SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 26, 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

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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CA 13-01318

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

PEGGY ANN ROSE, AS EXECUTRIX OF THE ESTATE OF JOYCE PRZYTULA, DECEASED, AND JOHN PRZYTULA, PLAINTIFFS-RESPONDENTS,

V ORDER

BROOKS MEMORIAL HOSPITAL, GREGORY C. DIFRANCESCO, M.D., JAMES P. FITZGERALD, M.D., LAKESHORE ORTHOPEDIC GROUP, P.C., DEFENDANTS-RESPONDENTS, REENA BOSE, M.D. AND RAZVAN BALOTESCU, M.D., DEFENDANTS-APPELLANTS.

DAMON MOREY LLP, BUFFALO (MARYLOU K. ROSHIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (LARAINE KELLEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

RICOTTA & VISCO, BUFFALO (K. JOHN BLAND OF COUNSEL), FOR DEFENDANT-RESPONDENT BROOKS MEMORIAL HOSPITAL.

FELDMAN KIEFFER, LLP, BUFFALO (JAMES E. EAGAN OF COUNSEL), FOR DEFENDANT-RESPONDENT GREGORY C. DIFRANCESCO, M.D.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered March 22, 2013. The order, insofar as appealed from, denied in part the motion of defendants Reena Bose, M.D., and Razvan Balotescu, M.D., to preclude certain testimony of plaintiffs' expert and granted the motion of plaintiffs to direct Marylou K. Roshia to accept service of subpoenas for Reena Bose, M.D. and Razvan Balotescu, M.D., out-of-state residents.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 14, 2014, and filed in the Chautauqua County Clerk's Office on February 12, 2014,

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

Entered: September 26, 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 13-01454

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

JUSTIN BROWN, PLAINTIFF-APPELLANT,

V ORDER

VALERIE ALEXANDER, ALSO KNOWN AS VALERIE J. LAYMON, DEFENDANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (V. CHRISTOPHER POTENZA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered March 4, 2013. The order denied in part plaintiff's motion seeking, inter alia, summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 24 and March 31, 2014, and filed in the Oneida County Clerk's Office on April 3, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

842

KA 13-01140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY L. FINCH, 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, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered June 10, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and criminal trespass in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]) and criminal trespass in the second degree (§ 140.15 [1]), defendant contends that his waiver of the right to appeal is not valid and that his sentence is unduly harsh and severe. Although we conclude that defendant's waiver of the right to appeal is invalid inasmuch as the minimal perfunctory inquiry made by County Court was insufficient to "establish that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

843

KA 12-01907

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNNIE COLOME-RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (William D. Walsh, J.), entered February 28, 2011. The order denied the motion of defendant for resentencing pursuant to CPL 440.46.

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

Memorandum: On appeal from an order denying his motion for resentencing pursuant to the 2009 Drug Law Reform Act (CPL 440.46), defendant contends that County Court failed to apprehend that it had discretion to resentence him. That contention is belied by the record, which establishes that the People conceded that defendant was eligible for resentencing but the court concluded that "substantial justice" required denial of defendant's motion.

Contrary to defendant's further contention, "[t]he court properly exercised its discretion in determining that substantial justice dictated that defendant's resentencing application should be denied" (*People v Perez*, 110 AD3d 528, 528, *lv denied* 22 NY3d 1043; *see People v Sosa*, 18 NY3d 436, 443). In denying the application, the court considered the facts that defendant absconded prior to trial in this case and was sentenced in absentia, that he remained at large for 17 years, and that he possessed a large quantity of drugs that was inconsistent with street-level sales (*see Perez*, 110 AD3d at 528). Defendant did not contest the information in the presentence report that he had been arrested on new drug charges in New York City while he was at large, nor did he object to the court's statement that he possessed a handgun at the time of the initial arrest on this matter. Thus, inasmuch "[a]s defendant failed to object at the time of sentencing, the claim that the court considered improper factors in imposing the sentence is unpreserved for [our] review" (*People v Rosado*, 300 AD2d 838, 840-841, *lv denied* 99 NY2d 619; *see People v*

Harrison, 82 NY2d 693, 694; *People v Mathieu*, 83 AD3d 735, 737, *lv denied* 17 NY3d 798), and we decline to exercise our power to review that claim as a matter of discretion in the interest of justice. The information that defendant submitted on appeal regarding that claim is de hors the record.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

844

KA 08-02384

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRELL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal possession of forgery devices.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of forgery devices (Penal Law § 170.40 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of identity theft in the first degree (§ 190.80 [1]). Both pleas were entered during one plea proceeding, during which defendant waived his right to appeal. We reject defendant's challenge in both appeals to the validity of the waiver of the right to appeal (*see People v Lopez*, 6 NY3d 248, 256; *People v Callahan*, 80 NY2d 273, 283). "The written waiver of the right to appeal, together with defendant's responses during the plea proceeding, establish that the waiver was voluntarily, knowingly, and intelligently entered" (*People v Griner*, 50 AD3d 1557, 1558, *lv denied* 11 NY3d 737; *see People v Ramos*, 7 NY3d 737, 738). The valid waiver of the right to appeal encompasses defendant's contention in appeal No. 1 with respect to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833).

Defendant's constitutional speedy trial claim raised with respect to both appeals survives the plea and the valid waiver of the right to appeal (*see People v Chinn*, 104 AD3d 1167, 1169, *lv denied* 21 NY3d 1014; *see also Lopez*, 6 NY3d at 255), but it is unpreserved for our review with respect to appeal No. 2 because defendant never moved to dismiss the superior court information (*see Chinn*, 104 AD3d at 1169;

People v Kwiatkowski, 263 AD2d 552, 552, *lv denied* 93 NY2d 1021). We decline to exercise our power to review the contention with respect to appeal No. 2 as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). With respect to appeal No. 1, defendant contends that the 14-month delay from the time the search warrant was executed until he was indicted deprived him of his right to due process. In determining whether there has been an unconstitutional delay in commencing a prosecution, we must examine "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*People v Taranovich*, 37 NY2d 442, 445; *see People v Pulvino*, 115 AD3d 1220, 1222, *lv denied* ___ NY3d ___ [June 10, 2014]). Upon considering the *Taranovich* factors, we conclude that the delay did not deprive defendant of his right to due process (*see People v White*, 108 AD3d 1236, 1237, *lv denied* 22 NY3d 1044). We note in particular that the indictment encompassed charges that occurred several months after the warrant was executed. In addition, the People established that the investigation was ongoing during the relevant time period, and it included attempting to locate a primary witness who disappeared after being arrested and released on an appearance ticket, and conducting photo array identification procedures and forensic analysis of the seized computer.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

845

KA 11-02036

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN T. ENDERLIN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (John L. DeMarco, J.), rendered July 1, 2010. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentences imposed on the two counts of endangering the welfare of a child and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for resentencing on those counts.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]) and two counts of endangering the welfare of a child (§ 260.10 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in refusing to permit defendant to withdraw the plea (*see generally People v Watkins*, 107 AD3d 1416, 1416-1417, *lv denied* 22 NY3d 959; *People v Tracy*, 77 AD3d 1402, 1403, *lv denied* 16 NY3d 746). We note, however, that the sentencing minutes reflect that the court sentenced defendant to time served plus a 10-year term of probation on each count of endangering the welfare of a child, and that term of probation is illegal (*see* § 65.00 [3] [b] [i]; *see also* § 65.00 [3]). Defendant's failure to preserve that issue for our review or, indeed, to raise it on appeal "is of no moment, inasmuch as we cannot permit an illegal sentence to stand" (*People v Terry*, 90 AD3d 1571, 1572; *see People v Moore* [appeal No. 1], 78 AD3d 1658, 1658, *lv denied* 17 NY3d 798). We therefore modify the judgment by vacating the sentences imposed on the counts of endangering the welfare of a child, and we remit the matter to County Court for resentencing on those counts.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

846

KA 11-01820

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. LORENZ, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JODI A. DANZIG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered September 22, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that the waiver of the right to appeal is invalid. The record establishes that 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 Ripley*, 94 AD3d 1554, 1554, *lv denied* 19 NY3d 976), and that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*see People v Lopez*, 6 NY3d 248, 256; *Ripley*, 94 AD3d at 1554; *People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). Defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see Lopez*, 6 NY3d at 256; *People v Raynor*, 107 AD3d 1567, 1568, *lv denied* 22 NY3d 1090).

Although defendant's contention that his guilty plea was not knowing, voluntary and intelligent survives his waiver of the right to appeal, defendant failed to preserve that contention for our review inasmuch as he withdrew his motion to withdraw his plea and did not thereafter move to vacate the judgment of conviction (*see People v Jones*, 114 AD3d 1080, 1081; *People v Hodge*, 85 AD3d 1680, 1680, *lv denied* 18 NY3d 883). This case does not fall within the rare exception to the preservation rule set forth in *People v Lopez* (71

NY2d 662, 666), “inasmuch as nothing in the plea colloquy casts significant doubt on defendant’s guilt or the voluntariness of the plea” (*People v Lewandowski*, 82 AD3d 1602, 1602).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

847

KA 10-02245

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVON GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (William D. Walsh, J.), rendered June 10, 2010. Defendant was resentenced upon his conviction of manslaughter in the first degree.

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

Memorandum: Defendant was convicted upon a plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). On a prior appeal, we affirmed the judgment of conviction (*People v Griffin*, 24 AD3d 1316, *lv denied* 6 NY3d 813), but we subsequently granted defendant's motion for a writ of error coram nobis (*People v Griffin*, 59 AD3d 1106). Upon reviewing the appeal de novo, we agreed with defendant that County Court erred in sentencing him as a first felony offender after "it became apparent at sentencing that defendant had a prior felony conviction" (*People v Griffin*, 72 AD3d 1496, 1497). Inasmuch as " '[i]t is illegal to sentence a known predicate felon as a first offender,' " we modified the judgment by vacating the sentence, and we remitted the matter for resentencing pursuant to CPL 400.21 (*id.*). On remittal, the court sentenced defendant as a second felony offender to a determinate term of incarceration of 10 years, with a period of postrelease supervision of five years.

As defendant correctly concedes, his contention that County Court erred in failing to order an updated presentence report is unpreserved for our review "inasmuch as he never requested such an update, objected to the presentence report at the resentencing, or moved to vacate the resentencing on that ground" (*People v Lard*, 71 AD3d 1464, 1465, *lv denied* 14 NY3d 889; *see People v Campbell*, 111 AD3d 1253, 1253, *lv denied* ___ NY3d ___ [June 9, 2014]; *People v Stachnik*, 101 AD3d 1590, 1591-1592, *lv denied* 20 NY3d 1104). In any event, "the decision whether to obtain an updated [presentence] report at resentencing is a matter resting in the sound discretion of the

sentencing [court]" (*People v Kuey*, 83 NY2d 278, 282). "Where, as here, [the] defendant has been continually incarcerated between the time of the initial sentencing and resentencing, to require an update . . . does not advance the purpose of CPL 390.20 (1)" (*Lard*, 71 AD3d at 1465 [internal quotation marks omitted]; *see Campbell*, 111 AD3d at 1253-1254).

Finally, we reject defendant's contention that he was denied effective assistance of counsel at the resentencing, inasmuch as defense counsel was able to secure an advantageous resentence for defendant (*see People v Cobado*, 104 AD3d 1322, 1323; *see generally People v Baldi*, 54 NY2d 137, 147). Although the period of postrelease supervision was increased from 2½ years to 5 years, the period of incarceration was reduced from 15 years to 10 years.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

848

KA 12-02043

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO R. DAVIS, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 15, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that his plea was not knowingly, voluntarily and intelligently entered because, inter alia, County Court failed to advise him that he was subject to a period of postrelease supervision as a condition of the plea. Initially, although we reject defendant's contention that his waiver of the right to appeal is invalid (*cf. People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767), his challenge to the voluntariness of the plea survives his waiver of the right to appeal (*see People v Cullen*, 62 AD3d 1155, 1156, *lv denied* 13 NY3d 795).

As the People correctly concede, defendant's contention requires reversal. Where, as here, " 'a trial judge does not fulfill the obligation to advise a defendant of postrelease supervision during the plea allocution, the defendant may challenge the plea as not knowing, voluntary and intelligent on direct appeal, notwithstanding the absence of a postallocution motion' " raising that contention (*People v Boyd*, 12 NY3d 390, 393, quoting *People v Louree*, 8 NY3d 541, 545-546). We therefore reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

849

KA 11-02195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRELL WILLIAMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 15, 2008. The judgment convicted defendant, upon his plea of guilty, of identity theft in the first degree.

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

Same Memorandum as in *People v Williams* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

850

KA 07-02436

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES K. WILSON, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Stephen R. Sirkin, A.J.), rendered September 17, 2007. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, robbery in the first degree (two counts), burglary in the first degree (three counts), assault in the first degree (two counts) and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment and by directing that the sentences on the remaining counts shall run concurrently with respect to each other and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [2]), arising from a home invasion, defendant contends that the attempted murder count was rendered duplicitous by the testimony at trial. We agree with defendant, as we agreed with his codefendant on a prior appeal, that the conviction of attempted murder in the second degree must be reversed because, based on the evidence presented at trial, " 'the jury may have convicted defendant of an unindicted [attempted murder], resulting in the usurpation by the prosecutor of the exclusive power of the [g]rand [j]ury to determine the charges' " (*People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814). We reach this issue despite defendant's failure to preserve it (*see People v Lane*, 106 AD3d 1478, 1481, *lv denied* 21 NY3d 1043; *People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025). We therefore modify the judgment by reversing that part convicting defendant of attempted murder in the second degree and dismissing the ninth count of the amended indictment. We further agree with defendant that the sentences imposed on the remaining

counts must run concurrently with respect to each other, and we therefore further modify the judgment accordingly (*see Boykins*, 85 AD3d at 1555).

Contrary to defendant's further contention, Supreme Court did not err in refusing to suppress identification evidence. " 'Multiple photo identification procedures are not inherently suggestive' " (*People v Dickerson*, 66 AD3d 1371, 1372, *lv denied* 13 NY3d 859). "While 'the inclusion of a single suspect's photograph in successive arrays is not a practice to be encouraged, it does not per se invalidate the identification procedures' " (*People v Beaty*, 89 AD3d 1414, 1415, *affd* 22 NY3d 918; *see Dickerson*, 66 AD3d at 1372). Here, although there was not a significant lapse of time between the presentation of the arrays (*see Beaty*, 89 AD3d at 1415; *cf. Dickerson*, 66 AD3d at 1372), the record establishes that different photographs of defendant were used, that the photographs of defendant appeared in a different location in each photo array (*see Dickerson*, 66 AD3d at 1372), and that the fillers were very similar in appearance to defendant (*see generally People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833). We also conclude that the court did not err in determining that defendant's statements to the police during a brief exchange, made by defendant after he refused to waive his *Miranda* rights, were voluntary and thus were admissible for impeachment purposes (*see People v Maerling*, 64 NY2d 134, 140; *People v Stephanski*, 286 AD2d 859, 860). Here, the People met their initial "burden at the *Huntley* hearing of establishing that defendant's . . . statements were not the product of 'improper police conduct' " (*People v Rapley* [appeal No. 1], 59 AD3d 927, 927, *lv denied* 12 NY3d 858), and "[d]efendant presented no bona fide factual predicate in support of his conclusory speculation that his statement[s were] coerced" (*id.* [internal quotation marks omitted]).

Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion to sever his trial from that of his codefendant (*see People v Mahboubian*, 74 NY2d 174, 183). Where counts are properly joined pursuant to CPL 200.40 (1), a defendant may nevertheless seek severance for " 'good cause shown' " (*id.*). "Good cause . . . includes, but is not limited to, a finding that a defendant 'will be unduly prejudiced by a joint trial' " (*id.*, quoting CPL 200.40 [1]). "Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires" (CPL 200.40 [1]). Here, defendant contends that, if he had testified at trial, he would have been prejudiced by the admission in evidence of a statement of his codefendant indicating that the codefendant had merely "heard" of defendant's involvement in this home invasion. We reject that contention, and we note that the statement is not incriminating and thus does not implicate *Bruton v United States* (391 US 123), wherein "the Supreme Court held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is specifically instructed to consider the confession only against the codefendant" (*People v Eastman*, 85 NY2d 265, 271 n 2).

