations of quasi-judicial administrative agencies, such as the Workers' Compensation Board (*see Auqui v Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255), plaintiff and Univera were not parties to and did not participate in the subject administrative proceeding. Although plaintiff and Univera received notice of the administrative proceeding, as a health care provider and private health insurer,

respectively, they could not by virtue of such notice be compelled to participate in the proceeding (*see Liss v Trans Auto Sys.*, 68 NY2d 15, 21; *see also* Workers' Compensation Law § 25 [3] [a]). Utica's further contention that this action is barred because plaintiff was required to arbitrate this dispute is without merit because "[a]n agreement to arbitrate is not a defense to an action" (*Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL–CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738), and arbitration is not compulsory here inasmuch as the value of the medical services provided are not in dispute (*see* § 13-g [1] - [3]; 12 NYCRR 325-1.24 [d]). Finally, contrary to Utica's contention, we conclude that Supreme Court properly determined that Utica was responsible for the outstanding hospital bill pursuant to Public Health Law § 2807-c (1) (b-2) inasmuch as the subject patient's admission to one of plaintiff's hospitals was not a separate or new hospital admission, but was a continuation of that patient's earlier admission to another hospital, which was for treatment of a long-standing work-related injury.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

45

KA 07-01929

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEMON JONES, ALSO KNOWN AS CLEMENT/CLEMONT JONES,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CLEMON JONES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 4, 2007. The judgment convicted defendant, upon a jury verdict, of criminal possession of a forged instrument in the second degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the first degree (§ 170.30). With respect to appeal No. 1, defendant correctly concedes that he failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he made only a general motion for a trial order of dismissal (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The evidence presented at trial, which included recorded conversations between defendant and an undercover officer, supported the jury's rejection of the affirmative defense of entrapment (*see People v Gordon*, 72 AD3d 841, 842, *lv denied* 15 NY3d 920; *People v White*, 272 AD2d 872, 872, *lv denied* 95 NY2d 859).

Defendant failed to preserve for our review his further contention in appeal No. 1 that the police conduct deprived him of due process and, in any event, that contention is without merit (*see People v Din*, 62 AD3d 1023, 1024, *lv denied* 13 NY3d 795). Contrary to the further contention of defendant, County Court did not abuse its discretion in refusing to assign him new counsel. The record establishes that the court made the requisite " 'minimal inquiry' " into defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100; *see People v Adger*, 83 AD3d 1590, 1591-1592, *lv denied* 17 NY3d 857), and defendant " 'did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]' " (*Adger*, 83 AD3d at 1591; *see People v Ayuso*, 80 AD3d 708, 708-709, *lv denied* 16 NY3d 856). Defendant's problems with defense counsel resulted from "strategic disagreements . . . and from an antagonistic attitude on defendant's part," neither of which requires substitution of counsel (*People v Sturdevant*, 74 AD3d 1491, 1494, *lv denied* 15 NY3d 810). We note that the court granted defendant's previous request for new counsel, and it is well settled that " '[t]he right of an indigent criminal defendant to the services of a court-appointed lawyer does not encompass a right to appointment of successive lawyers at defendant's option' " (*People v Ward,* 27 AD3d 1119, 1120, *lv denied* 7 NY3d 819, *reconsideration denied* 7 NY3d 871, quoting *People v Sides*, 75 NY2d 822, 824).

Also with respect to appeal No. 1, we reject the contention of defendant in his main and pro se supplemental briefs that he was denied effective assistance of counsel. The record does not support defendant's contention in his main brief that communication issues hindered the defense. Even assuming, arguendo, that defense counsel's prior representation of a codefendant of the confidential informant in an unrelated case constitutes a potential conflict of interest, we conclude that defendant has not demonstrated that "the alleged conflict operated upon his defense in any way" (*People v Monette*, 70 AD3d 1186, 1188, *lv denied* 15 NY3d 776). Contrary to defendant's contention in his pro se supplemental brief, defense counsel's failure to object to a single allegedly improper remark during the prosecutor's summation does not render him ineffective (*see People v Ward*, 107 AD3d 1605, 1607, *lv denied* 21 NY3d 1078). Rather, "[v]iewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation," we conclude that defendant was not denied effective assistance of counsel (*People v Goossens*, 92 AD3d 1281, 1282, *lv denied* 19 NY3d 960; *see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends in his main brief that he was deprived of a fair trial by prosecutorial misconduct on summation. Defendant failed to preserve his contention for our review with respect to one of the two challenged remarks inasmuch as he did not object to that remark at trial (*see Ward*, 107 AD3d at 1606; *People v Foster*, 101 AD3d 1668, 1670, *lv denied* 20 NY3d 1098). In any event, we conclude that "[a]ny 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv*

denied 100 NY2d 583). As defendant correctly concedes, he likewise failed to preserve for our review his contention that he was improperly shackled during the persistent felony offender hearing (*see People v Robinson*, 49 AD3d 1269, 1270, *lv denied* 10 NY3d 869), 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]).

The contention of defendant concerning appeal No. 1 in his main and pro se supplemental briefs that he was improperly adjudicated a persistent felony offender was considered and rejected by this Court on defendant's appeal from an order denying his CPL article 440 motion to vacate the sentence imposed upon the underlying judgment of conviction (*People v Jones*, 109 AD3d 1108, 1108). Defendant's further contention in his pro se supplemental brief that the persistent felony offender statute is unconstitutional is unpreserved for our review (*see People v Besser*, 96 NY2d 136, 148), and without merit in any event (*see People v Quinones*, 12 NY3d 116, 119, *cert denied* 558 US 821; *People v Coleman*, 82 AD3d 1593, 1594, *lv denied* 17 NY3d 793).

We have reviewed defendant's remaining contentions in his pro se supplemental brief concerning appeal No. 1 and conclude that none warrants reversal or modification.

With respect to appeal No. 2, defendant contends in his main brief that he did not knowingly, voluntarily, or intelligently enter his *Alford* plea and that the People failed to provide strong evidence of guilt. As defendant correctly concedes, he failed to preserve those contentions for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Hinkle*, 56 AD3d 1210, 1210). Contrary to defendant's contention, this case does not fall within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666) and, in any event, we conclude that the record establishes that defendant's *Alford* plea was "the product of a voluntary and rational choice," and that the record "contains strong evidence of actual guilt" (*People v Dash*, 74 AD3d 1859, 1860, *lv denied* 15 NY3d 892 [internal quotation marks omitted]; *see People v Cruz*, 89 AD3d 1464, 1465, *lv denied* 89 NY3d 993).

Finally, defendant's contention in appeal No. 2 that the court should have corrected unspecified errors in the presentence report (PSR) or, alternatively, that the court should have conducted a hearing to determine the merits of defendant's allegations concerning the alleged errors is unpreserved for our review inasmuch as he did not request such relief from the court (*see People v Gibbons*, 101 AD3d 1615, 1616; *see generally* CPL 470.05 [2]). Indeed, the record establishes that defense counsel provided the court with certain objections to the PSR and requested that the court append those objections to the PSR. The court agreed to do so, and defense counsel responded that such relief "comports with our request."

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02407

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN B. WITKOP, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Niagara County Court (Sara S. Sperrazza, J.), dated July 25, 2011. The order denied defendant's amended motion pursuant to CPL 440.10.

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

Memorandum: Defendant appeals from an order summarily denying, inter alia, his amended pro se motion pursuant to CPL 440.10 (hereafter, motion) to vacate the judgment convicting him upon his guilty plea of burglary in the first degree (Penal Law § 140.30 [2]) and manslaughter in the second degree (§ 125.15 [1]). We reject defendant's contention that County Court abused its discretion in denying the motion without a hearing based on his allegations of ineffective assistance of counsel. Defendant asserted in his supporting affidavit that defense counsel's investigation of the charges against him was inadequate inasmuch as defense counsel failed to discover statements by three alleged witnesses who "all stated that [defendant] was on the premises to work," and who "saw defendant at work" on the victim's home. Even assuming, arguendo, that those alleged witnesses could establish that defendant did not enter the victim's home unlawfully, we conclude that such entry would not negate the trespass element of burglary inasmuch as the indictment charged only that defendant "remained unlawfully" in the home (*see* Penal Law § 140.30; *see generally People v Jackson*, 48 AD3d 891, 892, *lv denied* 10 NY3d 841). Defendant further asserted in his supporting affidavit that defense counsel "intimidated" him into pleading guilty during two off-the-record discussions at the plea proceeding. Defendant's unsupported, self-serving assertions, however, are contradicted by the transcript of the plea proceeding, at which defendant indicated that he agreed to plead guilty of his own free will and that no one had

coerced him to enter the plea (*see* CPL 440.30 [4] [d] [i]; *People v Sayles*, 17 AD3d 924, 924-925, *lv denied* 5 NY3d 794). We note, moreover, that defense counsel's alleged off-the-record discussions with defendant occurred after defendant's above-described statements during the plea colloquy, and thus there is no reasonable possibility that any such intimidation affected defendant's decision to plead guilty (*see* CPL 440.30 [4] [d] [ii]). The record likewise does not support defendant's assertion that defense counsel was unprepared at sentencing. We conclude, therefore, that the court properly denied defendant's motion without a hearing because, "given the nature of the claimed ineffective assistance, the motion could be determined on the trial record and defendant's submissions on the motion" (*People v Satterfield*, 66 NY2d 796, 799; *see People v Jamison*, 71 AD3d 1435, 1437, *lv denied* 14 NY3d 888).

Defendant failed to address in his brief on appeal the remaining grounds advanced in support of his motion, and we thus deem any contentions with respect thereto abandoned (*see generally People v Dombrowski*, 87 AD3d 1267, 1267-1268).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 08-02408

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEMON JONES, ALSO KNOWN AS CLEMENT/CLEMONT JONES,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (Teresa D. Johnson, A.J.), rendered October 29, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the first degree.

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

Same Memorandum as in *People v Jones* (___ AD3d ___ [Feb. 14, 2014]).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 12-00702

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

UDA HIDALGO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Sheila A. DiTullio, A.J.), rendered February 29, 2012. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 11-02525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT BAKERX, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 21, 2011. The judgment convicted defendant, upon a nonjury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a joint nonjury trial with one codefendant (*People v Heary*, 104 AD3d 1208, *lv denied* 21 NY3d 943, *reconsideration denied* 21 NY3d 1016), of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree ([CPW 2d] § 265.03 [3]). Defendant contends that the evidence is legally insufficient to support his conviction of manslaughter because the People failed to meet their burden of disproving his justification defense beyond a reasonable doubt (*see generally* § 25.00 [1]; *People v Umali*, 10 NY3d 417, 425, *rearg denied* 11 NY3d 744, *cert denied* 556 US 1110). He further contends that the evidence is legally insufficient to support the conviction of CPW 2d because the People failed to establish that he did not possess the loaded weapon in his home or place of business (§ 265.03 [3]) or that he intended to use the weapon against another. Those "contention[s are] not preserved for our review inasmuch as defendant 'did not move for a trial order of dismissal on th[ose] ground[s]' " (*Heary*, 104 AD3d at 1209; *see generally People v Gray*, 86 NY2d 10, 19). We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to move for a trial order of dismissal on those grounds. "It is well settled that '[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success' . . . Here, there was no chance that such a motion would have succeeded" (*Heary*, 104 AD3d at 1209, quoting *People v*

Stultz, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Defendant further contends that the evidence is legally insufficient to support the conviction of manslaughter because the People failed to establish the element of intent to cause serious physical injury. Although defendant preserved that contention for our review, we conclude that it lacks merit. Such "intent may be inferred from [defendant's] conduct, the surrounding circumstances, and the medical evidence," which established that defendant shot the victim and that the bullet entered the victim through the back, piercing his right lung and aorta (*People v Wise*, 46 AD3d 1397, 1399, *lv denied* 10 NY3d 872 [internal quotation marks omitted]; *see generally People v Bleakley*, 69 NY2d 490, 495).

Although defendant further contends that Supreme Court erred in failing to consider the lesser included offense of manslaughter in the second degree (Penal Law § 125.15 [1]), we reject that contention. There is no "reasonable view of the evidence [that] would support a finding that the defendant committed such lesser offense but did not commit the greater" (CPL 300.50 [1]; *see generally People v Glover*, 57 NY2d 61, 63). We further conclude, upon viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Inasmuch as defendant did not join in the application of the codefendant to introduce evidence of the victim's prior bad acts, he did not preserve for our review his contention that the court erred in refusing to admit such evidence (*see People v Thompson*, 300 AD2d 1032, 1033, *lv denied* 99 NY2d 620; *People v Cook*, 286 AD2d 917, 917, *lv denied* 97 NY2d 680; *see generally People v Buckley*, 75 NY2d 843, 846). In any event, that contention lacks merit (*see Matter of Robert S.*, 52 NY2d 1046, 1048) and, therefore, defense counsel was not ineffective in failing to make an argument that had little or no chance of success (*see Heary*, 104 AD3d at 1209; *see generally Stultz*, 2 NY3d at 287).