Defendant further contends that, if he had testified at trial, he and his codefendant would have been placed in antagonistic positions inasmuch as the codefendant would not have been bound by the court's *Sandoval* ruling in cross-examining defendant. Defendant is correct that the codefendant would not have been bound by the court's *Sandoval* ruling (*see People v McGee*, 68 NY2d 328, 333; *People v Padilla*, 181 AD2d 1051, 1052, *lv denied* 79 NY2d 1052). Nevertheless, inasmuch as both defendants were charged with principal and accomplice liability for the same crimes, both defendants noticed alibi defenses, and both defendants were familiar to the eyewitnesses prior to the shooting, we see no basis for concluding that defendants would have "antagonized" each other at trial. Had one defendant attacked the other, the "attacking" defendant essentially would have taken the position that the eyewitnesses correctly identified only the "other" defendant.

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's contention that defense counsel was ineffective in failing to request a missing witness charge has no merit because there was no basis for such a charge (*see People v Hicks*, 110 AD3d 1488, 1489, *lv denied* 22 NY3d 1156), and an attorney's "failure to 'make a motion or argument that has little or no chance of success' " does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and "the jury was entitled to reject certain portions of the victim's testimony while crediting other portions" (*People v McCray*, 96 AD3d 1480, 1480, *lv denied* 19 NY3d 1104). It cannot be said that the testimony of the eyewitnesses was " 'incredible and unbelievable, that is, impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Mohamed*, 94 AD3d 1462, 1463-1464, *lv denied* 19 NY3d 999, *reconsideration denied* 20 NY3d 934).

Finally, we have reviewed defendant's remaining contention, and we conclude that it has been rendered academic as a result of our decision herein.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

852

CA 13-00659

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

IN THE MATTER OF THE STATE OF NEW YORK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ROY CASTLEBERRY, RESPONDENT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 13, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10 and committing him to a secure treatment facility. Respondent contends that the admission of "hearsay basis evidence" from petitioner's experts deprived him of a fair trial and violated his constitutional right to due process (*Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109). Inasmuch as respondent did not object to any of the allegedly improper evidence, we conclude that he failed to preserve his contention for our review (*see Matter of State of New York v Muench*, 85 AD3d 1581, 1582; *Matter of State of New York v Wilkes* [appeal No. 2], 77 AD3d 1451, 1452). We decline to exercise our power to review that contention in the interest of justice (*see Muench*, 85 AD3d at 1582).

Respondent's challenge to the reliability of the actuarial assessment instruments used by petitioner's expert is actually a challenge "to the weight of that evidence rather than its admissibility" (*Matter of State of New York v Timothy EE.*, 97 AD3d 996, 998; *see Matter of State of New York v High*, 83 AD3d 1403, 1403-1404, *lv denied* 17 NY3d 704). "Supreme Court was in the best position to evaluate the weight and credibility of the conflicting [psychological and] psychiatric testimony presented . . . After independently reviewing the evidence presented at the dispositional

hearing and according appropriate deference to the court's decision to credit the opinion of [petitioner's expert] over that of [respondent's expert] . . . , we find no basis to disturb [the court's] determination that respondent was a dangerous sex offender requiring confinement" (*Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144-1145; *see Matter of State of New York v Trombley*, 98 AD3d 1300, 1301, *lv denied* 20 NY3d 856; *Timothy EE.*, 97 AD3d at 999).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

853

CA 13-01023

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

RONALD C. VANYO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ANN M. VANYO, DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR DEFENDANT-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (ROBERT R. VARIO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (John F. O'Donnell, J.), entered October 5, 2012. The order and judgment imposed monetary sanctions on defendant.

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

Memorandum: In this postjudgment proceeding to enforce the terms of a judgment of divorce, defendant contends that Supreme Court erred in directing her to pay plaintiff's counsel fees and in imposing other sanctions. We previously decided defendant's appeal from the judgment of divorce (*Vanyo v Vanyo*, 79 AD3d 1751, 1751), which judgment, inter alia, directed that the former marital residence be sold and the proceeds divided between the parties. Plaintiff, by several orders to show cause, sought and obtained orders requiring defendant to cooperate with various phases of the process of selling the property. Those orders required defendant, among other things, to sign documents allowing the property to be listed for sale, provide a key to the residence to the realtor with whom the property was listed, permit prospective purchasers and their agents access to the property, and properly maintain the property. There were numerous court appearances with respect to those orders to show cause and the relief requested, at which the court and the parties discussed the events at issue on appeal. In response to one such order to show cause, the court issued an order directing defendant to "execute a listing contract prepared by" the listing agent by the close of business on March 8th. The order further provided that, if defendant failed to do so, she was to pay a fine of $250 per day to plaintiff "until a proper listing contract, as determined by th[e] [c]ourt, has been executed by" defendant, and the court granted plaintiff's request for counsel fees. Another interim order appointed a receiver to sell the property on behalf of defendant, and that receiver eventually prepared the necessary papers permitting the property to be listed for sale.

Contrary to defendant's contention, the court properly calculated the fines and counsel fees without first holding a hearing. Defendant's contention that she provided a key by mail in June is belied by her submission of emails establishing that no key was received until July 10th. Those emails also belie her contention that a key was hand-delivered on July 3rd, and in any event she failed to submit an affidavit from the unidentified person who allegedly hand-delivered the key. Under these circumstances, the court's determination that defendant had failed to comply with the earlier order, "without a hearing, was a provident exercise of discretion, especially in light of defendant's failure to submit competent . . . evidence in support of her assertion[s], and that [determination] was consistent with the court's own observations and familiarity with the history of the action" (*Roach v Benjamin*, 78 AD3d 468, 469; *see Skidelsky v Skidelsky*, 279 AD2d 356, 356).

Finally, the evidence in the record establishes that there were several interim court appearances at which counsel for the parties discussed the key and access to the property, the state of repair of the property, and the execution of documents required to list the property. The court, after hearing from counsel, made determinations at those appearances concerning the issues that are now raised on appeal, but we do not consider those determinations because defendant failed to include the transcripts of those appearances in the record on appeal. Defendant, "as the appellant[], must suffer the consequences of having submitted an incomplete record" (*Gaiter v City of Buffalo Bd. of Educ.*, 118 AD3d 1507, 1508; *see Matter of Lopez v Lugo*, 115 AD3d 1237, 1237).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

854

CA 13-01343

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

RED BARN COUNTRY, LLC, PLAINTIFF,
AND GARY HAFNER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LINDA TROMBLEY, DEFENDANT-RESPONDENT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR PLAINTIFF-APPELLANT.

CURTIN & DEJOSPEH, P.C., CAZENOVIA (CHRISTINA F. DEJOSEPH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered October 29, 2012. The order, insofar as appealed from, granted that part of defendant's motion seeking to dismiss the plaintiffs' amended complaint.

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

Memorandum: Plaintiffs commenced this action seeking to recover money paid by Gary Hafner (plaintiff) to discharge a mortgage on property owned by defendant, his sister. Plaintiff and his father (hereafter, decedent) each owned various parcels of land that comprised the family farm and obtained a single note and mortgage encumbering those parcels. Plaintiff and decedent thereafter defaulted on the mortgage, and the bank commenced a foreclosure action, at which time decedent conveyed certain parcels that were subject to the mortgage to defendant, his daughter. Decedent conveyed his remaining parcels that were subject to the mortgage to plaintiff, who in turn sold them to Red Barn Country, LLC (Red Barn). As part of the transaction with Red Barn, plaintiff was required to pay off the mortgage. Decedent commenced an action seeking to set aside the transfer of the property to defendant and, after his death, the action was dismissed by Supreme Court on the ground that it was duplicative of a proceeding pending in Surrogate's Court "surrounding the distribution of the assets of [decedent's] Estate." Defendant moved, inter alia, to dismiss the instant action on the ground that the issues raised herein likewise should be resolved in the action in Surrogate's Court, and plaintiff appeals from an order granting that part of defendant's motion. We reverse the order insofar as appealed from.

Pursuant to CPLR 3211 (a) (4), "[a] party may move for judgment dismissing one or more causes of action . . . on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state or the United States." "In determining whether two causes of action are the same, we consider '(1) [whether] both suits arise out of the same actionable wrong or series of wrongs[ ] and (2) as a practical matter, [whether] there [is] any good reason for two actions rather than one being brought in seeking the remedy' " (*Rinzler v Rinzler*, 97 AD3d 215, 217; *see Kent Dev. Co. v Liccione*, 37 NY2d 899, 901; *JC Mfg. v NPI Elec.*, 178 AD2d 505, 506; *Mullins v Saul*, 130 AD2d 634, 636). We conclude that CPLR 3211 (a) (4) is not applicable here inasmuch as the parties are not the same nor are the causes of action or the relief sought the same. The " 'actionable wrong' " in the action in Surrogate's Court was the transfer of the disputed property to defendant, whereas the " 'actionable wrong' " in this action was defendant's failure to pay the mortgage on the disputed property (*Rinzler*, 97 AD3d at 217). The court therefore erred in dismissing the amended complaint because "neither the parties nor the causes of action in the two [actions] are the same or even substantially similar" (*Zabel v Karasik*, 184 AD2d 436, 436; *see Ramsey v Ramsey*, 69 AD3d 829, 832).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

855

CA 14-00346

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

SANTINA MURINE, PLAINTIFF-RESPONDENT,

V ORDER

CITY OF UTICA, DEFENDANT-APPELLANT.

MARK CURLEY, CORPORATION COUNSEL, UTICA, FOR DEFENDANT-APPELLANT.

DAVID M. GIGLIO & ASSOCIATES, LLC, UTICA (ALYSSA O'NEIL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered November 19, 2013. The judgment determined, upon a jury verdict, that defendant is 100% liable for plaintiff's damages.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

857

CA 13-01754

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

IN THE MATTER OF THE APPLICATION FOR A REVIEW
UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW OF
THE ASSESSMENTS BY FFT SENIOR COMMUNITIES, INC.,
PETITIONER-RESPONDENT,

V ORDER

TOWN OF CANANDAIGUA AND BOARD OF ASSESSMENT REVIEW
FOR TOWN OF CANANDAIGUA, COUNTY OF ONTARIO,
RESPONDENTS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (JOHN T. REFERMAT OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

BIERSDORF & ASSOCIATES, P.A., MINNEAPOLIS, MINNESOTA (DAN BIERSDORF OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered June 17, 2013 in a proceeding pursuant to RPTL article 7. The order, among other things, granted petitioner's motion seeking to establish the value of its property for three assessment dates.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

859

CA 14-00276

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

BENJAMIN L. JOLLEY, PLAINTIFF-RESPONDENT,

V ORDER

AGOSTINHA R. LANDO, DEFENDANT-APPELLANT.

WILLIAMSON, CLUNE & STEVENS, ITHACA (JOHN H. HANRAHAN, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered September 4, 2013 in a divorce 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.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

862.1

CA 14-00384

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

CSMC 2007-C1 OSWEGO ROAD, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBROOK ROUTE 31, LLC, PHILIP J. SIMAO,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHEN A. DONATO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BUCHANAN INGERSOLL & ROONEY PC, BUFFALO (MAUREEN T. BASS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 10, 2013. The order, inter alia, granted those parts of the motion of plaintiff seeking partial summary judgment, and seeking to sever the counterclaim, and denied the cross motion of defendants-appellants to compel the disclosure of documents.

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

Memorandum: Plaintiff commenced this commercial foreclosure action against Kimbrook Route 31, LLC (Kimbrook) and Philip J. Simao (collectively, defendants) after they defaulted on payment of a loan and guarantee, respectively. In appeal No. 1, defendants contend that Supreme Court erred in granting those parts of plaintiff's motion for partial summary judgment and to sever defendants' counterclaim, and in denying their cross motion to compel the disclosure of documents. In appeal No. 2, defendants contend that the court erred in granting plaintiff's motion for a judgment of foreclosure and sale.

The court properly granted that part of plaintiff's motion for partial summary judgment in appeal No. 1. We note at the outset that the court properly rejected defendants' contention that plaintiff's motion was premature insofar as plaintiff sought partial summary judgment. "Although a motion for summary judgment may be opposed on the ground 'that facts essential to justify opposition may exist but cannot then be stated' (CPLR 3212 [f]), 'the opposing party must make an evidentiary showing supporting this conclusion, mere speculation or conjecture being insufficient' " (*Preferred Capital v PBK, Inc.*, 309

AD2d 1168, 1169), and defendants failed to make that showing.

On the merits, we conclude that plaintiff met its initial burden of establishing its "entitlement to judgment as a matter of law by submitting the mortgage, unpaid note, and proof of defendants' default" (*Cassara v Wynn* [appeal No. 2], 55 AD3d 1356, 1356, *lv dismissed* 11 NY3d 919). Defendants contend that plaintiff was not entitled to partial summary judgment because defendants raised a meritorious defense (*see Lawler v KST Holdings Corp.*, 115 AD3d 1196, 1198-1199), i.e., plaintiff's wrongful refusal to release certain escrow funds that allegedly precipitated the foreclosure action, and plaintiff's misconduct in misleading defendants during subsequent negotiations to modify the loan. We reject that contention. With respect to plaintiff's failure to release the escrow funds, the record establishes that defendants were in default on the mortgage for failing to make a March 1, 2010 payment, and defendants did not request the escrow funds until March 25, 2010. The loan agreement provided that the escrow funds would not be returned to defendants if they were in default under the loan agreement, and defendants therefore have failed to establish that plaintiff's conduct in not releasing the funds caused the default (*see generally Trustco Bank, Natl. Assn. v Allison Assoc.*, 249 AD2d 911, 912). With respect to plaintiff's conduct during the negotiations to modify the loan, we note that the negotiation letter agreement provides that any negotiations were not binding on the parties in the absence of a written modification of the loan agreement, which never occurred. There is thus no estoppel defense here because there was no binding promise or conduct by plaintiff indicating that it would not seek to foreclose on the property (*see Massachusetts Mut. Life Ins. Co. v Gramercy Twins Assoc.*, 199 AD2d 214, 217).

Next, we reject defendants' contention in appeal No. 1 that the court erred in granting that part of plaintiff's motion to sever their counterclaim. Where, as here, the "counterclaim seeks damages and does not affect the validity of the mortgage, the appropriate remedy is to sever it from the foreclosure action" (*First Union Mtge. Corp. v Fern*, 298 AD2d 490, 491). We further reject defendants' contention in appeal No. 1 that the court erred in denying their cross motion to compel disclosure of documents. Plaintiff established that it turned over all documents in its possession, thereby warranting the denial of the cross motion (*see Hawley v Hasgo Power Equip. Sales*, 269 AD2d 804, 804).

We have reviewed defendants' remaining contentions with respect to appeal Nos. 1 and 2 and conclude that they are without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

862.2

CA 14-00619

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

CSMC 2007-C1 OSWEGO ROAD, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIMBROOK ROUTE 31, LLC, PHILIP J. SIMAO,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

BOND, SCHOENECK & KING, PLLC, SYRACUSE (STEPHEN A. DONATO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BUCHANAN INGERSOLL & ROONEY PC, BUFFALO (MAUREEN T. BASS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 28, 2014. The judgment ratified and confirmed a report of a referee and ordered a foreclosure sale.

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

Same Memorandum as in *CSMC 2007-C1 Oswego Rd., LLC v Kimbrook Rte. 31, LLC* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

862.3

KA 12-01876

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

DESTINY BELLAUS, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 9, 2012. The appeal was held by this Court by order entered January 3, 2014, the decision was reserved and the matter was remitted to Cattaraugus County Court for further proceedings (113 AD3d 1113).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on March 17, 2014, and the attorneys for the parties on March 25 and April 2, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

863

KA 13-01185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVIN JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered May 22, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends, *inter alia*, that County Court erred in refusing to grant him a downward departure from the presumptive risk level. We reject that contention.

While a court has the discretion to grant a downward departure, it may do so "only after a defendant makes a twofold showing. First, a defendant must identify, as a matter of law, an appropriate mitigating factor, namely, a factor which 'tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the [SORA] Guidelines' . . . Second, a defendant must prove by a preponderance of the evidence the facts necessary to support that mitigating factor . . . In the absence of that twofold showing, the court lacks discretion to depart from the presumptive risk level" (*People v Henry*, 106 AD3d 796, 796, *lv denied* 21 NY3d 863; *see People v Wyatt*, 89 AD3d 112, 128, *lv denied* 18 NY3d 803; *see generally People v Gillotti*, ___ NY3d ___, ___ [June 10, 2014]). Defendant contended during the SORA hearing that his age, lengthy incarceration, and maturation were factors that tended to reduce his risk of reoffending, but he failed to submit any evidence to support that contention. We thus conclude that he failed to meet the requisite burden of proof.