In his pretrial omnibus motion and supplemental motions, defendant sought suppression of his statements, physical evidence and DNA evidence contending, inter alia, that he was arrested without probable cause. We conclude that the court properly denied the *Dunaway* branch of defendant's motions without a hearing. "Given '(1) the face of the pleadings, (2) assessed in conjunction with the context of the motion[s], and (3) defendant's access to information,' defendant's allegations in support of his motion[s] were too conclusory to warrant a hearing" (*People v Lopez*, 5 NY3d 753, 754, quoting *People v Mendoza*, 82 NY2d 415, 426; *see People v Arokium*, 33 AD3d 458, 459, *lv denied* 8 NY3d 878; *People v McDowell*, 30 AD3d 160, 160, *lv denied* 7 NY3d 850). In any event defendant's "written postarrest statement . . . on its face shows probable cause for defendant's arrest, and defendant failed to controvert it in his motion papers" (*Lopez*, 5 NY3d at 754).

Defendant contends for the first time on appeal that the

Miranda warnings given to him were defective. That contention is not preserved for our review (*see People v Tutt*, 38 NY2d 1011, 1012-1013; *People v Louisias*, 29 AD3d 1017, 1018-1019, *lv denied* 7 NY3d 814) and, in any event, it lacks merit. Although the detective issuing the warnings did not inform defendant that he would be entitled to "free" counsel if he could not afford counsel, "the *Miranda* prophylaxis does not require a 'ritualistic incantation of warnings in any particular language or form' " (*People v Snider*, 258 AD2d 929, 930, *lv denied* 93 NY2d 979). "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*' " (*Duckworth v Eagan*, 492 US 195, 203; *see Louisias*, 29 AD3d at 1019). Here, defendant was informed that he would receive appointed counsel if he could not afford counsel and, therefore, the warnings given to defendant reasonably apprised him of his rights.

Defendant also contends for the first time on appeal that he was denied his right to counsel because, although he was not in custody on a prior charge, he was represented by counsel on that charge and it was related to the charges for which he was in custody (*see People v Vella*, 21 NY2d 249, 251). "[T]he rule 'authorizing review of unpreserved constitutional right-to-counsel claims' has been applied 'only when the constitutional violation was established on the face of the record' " (*People v McClean*, 15 NY3d 117, 121, quoting *People v Ramos*, 99 NY2d 27, 37). Here, because "the record does not make clear, irrefutably, that a right to counsel violation has occurred, the claimed violation can be reviewed only on a post[]trial motion under CPL 440.10, not on direct appeal" (*id.*). Defendant's further contention that defense counsel was ineffective in failing to pursue that theory of suppression also involves matters outside the record on appeal and thus is properly raised by way of a CPL 440.10 motion (*see People v Rivera*, 71 NY2d 705, 709).

Defendant contends that photo arrays shown to two witnesses were unduly suggestive because of the differences in the attire of the persons depicted and in the composition of the photographs. We reject that contention inasmuch as those differences were "not sufficient to create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833). For the first time on appeal, defendant also contends that the photo arrays were unduly suggestive because he was the only person with a mohawk hairstyle in both arrays. That contention was not raised in the hearing court and, therefore, is not preserved for our review (*see People v Johnson*, 306 AD2d 214, 215, *lv denied* 100 NY2d 621; *People v Berry*, 201 AD2d 489, 489-490, *lv denied* 83 NY2d 869). 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]).

Finally, we reject defendant's challenges to the severity of the sentence and the court's remarks at sentencing.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 13-00501

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

IN THE MATTER OF CARYN CONSILIO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHRISTOPHER TERRIGINO AND MARY E. DODDS,
RESPONDENTS-RESPONDENTS.

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

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (ERIC M. DOLAN OF COUNSEL), FOR RESPONDENT-RESPONDENT CHRISTOPHER TERRIGINO.

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Thomas W. Polito, R.), entered January 29, 2013 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent Christopher Terrigino to dismiss the petition seeking to modify the existing visitation order.

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

Memorandum: Petitioner mother appeals from an order granting respondent father's motion to dismiss her petition seeking to modify the existing visitation order. The mother is not aggrieved by Family Court's failure to amend the order to reflect more accurately the intent of the parties inasmuch as the record indicates that the mother opposed any such amendment to the order during the underlying proceedings (*see generally* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545; *Matter of Glazier v Brightly*, 81 AD3d 1197, 1199). Contrary to the mother's further contention, the court properly granted the father's motion to dismiss the petition without a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order" (*Matter of Wurmlinger v Freer*, 256 AD2d 1069, 1069) and, here, "the mother failed to 'make a sufficient evidentiary showing of a change in circumstances to require a hearing' " (*Matter of Warrior v Beatman*, 70 AD3d 1358, 1359, *lv denied* 14 NY3d 711).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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KA 09-02646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESMOND BONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Teresa D. Johnson, A.J.), rendered November 5, 2009. The judgment convicted defendant, upon his plea of guilty, of resisting arrest.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of resisting arrest (Penal Law § 205.30), defendant contends that County Court abused its discretion in denying his request for an adjournment in order to submit a written motion to withdraw his plea. We note that the request for an adjournment occurred after defendant waived his right to appeal and, even assuming, arguendo, that defendant's waiver of the right to appeal was invalid, we conclude that the court did not abuse its discretion in denying defendant's request (*see People v Degree*, 270 AD2d 847, 847).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01333

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

MARK D. PLUMLEY AND TINA A. PLUMLEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE BOULEVARD HYDROPOWER, L.P.,
DEFENDANT-RESPONDENT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (JOHN D. CONNERS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HISCOCK & BARCLAY, LLP, SYRACUSE (JOHN M. NICHOLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 25, 2012. The order, among other things, dismissed the complaint.

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

Memorandum: Plaintiffs appeal from an order that, inter alia, granted that part of defendant's motion seeking to dismiss the complaint on the ground that the action was barred by collateral estoppel (*see* CPLR 3211 [a] [5]), and on the further ground that, pursuant to CPLR 3211 (c), defendant was entitled to summary judgment because there was no material issue of fact to be tried. We agree with plaintiffs that Supreme Court erred in determining that the action was barred by collateral estoppel. Collateral estoppel "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action' " (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128, quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349). We conclude that the primary issue in this action was not previously litigated and decided against plaintiffs in a prior action. We further conclude, however, that the court, in treating defendant's motion as one for summary judgment pursuant to CPLR 3211 (c), properly granted the motion. Defendant met its burden of establishing that it was under no obligation to include plaintiffs in a "global" settlement agreement that defendant reached with other parties situated similarly to plaintiffs. In opposition, plaintiffs established only that they had a "mere agreement to agree" with defendant, which "is unenforceable" (*Joseph Martin, Jr., Delicatessen*

v Schumacher, 52 NY2d 105, 109; *see Willmott v Giarraputo*, 5 NY2d 250, 253). Thus, it was insufficient to defeat defendant's motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

80

CA 13-01158

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

DONALD E. KEINZ, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PETER M. HOBAICA, LLC, DEFENDANT-RESPONDENT.

KERNAN AND KERNAN, P.C., UTICA (LEIGHTON R. BURNS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PETER M. HOBAICA, LLC, UTICA (ROBERT F. JULIAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered September 6, 2012. The judgment, among other things, dismissed the amended complaint after a bench trial.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the amended complaint insofar as it seeks declaratory relief and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that, as of June 22, 2010, defendant is no longer obligated to pay, as set forth in paragraph two of the parties' agreement dated November 2, 2006, any portion of fees earned,

and as modified the judgment is affirmed without costs.

Memorandum: Defendant purchased plaintiff's law practice pursuant to the parties' agreement dated November 2, 2006 (agreement). On June 22, 2010, plaintiff resigned from the practice of law (*Matter of Keinz*, 75 AD3d 1113, 1113), and defendant thereafter ceased making certain payments under the agreement. Plaintiff commenced this action seeking a judgment declaring that defendant is obligated to pay plaintiff, in accordance with the agreement, 50% of the net income derived by defendant from clients of plaintiff's former firm. Plaintiff amended his complaint to assert a second cause of action for reformation of the agreement to reflect that the payments at issue were part of the purchase price of the practice, not an agreement to share fees.

We conclude that Supreme Court properly resolved the merits of the first and second causes of action in favor of defendant, but erred

in dismissing the amended complaint insofar as it seeks declaratory relief "rather than declaring the rights of the parties" (*Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457; *see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

The court's determination that the payments at issue were part of a fee sharing arrangement, rather than a portion of the purchase price of plaintiff's former practice, is consistent with "a fair interpretation of the evidence" (*Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170), and we see no reason to disturb that determination. Furthermore, because plaintiff resigned from the practice of law, he is no longer permitted to "share in any fee for legal services rendered by another attorney during the period of . . . removal from the roll of attorneys" (22 NYCRR 1022.27 [e]). The provision of the agreement providing for the payments at issue is therefore not binding (*cf. Padilla v Sansivieri*, 31 AD3d 64, 66-67).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

81

CA 13-00831

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

WELLS FARGO BANK NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR THE DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. PODESWIK, AS ADMINISTRATOR OF THE ESTATE OF KATHRYN PODESWIK, DECEASED, DELTA FUNDING CORPORATION, DAVID JAY, BOB JAY, LES PAULSON, LISA LOOMIS, MICHELLE WINTER AND AMANDA ROBERTS, DEFENDANTS-APPELLANTS. (ACTION NO. 1.)

HILARY LESNIAK, AS ADMINISTRATOR OF THE ESTATE OF KATHRYN PODESWIK, DECEASED, PLAINTIFF-APPELLANT,

V

WELLS FARGO BANK NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR THE DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2, DELTA FUNDING CORPORATION, OCWEN LOAN SERVICING LLC, AMERICAN SECURITY INSURANCE CO., AND PETER T. ROACH, ESQ., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS. (ACTION NO. 2.)

LAURIE A. LESNIAK, WHITE PLAINS, FOR PLAINTIFF-APPELLANT.

HARRIS, CHESWORTH, O'BRIEN, JOHNSTONE & WELCH, LLP, ROCHESTER (LETTY L. LASKOWSKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANT-RESPONDENT WELLS FARGO BANK NA, SUCCESSOR BY MERGER TO WELLS FARGO BANK MINNESOTA, NA, AS TRUSTEE FORMERLY KNOWN AS NORWEST BANK MINNESOTA, NA, AS TRUSTEE FOR THE DELTA FUNDING HOME EQUITY LOAN ASSET-BACKED CERTIFICATE SERIES 1999-2 AND FOR DEFENDANT-RESPONDENT OCWEN LOAN SERVICING LLC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (ROBERT A. CRAWFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT AMERICAN SECURITY INSURANCE CO.

Appeal from an order and judgment (one paper) of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered July 17, 2012. The order and judgment, inter alia, granted the motion of Peter T. Roach, Esq., a defendant in action No. 2, for summary judgment dismissing the complaint in action No. 2 against him and sua sponte dismissed that complaint against all defendants in action No. 2.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion to vacate is granted, the nunc pro tunc order is vacated, the motion for summary judgment is denied, and the complaint in action No. 2 is reinstated.

Opinion by CENTRA, J.P.: On this appeal, we must decide whether to vacate an order that modified a default judgment of foreclosure by including an additional parcel. We conclude, inter alia, that plaintiff has made a clear showing of entitlement to such vacatur.

Facts and Procedural History

These two actions have a lengthy factual and procedural history. In March 1997, Kathryn Podeswik (decedent) purchased two adjacent parcels of real property in Herkimer County; Parcel No. 1 is improved by a two-family dwelling, and Parcel No. 2 is improved by a four-family dwelling. Both parcels were used as rental property. On June 2, 1999, which was approximately one year prior to her death, decedent executed a note and mortgage in the amount of $60,000 covering Parcel No. 1 in favor of the predecessor of Wells Fargo Bank NA (Wells Fargo), plaintiff in action No. 1 and a defendant in action No. 2. The mortgage description shows that the mortgage encumbered only Parcel No. 1. Also on that date, decedent executed a second note and second mortgage in the amount of $31,700 covering Parcel No. 2 in favor of Wells Fargo's predecessor. Although the mortgages list the address of both properties as "124-128 East Main Street," Parcel No. 1 and Parcel No. 2 were defined by different metes and bounds, and the two mortgages were recorded separately in the Herkimer County liber of mortgages.

Decedent died intestate on May 6, 2000, and her husband, David J. Podeswik, a defendant in action No. 2, was named administrator of her estate. In June 2005, Podeswik ceased making payments on the first mortgage, prompting Wells Fargo to commence an action seeking to foreclose the first mortgage in late 2006 or early 2007 (action No. 1). The complaint, notice of pendency, and attached schedule A listed only the first mortgage and Parcel No. 1. Decedent's estate (Estate) was named as a defendant and defaulted in the action. Supreme Court (Daley, J.) issued a default judgment of foreclosure in October 2007, and Wells Fargo purchased the property at the subsequent public auction.

In the spring of 2007, Podeswik was removed as administrator of the Estate, and Hilary Lesniak, the plaintiff in action No. 2, was appointed administrator. Lesniak and her attorney began communicating with Wells Fargo about the first and second mortgages in April 2007, and those communications continued until at least May 2009. The Estate commenced action No. 2 against Wells Fargo and others in November 2009 alleging, inter alia, tortious interference with contract. According to the Estate, despite the fact that no foreclosure action had been commenced with respect to Parcel No. 2, Wells Fargo had notified the tenants of that property around December 2006 that they needed to vacate the premises because of a foreclosure action. Around February 2007, the tenants vacated the premises and, shortly thereafter, the pipes in the abandoned residence froze and burst, causing extensive damage.

Meanwhile, it appears from the record that, when Wells Fargo sought title insurance following its purchase at the auction, it became aware that the judgment of foreclosure covered only Parcel No. 1. Wells Fargo contacted Lesniak's attorney and requested that the Estate execute a deed in lieu of foreclosure for Parcel No. 2 to correct an "error in the foreclosure action." Wells Fargo indicated that, if it did not receive the deed, it would move to reopen the foreclosure action to amend it by including Parcel No. 2. Lesniak did not execute the deed and, in August 2009, before the Estate commenced action No. 2, Wells Fargo moved for a nunc pro tunc order in action No. 1 to amend the judgment of foreclosure (nunc pro tunc motion). Despite having communicated with Lesniak and her attorney for over two years, Wells Fargo served the notice of motion only on Podeswik, who was still the Estate's representative of record with respect to the foreclosure action; Lesniak was not aware of the motion.

In the nunc pro tunc motion, Wells Fargo sought "an Order deeming the pleadings, lis pendens, judgment of foreclosure and sale and all other documents filed in the instant foreclosure action corrected *nunc pro tunc*, pursuant to CPLR []2001 and in the interests of justice, to correct a recurring error in the legal description stated." In the affirmation in support of the motion, Wells Fargo's attorney asserted that "the Property described [in the first mortgage] by its common address, contains two parcels, Parcel #1 and Parcel #2." After receiving no opposition, Supreme Court (Daley, J.) granted the motion, and its order thereon was entered on September 21, 2009 (nunc pro tunc order). The nunc pro tunc order states that the "mortgage instrument, pleadings, lis pendens, judgment of foreclosure and sale and all other documents filed in the instant foreclosure action are deemed to contain, *nunc pro tunc*, the correct Schedule A-Legal Description annexed to this Order and made a part hereof." The "correct Schedule A" contains the legal description of both Parcel No. 1 and Parcel No. 2.

The Estate now appeals from an order and judgment of Supreme Court (Gall, J.) deciding various motions related to the two actions. As relevant to this appeal, the court denied the Estate's motion pursuant to CPLR 5015 seeking, inter alia, to vacate the nunc pro tunc order in action No. 1. The court also granted the motion of Peter T.

Roach, Esq., a defendant in action No. 2, for summary judgment seeking dismissal of the complaint against him in action No. 2 and sua sponte dismissed the complaint against all defendants in action No. 2. We conclude that the order and judgment insofar as appealed from should be reversed.

Analysis

I

We first address the Estate's motion pursuant to CPLR 5015 to vacate the nunc pro tunc order issued in action No. 1. Although the Estate did not specify any particular subdivision of that statutory provision as a ground for its motion, we conclude based on the arguments made in support of the motion that the Estate was seeking vacatur pursuant to CPLR 5015 (a) (3) or (4), and we agree with the Estate that the nunc pro tunc order should have been vacated on those grounds.

First, we agree with the Estate that the court (Gall, J.) should have granted the motion to vacate the nunc pro tunc order because the court (Daley, J.) was without subject matter jurisdiction to issue the nunc pro tunc order (*see* CPLR 5015 [a] [4]). Wells Fargo moved for the nunc pro tunc order pursuant to CPLR 2001, which provides that a "court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." The court erred in granting the nunc pro tunc motion because Wells Fargo was not seeking to correct a mere ministerial or clerical mistake (*see Meenan v Meenan*, 103 AD3d 1277, 1278-1279). We conclude that, based on its discussions with Lesniak's attorney and, indeed, based on the plain language of the two mortgages it held, Wells Fargo either was aware or should have been aware that the judgment of foreclosure concerned only Parcel No. 1, and that it had failed to commence a foreclosure action with respect to Parcel No. 2. The complaint in action No. 1 clearly sets forth that Wells Fargo was foreclosing only the first mortgage; there is nothing in the complaint or lis pendens in action No. 1 referencing the second mortgage or Parcel No. 2. Rather than commencing a foreclosure action with respect to Parcel No. 2, Wells Fargo improperly sought to amend the judgment of foreclosure by adding an entirely separate parcel, and made representations to the court that it merely sought to correct a simple clerical mistake. In issuing the nunc pro tunc order, the court made a substantive amendment to the judgment of foreclosure without jurisdiction (*see Helmer v McKerrow*, 207 AD2d 967, 968; *cf. Key Bank Natl. Assn. v Stern*, 14 AD3d 656, 657). Without jurisdiction, "the default [nunc pro tunc order] is a nullity and must be vacated" (*2837 Bailey Corp. v Gould*, 143 AD2d 523, 524; *see Hitchcock v Pyramid Ctrs. of Empire State Co.*, 151 AD2d 837, 838).

Second, we agree with the Estate that the court (Gall, J.) also should have granted the motion to vacate the nunc pro tunc order based

on "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015 [a] [3]; *see Oppenheimer v Westcott*, 47 NY2d 595, 603-604; *Yip v Ip*, 229 AD2d 979, 979; *Gorman, Naim & Musa, M.D., P.C. v ABJ Fire Protection*, 195 AD2d 1063, 1064). In its nunc pro tunc motion, Wells Fargo asserted that the "common address" of 124-128 East Main Street contained both Parcel No. 1 and Parcel No. 2. Wells Fargo failed to advise the court (Daley, J.), however, that the metes and bounds descriptions of the two parcels are different. Wells Fargo does not dispute that, "when there is a discrepancy between the street address and the legal description of a piece of real property, the legal description controls" (*Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 219 AD2d 186, 190, *lv denied* 88 NY2d 808). Wells Fargo also failed to advise the court of the second mortgage that encumbered Parcel No. 2, which, as noted earlier, was executed on the same date as the first mortgage. Further, Wells Fargo failed to advise the court that there was a two-family dwelling on Parcel No. 1 and a separate four-family dwelling on Parcel No. 2. Had Wells Fargo made the court aware of those facts, the court may have realized that there was no clerical error in omitting Parcel No. 2 from schedule A. We conclude that, when presenting its nunc pro tunc motion, at worst, Wells Fargo perpetrated a fraud upon the court and, at best, it engaged in misconduct by not revealing all of the facts to the court. Indeed, we are struck by the fact that, on appeal, Wells Fargo makes no effort to defend the propriety of the nunc pro tunc order, and instead raises only procedural objections to the Estate's motion to vacate, which are all without merit.

We reject the contention of Wells Fargo that, because this appeal is from only the order and judgment, and not from the nunc pro tunc order, the Estate may not raise legal issues pertaining to the nunc pro tunc order. Although the Estate could not have appealed directly from the nunc pro tunc order because it was entered on default (*see Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196; *Lauer v City of Buffalo*, 53 AD3d 213, 215), we conclude that the Estate properly availed itself of its only remedy by moving to vacate the nunc pro tunc order pursuant to CPLR 5015. We further conclude that the Estate properly raises on this appeal from the order and judgment denying that motion legal issues pertaining to the nunc pro tunc order, namely, whether the court had the authority to issue the nunc pro tunc order and whether Wells Fargo committed fraud or misconduct in seeking the nunc pro tunc order.

Wells Fargo further contends that the court (Gall, J.) properly denied the motion to vacate because it was untimely and because it was not supported by an affidavit of merit. We reject that contention and conclude that neither ground was an appropriate basis for denying the motion to vacate. A motion to vacate pursuant to CPLR 5015 (a) (3) on the ground of fraud must be made in a "reasonably timely manner" (*Matter of Di Fiore v Scott*, 2 AD3d 1417, 1418; *see Miller v Lanzisera*, 273 AD2d 866, 868, *appeal dismissed* 95 NY2d 887, *rearg denied* 96 NY2d 731), and a motion to vacate pursuant to CPLR 5015 (a) (4) for lack of jurisdiction may be made at any time (*see Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517, 523; *Matter of*

DeNoto v DeNoto, 96 AD3d 1646, 1647; *Robert F. Wood, P.C. v Ford*, 78 AD2d 585, 585). Under the circumstances of this case, we conclude that the motion as grounded upon CPLR 5015 (a) (3) was made in a reasonably timely manner. Further, the Estate was not required to set forth a meritorious defense in an affidavit of merit on its motion to vacate pursuant to CPLR 5015 (a) (3) (*see Tonawanda Sch. Empls. Credit Union v Zack*, 242 AD2d 894, 894), or (a) (4) (*see Toyota Motor Credit Corp. v Lam*, 93 AD3d 713, 713-714; *Ayala v Bassett*, 57 AD3d 387, 389). In addition, contrary to the contention of Wells Fargo and the reasoning of the court, CPLR 6501 has no relevance to the Estate's motion to vacate.

II

We next address the motion by Roach for summary judgment dismissing the complaint against him in action No. 2. Roach argued, and the court (Gall, J.) agreed, that action No. 2 was barred by res judicata. The court therefore granted the motion and sua sponte dismissed the complaint in action No. 2 against all defendants. We note that Peter T. Roach and Associates, P.C. represented Wells Fargo in the foreclosure action and moved for the nunc pro tunc order. Roach has not appeared in this appeal, but Wells Fargo and defendant American Security Insurance Co. (American Security), a defendant in action No. 2, contend that the court's ruling was proper (*see generally Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429). We reject that contention.

"[W]here there is a valid final judgment[,] the doctrine of res judicata, or claim preclusion, bars future litigation between those parties on the same cause of action" (*Matter of Hodes v Axelrod*, 70 NY2d 364, 372). "This doctrine is based on the principle that a 'judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first' " (*Lot 1555 Corp. v Nahzi*, 79 AD3d 580, 580, quoting *Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307).

First, we conclude that, inasmuch as action No. 1 involved only Parcel No. 1, and action No. 2 involved only Parcel No. 2, the issues raised in action No. 2 were not "necessarily decided" in the action resulting in the default judgment of foreclosure, and res judicata therefore is inapplicable to the issues raised in action No. 2 (*Matter of New Cr. Bluebelt, Phase 4*, 79 AD3d 888, 890, *lv dismissed* 16 NY3d 825 [internal quotation marks omitted]). The nunc pro tunc order amended the judgment of foreclosure by adding Parcel No. 2, but the nunc pro tunc order is a nullity and has no res judicata effect (*see Blank v Schafrann*, 206 AD2d 771, 774).

Second, contrary to the contentions of Wells Fargo and American Security, the Estate would not have been required to assert its claims from action No. 2 as counterclaims in action No. 1 even if that action sought to foreclose upon Parcel No. 2 (*see Lot 1555 Corp.*, 79 AD3d at

580-581). Neither Wells Fargo nor American Security has shown that the claims asserted by the Estate in action No. 2 would "impair the rights or interests established" in action No. 1 (*Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 NY2d 456, 462 n 2, *rearg denied* 69 NY2d 741; *see Lot 1555 Corp.*, 79 AD3d at 581). The general rule is that, when "a defendant may interpose a claim as a counterclaim but fails to do so, the doctrine of *res judicata* . . . does not apply to prevent [it] from subsequently maintaining an action on that claim" (*Pace v Perk*, 81 AD2d 444, 460; *see Henry Modell & Co.*, 68 NY2d at 462 n 2; *67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888, 889-890), and we conclude that the general rule applies herein.

Conclusion

Accordingly, we conclude that the order and judgment insofar as appealed from should be reversed, the motion to vacate granted, the nunc pro tunc order vacated, the motion for summary judgment denied, and the complaint in action No. 2 reinstated.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-01171

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

DAVID R. MARKHAM, CHRISTINE V. MARKHAM AND JAMES MARKHAM, AS ADMINISTRATOR OF THE ESTATES OF STEVEN R. MARKHAM AND SANDRA H. MARKHAM, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

EDWARD J. SCHMIEDER, BRUCE C. KERSHENSKI, DEFENDANTS-RESPONDENTS, NOTHNAGLE DRILLING, INC., DEFENDANT-APPELLANT, ET AL., DEFENDANT.

FLINK SMITH LLC, ALBANY (EDWARD B. FLINK OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JOHN H. CALLAHAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

HISCOCK & BARCLAY, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT EDWARD J. SCHMIEDER.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (DANIEL R. ROSE OF COUNSEL), FOR DEFENDANT-RESPONDENT BRUCE C. KERSHENSKI.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 30, 2012 in a personal injury action. The order, inter alia, denied the motion of defendant Nothnagle Drilling, Inc. for summary judgment dismissing the complaint and any cross claims against it.

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

Memorandum: Plaintiffs commenced this action seeking damages for personal injuries, loss of consortium and wrongful death resulting from a motor vehicle accident in which a vehicle owned by defendant Nothnagle Drilling, Inc. (NDI) and operated by defendant Edward J. Schmieder (Schmieder), an employee of NDI, struck motorcycles operated by Steven R. Markham (Steven), Sandra H. Markham (Sandra) and plaintiff David R. Markham (David). Steven and Sandra were killed in the accident, and David sustained personal injuries. According to plaintiffs, NDI is vicariously liable for Schmieder's negligence because Schmieder was operating the NDI-owned vehicle with NDI's permission. NDI subsequently moved for summary judgment dismissing

the complaint and any cross claims against it, and Supreme Court denied the motion. We affirm.