We have reviewed defendant's remaining contention and conclude that it lacks merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

864

KA 12-01687

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAZ K. DAVIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 12, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). We reject defendant's contention that the verdict is against the weight of the evidence because one of the People's witnesses, a confidential informant who testified pursuant to a cooperation agreement, was not credible. " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422; *see People v Hollins*, 278 AD2d 932, 932, *lv denied* 96 NY2d 759). Here, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to the further contention of defendant, we conclude that County Court properly denied defendant's motion to dismiss the indictment based upon New York State's alleged violation of the Interstate Agreement on Detainers (IAD or Agreement) (*see* CPL 580.20). The IAD is a compact entered into by, inter alia, the United States

and New York State and which, as relevant here, "prescribes procedures by which a member State may obtain for trial a prisoner incarcerated in another member jurisdiction" (*United States v Mauro*, 436 US 340, 343; *see New York v Hill*, 528 US 110, 111; *People v Reilly*, 136 AD2d 355, 359, *lv denied* 72 NY2d 865). It is well established that "the provisions of the Agreement are triggered only when a 'detainer' is filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner" (*Mauro*, 436 US at 343; *see* CPL 580.20, art IV [a]). Here, defendant's attendance in state court was secured pursuant to a writ of habeas corpus ad prosequendum, and not pursuant to the IAD (*see* CPL 580.30). Because New York "never filed a detainer against [defendant], the Agreement never became applicable and [New York] was never bound by its provisions" (*Mauro*, 436 US at 361).

We further conclude that there is no merit to defendant's contention that he was improperly sentenced as a second felony drug offender (*see* Penal Law § 70.71 [1] [b]). Defendant's conviction of 21 USC § 841 (a) for possession with intent to distribute more than five grams of cocaine base is equivalent to a conviction of criminal possession of a controlled substance in the third degree, a class B felony (*see* Penal Law § 220.16), and thus he was properly adjudicated a second felony drug offender (*see People v Reilly*, 273 AD2d 143, 143, *lv denied* 95 NY2d 937; *see also People v Yensi*, 251 AD2d 262, 263, *lv denied* 92 NY2d 932; *see generally People v Muniz*, 74 NY2d 464, 467-468).

Finally, the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

866

KA 10-02084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KALVIN M. SMITH, 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 Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered December 18, 2009. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that he was denied effective assistance of counsel on the ground that defense counsel, during the *Sandoval* hearing, conceded that defendant could be cross-examined, should he testify at trial, with respect to a 2004 conviction of criminal possession of stolen property in the fourth degree, a class E felony. We reject that contention. "To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712-713). Here, defense counsel conceded an issue that, in any event, would likely have been decided against defendant (*see generally People v Williams*, 98 AD3d 1234, 1235, *lv denied* 21 NY3d 947; *People v Robles*, 38 AD3d 1294, 1295, *lv denied* 8 NY3d 990), while at the same time arguing that the People should be precluded from using on cross-examination various other criminal convictions to impeach defendant's credibility. Supreme Court agreed in part with defense counsel and precluded cross-examination of defendant with respect to three other criminal convictions. Under the circumstances, we conclude that defendant failed to meet the requisite burden in support of his claim of ineffective assistance of counsel (*see Rivera*, 71 NY2d at 709).

Even assuming, arguendo, that defense counsel erred in making the limited *Sandoval* concession, we conclude that the single error was not so egregious as to deprive defendant of his right to a fair trial (*see generally People v Turner*, 5 NY3d 476, 480; *People v Cosby*, 82 AD3d 63, 67, *lv denied* 16 NY3d 857). Viewed as a whole, the record establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Long*, 96 AD3d 1492, 1494, *lv denied* 19 NY3d 1027).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

867

KA 13-00170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST BROWN, DEFENDANT-APPELLANT.

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

ERNEST BROWN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered January 11, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during the cross-examination of defendant and on summation is not preserved for our review. Defendant failed to object to most of the allegedly improper conduct (*see People v Gonzalez*, 81 AD3d 1374, 1374; *see also* CPL 470.05 [2]) and, when he objected, his objections were sustained, the court gave curative instructions to the jury and no further remedy was requested by defendant (*see People v Ennis*, 107 AD3d 1617, 1619-1620, *lv denied* 22 NY3d 1040, *reconsideration denied* ___ NY3d ___ [July 14, 2014]). Defendant also failed to preserve for our review his contention that he was denied a fair trial by judicial misconduct arising from the questioning of a prosecution witness by County Court. Defendant did not object to the court's questioning of that witness, and we reject defendant's contention that the alleged judicial misconduct constitutes a mode of proceedings error for which preservation is not required (*see generally People v Alcide*, 21 NY3d 687, 695; *People v Becoats*, 17 NY3d 643, 651). We decline to exercise our power to review those unpreserved contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

By failing to renew his motion for a trial order of dismissal

after presenting evidence, defendant failed to preserve his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Sterina*, 108 AD3d 1088, 1089). 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 People v Bleakley*, 69 NY2d 490, 495; *People v Lugo*, 87 AD3d 1403, 1404, *lv denied* 18 NY3d 860). Defendant's sentence is not unduly harsh or severe.

We reject the contentions in the main and pro se supplemental briefs that defendant was not provided effective assistance of counsel. Viewing the evidence, the law and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see People v Baldi*, 54 NY2d 137, 147). To the extent that the contentions in the pro se supplemental brief involve matters outside the record on appeal, those contentions must be raised by way of a motion pursuant to CPL 440.10 (*see People v Reed*, 115 AD3d 1334, 1337, *lv denied* ___ NY3d ___ [June 25, 2014]). Finally, we reject the contention in defendant's pro se supplemental brief that cumulative errors deprived him of a fair trial (*see People v Wurthmann*, 26 AD3d 830, 831, *lv denied* 7 NY3d 765).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

868

KA 13-00160

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL CONTI, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (MEGAN P. DADD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered October 22, 2012. The judgment revoked a sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking a sentence of probation and imposing a period of incarceration and restitution. Defendant contends, inter alia, that County Court lacked jurisdiction to preside over the violation proceeding because his term of probation had expired before the declaration of delinquency was filed. We reject that contention.

Several months before his term of probation was set to expire, a declaration of delinquency was filed, and defendant admitted to an initial violation of probation as part of a plea agreement. The court sentenced defendant to "time served" and stated that it would "continue [his] Probation under 65.00 Subdivision 4 of the Penal Law and extend [probation] for a period of one year from this date." Penal Law § 65.00 (4) provides that, in any case where a court revokes probation and sentences a defendant to imprisonment and probation, the period of probation shall be either "the remaining period of the original probation sentence or one year whichever is greater." Because the court stated that it would "continue," as opposed to "revoke," defendant's probation, defendant contends that the court could extend his probation for only 75 days, representing the period of time between the filing of the declaration of delinquency and the final determination with respect to that delinquency (*compare* § 65.00 [4] *with* § 65.15 [2]). Defendant thus contends that his probationary period expired before the declaration of delinquency was filed, and that the court therefore lacked jurisdiction to preside over the violation proceeding.

Defendant concedes that he failed to raise his contention with respect to jurisdiction before the court, but we nevertheless agree with him that it may be raised for the first time on appeal (*see People v Correa*, 15 NY3d 213, 222; *People v Wilson*, 14 NY3d 895, 897; *People v Nicometi*, 12 NY2d 428, 431). We conclude, however, that his contention lacks merit. Although the court, following the initial violation of probation proceeding, stated that it would "continue" rather than "revoke" his probation, it also stated that it was imposing a period of imprisonment, i.e., "time served," and, furthermore, the court cited Penal Law § 65.00 (4) as the basis for the period of incarceration and extension of probation. We thus conclude that, pursuant to section 65.00 (4), defendant's probation was lawfully extended for one year and that, because defendant was still subject to that period of probation when the declaration of delinquency was filed, the court had jurisdiction to preside over the violation proceeding and to impose a period of incarceration on defendant.

We reject defendant's further contention that the court erred in ordering him to pay restitution to the County of Yates (County) to cover the expenses related to his extradition. Following the filing of the declaration of delinquency, defendant left New York State and was ultimately apprehended in Tennessee. Pursuant to the terms and conditions of his probation, which had been modified in May 2010 to incorporate the terms and conditions of a Drug Treatment Court Contract that he had executed in order to participate in the Yates County Drug Treatment Court Program, defendant was required to reimburse the County for all expenses related to his extradition. Moreover, as part of his plea agreement with respect to the violation of probation herein, defendant agreed to reimburse the County for the extradition expenses in exchange for a sentence of incarceration that was less than the maximum sentence authorized by law. Inasmuch as defendant agreed to reimburse the County as a condition of probation and "committed to such payment as part of his plea agreement," we see no basis upon which to vacate the order of restitution (*People v Carter*, 64 AD3d 1089, 1091, *lv denied* 13 NY3d 835; *see People v Burke*, 47 AD3d 1161, 1161; *People v Perry*, 261 AD2d 650, 650-651, *lv denied* 93 NY2d 1024; *cf. People v Monroe*, 82 AD3d 1674, 1675, *lv denied* 17 NY3d 808; *People v Pelkey*, 63 AD3d 1188, 1190-1191, *lv denied* 13 NY3d 748). We acknowledge our prior decisions in *People v Watson* (197 AD2d 880, 880-881) and *People v Dulanski* (175 AD2d 672, 672), but we note that those decisions preceded the amendment to CPL 570.56, which permits a county to seek reimbursement for extradition expenses "from the person who was extradited" (*see* L 1995, ch 193, § 1).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

869

KA 13-00428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLIFFORD C. ANDERSON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (JOHN E. TYO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal contempt in the first degree (Penal Law § 215.51 [c]). Contrary to defendant's contention, County Court properly admitted uncharged crimes as *Molineux* evidence on the People's direct case because that evidence was relevant to defendant's intent to violate the order of protection and was admissible " 'to develop the necessary background and [to] complete the victim's narrative' " (*People v Erle*, 83 AD3d 1442, 1444, *lv denied* 17 NY3d 794; *see People v Alvino*, 71 NY2d 233, 242; *People v Ray*, 63 AD3d 1705, 1706, *lv denied* 13 NY3d 838). We further conclude that the probative value of such evidence outweighed any prejudice (*see People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797; *see also Ray*, 63 AD3d at 1706).

Even assuming, arguendo, that the court erred in admitting such evidence, we conclude that the error is harmless. The evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Laws*, 27 AD3d 1116, 1117, *lv denied* 7 NY3d 758; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

872

KA 12-00925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK ANDERSON, 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 (Christopher J. Burns, J.), rendered May 1, 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law § 155.35 [1]). We reject defendant's contention that he was denied effective assistance of counsel. Defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to request an accomplice charge with respect to two of the People's witnesses (*People v Rivera*, 71 NY2d 705, 709*; see People v Walker*, 50 AD3d 1452, 1454, *lv denied* 11 NY3d 795; *see also People v Smith-Merced*, 50 AD3d 259, 259, *lv denied* 10 NY3d 939).

Defendant failed to preserve for our review his contention that the testimony of the accomplices was not sufficiently corroborated and thus that the conviction is not supported by legally sufficient evidence (*see People v Matt*, 78 AD3d 1616, 1617, *lv denied* 15 NY3d 954). In any event, we conclude that defendant's statement to the police and the victim's trial testimony constitute "sufficient evidence connecting defendant to the crime[], thereby satisfying the corroboration requirement" (*id.*; *see* CPL 60.22 [1]; *People v Reome*, 15 NY3d 188, 191-192). 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 further conclude that the jury did not fail to give the evidence the weight it should be accorded (*see People v Howard*, 101 AD3d 1749, 1750, *lv denied* 21 NY3d 944; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant also failed to preserve for our review his contention that Supreme Court's handling of a jury note denied him due process inasmuch as there was no objection or request with respect to the manner in which the court responded to the note (*see People v Kalb*, 91 AD3d 1359, 1359, *lv denied* 19 NY3d 963). In any event, that contention lacks merit inasmuch as the court's response to the note constituted " 'a meaningful response to the jury's request for information' " (*People v Jones*, 52 AD3d 1252, 1252, *lv denied* 11 NY3d 738; *see generally* CPL 310.30; *People v Malloy*, 55 NY2d 296, 302, *cert denied* 459 US 847). Finally, the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

873

CA 13-01700

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

TOWN OF AMHERST, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PAUL D. WEISS, ESQ., BARTLO, HETTLER & WEISS, POLOWITZ & SCHWACH, LLP AND WAYNE R. GRADL, ESQ., DEFENDANTS-RESPONDENTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (DAVID M. HEHR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS PAUL D. WEISS, ESQ. AND BARTLO, HETTLER & WEISS.

FELDMAN KIEFFER, LLP, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS POLOWITZ & SCHWACH, LLP AND WAYNE R. GRADL, ESQ.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 8, 2013. The order granted the motions of defendants for summary judgment and dismissed the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are denied and the amended complaint is reinstated.

Memorandum: Plaintiff, Town of Amherst (Town), commenced this legal malpractice action alleging that defendants Paul D. Weiss, Esq., and Wayne R. Gradl, Esq., attorneys in defendant law firms, were negligent in failing to advise the Town of the appropriate method for appointing a hearing officer for a Civil Service Law § 75 (hereafter, Section 75) proceeding that the Town had commenced against one of its employees. Following the Section 75 hearing and a Town resolution terminating the employee, the resolution had to be annulled because the Hearing Officer had not been properly appointed by the Town Board and, therefore, the first hearing was a nullity. The Town seeks to recover the fees, costs and expenses related to the first hearing.

Weiss, and his law firm, defendant Bartlo, Hettler & Weiss (collectively, Weiss defendants), moved for summary judgment dismissing the amended complaint against them contending, inter alia, that the action was time-barred. Gradl, and his law firm, defendant

Polowitz & Schwach, LLP (collectively, Gradl defendants), also moved for summary judgment dismissing the amended complaint against them, contending, inter alia, that the action was time-barred, and that the Town could not maintain an action against them because the Town lacked privity of contract with them. We conclude that Supreme Court erred in granting defendants' respective motions, and we therefore reverse the order, deny the motions and reinstate the amended complaint.

It is well settled that a cause of action for legal malpractice accrues on the date when the malpractice was committed, regardless of the date on which the malpractice is actually discovered (*see Shumsky v Eisenstein*, 96 NY2d 164, 166; *Ackerman v Price Waterhouse*, 84 NY2d 535, 541; *Glamm v Allen*, 57 NY2d 87, 94). The parties agree that the alleged malpractice was committed on June 26, 2001, the date the hearing began before the improperly appointed Hearing Officer. The statute of limitations for legal malpractice is three years (*see* CPLR 214 [6]) and, therefore, the statute expired on June 26, 2004 unless it was tolled. We conclude that defendants met their initial burden of establishing that the action was commenced after the statute of limitations had expired (*see International Electron Devices [USA] LLC v Menter, Rudin & Trivelpiece, P.C.*, 71 AD3d 1512, 1512). "The burden then shifted to [the Town] to raise a triable issue of fact whether the statute of limitations was tolled by the continuous representation doctrine" (*id.*; *see Priola v Fallon*, 117 AD3d 1489, 1489-1490; *but see 730 J & J, LLC v Polizzotto & Polizzotto, Esqs.*, 69 AD3d 704, 705).

We conclude that the Town raised a triable issue of fact whether there were "clear indicia of an ongoing, continuous, developing, and depend[e]nt relationship between the [Town] and [defendants,] which . . . include[d] an attempt by [defendants] to rectify an alleged act of malpractice" (*Luk Lamellen U. Kupplungbau GmbH v Lerner*, 166 AD2d 505, 506-507; *see International Electron Devices [USA], LLC*, 71 AD3d at 1512-1513). Contrary to defendants' contentions, the Town raised triable issues of fact whether the continuing representation "pertain[ed] specifically to the matter in which [defendants] committed the alleged malpractice" (*Shumsky*, 96 NY2d at 168; *see International Electron Devices [USA], LLC*, 71 AD3d at 1512-1513), and whether there was "a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" (*McCoy v Feinman*, 99 NY2d 295, 306).