" '[I]t is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary' " (*Margolis v Volkswagen of Am., Inc.*, 77 AD3d 1317, 1320; *see Leotta v Plessinger*, 8 NY2d 449, 461, *rearg denied* 9 NY2d 688, *mot to amend remittitur granted* 9 NY2d 686). As the undisputed owner of the subject vehicle, NDI is presumed to have granted permission to Schmieder to have been operating it at the time of the accident (*see Murdza v Zimmerman*, 99 NY2d 375, 380; *Leotta*, 8 NY2d at 461). As the movant, it was NDI's obligation to rebut the presumption of permission with substantial evidence (*see Matter of Fiduciary Ins. Co. of Am. [Jackson]*, 99 AD3d 625, 625; *Margolis*, 77 AD3d at 1320; *Power v Hodge*, 37 AD3d 1078, 1078-1079; *Guerrieri v Gray*, 203 AD2d 324, 325), i.e., "evidence which reasonably sustains the proposition that permission was not given or was subject to a restriction . . . with which the operator did not comply" (1A NY PJI3d 1:63 at 85 [2014]; *see Orlando v Pioneer Barber Towel Supply Co.*, 239 NY 342, 345). "[S]ummary judgment for the owner will not *inexorably* follow whenever the owner and driver disavow consent" but, rather, "whether summary judgment is warranted depends on the strength and plausibility of the disavowals, and whether they leave room for doubts that are best left for the jury" to resolve (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 179). In other words, "[w]here the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury" on the theory that the determination of the weight to be accorded the disavowals lies with the trier of fact (*id.* at 178; *see St. Andrassy v Mooney*, 262 NY 368, 372).

Here, we conclude that NDI failed to meet its initial burden on its motion inasmuch as there is an issue of fact whether the disavowals of permission by Schmieder and NDI's primary owner are "arguably suspect" (*Country-Wide Ins. Co.*, 6 NY3d at 178; *see Marino v City of New York*, 95 AD3d 840, 841; *Power*, 37 AD3d at 1078-1079; *Stewart v Town of Hempstead*, 204 AD2d 431, 431). Although both Schmieder and NDI's primary owner testified at their depositions that Schmieder was using the subject vehicle for personal travel without the permission of NDI at the time of the accident, the record is unclear whether permission for such personal use was in fact required from NDI's primary owner. Indeed, the record establishes that any limitations on the use of the subject vehicle were never communicated to Schmieder in writing, and neither Schmieder nor NDI's primary owner testified at their depositions with specificity whether or how any such limitations were verbally communicated to Schmieder. Moreover, there is no evidence whether or how any rule concerning the use of vehicles for personal travel was communicated to the 8 or 10 other NDI employees who were assigned NDI-owned vehicles prior to the accident. In addition, Schmieder's access to the subject vehicle was unfettered and, although NDI paid for fuel for the vehicle, it did not require Schmieder to record the vehicle's mileage. The record also

establishes that Schmieder could not recall NDI's primary owner ever denying permission to any NDI employee to use an NDI-owned vehicle for personal travel, and it further establishes that other NDI employees used their NDI-owned vehicles for personal travel, and that Schmieder had used the subject vehicle for both local and out-of-town personal travel prior to the accident.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

88

KA 13-00198

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. DEMARCO, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (William H. Mountain, III, A.J.), rendered November 26, 2012. The judgment convicted defendant, upon his plea of guilty, of aggravated driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i]). We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because “no mention was made on the record during the course of the allocution” that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

89

KA 12-00705

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

ANTHONY BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 9, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]), defendant contends that his waiver of the right to appeal does not encompass his challenge to the severity of his sentence, and that the sentence is unduly harsh and severe. The People correctly concede that the waiver of the right to appeal does not preclude defendant from challenging his sentence inasmuch as Supreme Court "failed to advise defendant of the potential periods of incarceration or the potential maximum term of incarceration" (*People v Ravarini*, 96 AD3d 1700, 1701, *lv denied* 20 NY3d 1014; *see People v Kelly*, 96 AD3d 1700, 1700). Nevertheless, we reject defendant's challenge. We note in particular that the court sentenced defendant to less than the maximum permitted by law, and defendant has already been released to parole supervision. In addition, defendant has 10 prior criminal convictions, two of which are for felonies, and he showed no remorse for his conduct.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

96

KA 11-02136

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUAN A. LABOY, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 25, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, obstructing governmental administration in the second degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed as a matter of discretion in the interest of justice and on the law, and the indictment is dismissed and the matter is remitted to Ontario County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [former (3)]), obstructing governmental administration in the second degree (§ 195.05), and resisting arrest (§ 205.30). The conviction arises out of an altercation with a sheriff’s deputy who responded to defendant’s home in connection with a dispatch for possible family trouble. Earlier that day, other sheriff’s deputies had responded to defendant’s home and in his absence obtained an information signed by the complainant, alleging that defendant committed harassment in the second degree. When the deputy responded later that day, she had knowledge that there was a signed information charging the violation of harassment in the second degree, that defendant caused red marks on the complainant’s hand or arms, that the information had not been entered in court, and that there was no warrant for defendant’s arrest. The complainant was present but, because of a language barrier, she was able to communicate to the deputy only that defendant was inside the house and in a certain room behind a door. The deputy entered the room with her gun drawn and told defendant multiple times to get out of bed and that he was under

arrest. Thereafter, an altercation between defendant and the deputy ensued in which defendant head-butted the deputy, causing a welt on her head and bruising.

Defendant contends that the evidence is legally insufficient to support the conviction. Although defendant preserved that contention for our review only with respect to the charges of obstructing governmental administration and resisting arrest (*see People v Gray*, 86 NY2d 10, 19), we exercise our power to review defendant's contention with respect to the charge of assault in the second degree as well, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We conclude that the evidence is legally insufficient to establish that the deputy's arrest of defendant was lawful inasmuch as the deputy lacked reasonable cause to believe that defendant committed an offense in her presence (*see* CPL 140.10 [1] [a]). Because the arrest was not authorized at its inception, the evidence is legally insufficient to support the conviction of assault, obstructing governmental administration, and resisting arrest (*see People v Perez*, 47 AD3d 1192, 1192-1994), and reversal therefore is required. In view of our decision, we need not address defendant's remaining contentions.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

100

CA 13-00559

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

IN THE MATTER OF JOHN REILLY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROME, ROME POLICE DEPARTMENT, AND
JAMES MASUCCI, COMMISSIONER OF PUBLIC SAFETY,
RESPONDENTS-RESPONDENTS.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR PETITIONER-APPELLANT.

COHEN & COHEN LLP, UTICA (RICHARD A. COHEN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered June 13, 2012 in a proceeding pursuant to CPLR article 78. The order granted respondents' motion to vacate a default judgment.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner appeals from an order granting respondents' motion to vacate a default judgment. We note at the outset that, although no appeal as of right lies from an intermediate order in a CPLR article 78 proceeding (*see* CPLR 5701 [b] [1]), we treat the notice of appeal as an application for leave to appeal from the order and grant the application (*see Matter of Conde v Aiello,* 204 AD2d 1029, 1029). It is well settled that the decision whether to vacate a default judgment is a matter within Supreme Court's discretion (*see Alliance Prop. Mgt. & Dev. v Andrews Ave. Equities*, 70 NY2d 831, 832-833). Here, given that respondents proffered a reasonable excuse for failing to serve a timely answer to the petition and demonstrated a meritorious defense (*see* CPLR 5015 [a] [1]; *Puchner v Nastke*, 91 AD3d 1261, 1261-1262), and considering the "strong public policy in favor of resolving cases on the merits" (*Moore v Day*, 55 AD3d 803, 804; *see Puchner*, 91 AD3d at 1262), we conclude that the court did not abuse its discretion in granting respondents' motion (*see Cavagnaro v Frontier Cent. Sch. Dist*., 17 AD3d 1099, 1099). We note that, prior to the default, respondents engaged in settlement discussions with petitioner and filed a motion to dismiss the petition, thus evidencing a "good faith intent to defend" the proceeding on the merits (*Coven v Trust Co. of*

N.J., 225 AD2d 576, 576), and we further note that petitioner was not prejudiced by the slight delay in answering the petition (*see Accetta v Simmons*, 108 AD3d 1096, 1097).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

110

KA 11-02474

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. WHITE, ALSO KNOWN AS MICHAEL BREWER,
DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, MULDOON & GETZ, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Thomas M. Van Strydonck, J.), rendered July 27, 2011. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, following a nonjury trial, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Contrary to defendant's contention, he was not denied his constitutional right to proceed pro se. Defendant's request to proceed pro se "was made in the context of a claim expressing his dissatisfaction with his attorney and was not unequivocal" (*People v Alexander*, 109 AD3d 1083, 1084; *see People v Gillian*, 8 NY3d 85, 88; *People v Caswell*, 56 AD3d 1300, 1301-1302, *lv denied* 11 NY3d 923). We note in any event that defendant thereafter "abandoned his request to proceed pro se and, instead, requested the assignment of new counsel" (*People v Grippo*, 124 AD2d 985, 986, *lv denied* 69 NY2d 881; *see Gillian*, 8 NY3d at 88; *Alexander*, 109 AD3d at 1084; *People v Mercer*, 66 AD3d 1368, 1370, *lv denied* 13 NY3d 940).

Defendant's challenge to the legal sufficiency of the evidence is unpreserved for our review inasmuch as he failed to move for a trial order of dismissal at the close of the People's case (*see People v Jamieson*, 88 AD3d 1298, 1298; *People v Batjer*, 77 AD3d 1279, 1279, *lv denied* 77 NY3d 951; *see generally* CPL 470.05 [2]). In any event, we conclude that the evidence is legally sufficient to establish defendant's intent to sell the narcotic drugs in his possession (*see People v Alverson*, 79 AD3d 1787, 1788; *see generally People v*

Bleakley, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's contention that a police witness lacked sufficient experience to testify as an expert with respect to defendant's intent to sell is unpreserved for our review inasmuch as he failed to object to that testimony (*see People v Snyder*, 100 AD3d 1367, 1369, *lv denied* 21 NY3d 1010; *People v Hamilton*, 96 AD3d 1518, 1519, *lv denied* 19 NY3d 997; *see also People v Scully*, 61 AD3d 1364, 1365, *affd* 14 NY3d 861), 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]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

111

KA 10-00653

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN WALKER, 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 (Richard A. Keenan, J.), rendered December 17, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of burglary in the first degree (Penal Law § 140.30 [4]) and robbery in the first degree (§ 160.15 [4]), defendant contends that County Court erred in failing to ask him at sentencing why he wished to withdraw his guilty plea. We reject that contention. Where, as here, "a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made" (*People v Brown*, 14 NY3d 113, 116 [internal quotation marks omitted]; *see People v Mitchell*, 21 NY3d 964, 966). "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice" (*People v Tinsley*, 35 NY2d 926, 927). "The defendant should be afforded reasonable opportunity to present his contentions" (*id.*; *see People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045; *People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015).

Here, during the plea colloquy, defendant admitted his involvement in the crimes in question, which involved a home invasion robbery and a separate armed robbery committed the following day, and waived his right to appeal. In return, the court promised to sentence defendant to concurrent determinate terms of imprisonment of 18 years, plus a period of postrelease supervision. At sentencing, however, defense counsel stated that defendant wished to withdraw his plea, and

that she had instructed him that a plea withdrawal was something that he needed to raise with the court. The court turned to defendant, who said "Yes. I withdraw my plea." The court asked defendant whether there was anything else he wished to say, whereupon defendant answered "No." The court then denied defendant's "request" to withdraw his plea and asked him if he wished to say anything before the negotiated sentence was imposed. Defendant availed himself of that opportunity, stating that he had not received any "information" about his case, and that he preferred to go to trial "rather than settle for 18, [be]cause that's a long time for something I didn't do." The record therefore establishes that defendant was afforded a reasonable opportunity to present his contentions. We note that if, as defendant contends, there is a legitimate basis for withdrawal of his plea, he may seek relief in a motion pursuant to CPL 440.10.

Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

115

KA 11-02360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD TACKENTIEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 22, 2011. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony (two counts), criminally negligent homicide and failure to drive on right side of road.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, two counts of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i]) and one count of criminally negligent homicide (Penal Law § 125.10). We reject defendant's contention that the evidence is legally insufficient to support his conviction of criminally negligent homicide. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the People "demonstrated that defendant engaged in conduct exhibiting 'the kind of seriously blameworthy carelessness,' " the seriousness of which " 'would be apparent to anyone who shares the community's general sense of right and wrong' " (*People v Asaro*, 21 NY3d 677, 685, quoting *People v Cabrera*, 10 NY3d 370, 377; *see People v Conway*, 6 NY3d 869, 871-872; *People v Kraft*, 278 AD2d 591, 591-592, *lv denied* 96 NY2d 864; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crime of criminally negligent homicide in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Although we agree with defendant that Supreme Court erred in admitting in evidence photographs of the victim's body taken at the accident scene and during the autopsy, we conclude that the error is

harmless (*see People v Holley*, 48 AD3d 481, 481; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Contrary to defendant's further contention, the court properly sentenced him to five years of probation pursuant to Penal Law § 60.21 (*see People v O'Brien*, 111 AD3d 1028, 1029; *People v Panek*, 104 AD3d 1201, 1201-1202, *lv denied* 21 NY3d 1018).

Finally, the sentence is not unduly harsh or severe.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

116

KA 09-02165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

SEAN L. SANDERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered July 23, 2009. The judgment convicted defendant, upon a nonjury verdict, of criminally negligent homicide and assault in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, criminally negligent homicide (Penal Law § 125.10) for punching the victim in the back of the head and thereby causing his death, defendant contends that the verdict with respect to that crime is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We reject that contention. "A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person" (§ 125.10). "A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists[;] [t]he risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation" (§ 15.05 [4]). " '[T]he carelessness required for criminal negligence . . . must be such that its seriousness would be apparent to anyone who shares the community's general sense of right and wrong' " (*People v Conway*, 6 NY3d 869, 872).

Here, the evidence at trial established that defendant rushed at the victim from behind and, without warning, delivered a powerful blow with his closed fist to the victim's head, which resulted in massive bleeding around the victim's brain and, ultimately, his death.

Eyewitnesses described defendant as using all of his body weight and all of his momentum to deliver a blow that immediately dropped the victim to the ground. The sound of the punch was described by eyewitnesses as a very loud crack, like a wooden bat hitting a ball. The Medical Examiner who performed the autopsy described the victim's injuries as similar to those she had seen in individuals who were killed in high-speed automobile collisions. Although defendant is correct that death resulting from a single punch may be unusual, we have consistently held that one can commit criminally negligent homicide with a single punch (*see People v Bridenbaker*, 266 AD2d 875, 875, *lv denied* 94 NY2d 917; *People v Doty*, 175 AD2d 564, 564, *lv denied* 78 NY2d 1127). Viewing the evidence in light of the elements of the crime of criminally negligent homicide in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, although an acquittal would not have been unreasonable, it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Howard*, 101 AD3d 1749, *lv denied* 21 NY3d 944).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

117

KA 12-00186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. RUSSAW, JR., DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered October 17, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Defendant failed to preserve for our review his contention that County Court committed several errors in allowing the jurors to take notes and in instructing the jurors with respect to note-taking, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Green*, 35 AD3d 1197, 1198, *lv denied* 8 NY3d 922; *People v Valiente*, 309 AD2d 562, 562, *lv denied* 1 NY3d 602). Contrary to defendant's further contention, the evidence is legally sufficient to establish that he constructively possessed the controlled substance. "Where . . . there is no evidence that defendant actually possessed the controlled substance, 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* § 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 the controlled substance (*see generally People v Bleakley*, 69 NY2d 490, 495). Also contrary to defendant's

contention, viewing the evidence in light of the elements of the crime 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 Bleakley*, 69 NY2d at 495).

We reject defendant's further contentions that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147), and that the sentence is unduly harsh and severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not require reversal or modification of the judgment of conviction.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

120

CA 13-00853

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

LINDA BENSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF TONAWANDA AND RONALD PILOZZI, MAYOR,
CITY OF TONAWANDA, DEFENDANTS-RESPONDENTS.

FEUERSTEIN & SMITH, LLP, BUFFALO (MARK E. GUGLIELMI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA, LLP, BUFFALO (LISA M. DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), granted August 7, 2012 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, insofar as it alleges that defendants created a dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when her foot was caught in a gap between two wooden planks on a pedestrian bridge located within a park maintained by defendant City of Tonawanda. According to the complaint, as amplified by the bill of particulars, defendants failed to maintain the bridge in a reasonably safe condition, and defendants "created the condition of the bridge which caused [her] injury." Supreme Court granted defendants' motion for summary judgment and dismissed the complaint. We conclude that the court erred in granting the motion to the extent that plaintiff alleges that defendants created the dangerous condition that resulted in her injuries (*see generally Horton v City of Schenectady*, 177 AD2d 823, 823). We therefore modify the order accordingly.

Where, as here, a municipality has enacted a prior notification law, prior written notice of a defective or unsafe condition is a condition precedent to an action against the municipality (*see Amabile v City of Buffalo*, 93 NY2d 471, 474; *Hawley v Town of Ovid*, 108 AD3d 1034, 1034-1035; *see also* Tonawanda City Charter § 6.003). We conclude that defendants met their initial burden of establishing as a

matter of law that they did not receive prior written notice of any defective or dangerous condition on or near the bridge (*see Hawley*, 108 AD3d at 1035; *Young v City of Buffalo*, 1 AD3d 1041, 1042-1043, *lv denied* 2 NY3d 707; *Smith v City of Syracuse*, 298 AD2d 842, 842). We conclude, however, that plaintiff raised an issue of fact with respect to the applicability of one of the two recognized exceptions to the prior written notice requirement, i.e., "that the municipality affirmatively created the defect through an act of negligence" (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Hawley*, 108 AD3d at 1035). Specifically, plaintiff raised an issue of fact whether defendants created a dangerous condition by constructing the bridge with half-inch gaps between the wooden planks instead of the quarter-inch gaps specified in the design plans for the bridge (*see Hawley*, 108 AD3d at 1035).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

128

CA 13-01128

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

AMY GELIA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID GELIA, DEFENDANT-APPELLANT.

JOHN P. PIERI, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered November 16, 2012 in a divorce action. The order directed defendant to pay attorney's and accountant's fees of plaintiff.

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

Memorandum: Defendant appeals from an order directing him to pay counsel fees in the amount of $20,475 and accountant's fees in the amount of $11,115 as his share of such fees incurred by plaintiff in this matrimonial action. We reject defendant's contention that those awards are excessive. "The award of reasonable . . . fees is a matter within the sound discretion of the trial court" (*Morrissey v Morrissey*, 259 AD2d 472, 473; *see* Domestic Relations Law § 237 [a]). Supreme Court properly considered the parties' submissions in light of all the circumstances of the case, including the parties' relative financial circumstances and the merits of their positions during settlement negotiations, and we conclude that the awards are reasonable and do not constitute an abuse or improvident exercise of the court's discretion (*see Decker v Decker*, 91 AD3d 1291, 1291-1292; *Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

132

KA 11-02126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. WESTFALL, DEFENDANT-APPELLANT.

CARR SAGLIMBEN LLP, OLEAN (JAY D. CARR OF COUNSEL), FOR DEFENDANT-APPELLANT.

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from an amended order of the Cattaraugus County Court (Larry M. Himelein, J.), entered September 13, 2011. The amended order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an amended order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Contrary to defendant's contention, County Court's determination to classify him in accordance with his presumptive classification as a level two risk is supported by the requisite clear and convincing evidence (*see* § 168-n [3]; *People v Carbone*, 89 AD3d 1392, 1392-1393, *lv denied* 18 NY3d 806). Contrary to defendant's further contention, he received effective assistance of counsel at the SORA hearing (*see People v Reid*, 59 AD3d 158, 158-159, *lv denied* 12 NY3d 708). Based upon the information contained in the presentence report and defendant's admissions in the underlying criminal proceeding, defense counsel could have reasonably concluded that, beyond the downward departure requested by defense counsel, there was nothing to litigate at the hearing (*see id.* at 159; *cf. People v DeFreitas*, 213 AD2d 96, 101-102, *lv denied* 86 NY2d 872). Defendant's contention that defense counsel was ineffective because he did not present the testimony of a "sexual therapy guy" with whom defendant had spoken at some time before the hearing concerns matters dehors the record and is thus not subject to review in this appeal (*see generally People v Gravino*, 14 NY3d 546, 558).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

138

CA 13-01104

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

MARK MOORE AND STACY MOORE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SYDNEY MOORE, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

RICHARD E. HOFFMAN, DEFENDANT-APPELLANT.

LAW OFFICES OF KAREN L. LAWRENCE, PITTSFORD (BARNEY BILELLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (RICHARD A. GRIMM, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 26, 2013 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by their daughter while skiing. According to plaintiffs, their daughter's arm was fractured by defendant's "carelessness and negligence" in colliding with their daughter from behind. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint because there are issues of fact whether the doctrine of assumption of the risk applies and whether defendant's carelessness in colliding with plaintiffs' daughter was reckless conduct.

The daughter testified at her deposition that she was a novice skier and that, at the time of the collision, she was skiing down an easy trail. As she entered the slow skiing area near the end of the trail, she heard defendant yell "whoa" three times just before he struck her from behind. The friend with whom plaintiffs' daughter was skiing asserted in an affidavit submitted by plaintiffs in opposition to the motion that she observed the daughter slowly enter the slow skiing area and then observed defendant, who was skiing "very fast," "r[u]n her over from nearly directly behind," "[w]ithout slowing, stopping or otherwise turning to avoid" her.

It is well established that, "by engaging in a sport or

recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484). "While awareness or appreciation of such risks must be 'assessed against the background of the skill and experience of the particular plaintiff' . . . , '[t]he risk of injury caused by another skier is an inherent risk of downhill skiing' " (*DeMasi v Rogers*, 34 AD3d 720, 721). Nevertheless, "a sporting participant 'will not be deemed to have assumed the risks of reckless or intentional conduct' " (*Thornton v Rickner*, 94 AD3d 1504, 1504, quoting *Morgan*, 90 NY2d at 485). " 'Generally, the issue of assumption of [the] risk is a question of fact for the jury' " (*Hyde v North Collins Cent. Sch. Dist.*, 83 AD3d 1557, 1558; *see Clauss v Bush*, 79 AD3d 1397, 1398).

Here, even assuming, arguendo, that defendant met his initial burden on the motion by "establishing that he did not engage in any 'reckless, intentional or other risk-enhancing conduct not inherent in the activity' of downhill skiing that caused or contributed to the accident" (*Zielinski v Farace*, 291 AD2d 910, 911, *lv denied* 98 NY2d 612), we conclude that there is a triable issue of fact whether defendant's conduct rose to the level of recklessness and thus was over and above the risk assumed by plaintiffs' daughter, a novice skier who was injured while skiing slowly on an easy trail in a slow skiing area. Indeed, we note that defendant struck plaintiffs' daughter with such force that the daughter's arm was "shattered" and defendant's kidney was lacerated, and thus there is "at least a question of fact as to whether the defendant's speed in the vicinity and overall conduct was reckless" (*DeMasi*, 34 AD3d 721-722).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

139

CA 13-01223

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

AARON MANOR REHABILITATION AND NURSING CENTER, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GRACE DIOGO AND ANNETTE LOUIS, DEFENDANTS-RESPONDENTS.

LAW OFFICE OF HEIDI E. LADUCA, ESQ., WEBSTER (HEIDI E. LADUCA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 4, 2012. The order, inter alia, denied the motion of plaintiff for summary judgment on the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion for summary judgment on the first and second causes of action against defendant Grace Diogo and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking judgment in the amount of $62,344.71 for services rendered in caring for defendant Grace Diogo. Plaintiff asserted causes of action for breach of contract, an account stated, unjust enrichment, and fraudulent conveyance against Diogo and defendant Annette Louis, the niece who signed the "long-term admission agreement" (hereafter, contract) as Diogo's power of attorney (POA). It is undisputed that Louis signed the contract in February 2011 and agreed to utilize Diogo's assets to pay for Diogo's care and to apply for Medicaid assistance if necessary. It is also undisputed that Medicaid funding was not approved for a portion of Diogo's care based upon an uncompensated transfer of assets in February 2009, when Diogo gave Louis and Louis's sister $24,000 each.

We conclude that, inasmuch as defendants concede that Diogo is liable for the services rendered to her, Supreme Court erred in determining that defendants raised an issue of fact sufficient to defeat the motion with respect to Diogo on the first and second causes of action, for breach of contract and an account stated. We therefore modify the order accordingly. We conclude with respect to Louis that, although plaintiff established its entitlement to judgment with respect to the first and second causes of action, the court properly determined that defendants raised an issue of fact sufficient to

defeat the motion on those causes of action against Louis. With respect to the cause of action for breach of contract, Louis submitted an affidavit stating that she exhausted Diogo's assets and then applied for Medicaid for Diogo, in conformance with the terms of the contract (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). With respect to the cause of action for an account stated, both Louis and her attorney submitted affidavits stating that they contacted plaintiff and objected to the implicit claim that Louis was personally liable for the amount due. " 'There can be no account stated where . . . any dispute about the account is shown to have existed' " (*Hull v City of N. Tonawanda*, 6 AD3d 1142, 1142) and, here, defendants established that there was a dispute about the account.