The Town first hired Weiss in early 2001 to investigate the possibility of Section 75 charges against one of the Town's employees. Weiss hired Gradl to assist him. From that point on, Weiss and Gradl performed legal work on behalf of the Town related to the Section 75 proceeding. They drafted the Section 75 charges and amended charges, presented evidence at the improperly commenced Section 75 hearing, prepared the resolution of the Town Board terminating the employee, and responded to the employee's legal challenge to the termination. When it appeared that a second hearing was required, the Town Board resolved to appoint Weiss "and associates . . . to prosecute" the Section 75 charges and amended charges against the employee, i.e., to correct the legal error resulting in the need to nullify the first hearing and the initial determination terminating the employee.

Defendants performed legal work on behalf of the Town by prosecuting the Section 75 charges and amended charges at a second hearing and by preparing the second resolution of the Town Board terminating the employee. When the employee challenged that termination, the Town Board resolved to retain Weiss's firm to represent the Town at a potential hearing pursuant to General Municipal Law § 50-h and "to defend the Town Board's decision" in an anticipated CPLR article 78 proceeding to be brought by the terminated employee.

Although defendants contended that their representation was not continuous, as evidenced by the fact that there were three separate and distinct actions by the Town to retain them and numerous gaps in their representation of the Town, we conclude that the Town nevertheless raised triable issues of fact concerning continuous representation. It is well established that "[a]n attorney-client relationship may exist in the absence of a formal retainer agreement" (*Swalg Dev. Corp. v Gaines*, 274 AD2d 385, 386; *see Terio v Spodek*, 63 AD3d 719, 721). Instead, such a relationship is formed by "an explicit undertaking to perform a specific task" (*Terio*, 63 AD2d at 721). Here, while there were three separate and distinct retainer agreements, we conclude that there are triable issues of fact whether defendants were retained for separate and distinct legal proceedings or, rather, "ongoing and developing phases of the [same] litigation" (*Muller v Sturman*, 79 AD2d 482, 485, citing *Siegel v Kranis*, 29 AD2d 477, 480-481). We cannot say as a matter of law that all of defendants' acts "were not interrelated so that representation on [the second Section 75 hearing and the subsequent CPLR article 78 proceeding were] not part of a continuing, interconnected representation" to perform the specific task of terminating a Town employee (*Deep v Boies*, 53 AD3d 948, 952). Inasmuch as "[a] question of fact exists on this issue, . . . summary judgment is inappropriate" (*id.*).

We further conclude that there are triable issues of fact whether the gaps in the legal services that defendants performed for the Town were "merely . . . period[s] absent expectations, rather than . . . period[s] when representation formally ended" (*Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 2013 NY Slip Op 23468, *affd* 118 AD3d 581, 582). Here, as in *Red Zone*, the Town "immediately return[ed] to [defendants] . . . once an issue arising from [the alleged] malpractice [was] detected" (*id.*; *see N&S Supply v Simmons*, 305 AD2d 648, 649-650)

Although defendants correctly contend that the continuous representation doctrine requires that there be " 'continuing trust and confidence in the relationship between the parties' " (*Kanter v Pieri*, 11 AD3d 912, 913), there are triable issues of fact whether the Town ever lost such trust and confidence in defendants. There is no dispute that the Town received an unsolicited letter from an attorney suggesting that defendants had committed legal error and offering to represent the Town in recovering the money spent as a result of that error. There is likewise no dispute that the Town Board discussed that letter. The Town, however, neither consulted with that attorney nor instituted any legal malpractice action during the pendency of

defendants' representation (*cf. Lazzaro v Kelly*, 87 AD2d 975, 976, *affd* 57 NY2d 630; *Schloss v Albany Med. Ctr.*, 278 AD2d 614, 615). While the Town solicited a proposal from a second law firm for representation in a subsequent phase of the Section 75 proceeding, consultation with a second attorney for representation on the same legal matter does not terminate the first attorney-client relationship (*see Red Zone LLC*, 2013 NY Slip Op 23468). The Town, after discussing other legal options, opted against retaining other counsel, thereby "evidenc[ing] a desire to continue the relationship [with defendants] and to continue with [its] case" (*Bucaro v Keegan, Keegan, Hecker & Tully*, 126 Misc 2d 590, 593).

Additionally, we agree with the Town that there are triable issues of fact whether there was "actual privity of contract between the [Town and Gradl] or a relationship so close as to approach that of privity" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 382, *rearg denied* 81 NY2d 955). "Viewed as a whole, we conclude that the evidence submitted in opposition to the [Gradl defendants'] motion raises a triable issue of fact whether there was an attorney-client relationship between [the Town] and [Gradl]" (*Bloom v Hensel*, 59 AD3d 1026, 1027; *see Shanley v Welch*, 31 AD3d 1127, 1128; *see generally Prudential Ins. Co. of Am.*, 80 NY2d at 382).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

874

CA 13-00766

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

TREMAIN CASON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KIRBY SY SMITH, III AND WERNER ENTERPRISES, INC.,
DEFENDANTS-APPELLANTS.

DEMARIE & SCHOENBORN, PC, BUFFALO, LAWRENCE A. SCHULZ, ORCHARD PARK, FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered March 22, 2013. The order affirmed orders of the Buffalo City Court entered June 12, 2007, April 11, 2008, and April 28, 2011, and affirmed an order and judgment (one paper) of the Buffalo City Court entered January 5, 2011.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying in part plaintiff's motion to strike defendants' answer and reinstating the answer insofar as interposed by defendant Werner Enterprises, Inc., resolving the issue of negligence in favor of plaintiff, and directing defendant Werner Enterprises, Inc. to pay $1,500 to plaintiff's counsel, and as modified the order is affirmed without costs and the matter is remitted to Buffalo City Court for further proceedings in accordance with the following Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when the bus he was operating collided with a tractor-trailer owned by defendant Werner Enterprises, Inc. (Werner) and operated by defendant Kirby Sy Smith, III (Smith). The matter was transferred to Buffalo City Court for disposition. As defendants implicitly concede, City Court did not abuse its discretion in granting plaintiff's motion to strike the answer insofar as interposed by Smith based upon Smith's failure to appear for a court-ordered deposition (*see Carabello v Luna*, 49 AD3d 679, 679-680; *Moriartes v Powertest Petroleum Co.*, 114 AD2d 888, 889-890, *lv dismissed* 67 NY2d 603, 757). We agree with defendants, however, that the court abused its discretion in striking the answer insofar as interposed by Werner. Initially, we note that there was no basis for the court to sanction Werner for failing to produce Smith inasmuch as Smith left Werner's employ prior to commencement of the action, and plaintiff "proffered no evidence that [Werner] exercised control over [Smith] and thus was responsible for [Smith]'s failure to

appear for his deposition" (*Carabello*, 49 AD3d at 680; *see Moriartes*, 114 AD2d at 890; *see generally Hann v Black*, 96 AD3d 1503, 1503). With respect to Werner's failure to comply with a prior order to produce a corporate representative for deposition, it is well established that "[a]lthough the nature and degree of a sanction for a party's failure to comply with discovery generally is a matter reserved to the sound discretion of the trial court, the drastic remedy of striking an answer is inappropriate absent a showing that the failure to comply is willful, contumacious, or in bad faith" (*Green v Kingdom Garage Corp.*, 34 AD3d 1373, 1374; *see Mosey v County of Erie*, 117 AD3d 1381, 1384). "Once a moving party establishes that the failure to comply with a disclosure order was willful, contumacious or in bad faith, the burden shifts to the nonmoving party to offer a reasonable excuse" (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1619). Here, plaintiff met that initial burden, "thereby shifting the burden to defendant[s] to offer a reasonable excuse" (*Hill v Oberoi*, 13 AD3d 1095, 1096). We agree with Werner, however, that it offered a reasonable excuse for its failure to comply with the prior order. Plaintiff sought to depose a Werner representative solely in connection with his cause of action involving negligent hiring, training, and supervision, and such discovery was no longer relevant after Werner conceded the facts necessary to establish liability as a matter of law based on respondeat superior (*see generally Ruiz v Cope*, 119 AD3d 1333, 1335; *Leftenant v City of New York*, 70 AD3d 596, 597; *Ashley v City of New York*, 7 AD3d 742, 743). We thus conclude that the court abused its discretion in granting that part of plaintiff's motion to strike the answer insofar as asserted by Werner. Instead, we impose the lesser sanction of resolving the issue of negligence in plaintiff's favor (*see* CPLR 3126 [1]; *Beatty v First Atl. Hous. Corp.*, 209 AD2d 658, 660), and directing Werner to pay the sum of $1,500 to plaintiff's counsel (*see L&L Auto Distribs. & Suppliers Inc. v Auto Collection, Inc.*, 85 AD3d 734, 736; *Adzer v Rudin Mgt. Co., Inc.*, 50 AD3d 1070, 1072). We therefore modify the order accordingly, and we remit the matter to City Court for a trial on serious injury and proximate cause (*see Ruzycki v Baker*, 301 AD2d 48, 51) and, if necessary, a new trial on damages. Based upon our determination, we do not address defendants' remaining contentions.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

875

CA 14-00243

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

GLORY FOLMSBEE AND MARK FOLMSBEE,
PLAINTIFFS-RESPONDENTS,

V ORDER

THE GOODYEAR TIRE & RUBBER COMPANY, DOING
BUSINESS AS GOODYEAR AUTO SERVICE CENTERS,
DEFENDANT-APPELLANT,
AND BENDERSON PROPERTIES, INC., FORMERLY KNOWN
AS BENDERSON DEVELOPMENT COMPANY, LLC,
DEFENDANT-RESPONDENT.

HERRICK, FEINSTEIN LLP, NEW YORK CITY (RICHARD Y. IM OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN & MARANTO LLP, BUFFALO (BENJAMIN J. ANDREWS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

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

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered November 15, 2013. The order, among other things, denied the motion of defendant The Goodyear Tire & Rubber Company, doing business as Goodyear Auto Service Centers, for summary judgment dismissing the complaint.

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

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

876

CA 14-00296

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

IN THE MATTER OF ANDREA GERVAIS AND STEPHANIE PAROBEK, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF EAST AURORA UNION FREE SCHOOL DISTRICT AND EAST AURORA UNION FREE SCHOOL DISTRICT, RESPONDENTS-APPELLANTS.

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

RICHARD E. CASAGRANDE, LATHAM (JENNIFER N. COFFEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 3, 2013 in a CPLR article 78 proceeding. The judgment, inter alia, determined that the denial of petitioners' rights of placement on the preferred eligibility list was arbitrary and capricious, and reinstated petitioners to the preferred eligibility list.

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

Memorandum: Petitioners, former teachers in respondent East Aurora Union Free School District (School District), commenced this CPLR article 78 proceeding seeking, inter alia, a judgment requiring the School District to place them on the preferred eligibility list for their respective areas of tenure. Respondents—the School District and its Board of Education (Board)—asserted that the petition should be dismissed as untimely and that, in any event, petitioners are not entitled to be placed on the preferred eligibility list inasmuch as they had refused to accept the part-time teaching positions offered to them. Supreme Court ruled in favor of petitioners and ordered that they be placed on the preferred eligibility list, retroactive to September 12, 2012. We now affirm.

Shortly before the start of the 2011-2012 school year, petitioners were hired by the School District as full-time teachers. On June 6, 2012, the Board, owing to budget constraints, reduced multiple full-time teaching positions to part-time positions. The Board's resolution states that, "[a]s a result of the reduction of the positions, the individuals affected, as determined through seniority

and applicable contract language, will be excessed and placed on the Preferred Eligibility List in accordance with applicable law and regulation." Because petitioners had the least seniority among teachers in their subject areas, their jobs were selected for reduction. Petitioner Andrea Gervais's job was reduced from "1.0 FTE" (a full-time position) to ".4 FTE" (40% of a full-time position), while petitioner Stephanie Parobek's job was reduced from "1.0 FTE" to ".2 FTE" (20% of a full-time position). Petitioners thereafter declined to accept those respective part-time positions, whereupon the Board, by resolution passed on September 12, 2012, terminated their employment and, by letters dated October 2, 2012, informed them that their names "have not been placed on the District's preferred eligibility list" because they had rejected the part-time positions offered to them. Petitioners filed separate notices of claim pursuant to Education Law § 3813 on December 10 and 11, 2012, and then jointly commenced this proceeding on January 10, 2013.

We initially conclude that, contrary to respondents' contention, the court properly determined that the proceeding was timely commenced. "A claim accrues for purposes of Education Law § 3813 when it matures and damages become ascertainable" (*Pope v Hempstead Union Free Sch. Dist. Bd. of Educ.*, 194 AD2d 654, 655, *lv dismissed* 82 NY2d 846; *see Blaze v New York City Dept. of Educ.*, 112 AD3d 428, 428-429). Here, petitioners' claims accrued, at the earliest, on September 12, 2012 when the Board terminated their employment with the School District and then determined that they would not be placed on the preferred eligibility list. Although the Board reduced petitioners' positions to part-time on June 6, 2012 and notified them of such decision by letters dated June 20, 2012, petitioners are not challenging that action by the School District. Instead, petitioners are challenging the determination of respondents not to place them on the preferred eligibility list, and the June resolution did not state that petitioners would not be placed on the preferred eligibility list if they failed to accept the part-time positions offered to them. Although the June 20, 2012 letters to petitioners from the School District's superintendent stated that petitioners would be placed on the preferred eligibility list if they accepted the part-time positions, petitioners were not then informed that accepting the part-time positions was a requirement for being placed on the preferred eligibility list. Thus, as the court determined, petitioners' claims accrued no earlier than September 12, 2012. This proceeding was commenced on January 10, 2013, which is within the four-month statute of limitations applicable to CPLR article 78 proceedings (*see* CPLR 217 [1]).

With respect to the substantive merits of the case, we conclude that, contrary to respondents' further contention, the court properly ordered respondents to place petitioners on the preferred eligibility list. Education Law § 2510 (3) (a) provides that, if a teaching position "is *abolished* or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position

similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he or she has filled" (emphasis added). The statute further provides that the persons "on such preferred list shall be reinstated or appointed to such vacancies . . . in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position" (*id.*)

We agree with petitioners that respondents, by reducing their full-time teaching positions to part-time positions, "effectively abolished the full-time position[s] and created [] new part-time position[s]," thereby triggering petitioners' rights under Education Law § 2510 to be placed on the preferred eligibility list for possible reemployment in a full-time position (*Wild v Board of Educ. of Forestville Cent. Sch. Dist.*, 166 AD2d 901, 901, *lv denied* 77 NY2d 802; *see also Seney v Board of Educ. of the E. Greenbush Cent. Sch. Dist.*, 103 AD3d 1022, 1023). We further conclude that petitioners' rejection of the part-time positions, which resulted in the termination of their employment with the School District, did not render them ineligible for placement on the preferred eligibility list (*see generally Matter of Girard v Board of Educ. of City Sch. Dist. of Buffalo*, 168 AD2d 183, 186; *Matter of Lewis v Cleveland Hill Union Free Sch. Dist.*, 119 AD2d 263, 266-267).

Finally, we note that, to the extent that respondents contend that petitioners were not entitled to placement on the preferred eligibility list because they did not have tenure, that contention is not properly before us inasmuch as it is raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

878

CA 13-01525

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

GAIL A. ANDERSON, NOW KNOWN AS GAIL A. HALIM,
ALSO KNOWN AS GAIL A. DECKER,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. ANDERSON, DEFENDANT-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), FOR DEFENDANT-APPELLANT.

HISCOCK & BARCLAY, LLP, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered July 12, 2013 in a divorce action. The order, insofar as appealed from, denied that part of the motion of defendant seeking to terminate consultation fees payable to plaintiff.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking to terminate the consultation fees is granted.

Memorandum: Defendant former husband appeals from an order that denied his request to terminate the consultation fees that were being paid to plaintiff former wife pursuant to a provision of the parties' Separation and Property Settlement Agreement (Agreement), which had been incorporated but not merged into their judgment of divorce. According to defendant, the provision created an employment relationship, permitting defendant to terminate the payments for good cause. We agree.

The consultation fee provision is found in the "Support" section of the Agreement and is entitled, "Additional Support." According to the terms of the provision, if defendant's maintenance obligation to plaintiff terminates because of, inter alia, her remarriage, defendant will cause his business "to employ [plaintiff] as a consultant" for a certain weekly salary. The terms of the provision further provide that such "employment" shall continue until defendant's child support obligations under the Agreement terminate. Although the Agreement does not require plaintiff "to work any particular number of hours," it requires her to "be available at reasonable times and from time to time to consult, as needed by [defendant], with respect to [his] various business interests."

After plaintiff opened a competing business, defendant moved by order to show cause, inter alia, to terminate the consultation fees on the ground that plaintiff, as his employee, had breached her duty of loyalty. Supreme Court denied the motion, concluding in relevant part that "the employment provision is not a contract for employment, but rather . . . is a support provision which allow[ed] the defendant's business to make payments to plaintiff instead of the defendant himself." We conclude, however, that the provision constitutes an employment contract, thereby permitting defendant to terminate the payments upon plaintiff's breach of her duty of loyalty to him as her employer (*see Western Elec. Co. v Brenner*, 41 NY2d 291, 295), and we therefore reverse.

It is well established that a separation agreement that is incorporated but not merged into a judgment of divorce "is a contract subject to the principles of contract construction and interpretation" (*Matter of Meccico v Meccico*, 76 NY2d 822, 823-824, *rearg denied* 76 NY2d 889; *see Rainbow v Swisher*, 72 NY2d 106, 109; *Gurbacki v Gurbacki*, 270 AD2d 807, 807), and "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569; *see Thompson v McQueeney*, 56 AD3d 1254, 1257). By entering into the Agreement, defendant agreed to employ plaintiff in the event his maintenance obligation terminated during the period of time in which he was still obligated to pay child support. Inasmuch as the language of the Agreement is clear and unambiguous on its face, "the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence" (*Rainbow*, 72 NY2d at 109; *see Von Buren v Von Buren*, 252 AD2d 950, 950).

While we agree with plaintiff and the court that the clear and unambiguous intent of the Agreement was to provide a substitute source of monetary support for plaintiff after defendant's maintenance obligation terminated, we conclude that the *reason* defendant agreed to employ plaintiff does not change the fact that the Agreement established an employment relationship with corresponding rights and obligations for both parties.

As we have previously stated, "[a]n employee may not compete with his [or her] employer's business during the time of his [or her] employment" (*Hercules Packing Corp. v Steinbruckner*, 28 AD2d 635, 635, *appeal dismissed* 20 NY2d 757; *see Bon Temps Agency v Greenfield*, 184 AD2d 280, 281, *lv dismissed* 81 NY2d 759; *Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 88, *appeal dismissed* 63 NY2d 675). When plaintiff opened a business in direct competition with defendant's business, plaintiff breached her duty of loyalty to her employer (*see Western Elec. Co.*, 41 NY2d at 295), thereby permitting defendant to terminate the consultation fees and the employment relationship.

To the extent that plaintiff contends that defendant's delay in seeking her termination constitutes a waiver of his right to seek her termination, we note that the Agreement specifically provides that a party's failure to seek strict performance of the Agreement or to

exercise any option thereunder will not be construed as a waiver of the right to do so at a later date.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

882

CA 14-00013

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

BONNIE YOUNG AND MICHAEL RONDINELLO,
PLAINTIFFS-RESPONDENTS,

V ORDER

BARBARA LACY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BARTH SULLIVAN BEHR, BUFFALO (J. WILLIAM SAVAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 23, 2013. The order and judgment awarded money damages to plaintiff Bonnie Young.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D*. [appeal No. 1], 162 AD2d 1051).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

883

CA 13-01918

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

BONNIE YOUNG AND MICHAEL RONDINELLO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

BARBARA LACY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BARTH SULLIVAN BEHR, BUFFALO (J. WILLIAM SAVAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered July 16, 2013. The amended order and judgment, insofar as appealed from, awarded money damages to plaintiff Bonnie Young.

It is hereby ORDERED that the amended order and judgment insofar as appealed from is unanimously reversed on the law without costs and a new trial is granted on the first cause of action.

Memorandum: Bonnie Young (plaintiff) and her husband commenced this action seeking, inter alia, damages for injuries that plaintiff sustained in a motor vehicle accident with defendant. The case proceeded to trial, and the jury rendered a verdict in favor of plaintiff and awarded her damages of $329,517, including $200,000 for past pain and suffering and $127,387 for past lost earnings. We note that no damages were awarded on the derivative cause of action, and no cross appeal was taken. On appeal, defendant contends that Supreme Court erred in refusing to allow her attorney to cross-examine plaintiff with respect to information in her federal tax returns. We agree with defendant, and we therefore reverse the amended order and judgment insofar as appealed from and grant a new trial on plaintiff's cause of action.

At trial, defendant's attorney sought to question plaintiff about information in her federal tax returns that he believed to be inaccurate. Specifically, he wanted to ask plaintiff why she had filed as head of household for four consecutive years when she had been married and living with her husband during that period. He also sought to ask plaintiff how many of her children she had claimed as dependency exemptions. According to defendant's attorney, plaintiff,

as a result of her improper filing as head of household, had received a tax credit to which she would not otherwise have been entitled. The court precluded defendant's attorney from asking plaintiff any questions about information in her federal tax returns, explaining that, because plaintiff had not been asked about such issues at her deposition, defendant's attorney was improperly attempting to "ambush" her at trial. Defendant's attorney objected to the court's ruling, thereby preserving the issue for our review.

"It is, of course, the general rule that a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness's credibility . . . While the nature and extent of such cross-examination is discretionary with the trial court . . . , the inquiry must have some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr v Hogan*, 75 NY2d 629, 634). Furthermore, " 'cross-examination aimed at establishing a possible reason to fabricate must proceed upon some good-faith basis' " (*Matter of Michael U. [Marcus U.]*, 110 AD3d 821, 822).

Here, based on his reading of IRS Publication 51 and plaintiff's federal tax returns, defendant's attorney had a good faith basis to ask plaintiff about the propriety of her filing status. Moreover, if plaintiff had improperly filed federal tax returns as head of household in order to receive a tax credit to which she was not entitled, it raises the possibility that she may have committed tax fraud. We conclude that evidence that plaintiff may have committed tax fraud has "some tendency to show moral turpitude to be relevant on the credibility issue" (*Badr*, 75 NY2d at 634; *see generally Delgado v Murray*, 115 AD3d 417, 418). Although it is true, as plaintiff points out, that, because of the collateral evidence rule, defendant's attorney would have been bound by plaintiff's answers concerning her federal tax returns without "refuting [those] answers by calling other witnesses or by producing extrinsic evidence" (Prince, Richardson on Evidence § 6-305 [Farrell 11th ed]; *see also People v Schwartzman*, 24 NY2d 241, 245, *cert denied* 396 US 846; *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 924), we nevertheless conclude that defendant's attorney should have been allowed to ask the questions (*see McNeill v LaSalle Partners*, 52 AD3d 407, 410).

Plaintiff's reliance on *Badr* (75 NY2d 629) is misplaced. In that case, the plaintiff in a personal injury action was asked on cross-examination whether she had committed welfare fraud. After plaintiff answered "[n]o" (*id*. at 632), the defendant's attorney marked as an exhibit a confession of judgment wherein plaintiff had admitted that she had improperly received money from the Department of Social Services and had agreed to pay it back. Over plaintiff's objection, the court allowed defendant's attorney to use the confession of judgment to impeach plaintiff's testimony that she had not committed welfare fraud. The Court of Appeals determined that it was reversible error for the trial court to have allowed the defendant's attorney to use *extrinsic evidence*, i.e., the confession of judgment, to impeach plaintiff's credibility (*id*. at 634-636).

The question presented in the case before us is not whether the court should have allowed defendant's attorney to impeach plaintiff's credibility with extrinsic evidence; rather, the question is whether the court should have allowed defendant's attorney to question plaintiff about information in plaintiff's federal tax returns that he believed to be inaccurate. Notably, the Court of Appeals in *Badr* did not suggest that it was error for the defendant's attorney to ask the plaintiff whether she had committed welfare fraud; the error occurred in allowing the defendant's attorney to use extrinsic evidence to show that the plaintiff's answer to the fraud question was false. Here, defendant's attorney was not permitted even to ask plaintiff his questions, and thus the facts of this case do not come within the holding of *Badr.* Finally, because plaintiff's credibility was central to several close issues at trial—including proximate cause, serious injury, and damages—it cannot be said that the error is harmless.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

885

KA 11-02471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NORMAN KOONCE, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 31, 2011. The appeal was held by this Court by order entered November 8, 2013, decision was reserved and the matter was remitted to Erie County Court for further proceedings (111 AD3d 1277). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision and remitted the matter to County Court to rule on defendant's renewed motion to " 'rule on whether the jurors who voted this indictment were present for all the testimony presented on this case' " (*People v Koonce*, 111 AD3d 1277, 1279). We determined in our prior decision that defendant's remaining contentions on the appeal from the judgment of conviction after a jury trial lacked merit (*id.* at 1278-1279). Upon remittal, the court denied the renewed motion, and we now affirm.

Defendant contends that the grand jury proceeding was not properly conducted in accordance with CPL 190.25 (1) inasmuch as the summary sheet from the proceeding shows that 20 votes were cast to indict him, while the attendance sheet lists only 19 grand jurors present. We reject that contention. The attendance sheet shows, in fact, that there were 21 grand jurors present on the day that defendant was indicted. We therefore conclude from the two sheets that one grand juror simply did not vote. Thus, contrary to defendant's contention, the record establishes that "at least 12 [grand] jurors who . . . heard all of the 'essential and critical evidence' vote[d] to indict" (*People v Perry*, 199 AD2d 889, 891, *lv*

denied 83 NY2d 856; *see People v Collier*, 72 NY2d 298, 301-302).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

886

KA 10-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAURICE COTTON, DEFENDANT-APPELLANT.

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

MAURICE COTTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered June 10, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). In his main brief, defendant contends that the verdict is contrary to the weight of the evidence, primarily based upon his contention that the victim was not credible, and he also asks us to review the legal sufficiency of the evidence as part of our weight of the evidence review. In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to support the conviction. Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus failed to preserve his sufficiency challenge for our review (*see People v Lane*, 7 NY3d 888, 889; *People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926), we conclude that it is legally sufficient to support the conviction of the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[R]esolution

of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]; *see People v Mulligan*, 118 AD3d 1372, 1375), and, based upon our independent review of the evidence and the credibility of the witnesses, we see no reason to disturb the jury's determination.

We agree with defendant's further contention in his pro se supplemental brief that he should not have been shackled when he testified before the grand jury, but we conclude that reversal based on that error is not warranted. "As the People correctly contend, the prosecutor's cautionary instructions to the grand jurors, which forbade them from drawing any negative inferences from the shackling, 'were sufficient to dispel any potential prejudice' to defendant" (*People v Burroughs*, 108 AD3d 1103, 1106, *lv denied* 22 NY3d 995; *see People v Gilmore*, 12 AD3d 1155, 1155). Insofar as defendant's pro se supplemental brief may be read to challenge the sufficiency of the evidence before the grand jury, we note that such challenge is not properly before us. "It is well established that '[t]he validity of an order denying any motion [to dismiss an indictment for legal insufficiency of the grand jury evidence] is not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' " (*People v Afrika*, 79 AD3d 1678, 1679, *lv denied* 17 NY3d 791, quoting CPL 210.30 [6]; *see People v Lane*, 106 AD3d 1478, 1481, *lv denied* 21 NY3d 1043). Similarly, "[b]ecause his convictions are supported by legally sufficient trial evidence, defendant's challenges to . . . the instructions given during [the grand jury] proceeding are precluded" (*People v Medeiros*, 116 AD3d 1096, ____ n 1).

Also in his pro se supplemental brief, defendant contends that Supreme Court committed reversible error in permitting two witnesses to bolster the victim's prior identification of defendant. That contention is not preserved for our review because, "[a]lthough a [hearsay objection] was raised against this testimony, defendant at no time objected to this testimony on the specific ground that it constituted improper bolstering" (*People v West*, 56 NY2d 662, 663; *see People v Comerford*, 70 AD3d 1305, 1306; *see also People v Jacque*, 2 AD3d 1362, *lv denied* 2 NY3d 741). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention in his pro se supplemental brief that he was denied effective assistance of counsel, inasmuch as he failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's allegedly deficient conduct" (*People v Caban*, 5 NY3d 143, 152; *see People v Coleman*, 37 AD3d 489, 490, *lv denied* 9 NY3d 864; *see generally People v Benevento*, 91 NY2d 708, 712).

The sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions in defendant's pro se

supplemental brief and conclude that they are without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

888

KA 12-01775

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD P. MCGUAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 3, 2011. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [a]), defendant contends that he was deprived of his constitutional right to present a defense because County Court denied his request to serve a late notice of intent to present psychiatric evidence (*see* CPL 250.10 [2]). By pleading guilty, however, defendant forfeited his right to challenge the court's denial of his motion (*see People v Di Donato*, 87 NY2d 992, 993). For the same reason, defendant also forfeited his right to challenge the court's denial of his request for the appointment of a special prosecutor (*see generally People v Taylor*, 65 NY2d 1, 5).

We reject defendant's contention that the court erred in denying his motion to suppress incriminating statements he made to law enforcement officials. As the court properly determined, defendant was not in custody when he made the statements, and thus the police were not required to advise defendant of his *Miranda* rights (*see generally People v Paulman*, 5 NY3d 122, 129; *People v Berg*, 92 NY2d 701, 704; *People v Beard*, 1 AD3d 886, 886, *lv denied* 1 NY3d 624). The evidence at the *Huntley* hearing establishes that defendant voluntarily accompanied the police to the station for both interviews, he was not restrained in any way during either interview, and he was allowed to go home at the conclusion of the interviews. Moreover, defendant was specifically advised by one of the investigators that he was free to

leave at anytime. In our view, a reasonable person in defendant's position who was innocent of any crime would not have believed that he or she was in custody (*see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *People v Lunderman*, 19 AD3d 1067, 1068, *lv denied* 5 NY3d 830).

Although defendant contends that his plea was involuntarily entered, he failed to preserve his contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Cubi*, 104 AD3d 1225, 1226, *lv denied* 21 NY3d 1003), and the narrow exception to the preservation rule does not apply because defendant said nothing during the plea colloquy that "clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666; *see People v Hall*, 119 AD3d 1349, 1349).

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

891

KA 11-01210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEAN TUSZYNSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 1, 2011. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class D felony, aggravated unlicensed operation of a motor vehicle in the first degree and leaving the scene of an incident without reporting.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), defendant contends that the verdict with respect to those counts is contrary to the weight of the evidence with respect to the issue of intoxication. We reject that contention.

We note at the outset that the conviction of aggravated unlicensed operation of a motor vehicle in the first degree does not require proof of intoxication, and we thus reject defendant's contention with respect to that crime. Unlike the driving while intoxicated count, which requires proof that defendant was intoxicated (*see* Vehicle and Traffic Law § 1192 [3]), the aggravated unlicensed operation of a motor vehicle in the first degree count may be sustained upon proof that defendant was driving while his ability to operate a motor vehicle was impaired pursuant to Vehicle and Traffic Law § 1192 (1) (*see People v Gelster*, 256 AD2d 1133, 1133; *see e.g. People v Kaminski*, 109 AD3d 1186, 1186, *lv denied* 22 NY3d 1088; *People v DeCarlis*, 37 AD3d 1040, 1040, *lv denied* 8 NY3d 945), and it is well settled that a " '[c]onviction of [that] offense [does] not require proof of intoxication, but only [requires proof] that defendant's driving ability was impaired to any extent' " by the consumption of

alcohol (*People v McDonald*, 27 AD3d 949, 950). Here, defendant concedes in his brief that the weight of the evidence supports a finding that his driving ability was impaired by his consumption of alcohol.

In any event, we conclude that the verdict is not against the weight of the evidence on the issue of intoxication. "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [internal quotation marks omitted]; *see People v Roman*, 107 AD3d 1441, 1442-1443, *lv denied* 21 NY3d 1045; *People v Scott*, 107 AD3d 1635, 1636, *lv denied* 21 NY3d 1077). "Viewing the evidence in a neutral light and weighing the probative value of the conflicting testimony and the conflicting inferences that could be drawn, while deferring to the jurors' ability to observe the witnesses and assess their credibility, aided by the video recording, we find that it was not contrary to the weight of the credible evidence for the jury to find that defendant" was intoxicated (*People v Purvis*, 90 AD3d 1339, 1341, *lv denied* 18 NY3d 997; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that the persistent felony offender statutory scheme is unconstitutional in light of the rule in *Apprendi v New Jersey* (530 US 466). To the contrary, it is well settled that Penal Law § 70.10 and CPL 400.20 are constitutional (*see People v Battles*, 16 NY3d 54, 59, *cert denied* ___ US ___, 132 S Ct 123; *People v Quinones*, 12 NY3d 116, 122-131, *cert denied* 558 US 821). Finally, the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

892

KA 12-02195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAZ J. GRIFFIN, ALSO KNOWN AS JOHN DOE, ALSO KNOWN AS CHIZZLE, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered October 3, 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, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). " 'Although County Court's colloquy was brief, defendant signed a detailed written waiver of the right to appeal . . . , and he acknowledged to the court that he understood that he was foregoing the right to appeal' " (*People v Bridenbaker*, 112 AD3d 1379, 1380). Defendant's valid waiver of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Gardner*, 101 AD3d 1634, 1634). In any event, defendant failed to preserve that challenge for our review, and this case does not fall within the narrow exception to the preservation requirement (*see People v Thomas*, 72 AD3d 1483, 1483).