We conclude that the court properly denied that part of the motion with respect to the third cause of action, for unjust enrichment, but our reasoning differs from that of the court. Plaintiff alleges that defendants were unjustly enriched by the care provided to Diogo for which there was no compensation, but there can be no unjust enrichment "because the matter is controlled by contract" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572; *see Leo J. Roth Corp. v Trademark Dev. Co.* [appeal No. 2], 90 AD3d 1579, 1581). Plaintiff therefore failed to establish its entitlement to judgment on that cause of action (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Finally, the court properly denied that part of the motion with respect to the fourth cause of action, for fraudulent conveyance. Even assuming, arguendo, that plaintiff established that the transfer of funds from Diogo to Louis and Louis's sister in 2009 constituted a fraud pursuant to Debtor and Creditor Law § 275, we conclude that defendants raised an issue of fact sufficient to defeat the motion. Debtor and Creditor Law § 275 provides that "[e]very conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he [or she] will incur debts beyond his or [her] ability to pay as they mature, is fraudulent as to both present and future creditors." Defendants established that, as early as 2003, Diogo had an account entitled "Grace Diogo, in trust for" Louis and Louis's sister, and the account was closed at the time Diogo gave the proceeds to her nieces in 2008. Defendants also established that Diogo had resided in Portugal since 1987 and that in 2006 she advised her family in Rochester that she would not again visit because of the difficulty she had in traveling alone at age 82. She returned to Rochester in 2010, however, because her husband was critically ill and his family in Portugal could not care for both Diogo and her husband. At the time of the transfer, Diogo had in excess of $139,000 in another account with the same bank, and defendants thus raised an issue of fact whether the transfer of funds in 2008 rendered Diogo insolvent with respect to the amount owed to plaintiff (*see* § 273; *Grace Plaza of Great Neck v Heitzler*, 2 AD3d 780, 781; *cf. Chamberlain v Amato*, 259 AD2d 1048, 1049-1050).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

144

KA 12-01041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH K. RANDLE, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered April 19, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of count three of the superior court information, vacating the plea with respect to that count and dismissing that count, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of felony driving while intoxicated ([felony DWI] Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]), arising from three separate incidents. Defendant was initially arraigned in local court on two separate felony complaints charging him with, inter alia, felony DWI for two incidents occurring in August and September 2011. Defendant was subsequently charged in a third felony complaint with one count of aggravated unlicensed operation of a motor vehicle in the first degree ([AUO1] § 511 [3] [a] [i]) for an incident occurring in October 2011. Defendant thereafter executed a written waiver of indictment and agreed to be prosecuted by a superior court information (SCI). The SCI charged defendant with three counts of felony DWI, i.e., one count for each incident. Defendant pleaded guilty to all three counts, and waived his right to appeal.

As a preliminary matter, we reject defendant’s contention that his waiver of the right to appeal is unenforceable. Contrary to defendant’s contention, his waiver of the right to appeal was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to

the severity of the sentence (*see id.* at 255-256).

As the People correctly concede, however, the third count of felony DWI in the SCI is jurisdictionally defective pursuant to CPL 195.20 because defendant was not held for action of the grand jury on that charge, nor is it a joinable offense pursuant to that statute or case law. We therefore modify the judgment accordingly. Initially, "[w]e note that defendant's contention that the SCI is jurisdictionally defective does not require preservation, and that contention survives defendant's valid waiver of the right to appeal" (*People v Stevenson*, 107 AD3d 1576, 1576). The third count of felony DWI is jurisdictionally defective because it " 'was not an offense charged in the [third] felony complaint or a lesser-included offense of an offense charged in th[at] felony complaint' " (*People v Cieslewicz*, 45 AD3d 1344, 1345). Furthermore, although the third count of felony DWI charged in the SCI is joinable, within the meaning of CPL 200.20 (2) (a), to the charge on which defendant was held for action of a grand jury, i.e., the AUO1 charge in the third felony complaint, "[t]he language of CPL 195.20 makes clear that where 'joinable' offenses are included, the [SCI] must, at a minimum, also include at least one offense that was contained in the felony complaint" at issue (*People v Zanghi*, 79 NY2d 815, 818).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

145

KA 12-00902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD GAST, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. Willam Boller, A.J.), rendered March 28, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, it is well established that "a 'waiver of the right to appeal [is] not rendered invalid based on [a] court's failure to require [the] defendant to articulate the waiver in his [or her] own words' " (*People v Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976; *see People v Thompson*, 70 AD3d 1319, 1319-1320, *lv denied* 14 NY3d 845, *reconsideration denied* 15 NY3d 810). "[W]e conclude that [defendant's] responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly, and voluntarily waived his right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019; *see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see Lopez*, 6 NY3d at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Defendant contends that his plea should be vacated because it was coerced by Supreme Court's repeated emphasis on what the potential sentence could be after a trial. "Although defendant's contention that the plea was not knowingly, voluntarily and intelligently entered survives the valid waiver of the right to appeal" (*People v Garner*, 111 AD3d 1421, 1421), he "failed to preserve for our review his contention that his guilty plea was coerced by [the court] inasmuch as

he failed to raise that issue in his motion to withdraw his plea . . . and failed to move to vacate the judgment of conviction on that ground" (*People v Robinson*, 64 AD3d 1248, 1248, *lv denied* 13 NY3d 862; *see People v Carlisle*, 50 AD3d 1451, 1452, *lv denied* 10 NY3d 957). In any event, defendant's contention lacks merit. "Although it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial' . . . , the statements of the court at issue . . . 'amount to a description of the range of the potential sentences' rather than impermissible coercion" (*People v Boyde*, 71 AD3d 1442, 1443, *lv denied* 15 NY3d 747). " 'The fact that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " (*id.*). Contrary to defendant's further contention, the court did not err in denying his motion to withdraw his guilty plea on the ground that defense counsel coerced him into pleading guilty. " 'The unsupported allegations of defendant that [defense counsel] pressured him into accepting the plea bargain do not warrant vacatur of his plea' " (*People v James*, 71 AD3d 1465, 1465). To the extent that defendant contends that the plea was not knowing, voluntary and intelligent because he was on medication at the time of the plea colloquy, and thus was unable to understand the nature of the proceedings, that contention " 'is belied by the record of the plea proceeding' . . . , which establishes that defendant understood the nature of the proceedings" (*People v Watkins*, 107 AD3d 1416, 1417, *lv denied* 22 NY3d 959).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

146

KA 12-01525

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAYME I. FRONTUTO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 5, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05). As the People correctly concede, because "[n]o mention of youthful offender status was made before defendant waived his right to appeal during the plea colloquy" (*People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991), defendant's waiver of the right to appeal does not encompass his contention regarding County Court's denial of his request for youthful offender status. We nevertheless reject defendant's contention that the court abused its discretion in denying that request (*see People v Lugo*, 87 AD3d 1403, 1405, *lv denied* 18 NY3d 860). The remedial measures of *People v Rudolph* (21 NY3d 497, 499) do not apply to the circumstances of this case.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

147

KA 10-00076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL JONES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered October 26, 2009. The order denied defendant's motion, pursuant to CPL 440.30 (1-a), for the performance of forensic DNA testing on specified evidence.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for a determination in accordance with the following Memorandum: Defendant appeals from an order denying his pro se motion pursuant to CPL 440.10 and 440.30 (1-a) seeking DNA testing on a rape kit, underwear, an "excised piece of cloth taken from the victim's underwear," swabs, slides, "hair, clothing or shaking from the victim's clothing," and a washcloth (*see generally* CPL 450.10 [5]). Preliminarily, we note that the notice of appeal incorrectly recites that defendant appeals from a judgment. As a matter of discretion in the interest of justice, however, we treat the notice of appeal as valid (*see* CPL 460.10 [6]; *People v Mitchell*, 93 AD3d 1173, 1173, *lv denied* 19 NY3d 999). The order addressed only that part of defendant's motion requesting testing on the washcloth, however, and Supreme Court's failure to rule on the other parts of defendant's motion " 'cannot be deemed a denial thereof' " (*People v Stewart*, 111 AD3d 1395, 1396; *see People v Santana*, 101 AD3d 1664, 1664, *lv denied* 20 NY3d 1103; *see generally People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to Supreme Court for a determination on the remainder of defendant's motion.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

148

KA 12-00168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMONE T. BURTS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 24, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the second degree (Penal Law § 160.10 [1]) and attempted robbery in the first degree (§§ 110.00, 160.15 [2]). Contrary to defendant's contention, we conclude that he knowingly, intelligently, and voluntarily waived his right to appeal as a condition of the plea (*see generally People v Lopez*, 6 NY3d 248, 256). County Court " 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Flagg*, 107 AD3d 1613, 1614), and the record establishes that defendant " 'understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*id.*, quoting *Lopez*, 6 NY3d at 256). Defendant's valid waiver forecloses our review of his contention concerning his purported motion (*see generally People v Callahan*, 80 NY2d 273, 285).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

149

KA 11-00806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PARIS HART, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 13, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea allocution was factually insufficient because County Court did not obtain a waiver of two possible affirmative defenses, i.e., mental disease or defect (*see People v Cruz*, 98 AD3d 1273, 1274, *lv denied* 20 NY3d 931; *People v Diallo*, 88 AD3d 511, 511, *lv denied* 18 NY3d 882; *People v Trapp*, 15 AD3d 916, 916, *lv denied* 4 NY3d 891), and extreme emotional disturbance (§ 125.25 [1] [a]). Nothing in the plea allocution raised the possibility that such defenses are applicable in this case (*cf. People v Mox*, 20 NY3d 936, 938; *People v Lopez*, 71 NY2d 662, 666-668; *People v Costanza*, 244 AD2d 988, 989), and defendant's contention therefore does not fall within the narrow exception to the preservation rule (*see Lopez*, 71 NY2d at 666).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

150

KA 12-00343

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRELL FORD, 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 Erie County Court (Michael L. D'Amico, J.), rendered January 31, 2012. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of assault in the second degree (Penal Law § 120.05 [1]) and harassment in the second degree (§ 240.26 [1]). With respect to the assault conviction, defendant contends that the evidence is legally insufficient to establish that he intended to cause serious physical injury to one of the victims. We reject that contention. " 'A defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [i]ntent may be inferred from the totality of conduct of the accused' " (*People v Moreland*, 103 AD3d 1275, 1276, *lv denied* 21 NY3d 945; *see People v Meacham*, 84 AD3d 1713, 1714, *lv denied* 17 NY3d 808). Here, several witnesses testified that defendant attacked the victim from behind and punched him in the face at least twice with a closed fist. During the altercation, defendant, who was approximately six feet five inches tall, weighed about 300 or 320 pounds, and was considerably larger than the victim, placed the victim in a headlock, and then struck the victim in the face at least once while the victim was thus immobilized. We conclude that one natural and probable consequence of striking someone under such circumstances is that the person will sustain a serious physical injury (*see Meacham*, 84 AD3d at 1714). Defendant also challenges the legal sufficiency of the evidence on the issue whether the victim sustained a serious physical injury within the meaning of Penal Law §§ 120.05 (1) and 10.00 (10). The People presented evidence establishing that the victim sustained two

fractures to his jaw, which required surgery and the permanent placement of a titanium plate in his chin. The victim's jaw was wired shut for four weeks, and the victim experienced numbness in his chin that continued until the time of trial. Consequently, we conclude that the evidence of serious physical injury is legally sufficient to support the conviction of assault (*see People v Santiago*, 111 AD3d 1383, 1384-1385; *People v Johnson*, 50 AD3d 1537, 1537-1538, *lv denied* 10 NY3d 935; *see also Matter of Tirell R.*, 33 AD3d 804, 805).

Viewing the evidence in light of the elements of the crime and the violation in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the court failed to give the evidence the weight it should be accorded when it determined that he intended to cause serious physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495), and when it rejected his justification defense (*see People v Moreno*, 31 AD3d 1214, 1214, *lv denied* 7 NY3d 869). "It is well settled that credibility determinations by the court . . . are entitled to great deference . . . , and minor inconsistencies in the testimony of certain prosecution witnesses do not render their testimony incredible as a matter of law" (*People v Howard*, 101 AD3d 1749, 1750, *lv denied* 21 NY3d 944 [internal quotation marks omitted]).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

151

CAF 13-00240

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

IN THE MATTER OF JODY L. BLY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. HOFFMAN, RESPONDENT-RESPONDENT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PETITIONER-APPELLANT.

WENDY G. PETERSON, ATTORNEY FOR THE CHILDREN, OLEAN.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered January 4, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal insofar as it concerns the parties' older child is unanimously dismissed, the order is reversed on the law without costs, the petition is reinstated and the matter is remitted to Family Court, Cattaraugus County, for further proceedings in accordance with the following Memorandum: Petitioner mother appeals from an order dismissing her petition to modify an existing custody order without a hearing. We note at the outset that the appeal is moot with respect to the parties' older child because he reached the age of 18 years during the pendency of this appeal (*see Matter of Woodruff v Adside*, 26 AD3d 866, 866). We agree with petitioner that she was denied the right to counsel when Family Court sua sponte dismissed her petition in the absence of her attorney. "The deprivation of a party's fundamental right to counsel in a custody or visitation proceeding is a denial of due process and requires reversal, without regard to the merits of the unrepresented party's position" (*Matter of Williams v Bentley*, 26 AD3d 441, 442; *see* Family Ct Act § 262 [a]; *Matter of Dolson v Mitts*, 99 AD3d 1079, 1080; *Matter of Scala v Tefft*, 42 AD3d 689, 691-692). We therefore reverse the order, reinstate the petition and remit the matter to Family Court for further proceedings on the petition. In light of our determination, we need not address petitioner's remaining contention.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CAF 12-01539

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

IN THE MATTER OF DELMAR GRICE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANY HARRIS, RESPONDENT-APPELLANT.