Defendant's further contention that the court abused its discretion in denying his motion to withdraw his plea on the ground that it was coerced survives his valid waiver of the right to appeal (*see People v Jackson*, 85 AD3d 1697, 1698, *lv denied* 17 NY3d 817; *People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). We nevertheless reject that contention. " 'The unsupported allegations of defendant that [defense counsel] pressured him into accepting the plea bargain [did] not warrant vacatur of his plea' " (*People v James*, 71 AD3d 1465, 1465). Defendant asserted that he accepted the plea

offer based on defense counsel's advice that he was unlikely to prevail at trial and that he would likely receive a harsher sentence if convicted after trial. That advice does not constitute coercion (*see People v Elting*, 18 AD3d 770, 771, *lv denied* 5 NY3d 788). Furthermore, defendant admitted at sentencing that he pleaded guilty based on his fear that he would not succeed at trial and would receive a harsher sentence, and it is well settled that " 'defendant's fear that a harsher sentence would be imposed if defendant were convicted after trial does not constitute coercion' " (*People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015; *see People v Jackson*, 90 AD3d 1692, 1693, *lv denied* 18 NY3d 958).

Finally, although defendant's contention that defense counsel was ineffective for coercing him into accepting the plea agreement also survives his valid waiver of the right to appeal (*see People v Neil*, 112 AD3d 1335, 1336), that contention is without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

902

CA 13-02129

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

LLOYD RIFENBURG, PLAINTIFF-RESPONDENT,

V ORDER

WESTERN NEW YORK AND PENNSYLVANIA RAILROAD,
DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWARD PEKAREK, WELLSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered July 17, 2013. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 13 and 28, 2014, and filed in the Allegany County Clerk's Office on July 2, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

903

CA 14-00028

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

IN THE MATTER OF KAREN A. WHITAKER, AS PROPOSED GUARDIAN OF JOSEPH L. MARTIN, JR., CLAIMANT-RESPONDENT,

V ORDER

KENNEDY/TOWN OF POLAND, TOWN OF POLAND HIGHWAY DEPARTMENT, RESPONDENTS-APPELLANTS, ET AL., RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered September 12, 2013. The order granted the application of claimant for leave to serve a late notice of claim on respondents Kennedy/Town of Poland and Town of Poland Highway Department.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs (*see McBee v County of Onondaga*, 34 AD3d 1360, 1360).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

904

CA 14-00359

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

ALI R. ABDULNABI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, DEFENDANT-RESPONDENT.

MARCUS & CINELLI, LLP, WILLIAMSVILLE (DAVID P. MARCUS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEWIS JOHS AVALLONE AVILES, LLP, ISLANDIA (DANIEL A. BARTOLDUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered November 25, 2013. The order, among other things, denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking damages based on defendant's alleged breach of an insurance policy issued by defendant to plaintiff covering real property owned by plaintiff. Plaintiff submitted a claim to defendant for fire loss, and defendant refused to pay the claim on the ground that, inter alia, plaintiff's intentional conduct caused the fire.

We conclude that Supreme Court properly denied plaintiff's motion for summary judgment. An insurer denying coverage based on the intentional ignition or procurement of a fire by the insured must establish "either that the fire was intentionally set *or* that [the insured] had a financial motive to destroy his [or her] property for the insurance proceeds" (*Van Nevius v Preferred Mut. Ins. Co.* [appeal No. 1], 280 AD2d 947, 947 [emphasis added]). Here, in the context of plaintiff's motion for summary judgment, if the evidence " 'indicates that plaintiff['s] premises *may* have been damaged by arson and that plaintiff[] *may* have had a motive to see the[] property destroyed by fire,' " a plaintiff-insured's motion for summary judgment should be denied (*Benjaminov v Republic Ins. Group*, 241 AD2d 473, 474; *see R.C.S. Farmers Mkts. Corp. v Great Am. Ins. Co.*, 56 NY2d 918, 920). Viewing the evidence in the light most favorable to the nonmoving party, as we must (*see Esposito v Wright*, 28 AD3d 1142, 1143), we conclude that plaintiff failed to meet his initial burden of establishing that the fire was not intentionally set (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We further conclude

that, although plaintiff met his initial burden of establishing that he did not have a financial motive to destroy the property for the insurance proceeds, defendant raised a triable issue of fact in that respect (*see generally id.*).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

910

TP 14-00128

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

IN THE MATTER OF BRENDA BERNIER, PETITIONER,

V MEMORANDUM AND ORDER

NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

NEIGHBORHOOD LEGAL SERVICES, INC., BUFFALO (DIANA M. STRAUBE OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Henry J. Nowak, Jr., J.], entered January 22, 2014) to review a determination of respondent. The determination denied petitioner's request for a modular wheelchair ramp.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to review respondent's determination made after a fair hearing denying her a modular wheelchair ramp. Respondent determined that the ramp did not meet the definition of durable medical equipment (DME) pursuant to 18 NYCRR 505.5 (a) (1). Contrary to petitioner's contention, respondent's determination is supported by substantial evidence (*see generally Matter of Coffey v D'Elia*, 61 NY2d 645, 648; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180). In addition, "[a]n agency's interpretation of its regulations must be upheld unless the determination is irrational and unreasonable" (*Matter of Taher v Novello*, 278 AD2d 809, 810, *lv denied* 96 NY2d 712 [internal quotation marks omitted]; *see Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 280; *Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549), and we conclude that respondent's determination that ramps do not fit within the definition of DME is rational. DME is equipment that is "primarily and customarily used for medical purposes" and that is "generally not useful to a person in the absence of an illness or injury" (18 NYCRR 505.5 [a] [1] [ii], [iii]). We agree with respondent that ramps may be useful to people, generally, even in the absence of an illness or injury. We have considered petitioner's

remaining contentions and conclude that they are without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

913

KA 09-02094

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOHNNY B. BIVINS, SR., DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HANNAH STITH LONG OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered June 18, 2009. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the second degree.

Now, upon reading and filing the stipulation of discontinuance signed by defendant on July 23, 2014 and by the attorneys for the parties on August 1 and 5, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

916

KA 11-01410

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVELL SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 16, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). We reject defendant's contention that Supreme Court erred in refusing to charge the jury with the lesser included offense of criminal possession of a controlled substance in the seventh degree (§ 220.03). "A lesser included offense may not be submitted unless there appears on the whole record 'some identifiable, rational basis' for the jury to reject evidence supportive of the greater crime yet accept so much of the evidence as would establish the lesser" (*People v Palmer*, 216 AD2d 883, 884, *lv denied* 86 NY2d 799, quoting *People v Scarborough*, 49 NY2d 364, 369). Here, the People presented expert testimony that the cocaine recovered from defendant weighed in excess of 1,400 milligrams, which is nearly triple the weight requirement for a conviction of criminal possession of a controlled substance in the fifth degree (*see* § 220.06 [5]). Viewing the evidence in the light most favorable to defendant (*see People v Rivera*, 23 NY3d 112, 120-121, citing *People v Martin*, 59 NY2d 704, 705; *People v Moultrie*, 100 AD3d 401, 402, *lv denied* 20 NY3d 1102), we conclude that "[t]here was no basis, other than sheer speculation, for the jury to find that the chemist inaccurately weighed the drugs, or to otherwise reject the portion of [her] testimony concerning the weight of the substance, while at the same time accepting the portion of [her] testimony identifying the substance" (*People v Johnson*, 66 AD3d 537, 538; *see*

Moultrie, 100 AD3d at 402; *Palmer*, 216 AD2d at 884). We therefore conclude that there is no reasonable view of the evidence that defendant committed the lesser offense but not the greater (*see People v Demus*, 82 AD3d 1667, 1668, *lv denied* 17 NY3d 815; *People v Bolden*, 70 AD3d 1352, 1353, *lv denied* 14 NY3d 838).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

918

KA 11-02612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL UBBINK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 21, 2011. The judgment convicted defendant upon a jury verdict, of criminal contempt in the first degree, stalking in the third degree and resisting arrest.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]) to criminal contempt in the second degree (§ 215.50 [3]) and vacating the sentence imposed on count one of the indictment and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Onondaga County, for sentencing on the conviction of criminal contempt in the second degree.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal contempt in the first degree (Penal Law § 215.51 [b] [ii]) and stalking in the third degree (§ 120.50 [4]). Contrary to the contention of the People, we conclude that defendant's challenge to the legal sufficiency of the evidence with respect to those crimes is preserved for our review (*see People v Payne*, 3 NY3d 266, 273), and we further conclude that the evidence is legally insufficient to support the conviction of criminal contempt in the first degree (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence presented at trial does not establish that defendant intentionally placed or attempted to place the victim in reasonable fear of physical injury, "let alone 'serious physical injury or death' " (*see People v Demisse*, 24 AD3d 118, 119, *lv denied* 6 NY3d 833). Defendant went to the victim's residence, but the evidence does not establish that his words or actions while he was there constituted an actual or implied threat of physical harm to the victim. "While defendant should have known that the victim did not want to have any contact with him and that the [visit] could well be upsetting to her,

it does not necessarily follow that defendant, when he made the [visit], intended to place the victim in reasonable fear for her physical safety. Without such evidence, the evidence is legally insufficient and his conviction for criminal contempt in the first degree cannot stand" (*People v Brown*, 61 AD3d 1007, 1010).

We further conclude, however, that there is legally sufficient evidence to sustain a conviction of the lesser included offense of criminal contempt in the second degree (Penal Law § 215.50 [3]) inasmuch as the evidence established that, despite having knowledge of the order of protection, defendant intentionally disobeyed it (*see Brown*, 61 AD3d at 1010). We therefore modify the judgment by reducing defendant's conviction of criminal contempt in the first degree to criminal contempt in the second degree and vacating the sentence imposed on count one of the indictment (*see* CPL 470.15 [2] [a]), and we remit the matter to Supreme Court for sentencing on the conviction of criminal contempt in the second degree (*see* CPL 470.20 [4]).

We reject defendant's contention that the evidence is not legally sufficient to support the conviction of stalking in the third degree. The evidence submitted in support of that crime "must be viewed in the context of the prior relationship that existed between defendant and the victim" (*Brown*, 61 AD3d at 1009). Here, defendant had been previously convicted of stalking as a result of his fixation with the victim such that he "had to have known that any attempt on his part to contact [her] would have no legitimate purpose and, at the very minimum, would serve to harass and annoy her[,] . . . [and that,] even absent some express threat directed at her, she [would have] legitimate and well-founded fears for her physical safety" if he visited her residence (*id*.). Contrary to defendant's contention, we further conclude that the evidence established the necessary element of a course of conduct, i.e., a series of acts "evidencing a continuity of purpose" (*People v Payton*, 161 Misc 2d 170, 174), for stalking in the third degree. Thus, viewing the evidence in the light most favorable to the People, we conclude that the evidence demonstrates a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury with respect to that crime (*see Bleakley*, 69 NY2d at 495).

Finally, viewing the evidence in light of the elements of the crime of stalking in the third degree 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 with respect to that crime (*see generally Bleakley*, 69 NY2d at 495).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

919

KA 12-02326

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. CURRY, DEFENDANT-APPELLANT.

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

ROBERT D. CURRY, DEFENDANT-APPELLANT PRO SE.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 16, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and assault in the third degree (§ 120.00 [1]). The charges arose from an incident in which defendant was involved in a physical altercation with another man. We reject defendant's contention that, because he had neither actual nor constructive possession of the handgun, the evidence is legally insufficient to support the conviction with respect to the weapon possession counts. Viewing the evidence in the light most favorable to the People (*see People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678; *People v Brown*, 92 AD3d 1216, 1217, *lv denied* 18 NY3d 992), we conclude that there is a valid line of reasoning and permissible inferences that could lead the jury to conclude that defendant actually or constructively possessed the subject weapon (*see* § 10.00 [8]; *see also People v Manini*, 79 NY2d 561, 573; *see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in the light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant also contends that he was illegally sentenced as a persistent violent felony offender (*see generally* Penal Law § 70.08). Defendant's contention is premised on the fact that, on the same day, he was resentenced for a 2004 felony weapons possession offense after pleading guilty to a probation violation and was sentenced for a separate 2005 felony weapons possession offense. We reject defendant's contention that the resentencing on the 2004 conviction "reset[] the controlling sentencing date for purposes" of determining whether the sentence of the 2004 conviction was imposed before commission of the 2005 felony (*People v Davis*, 93 AD3d 524, 524-525, *lv denied* 19 NY3d 995; *see* § 70.08 [1] [b]; *see also* § 70.04 [1] [b] [ii]). We therefore conclude, contrary to defendant's contention, that those crimes constitute separate predicate violent felonies, not a single predicate violent felony, for purposes of determining whether defendant was a persistent violent felony offender (*see Davis*, 93 AD3d at 524-525; *People v Newton*, 91 AD3d 1281, 1282, *lv denied* 19 NY3d 965; *see also People v Acevedo*, 17 NY3d 297, 302). We have reviewed defendant's remaining contentions in his pro se supplemental brief with respect to his persistent violent felony offender status and conclude that they are without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

920

CA 12-01334

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF CHARLES BROOKS, CONSECUTIVE NO. 262223, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW § 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DIVISION OF PAROLE, RESPONDENTS-RESPONDENTS.

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

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

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered June 13, 2012 in a proceeding pursuant to Mental Hygiene Law article 10. The order continued the commitment of petitioner to a secure treatment facility.

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

Memorandum: Petitioner was previously determined to be a dangerous sex offender requiring civil confinement and was committed to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*; *Matter of State of New York v C.B.*, 88 AD3d 599, 599, *appeal dismissed and lv denied* 18 NY3d 905). Petitioner now appeals from an order continuing his confinement in a secure treatment facility (*see* § 10.09 [h]). We reject petitioner's contention that respondents failed to prove by clear and convincing evidence that he is a dangerous sex offender requiring continued confinement (*see Matter of Sincere KK. v State of New York*, 111 AD3d 1083, 1083-1084, *lv denied* 22 NY3d 862; *Matter of William II. v State of New York*, 110 AD3d 1282, 1283). To the extent that petitioner contends that respondents' expert witness improperly relied upon hearsay testimony, we conclude that Supreme Court is presumed to have properly given any hearsay statements limited legal significance in making its determination, and that any evidentiary error is harmless (*see Matter of State of New York v Mark S.*, 87 AD3d 73, 80, *lv denied* 17 NY3d 714).

As the First Department concluded on his appeal from the initial

determination under Mental Hygiene Law article 10, "there is no merit to [petitioner's] argument that he is entitled to release on the ground that his initial confinement under article 9 of the Mental Hygiene Law had been illegal" (*C.B.*, 88 AD3d at 599-600; *see People ex rel. Joseph II. v Superintendent of Southport Corr. Facility*, 15 NY3d 126, 133, *rearg denied* 15 NY3d 847). Indeed, petitioner and others similarly situated challenged their confinement under article 9 in *State of New York ex rel. Harkavy v Consilvio* (7 NY3d 607; *see Matter of State of New York v C.B.*, 18 Misc 3d 1136[A], *1), and the Court of Appeals determined that the petitioners were not entitled to immediate release, but rather should be afforded the appropriate hearing (*see Harkavy*, 7 NY3d at 614; *see also State of N.Y. ex rel. Harkavy v Consilvio*, 8 NY3d 645, 651-652), which petitioner received here.

Contrary to petitioner's contention, the court properly denied his motion for a change of venue because the court did not have the authority to change venue in a hearing held pursuant to Mental Hygiene Law § 10.09 (*see Matter of Davis v State of New York*, 106 AD3d 1488, 1489, *lv granted* 22 NY3d 852). In any event, petitioner failed to establish good cause for a change of venue inasmuch as he made only conclusory statements regarding the convenience of his witnesses (*see Matter of State of New York v Steinmetz*, 101 AD3d 1726, 1727).