JON STERN, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

SARA E. ROOK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered August 6, 2012 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the parties' child to petitioner.

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

Memorandum: Respondent mother appeals from an order that, inter alia, awarded sole custody of the subject child to petitioner father. The mother contends that Family Court abused its discretion in denying her request to adjourn the evidentiary hearing. We reject that contention. It is well settled that "[t]he grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889, quoting *Matter of Anthony M.*, 63 NY2d 270, 283). Here, the mother "failed to demonstrate that the need for the adjournment to [arrange transportation] was not based on a lack of due diligence on [her] part" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747; *see Matter of Matthew K. v Susan O.*, 37 AD3d 1119, 1119, *lv denied* 8 NY3d 811). Consequently, we conclude that the court did not abuse its discretion in denying the mother's request for an adjournment, and in proceeding with the hearing in her absence (*see Matter of La'Derrick J.W. [Ashley W.]*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709; *cf. Matter of Nicole J.*, 71 AD3d 1581, 1582).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

161

CA 13-00765

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

JAMES T. SANDORO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

9274 GROUP, INC., DEFENDANT-RESPONDENT.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PALADINO, CAVAN, QUINLIVAN & PIERCE, BUFFALO (SHANNON M. HENEGHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 1, 2013. The judgment, inter alia, denied the motion of plaintiff for summary judgment and granted the cross motion of defendant for a judgment declaring that it is the titled owner of real property located at 204 and 208 Seneca Street, Buffalo.

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

Memorandum: Plaintiff commenced this action pursuant to RPAPL article 15 seeking, inter alia, a declaration that he had acquired title to a portion of defendant's property by adverse possession. Contrary to the contention of plaintiff, Supreme Court properly denied his motion for summary judgment and granted defendant's cross motion for summary judgment dismissing the complaint and declaring that defendant is the titled owner of the disputed property (*see* RPAPL 1521). Defendant met its burden on its cross motion by establishing that at least two of the five elements of adverse possession were not present, i.e., that plaintiff's possession was not hostile and under a claim of right, and that plaintiff's possession did not continue for the requisite 10 years (*see Walling v Przybylo*, 7 NY3d 228, 232; *see also* RPAPL 501 [2]). In support of its cross motion, defendant submitted a letter written by plaintiff during the statutory 10-year period, in which plaintiff acknowledged defendant's ownership of 208 Seneca Street—a large portion of the property in dispute. Plaintiff's acknowledgment of defendant's ownership negates the element of hostility during the requisite period as a matter of law (*see Van Gorder v Masterplanned, Inc.*, 78 NY2d 1106, 1107-1108; *Bedell v Shaw*, 59 NY 46, 49), and plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiff's contention that his letter referred to a different parcel

of real property, and we conclude that plaintiff's deposition testimony on that point was merely an attempt to avoid the legal consequences of his letter by raising feigned issues of fact (*see Taillie v Rochester Gas & Elec. Corp.*, 68 AD3d 1808, 1809). In any event, the confusing and conflicting deposition testimony about what this letter may have referred to makes it impossible as a matter of law to support a finding of hostility by clear and convincing evidence (*see Snyder v Fabrizio*, 2 AD3d 1464, 1464-1465, *lv denied* 2 NY3d 703). Moreover, plaintiff conceded that his use of the property was sporadic after his student parking contract with a local college expired, and he therefore failed to raise an issue of fact whether his use of the disputed property was continuous during the requisite period (*see Aubuchon Realty Company Inc. v Cohen*, 294 AD2d 738, 739; *see generally Zuckerman*, 49 NY2d at 562). In light of our determination, we do not address plaintiff's remaining contentions.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

162

CA 13-00111

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

ROBERT BERKLEY PHYSICAL THERAPY, P.C.,
PLAINTIFF-RESPONDENT,

V ORDER

THE HISTORIC WOODRUFF BLOCK, LLC,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

RICHARD PALMA, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (SCOTT J. DELCONTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 20, 2012. The order granted the motion of plaintiff for summary judgment, affirmed plaintiff's rejection of the parties' lease, and dismissed defendant's counterclaims.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567; *see also* CPLR 5501 [a] [1]).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

163

CA 13-01149

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

ROBERT BERKLEY PHYSICAL THERAPY, P.C.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE HISTORIC WOODRUFF BLOCK, LLC,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

RICHARD PALMA, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

BOND, SCHOENECK & KING, PLLC, OSWEGO (SCOTT J. DELCONTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered September 10, 2012. The order and judgment awarded money damages to plaintiff.

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

Memorandum: Defendant's sole contention on appeal is that a contract was never formed based on lack or failure of consideration, and thus that Supreme Court erred in granting plaintiff's motion for summary judgment and entering judgment in plaintiff's favor. That contention is raised for the first time on appeal and thus is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

165

KA 12-01601

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL D. WILLIAMS, SR., DEFENDANT-APPELLANT.

REBECCA CURRIER, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 5, 2012. The judgment revoked the probation component of defendant's split sentence of incarceration and probation and imposed a lengthier indeterminate term of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the probation component of the split sentence of incarceration and probation previously imposed upon his conviction of robbery in the third degree (Penal Law § 160.05) and sentencing him to a lengthier indeterminate term of incarceration. County Court did not abuse its discretion in denying defendant's request for an adjournment of the violation of probation hearing to enable him to obtain a copy of the plea and sentencing transcripts from the underlying conviction (*see People v Strauts*, 67 AD3d 1381, 1381, *lv denied* 14 NY3d 773; *see also People v Darryl P.*, 105 AD3d 1439, 1440, *lv denied* 21 NY3d 1041). Contrary to defendant's further contention, the People established by a preponderance of the evidence that he violated the condition of his probation that he abstain from the use of intoxicating beverages (*see People v Flinn*, 92 AD3d 1217, 1217-1218, *lv denied* 18 NY3d 994; *People v Jones*, 50 AD3d 1058, 1059, *lv denied* 10 NY3d 936). The State Trooper who arrested defendant for driving while intoxicated after he crashed his vehicle testified at the hearing that defendant tested positive for alcohol on the preliminary screening device, failed three sobriety tests, and admitted that he purchased beer. Also contrary to defendant's contention, the sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

166

KA 12-01629

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

ADAM M. WERTMAN, DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (HEATHER M. DESTEFANO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 28, 2012. The judgment convicted defendant, after a nonjury trial, of aggravated criminal contempt (five counts), criminal obstruction of breathing or blood circulation (three counts) and harassment in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of, inter alia, five counts of aggravated criminal contempt (Penal Law § 215.52 [3]) and three counts of criminal obstruction of breathing or blood circulation (§ 121.11 [a]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's challenge is without merit. "[T]he victim's testimony constituted 'competent evidence which, if accepted as true, would establish every element of [the] offense[s] charged' " (*People v Smith*, 41 AD3d 1093, 1094, *lv denied* 9 NY3d 1039, quoting CPL 70.10 [1]; *see People v Pettengill*, 36 AD3d 1070, 1071, *lv denied* 8 NY3d 948; *People v Liggins*, 2 AD3d 1325, 1326). Contrary to defendant's contention, it cannot be said that the victim's testimony was "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268, *lv denied* 11 NY3d 925; *see People v Latorre*, 94 AD3d 1429, 1430, *lv denied* 19 NY3d 998, *reconsideration denied* 20 NY3d 987).

Viewing the evidence in light of the elements of the crimes in this bench 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). Although a

different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, [County C]ourt . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*id.*; *see People v Romero*, 7 NY3d 633, 642-643). " '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 Gritzke*, 292 AD2d 805, 805-806, *lv denied* 98 NY2d 697), and we perceive no reason to disturb the court's credibility determinations.

Contrary to the further contention of defendant, we conclude that the court did not err in its *Molineux* ruling in allowing the People to introduce testimony concerning defendant's prior acts of domestic violence against the victim. That testimony was "relevant to provide background information concerning the context and history of defendant's relationship with the victim" (*People v Wolff*, 103 AD3d 1264, 1265, *lv denied* 21 NY3d 948; *see People v Meseck*, 52 AD3d 948, 950, *lv denied* 11 NY3d 739; *People v Nunez*, 51 AD3d 1398, 1399-1400, *lv denied* 11 NY3d 792), and it was also relevant to the issue of defendant's intent (*see People v Crump*, 77 AD3d 1335, 1336, *lv denied* 16 NY3d 857; *People v Williams*, 29 AD3d 1217, 1219, *lv denied* 7 NY3d 797). Further, the probative value of such testimony exceeded its potential for prejudice (*see Wolff*, 103 AD3d at 1266; *Crump*, 77 AD3d at 1336; *Nunez*, 51 AD3d at 1399-1400).

We reject defendant's further contention that the court's *Sandoval* ruling constituted an abuse of discretion (*see People v Sandoval*, 34 NY2d 371, 374). Defendant's "intentional violation of prior court orders bore on his honesty, truthfulness and willingness to advance his own interests at the expense of society, all bearing on his testimonial credibility" (*People v Olson*, 110 AD3d 1373, 1375; *see People v Salsbery*, 78 AD3d 1624, 1626, *lv denied* 16 NY3d 836; *People v Foster*, 52 AD3d 957, 960-961, *lv denied* 11 NY3d 788), and "[t]he similarity between the prior convictions and the instant crimes does not by itself preclude cross-examination concerning those prior convictions" (*People v Hammond*, 84 AD3d 1726, 1726-1727, *lv denied* 17 NY3d 816; *see People v Hayes*, 97 NY2d 203, 208; *People v Paige*, 88 AD3d 912, 912, *lv denied* 18 NY3d 885). Although defendant contends that the record does not establish that the court properly balanced the probative value of his prior convictions against their potential for undue prejudice, "it is well settled that 'an exercise of a trial court's *Sandoval* discretion should not be disturbed merely because the court did not provide a detailed recitation of its underlying reasoning . . . , particularly where, as here, the basis of the court's decision may be inferred from the parties' arguments' " (*People v Mull*, 89 AD3d 1445, 1445, *lv denied* 19 NY3d 965, quoting *People v Walker*, 83 NY2d 455, 459).

Defendant further contends that the court abused its discretion in denying his late request to call a particular individual as an alibi witness. We note, however, that defendant waived that contention because, prior to jury selection, defense counsel advised

the court that he did not intend to call that individual as a witness and thus that the court "[did not] need to address any issues" with respect to such individual (*see generally People v Harris*, 97 AD3d 1111, 1112, *lv denied* 19 NY3d 1026; *People v Hamilton*, 96 AD3d 1518, 1519, *lv denied* 19 NY3d 997).

Finally, we reject defendant's challenge to the severity of the sentence. The court imposed the minimum term of incarceration allowed on defendant's conviction, as a second felony offender, of aggravated criminal contempt, and the terms of incarceration imposed on the remaining convictions were directed to run concurrently thereto.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

168

KA 09-01754

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY MCDONALD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered August 20, 2009. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

169

KA 10-00058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEMETRIUS L. MACK, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered December 3, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress the physical evidence found in his vehicle because the police did not have probable cause to search the vehicle. Contrary to the People's contention, defendant argued in support of suppression that the search was unlawful because the police did not have probable cause and thus preserved his present contention for our review. Nevertheless, we reject defendant's contention. The police were entitled to stop defendant's vehicle based on his failure to use his turn signal before turning (*see People v Cuffie*, 109 AD3d 1200, 1201; *see generally* Vehicle and Traffic Law § 1163 [a], [b]). Furthermore, the officer who stopped the vehicle testified at the suppression hearing that he was familiar with the odor of marihuana, and he detected that odor upon reaching the driver's door. "[I]t is well established that '[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause' " to search a vehicle (*Cuffie*, 109 AD3d at 1201; *see People v Ponzo*, 111 AD3d 1347, 1347-1348).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

170

KA 13-00563

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DAVID PERRY, DEFENDANT-RESPONDENT.

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

JOHN M. SCANLON, BINGHAMTON, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Steuben County Court (Joseph W. Latham, J.), entered November 28, 2012. The order granted that part of defendant's omnibus motion seeking to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of the motion seeking to dismiss the indictment is denied, the indictment is reinstated, and the matter is remitted to Steuben 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 30.10 (2) (b), the People contend that County Court erred in determining that the statute of limitations had expired. We agree. Defendant was charged by an indictment with grand larceny in the second degree based on the theory that he stole in excess of $50,000 in New York State retirement disability benefits to which he was not entitled. Defendant applied for those benefits in 2004 or 2005, and received payments from February 17, 2005 through February 28, 2012.