We reject petitioner's further contention that the court erred in denying his request to substitute counsel or to proceed pro se. Petitioner failed to show good cause for substitution (*see People v Sides*, 75 NY2d 822, 824). Assuming, arguendo, that petitioner had a right to self-representation (*see Matter of State of New York v Raul L.*, 120 AD3d 52, ___; *see also Matter of State of New York v Timothy BB.*, 113 AD3d 18, 21, *appeal dismissed and lv denied* 23 NY3d 941), we conclude that petitioner did not make an unequivocal request to proceed pro se (*see People v Gillian*, 8 NY3d 85, 88; *People v McIntyre*, 36 NY2d 10, 17).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

922

CA 14-00270

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

SCAN TUBE & STEEL SERVICES, LTD.,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ALTX, INC., TUBACEX & COTUBES CANADA INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS,
AND TUBACEX CANADA, INC., DEFENDANT-RESPONDENT.

WEBSTER SZANYI LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS AND DEFENDANT-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered April 18, 2013. The order granted in part and denied in part the motion of defendants for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 26, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

925

CA 14-00021

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

IN THE MATTER OF ARBITRATION BETWEEN DENIS J. SULLIVAN, PETITIONER-RESPONDENT,

AND ORDER

JAMES R. MULDOON, RESPONDENT-APPELLANT, AND GEORGE S. BLASIAK, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, SYRACUSE (DAVID M. CAPRIOTTI OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

GEORGE S. BLASIAK, BALDWINSVILLE, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered March 15, 2013. The order granted the motion of petitioner to confirm an arbitration award and denied the cross motion of respondent James R. Muldoon to modify or vacate the arbitration award.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

930

TP 14-00415

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

IN THE MATTER OF RAFAEL RODRIGUEZ, PETITIONER,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 26, 2014) to review a determination of respondent. The determination revoked the parole of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his parole release and remanding him to serve the remainder of his sentence. We note at the outset that Supreme Court erred in transferring the matter to this Court inasmuch as petitioner does not allege that the determination is not supported by substantial evidence (*see* CPLR 7804 [g]). We nevertheless review the merits of the petition in the interest of judicial economy (*see Matter of Moulden v Coughlin*, 210 AD2d 997, 997). We reject petitioner's contention that he was deprived of due process based upon the alleged bias of the Hearing Officer. Indeed, "[t]here is no support in the record for the contention of petitioner that the Hearing Officer's determination was influenced by any alleged bias against [him]" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329; *see generally Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833, 834, *mot to amend remittitur granted* 74 NY2d 942). We also reject petitioner's contention that the Hearing Officer usurped the role of the prosecution, thereby depriving him of due process (*cf. Matter of Moore v Alexander*, 53 AD3d 747, 748-749, *lv denied* 11 NY3d 710). Contrary to petitioner's further contention, the Hearing Officer, rather than a member of the Parole Board, properly determined the penalty in accordance with Executive Law § 259-i (3) (*see Matter*

of Mayfield v Evans, 93 AD3d 98, 102-107; *see also People ex rel. Clinton v Fischer*, 111 AD3d 1360, 1361).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

931

TP 14-00070

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

IN THE MATTER OF KEVIN MARKMAN, PETITIONER,

V MEMORANDUM AND ORDER

GLADYS CARRION, COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES AND KELLY A. REED, COMMISSIONER, MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, RESPONDENTS.

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

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (PETER A. ESSLEY OF COUNSEL), FOR RESPONDENT KELLY A. REED, COMMISSIONER, MONROE COUNTY DEPARTMENT OF HUMAN SERVICES.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT GLADYS CARRION, COMMISSIONER, NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Monroe County [John J. Ark, J.], entered January 9, 2014) to review a determination of the New York State Office of Children and Family Services. The determination denied petitioner's application to amend the indicated report of maltreatment to an unfounded report.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination, made after a fair hearing, denying in part his request to amend an indicated report of maltreatment with respect to two of his children to an unfounded report, and to seal it (*see* Social Services Law § 422 [8] [a] [v]; [c] [ii]). We conclude that the determination is supported by substantial evidence and therefore decline to disturb it (*see Matter of Arbogast v New York State Off. of Children & Family Servs., Special Hearing Bur.*, 119 AD3d 1454, 1454-1455; *Matter of Parker v Carrion*, 90 AD3d 512, 512). Where, as here, hearsay evidence is "sufficiently relevant and probative," it may constitute substantial evidence (*People ex rel. Vega v Smith*, 66 NY2d 130, 139; *see Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382). The Administrative Law

Judge credited the children's accounts of the incidents over petitioner's denials thereof, and we perceive no basis to disturb those credibility determinations (*see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443; *Matter of Scaccia v Martinez*, 9 AD3d 882, 883).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

934

CAF 13-00785

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

IN THE MATTER OF JEREMY A. MCNEIL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL DEERING, BETH L. DEERING AND TINA DEERING, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

KATHY L. QUENCER, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order dismissed the amended petition for modification of custody.

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

Memorandum: In appeal No. 1, petitioner father appeals from an amended order that dismissed his amended petition seeking modification of the existing custody arrangement (2012 modification petition). Pursuant to a stipulated order, respondents Michael Deering and Tina Deering, the children's maternal grandparents, have joint legal custody of the children along with the father and respondent Beth L. Deering, the children's mother, and the grandparents have primary physical residence of the children with visitation to the father. By the amended petition in appeal No. 1, the father sought sole custody of the children. In appeal No. 2, the father appeals from an amended order that dismissed his petition alleging that the mother violated a visitation order. In appeal Nos. 3 and 4, the father appeals from amended orders that dismissed his petitions seeking an order of protection against the grandfather and the grandmother, respectively. Finally, in appeal No. 5, the father appeals from an order that dismissed his second petition seeking, inter alia, modification of the existing custody arrangement (2013 modification petition) on the ground that Vermont, rather than New York, is the more convenient forum. We note at the outset that the father has failed to address on appeal any issues with respect to the propriety of the amended orders in appeal Nos. 2, 3 and 4, and therefore is deemed to have abandoned any such issues (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

The father contends in appeal No. 1 that Family Court erred in failing to apply the extraordinary circumstances standard when evaluating the 2012 modification petition and should have granted the 2012 petition because it would be in the best interests of the children for the father to have sole custody. We agree with the father that the court erred in failing to conduct the threshold inquiry whether extraordinary circumstances existed here to warrant the continuation of primary physical residence with the grandparents (*see Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147). "The nonparent has the burden of establishing that extraordinary circumstances exist even where, as here, 'the prior order granting custody of the child to [the] nonparent[ ] was made upon consent of the parties' " (*id.*). We need not remit the matter to Family Court to make that determination, however, because the record here is adequate to enable us to do so (*cf. id.* at 1148). We conclude that there are the requisite extraordinary circumstances, based on the father's history of domestic violence, including an incident that occurred in the presence of one of the children and resulted in at least three orders of protection and incarceration, his history of substance abuse, and his sporadic contact with the children (*see Matter of Roberta W. v Carlton McK.*, 112 AD3d 729, 730; *Matter of Barnes v Evans*, 79 AD3d 1723, 1724, *lv denied* 16 NY3d 711; *Matter of Campo v Chapman*, 24 AD3d 439, 439-440, *lv denied* 6 NY3d 709). Nevertheless, we further conclude that the father failed to demonstrate a change in circumstances to warrant an inquiry into the best interests of the children on the issue of custody because the record does not support his contention that there was a deterioration in the parties' relationships and that the grandparents interfered with his scheduled visitation or telephone access (*see Matter of Kashif II. v Lataya KK.*, 99 AD3d 1075, 1076).

In appeal No. 5, the father contends that the court erred in refusing to retain jurisdiction over the 2013 modification petition because, contrary to the court's determination, New York is the more convenient forum. We reject that contention, inasmuch as there is a sound and substantial basis in the record to support the court's determination that Vermont is the more appropriate forum (*see Matter of Frank MM. v Lorain NN.*, 103 AD3d 951, 952).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

935

CAF 13-00786

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

IN THE MATTER OF JEREMY A. MCNEIL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BETH L. DEERING, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

KATHY L. QUENCER, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 6. The amended order dismissed the petition.

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

Same Memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

936

CAF 13-00787

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

IN THE MATTER OF JEREMY A. MCNEIL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL DEERING, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

KATHY L. QUENCER, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 8. The amended order dismissed the petition seeking an order of protection.

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

Same Memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

937

CAF 13-00788

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

IN THE MATTER OF JEREMY A. MCNEIL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TINA DEERING, RESPONDENT-RESPONDENT.
(APPEAL NO. 4.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

KATHY L. QUENCER, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an amended order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered April 12, 2013 in a proceeding pursuant to Family Court Act article 8. The amended order dismissed the petition seeking an order of protection.

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

Same Memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

938

CAF 13-01793

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

IN THE MATTER OF THE ADOPTION OF SAPPHIRE W.

MARY W., PETITIONER-APPELLANT,

MEMORANDUM AND ORDER

V

DEBBIE R., RESPONDENT-RESPONDENT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., OLEAN (JESSICA L. ANDERSON OF COUNSEL), FOR PETITIONER-APPELLANT.

FERN S. ADELSTEIN, OLEAN, FOR RESPONDENT-RESPONDENT.

JAY DAVID CARR, ATTORNEY FOR THE CHILD, MACHIAS.

Appeal from an amended order of the Family Court, Cattaraugus County (Ronald D. Ploetz, A.J.), entered September 10, 2013 in a proceeding pursuant to Domestic Relations Law § 112-b. The amended order terminated post-adoption contact between petitioner and the subject child.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting the petition in part and directing respondent to comply with that part of the agreement requiring her to provide petitioner with annual progress reports and photographs in the event that petitioner provides respondent with annual notice of her address, and as modified the amended order is affirmed without costs.

Memorandum: Petitioner, the biological mother of the child at issue herein, entered into an agreement with respondent, the adoptive mother of the child, which provided for biannual visits with the child as a condition of her judicial surrender of her parental rights. The agreement was determined by Family Court (Nenno, J.) to be in the best interests of the child (*see* Domestic Relations Law § 112-b [2]; *cf. Matter of Kaylee O.*, 111 AD3d 1273, 1274). The agreement provided, inter alia, that petitioner was entitled to visit the child for a period of two hours in the months of July and December, and that she was obligated to contact respondent by the first Monday of July and the first Monday of December to arrange the visits. The parties orally modified the agreement to provide for visitation on the day after Thanksgiving, rather than in December. It is undisputed that petitioner failed to contact respondent in July 2012 and that in November 2012 she did not contact respondent until November 15, rather

than on November 5, which was the first Monday of November. Respondent refused to schedule the visit in November 2012, and petitioner sought to enforce the agreement.

Following a hearing, Family Court (Ploetz, A.J.) determined that, although petitioner's cell phone containing respondent's telephone number was destroyed, petitioner failed to make sufficient attempts to obtain respondent's telephone number by other means. The court therefore determined that petitioner breached the agreement. The court further determined that it was in the best interests of the child that visitation be terminated.

The court properly determined that, although petitioner was ready, willing, and able to visit with the child in November 2012 (*cf. Matter of Mya V.P. [Amber R.—Laura P.]*, 79 AD3d 1794, 1795), she breached the agreement based upon her failure to contact respondent for a visit in July and her failure to provide timely notice of the visit in November (*see id.*; *cf. Matter of Brown v Westfall*, 36 Misc 3d 1234[A], 2012 NY Slip Op 51598[U] [Fam Ct, Yates County]). We further conclude that the court was entitled to credit respondent's testimony regarding the special needs of the child and her opinion that continued visits with petitioner would not be in the best interests of the child based upon the child's needs and petitioner's periodic inattention to the child during the two-hour visits (*see generally Kaylee O.*, 111 AD3d at 1274). The court's determination that it is not in the best interests of the child to resume visits with petitioner is entitled to great deference and, inasmuch as it is supported by a sound and substantial basis in the record, we will not disturb it (*see Matter of Kristian J.P. v Jeannette I.C.*, 87 AD3d 1337, 1337-1338).

We nevertheless conclude that the petition should be granted to the extent that it seeks to enforce that part of the agreement providing that, in the event that visitation is terminated, petitioner is to notify respondent of her address each year by November 1 and respondent is to provide a progress report and photographs of the child to petitioner in December of each year. By the terms of the agreement (*see generally Mya V.P.*, 79 AD3d at 1795), the provision requiring annual progress reports and photographs did not become effective until after visitation was terminated, i.e., at the time of the court's order. We therefore conclude that the court erred in failing to grant the petition to that extent, and we modify the amended order accordingly.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

939

CAF 13-00701

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

IN THE MATTER OF JANET WOODWORTH,
PETITIONER-RESPONDENT,

V ORDER

MICHAEL ATKINSON, RESPONDENT,
AND DEANNA LOWDEN, RESPONDENT-APPELLANT.

DEANNA LOWDEN, RESPONDENT-APPELLANT PRO SE.

PAMELA A. MUNSON, ATTORNEY FOR THE CHILD, FULTON.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered January 23, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent Deanna Lowden to an order of a support magistrate.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

942

CAF 13-01269

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

IN THE MATTER OF JEREMY A. MCNEIL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL DEERING, BETH L. DEERING AND TINA
DEERING, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 5.)

CHARLES J. GREENBERG, AMHERST, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered June 18, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition for modification of custody.

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

Same Memorandum as in *Matter of McNeil v Deering* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

943

CA 13-01121

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

IN THE MATTER OF WALTER BYAS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered May 22, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying him parole release. As an initial matter, we reject petitioner's contention that the 2011 amendment to Executive Law § 259-c (4) required the Parole Board to promulgate formal procedures to focus on rehabilitation in making parole release decisions. Instead, we agree with the Third Department that the 2011 memorandum issued by Chairwoman Andrea Evans to Parole Board members "sufficiently establishes the requisite procedures for 'incorporat[ing] risk and needs principles' into the process of making parole release decisions" (*Matter of Montane v Evans*, 116 AD3d 197, 202, *lv granted* 23 NY3d 903). In any event, we note that the Parole Board has promulgated regulations for "parole release decision-making procedures," which became effective July 30, 2014, that are consistent with the procedures set forth in the 2011 memorandum (*see* 9 NYCRR 8002.3).

We reject petitioner's further contention that the Parole Board's determination denying him parole release was based entirely on the severity of the crimes committed. The record establishes that the Parole Board properly considered not only the crimes committed, but also the fact that they were committed while petitioner was on parole

release, in addition to petitioner's criminal history, the COMPAS risk assessment instrument, his institutional programming and extensive history of institutional misbehavior reports, and his plans for release (*see Matter of Robles v Fischer*, 117 AD3d 1558, 1559). Petitioner "made no showing of irrationality bordering on impropriety to warrant judicial intervention" (*id.* [internal quotation marks omitted]; *see Matter of Silmon v Travis*, 95 NY2d 470, 476).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

947

CA 14-00187

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

IN THE MATTER OF WATERTOWN CITY SCHOOL DISTRICT AND BOARD OF EDUCATION OF WATERTOWN CITY SCHOOL DISTRICT, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ANONYMOUS, A TENURED TEACHER, RESPONDENT-RESPONDENT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR PETITIONERS-APPELLANTS.

RICHARD E. CASAGRANDE, LATHAM (A. KATHYA STEPHENSON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 27, 2013 in a proceeding pursuant to CPLR article 75. The judgment and order denied the petition to quash the subpoena duces tecum issued by the hearing officer on July 5, 2013 and granted the cross motion to compel petitioners to comply with the subpoena duces tecum.

It is hereby ORDERED that the judgment and order so appealed from is unanimously reversed on the law without costs, the cross motion is denied and the petition is granted.