It is well settled that the People may aggregate "a series of single larcenies governed by a common fraudulent scheme or plan even though the successive takings extended over a long period of time" (*People v Rosich*, 170 AD2d 703, 703, *lv denied* 77 NY2d 1000; *see People v Cox*, 286 NY 137, 142-143, *rearg denied* 286 NY 706; *People v Tighe*, 2 AD3d 1364, 1365, *lv denied* 2 NY3d 747). The offense of grand larceny as alleged in this case is therefore properly characterized as a continuing crime (*see People v First Meridian Planning Corp.*, 86 NY2d 608, 615-616), and "the [s]tatute of [l]imitations of a continuous crime is governed by the termination and not the starting date of the offense" (*People v Eastern Ambulance Serv.*, 106 AD2d 867, 868; *see People v DeBeer*, 35 AD3d 1275, 1276, *lv denied* 8 NY3d 921). The statute of limitations in this case did not begin to run until the

final taking in February 2012 (*see generally People v Randall-Whitaker,* 55 AD3d 931, 931, *lv denied* 12 NY3d 787), and the prosecution commenced shortly thereafter in March 2012 was thus timely pursuant to CPL 30.10 (2) (b).

Defendant contends that the statute of limitations began to run at the time of the allegedly fraudulent filing, relying on *People v O'Boyle* (136 Misc 2d 1010, 1012-1013). That case, however, is inapposite inasmuch as the defendant in that case was charged with insurance fraud, whereas defendant in this case is charged with grand larceny.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

171

KA 12-01057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY STRAHIN, 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 (DANIELLE N. SOLURI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 29, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that Supreme Court erred in refusing to suppress tangible evidence found in his vehicle and his statements to the police, which he alleges were the fruit of an illegal search and seizure of his vehicle. We reject that contention. Although we agree with defendant that the police "effectively seized [his] vehicle when [they] pulled into the [driveway] behind defendant's vehicle in such a manner as to prevent defendant from driving away" (*People v Layou*, 71 AD3d 1382, 1383; *see People v Dean*, 73 AD3d 801, 802; *see generally People v Cantor*, 36 NY2d 106, 111-112), we conclude that the police had reasonable suspicion to justify such a seizure (*see People v Bolden*, 109 AD3d 1170, 1172; *People v Richardson*, 70 AD3d 1327, 1328, *lv denied* 15 NY3d 756; *People v Van Every*, 1 AD3d 977, 978-979, *lv denied* 1 NY3d 602). Among other facts and circumstances, the burglary victims identified defendant, their nephew, as a possible suspect; the police determined that the make and model of the vehicle registered to defendant matched the make and model of a vehicle the victims observed in geographic and temporal proximity to the burglary; and the police observed that the damage to defendant's vehicle matched the description of the vehicle observed by the victims (*see Van Every*, 1 AD3d at 978; *see also Bolden*, 109 AD3d at 1172; *Richardson*, 70 AD3d at 1328; *see generally People v Casillas*, 289 AD2d 1063, 1063-1064, *lv denied* 97 NY2d 752).

Contrary to the further contention of defendant, we conclude that the police had probable cause to arrest him based upon their observation of property in defendant's vehicle that matched the description of property stolen from the victims (*see People v Green*, 68 AD3d 1780, 1780-1781, *lv denied* 14 NY3d 841; *People v LaBoy*, 43 AD3d 453, 454, *lv denied* 9 NY3d 991; *People v Saunders*, 180 AD2d 542, 542, *lv denied* 79 NY2d 1054). There is no merit to defendant's related contention that the court erred in crediting the police testimony that the stolen property was in plain view. It is well established that "[t]he credibility determinations of the suppression court 'are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record' " (*People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954). Contrary to defendant's contention, the police officer's testimony that he observed a bag containing jewelry between the driver's seat and the center console of the vehicle is not "unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829), and we therefore see no basis to disturb the court's credibility determination (*see Bush*, 107 AD3d at 1582).

Defendant further contends that the court erred in refusing to suppress his statements to the police because the People allegedly failed to establish that he knowingly, voluntarily, and intelligently waived his *Miranda* rights. We reject that contention. "Where, as here, a defendant has been advised of his *Miranda* rights and within minutes thereafter willingly answers questions during interrogation, 'no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights' " (*People v Goncalves*, 288 AD2d 883, 884, *lv denied* 97 NY2d 729, quoting *People v Sirno*, 76 NY2d 967, 968; *see People v Guilford*, 21 NY3d 205, 208). Thus, the record supports the court's determination that defendant "understood his *Miranda* rights and implicitly waived them when he willingly answered the officer[s'] questions after receiving the *Miranda* warnings" (*Goncalves*, 288 AD2d at 884; *see People v Hale*, 52 AD3d 1177, 1178; *People v Gill*, 20 AD3d 434, 434).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

172

KA 10-01470

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EVERETT J. OHSE, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered June 29, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fourth degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [5]), defendant contends that the evidence is legally insufficient to support the conviction of that crime because the People failed to establish that the value of the stolen motor vehicle he allegedly possessed exceeded $100, an essential element of the crime. We reject defendant's contention. The expert witness called by the People at trial, a mechanic and used car salesman, testified that the minimum value for an operable 2003 Honda Civic, such as the one possessed and admittedly driven by defendant, was $1,500, and that the scrap value was between $250 and $300. Although the People's expert did not examine the vehicle in question, we conclude that his testimony nevertheless provided the jury with a " 'reasonable basis for inferring, rather than speculating, that the value of the property exceeded the statutory threshold' " (*People v Szyzskowski*, 89 AD3d 1501, 1502).

Defendant failed to preserve for our review his further contention that the evidence is legally insufficient to establish that he knew the vehicle was stolen (*see People v Gray*, 86 NY2d 10, 19), and in any event that contention lacks merit. The vehicle's owner, who lives in Ohio, testified that he did not give defendant permission to possess the vehicle. Moreover, when arrested in New York for stealing gas that he put into the vehicle, defendant initially told

the police that he did not know who owned the vehicle and then, upon further questioning, stated that he thought the owner's first name was Steve but he did not know that person's last name or telephone number. That evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that defendant knowingly possessed stolen property (*see People v Cintron*, 95 NY2d 329, 332; *People v Morris*, 37 AD3d 1088, 1089, *lv denied* 8 NY3d 988).

Viewing the evidence in light of the elements of the crime of criminal possession of stolen property in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict with respect to that crime is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict on that count would not have been unreasonable, we cannot conclude that the jurors failed to give the evidence the weight it should be accorded (*see People v Kalen*, 68 AD3d 1666, 1667, *lv denied* 14 NY3d 842; *see generally Bleakley*, 69 NY2d at 495).

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

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

173

KA 12-00401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY DAVIS, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered May 3, 2010. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and criminal mischief in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the fourth degree (Penal Law § 155.30 [1]) and criminal mischief in the fourth degree (§ 145.00 [1]). The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the testimony of the accomplices is supported by sufficient corroborative evidence (*see* CPL 60.22 [1]). One of the nonaccomplice witnesses testified that, prior to the commission of the crime, defendant and his two accomplices discussed in her presence their intention to go to the victim's home and steal property, and she thereafter observed the three men leave together and return together (*see People v Swift*, 241 AD2d 949, 949, *lv denied* 91 NY2d 881, *reconsideration denied* 91 NY2d 1013). Another nonaccomplice witness testified that she observed defendant in possession of the stolen safe and some of its contents (*see People v La Porte*, 217 AD2d 821, 821-822; *People v Hadden*, 210 AD2d 546, 547, *lv denied* 85 NY2d 910). The testimony of those witnesses "tended to connect [defendant] with the crime and harmonized with the narrative provided by the accomplices" (*People v Hawley*, 286 AD2d 559, 561), such "that the jury [could have been] reasonably satisfied that the accomplice[s were] telling the truth" (*People v Daniels*, 37 NY2d 624, 630). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the

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

We further conclude that County Court's finding with respect to the amount of restitution is supported by the requisite preponderance of the evidence presented at the restitution hearing (*see* CPL 400.30 [4]). The court properly credited the testimony of the victim, a collector of currency for more than 40 years, with respect to the value of the stolen bills (*see People v Ford*, 77 AD3d 1176, 1176-1177, *lv denied* 17 NY3d 816). The court also properly credited the victim's testimony concerning the cost to repair the damage to his home, which was supported by invoices from his contractor (*see People v Empey*, 73 AD3d 1387, 1389, *lv denied* 15 NY3d 804).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

174

KA 12-02302

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

ADAM H. VAN BUSKIRK, AURORA, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 18, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree and burglary 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 his plea of guilty of robbery in the third degree (Penal Law § 160.05) and two counts of burglary in the third degree (§ 140.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see People v Lococo*, 92 NY2d 825, 827; *People v Hidaldgo*, 91 NY2d 733, 737). We have examined defendant's remaining contention concerning County Court's failure to recommend that he participate in a shock incarceration program in accordance with the alleged terms of the plea agreement and conclude that it lacks merit (*see generally People v Taylor*, 284 AD2d 573, 574, *lv denied* 96 NY2d 925).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

178

CA 13-01276

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

PATRICIA DEJOY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KEVIN M. EHMANN, DEFENDANT-RESPONDENT.

FINUCANE & HARTZELL, LLP, PITTSFORD (DANIEL O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF KAREN L. LAWRENCE, PITTSFORD (BARNEY BILELLO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 20, 2012. The order, among other things, granted defendant's motion to dismiss plaintiff's complaint.

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

Memorandum: Supreme Court properly granted defendant's motion to dismiss the complaint based upon plaintiff's failure to file a summons and complaint within the statute of limitations. Contrary to plaintiff's contention, we conclude that such nonfiling may not be corrected or disregarded pursuant to CPLR 2001 (*see Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 328). The court also properly denied plaintiff's motion seeking permission to file the summons and complaint nunc pro tunc (*see generally Mandel v Waltco Truck Equip. Co.*, 243 AD2d 542, 543-544, *lv denied* 91 NY2d 809), inasmuch as granting such relief would effectively extend the statute of limitations, a result proscribed by CPLR 201 (*see Bradley v St. Clare's Hosp.*, 232 AD2d 814, 815; *De Maria v Smith*, 197 AD2d 114, 116-117).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

181

CA 13-00840

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

ADAM L. WALTON, PLAINTIFF-APPELLANT,

V ORDER

STRONG MEMORIAL HOSPITAL, UNIVERSITY OF ROCHESTER MEDICAL CENTER, CHILDREN'S HOSPITAL AT STRONG, SCOTT STEWART, M.D., JAMES MANNING, M.D., PETER KNIGHT, M.D., J.A. JANUS, M.D., GREGORY APPENFELLER, M.D., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BROWN CHIARI LLP, LANCASTER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARTIN CLEARWATER & BELL LLP, NEW YORK CITY (BARBARA D. GOLDBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 24, 2012. The order granted the motion of defendants-respondents to dismiss plaintiff's complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Laborers Intl. Union of N. Am., Local 210, AFL-CIO v Shevlin-Manning, Inc.*, 147 AD2d 977).

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court

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

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CA 13-00841

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

ADAM L. WALTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STRONG MEMORIAL HOSPITAL, UNIVERSITY OF ROCHESTER MEDICAL CENTER, CHILDREN'S HOSPITAL AT STRONG, SCOTT STEWART, M.D., JAMES MANNING, M.D., PETER KNIGHT, M.D., J.A. JANUS, M.D., GREGORY APPENFELLER, M.D., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BROWN CHIARI LLP, LANCASTER, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARTIN CLEARWATER & BELL LLP, NEW YORK CITY (BARBARA D. GOLDBERG OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered December 5, 2012. The judgment dismissed all claims against defendants-respondents with prejudice.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries he sustained that allegedly resulted from defendants' failure to remove a polyvinyl catheter from his heart after surgery. Plaintiff underwent heart surgery when he was three years old and, during the surgery, polyvinyl catheters were placed inside plaintiff's heart to record atrial pressure. Three days later, a follow-up procedure was performed to remove the catheters. A nursing note indicated that a catheter "possibly broke off with a portion remaining in [patient]." In December 2008, when plaintiff was 25 years old, an echocardiogram showed a "linear density" inside plaintiff's heart. During a subsequent surgery, a 13-centimeter loop of plastic tubing was removed from plaintiff's heart.

We conclude that Supreme Court properly granted the motion of defendants-respondents seeking dismissal of the complaint as time-barred, but our reasoning differs from that of the court. The issue before us is the applicability of the foreign object exception to the medical malpractice statute of limitations (*see* CPLR 214-a). In granting the motion, the court determined that the polyvinyl catheter

was not a fixation device, but that the catheter did not fit within the legal definition of a foreign object. We, however, conclude that the polyvinyl catheter was a fixation device. We therefore reject plaintiff's contention that the polyvinyl catheter was not a fixation device and therefore must be a foreign object within the meaning of CPLR 214-a. Fixation devices are "placed in the patient with the intention that they will remain to serve some continuing treatment purpose" (*Rockefeller v Moront*, 81 NY2d 560, 564), while foreign objects are "negligently left in the patient's body without any intended continuing treatment purpose" (*LaBarbera v New York Eye & Ear Infirmary*, 91 NY2d 207, 212 [internal quotation marks omitted]). The polyvinyl catheter here was a fixation device and was not a foreign object because it was intentionally placed inside plaintiff's body to monitor atrial pressure for a few days after the surgery, i.e., it was placed for a continuing treatment purpose.

Entered: February 14, 2014

Frances E. Cafarell
Clerk of the Court