Memorandum: Petitioners commenced this proceeding seeking, inter alia, to quash a subpoena duces tecum served on them by respondent, a tenured teacher, in the course of an administrative proceeding commenced against respondent pursuant to Education Law § 3020-a. Respondent cross-moved to compel petitioners to comply with the subpoena duces tecum. We agree with petitioners that Supreme Court erred in denying the petition and granting the cross motion. The record establishes that, following an initial prehearing conference in the section 3020-a proceeding, the Hearing Officer granted respondent's request for production of the testifying high school students' records, notwithstanding protections under the Family Educational Rights and Privacy Act of 1974 (FERPA), and thereafter limited production of students' records to those from seventh grade forward. In connection with that request, the Hearing Officer issued a subpoena duces tecum ordering the production of those student records. Although the Hearing Officer had the authority to order the production of student records that were material and relevant to

respondent's defense (*see* § 3020-a [3] [c] [iii] [A], [C]), it is well established that, "[g]enerally, a subpoena duces tecum may not be used for the purpose of discovery or to ascertain the existence of evidence" (*Matter of Terry D.*, 81 NY2d 1042, 1044). Where, as here, "the relevance of the subpoena is challenged, it is incumbent upon the issuer to come forward with a factual basis establishing the relevance of the documents sought to the investigation," to show "that the material sought bears a reasonable relation to the matter under investigation" (*Matter of N. v Novello*, 13 AD3d 631, 632; *see Matter of Constantine v Leto*, 157 AD2d 376, 378, *affd for the reasons stated* 77 NY2d 975). Here, the allegations of misconduct against respondent involved activities outside of the classroom, and respondent stated only generally that the students' records were "highly relevant" in asserting a defense and that the records are "necessary and relevant to the preparation of a defense to the charges on its face." Thus, in light of respondent's failure to indicate how the records are reasonably related to respondent's defense and a factual basis establishing their relevance (*see Novello*, 13 AD3d at 632), we conclude that the court abused its discretion in refusing to quash the subpoena duces tecum (*see generally Kavanagh v Ogden Allied Maintenance Corp.*, 92 NY2d 952, 954; *Kephart v Burke*, 306 AD2d 924, 925).

In light of our decision, we do not consider petitioners' remaining contention, concerning the alleged violation of FERPA.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

948

CA 13-01727

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

MARKITA SMITH, INDIVIDUALLY AND AS MOTHER/NATURAL GUARDIAN OF RA'SHADRIAN THOMAS, AN INFANT, PLAINTIFF,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, PARKS AND STREETS, DEFENDANTS-RESPONDENTS, AND COUNTY OF ERIE, DEFENDANT-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANT-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 24, 2013. The order denied the motion of defendant County of Erie for partial summary judgment and granted the cross motion of defendants City of Buffalo and City of Buffalo Department of Public Works, Parks and Streets for partial summary judgment.

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

Memorandum: Plaintiff commenced this action, individually and on behalf of her daughter, seeking damages for an injury her daughter sustained when her leg became lodged in a drain intake opening of a splash pool owned by defendant City of Buffalo (City) and operated by defendant County of Erie (County) pursuant to their Intermunicipal Cooperation Agreement (Agreement), which provided for the operation, management and improvement of the City's parklands. It is undisputed that plaintiff's daughter stepped into the drain intake opening because the cover was missing. Pursuant to the Agreement, the City transferred to the County personnel and equipment necessary for the management and operation of the parklands and paid an annual fee to the County for the operational services; however, the City retained certain responsibilities with respect to the parklands. The Agreement also provided that each party agreed to defend, indemnify and hold harmless the other party for, inter alia, injuries that resulted directly or indirectly from the ownership of the parklands and from the services provided by the respective parties. The County moved for

partial summary judgment on its cross claim alleging that the City is obligated to defend and indemnify it in this personal injury action, and the City and defendant City of Buffalo Department of Public Works, Parks and Streets (City defendants) cross-moved for partial summary judgment on their cross claim against the County seeking the same relief. Supreme Court granted the cross motion of the City defendants. We affirm.

As a preliminary matter, we reject the County's contention that the court erred in determining that Supreme Court's decision in *Hall v City Fence, Inc.* (36 Misc 3d 1237[A], 2012 NY Slip Op 51694[U]), a personal injury action, is inapposite. The court in *Hall* denied motions of the City and the County for summary judgment dismissing the amended complaint and any cross claims against them, but the applicability of the indemnification clause was not at issue.

"It is well settled that a contract must be read as a whole to give effect and meaning to every term . . . Indeed, '[a] contract should be interpreted in a way [that] reconciles all [of] its provisions, if possible' " (*New York State Thruway Auth. v KTA-Tator Eng'g Servs., P.C.*, 78 AD3d 1566, 1567; *see RLI Ins. Co. v Smiedala*, 96 AD3d 1409, 1411). " 'Moreover, the contract must be interpreted so as to give effect to, not nullify, its general or primary purpose' " (*Matter of El-Roh Realty Corp.*, 74 AD3d 1796, 1799). Here, the purpose of the Agreement was to share responsibility for the improvement and operation of City-owned parklands. Pursuant to article X, the County has a "limited role in the provision or financing of capital improvements," which includes "major repairs, replacement and removal of capital assets as well as construction of new capital assets." Pursuant to article XIII, section 13.1, however, "the County shall operate, maintain, and manage the Parklands, including but not limited to having the power, discretion and responsibility to provide routine repairs . . . and generally exercise the same day-to-day powers, responsibilities and duties it does with respect to County-owned parks and recreation facilities." Schedule 4 of the agreement provides that the "County will maintain pools . . . inside Olmsted Parks," and it is undisputed that the splash pool at issue here is located in an "Olmsted" park. In view of the well-settled principles of contract construction, we conclude that the City defendants established their entitlement to summary judgment determining that the replacement of the drain intake cover falls within the provisions of section 13.1, and not article X, and the County failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 561).

The County contends for the first time that the court erred in granting summary judgment without first allowing discovery on the issue whether the replacement of the drain intake cover is a major repair, and thus subject to the provisions of article X, or a minor repair, and thus subject to the provisions of article XIII. That contention, therefore, is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Further, the County has abandoned its contention that, because the required repair was to a capital asset,

i.e., a splash pool, the City was responsible to undertake the repair (*see id.* at 984).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

949

CA 14-00293

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

JUDITH R. WHITMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, DEFENDANT-RESPONDENT.

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

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

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

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

Memorandum: In November 2007, defendant sent plaintiff a Notice and Demand for Payment of Sales Taxes Under Jeopardy Assessment (Jeopardy Assessment) pursuant to Tax Law § 1138 (b), and a Notice of Determination for sales taxes due pursuant to Tax Law § 1138 (a) (1) and (a) (3) (B). The Jeopardy Assessment and Notice of Determination advised plaintiff that defendant determined that she was liable as an officer or a responsible person of the named corporation for payment of the sales taxes. The Jeopardy Assessment indicated that a jeopardy assessment was required inasmuch as plaintiff appeared to be preparing to transfer property or to leave the State. Defendant filed tax warrants and liens against plaintiff.

On July 2, 2008, plaintiff commenced this declaratory judgment action alleging that she was not an officer, director, employee, shareholder, or responsible person of the named corporation and was not liable for the assessment. Plaintiff sought a judgment declaring that Tax Law § 1138 was not applicable to her, that the assessment issued by defendant was null and void, and that the liens were null and void because she was not a person responsible for the sales taxes. Plaintiff also sought a return of money seized by defendant from the sale of property she owned.

Supreme Court properly granted defendant's motion for summary

judgment dismissing the complaint as time-barred. It is well settled that a court must examine the substance of a declaratory judgment action to determine if the issues could be resolved in another proceeding for which a specific limitation period is provided by law (*see Solnick v Whalen*, 49 NY2d 224, 229-230). "Of course, when the claim is one against a governmental body or officer, the form of action that immediately springs to mind is a proceeding brought under CPLR article 78, a traditional, and surely the most common, vehicle for challenging a governmental decision or action" (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 201, *rearg denied* 84 NY2d 865).

As the court properly determined, the gravamen of plaintiff's complaint is that she is not responsible for the corporation's sales tax payments because she was not an officer, director, employee, shareholder, or responsible person of the corporation. This controversy could have been resolved in a CPLR article 78 proceeding to challenge the November 5, 2007 Jeopardy Assessment and Notice of Determination and, under the four-month statute of limitations, plaintiff's complaint is time-barred (*see Heron v Division of Taxation of Dept. of Taxation & Fin. of State of N.Y.*, 209 AD2d 989, 990, *lv denied* 85 NY2d 809; *Davidoff v State Tax Commn. of State of N.Y.*, 208 AD2d 1095, 1096; *Inserillo v State Tax Commn.*, 159 AD2d 488, 489, *appeal dismissed* 76 NY2d 772, *lv denied* 76 NY2d 709).

Plaintiff contends that the catch-all six-year statute of limitations applies because the nature of the action is a return of money paid under protest to defendant, which is a cause of action for monies had and received. She contends that such a cause of action is appropriate where the allegations are that defendant was without jurisdiction to collect the money, and the court has already ruled that the Jeopardy Assessment was untimely as a matter of law and thus defendant was without authority, or jurisdiction, to issue the Jeopardy Assessment (*Whitmer v New York State Dept. of Taxation & Fin.*, 24 Misc 3d 1017, 1021-1022). We reject those contentions. Although plaintiff's fourth cause of action sought a refund of approximately $73,000 for the money seized by defendant pursuant to the assessment and levies, that claim for monetary relief was incidental to the primary relief sought, i.e., a declaration that plaintiff was not a responsible person for the taxes sought under Tax Law § 1138 (*see* CPLR 7806; *Matter of Gross v Perales*, 72 NY2d 231, 236, *rearg denied* 72 NY2d 1042). When a tax statute is alleged to be unconstitutional, or attacked as wholly inapplicable, "the invalidity or total inapplicability affects the entire statute, including the limitations and restrictions on the remedy provided in it" (*Matter of First Natl. City Bank v City of N.Y. Fin. Admin.*, 36 NY2d 87, 92-93; *see City of Rochester v Chiarella*, 98 AD2d 8, 12, *affd* 63 NY2d 857). "To challenge a statute as wholly inapplicable, the taxpayer must allege that the agency had no jurisdiction over it or the matter that was taxed" (*Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322). Even assuming, arguendo, that the Jeopardy Assessment was untimely, we disagree with plaintiff that Tax Law § 1138 is therefore wholly inapplicable and unconstitutionally applied to her. As

explained above, defendant also issued a Notice of Determination pursuant to Tax Law § 1138 (a) seeking the unpaid sales taxes, which is not dependent upon the Jeopardy Assessment.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

950

CA 14-00382

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

KERRY BENNETT, PLAINTIFF-RESPONDENT,

V ORDER

JEFFREY PAUL, DEFENDANT-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (ALAN J. PIERCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (JAMES SONNEBORN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Charles C. Merrell, J.), entered January 2, 2014. The amended order denied the motion of defendant for summary judgment dismissing the complaint.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

951

CA 14-00404

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

IN THE MATTER OF AARON HAURI,
CLAIMANT-RESPONDENT,

V ORDER

SPRINGVILLE-GRIFFITH INSTITUTE CENTRAL SCHOOL
DISTRICT, RESPONDENT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (JILL L. YONKERS OF COUNSEL), FOR RESPONDENT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 9, 2013. The order, insofar as appealed from, granted claimant's application for leave to serve a late notice of claim.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on June 12 and 30, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

952.1

CA 13-02213

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

CHARLES G. MICHAELS AND ELIZABETH MICHAELS,
PLAINTIFFS-APPELLANTS,

V ORDER

MATTHEW DRAKE AND CITY OF ROCHESTER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

WILLIAM P. SMITH, JR., ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 4, 2013. The order dismissed the 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: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

952.2

CA 13-02214

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

CHARLES G. MICHAELS AND ELIZABETH MICHAELS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MATTHEW DRAKE AND CITY OF ROCHESTER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

WILLIAM P. SMITH, JR., ROCHESTER, FOR PLAINTIFFS-APPELLANTS.

Appeal from a judgment of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 4, 2013. The judgment dismissed the complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by plaintiff Charles G. Michaels when the vehicle he was driving collided with a vehicle driven by defendant Matthew Drake, a police officer with defendant City of Rochester. Following a bench trial, Supreme Court found in favor of defendants and dismissed the complaint. We affirm. Viewing the evidence in the light most favorable to sustain the judgment following this bench trial (*see Wayne Coop. Ins. Co. v Woodward*, 21 AD3d 1270, 1272), we conclude that a fair interpretation of the evidence supports the court's verdict. It is undisputed that at the time of the accident Drake was operating his vehicle in response to a dispatch call concerning a domestic dispute. He was thus engaged in the emergency operation of a vehicle as defined in Vehicle and Traffic Law § 114-b as a matter of law (*see Criscione v City of New York*, 97 NY2d 152, 154; *Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373), and the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence (*see* § 1104 [e]; *Criscione*, 97 NY2d at 154; *Herod v Mele*, 62 AD3d 1269, 1270, *lv denied* 13 NY3d 717). Although Drake admitted that he exceeded the speed limit in responding to the dispatch, speeding is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3) provided that the driver "does not endanger life or property" (*id.*; *see Saarinen v Kerr*, 84 NY2d 494, 499; *Herod*, 62 AD3d at 1270), and his conduct did not constitute the type of recklessness necessary for liability to attach (*see Szczerbiak v Pilat*, 90 NY2d

553, 557; *Dodds v Town of Hamburg*, 117 AD3d 1428, 1429-1430).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

956

KA 13-02023

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY L. RUSSELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the fourth degree (Penal Law § 265.01 [2]), defendant contends that Supreme Court erred in issuing an order of protection in favor of two witnesses (*see* CPL 530.13 [4] [a]), i.e., the mother of defendant's children and their daughter. As a preliminary matter, we agree with defendant that his waiver of the right to appeal does not preclude us from considering his contention inasmuch as the order of protection was "not a part of the plea agreement" (*People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860), and is not a part of his sentence (*see People v Nieves*, 2 NY3d 310, 316; *People v Tate*, 83 AD3d 1467, 1467). We note, however, that defendant failed to preserve his contention for our review by not objecting at sentencing to the issuance of the order of protection in favor of those two witnesses (*see* CPL 470.05 [2]; *Nieves*, 2 NY3d at 315-317; *People v Collins*, 117 AD3d 1535, 1535; *People v Loffler*, 111 AD3d 1059, 1060-1061; *People v Sweeney*, 106 AD3d 841, 842). In any event, we conclude that the contention lacks merit (*see* CPL 530.13 [4] [a]; *People v Wilson*, 115 AD3d 1229, 1229, *lv denied* 23 NY3d 969).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

958

KA 10-01126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PHILLIP L. JONES, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered March 1, 2010. 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]). Defendant contends that the People failed to establish that he knowingly, voluntarily, and intelligently waived his *Miranda* rights, and that County Court therefore erred in refusing to suppress the statements he made to the police after the arresting officer read him those rights. Specifically, defendant contends that the evidence at the *Huntley* hearing demonstrates that he did not waive his *Miranda* rights, but that he asked the arresting officer "[w]hat's going on" after the arresting officer read him the *Miranda* warnings. Contrary to defendant's contention, the court properly refused to suppress those statements. It is well settled that "an explicit verbal waiver is not required; an implicit waiver may suffice and may be inferred from the circumstances" (*People v Smith*, 217 AD2d 221, 234, *lv denied* 87 NY2d 977). Thus, "[w]here, 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 Strahin*, 114 AD3d 1284, 1285, *lv denied* 23 NY3d 968).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

959

KA 12-01347

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM ALLEN, ALSO KNOWN AS SEAN GILMORE,
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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered July 17, 2012. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, sexual abuse in the first degree and rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), sexual abuse in the first degree (§ 130.65 [1]), and rape in the third degree (§ 130.25 [3]). Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]) and "[w]here, as here, the defendant's challenge is focused upon the credibility of the witnesses, we [must] accord 'great deference to the resolution of credibility issues by the trier of fact because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Cole*, 111 AD3d 1301, 1302, *lv denied* ___ NY3d ___ [June 25, 2014]).

Contrary to the People's contention, we conclude that defendant preserved his challenge to County Court's *Sandoval* ruling (*cf. People v Manning*, 286 AD2d 690, 690, *lv denied* 97 NY2d 684), but we nevertheless conclude that defendant's challenge lacks merit (*see*

People v Hayes, 97 NY2d 203, 207-208; *People v Ayala*, 27 AD3d 1087, 1089, *lv denied* 6 NY3d 892). We reject defendant's further contention that the court erred in refusing to suppress statements that he made to the police. "The suppression hearing testimony established that defendant's initial statement[] [was] made spontaneously and [was] not in response to any police questioning or its functional equivalent, and defendant's later statements were made after defendant was advised of his *Miranda* rights and had waived them" (*People v Burnett*, 41 AD3d 1201, 1202; *see People v Irvin*, 111 AD3d 1294, 1295; *see generally People v Thomas*, 22 NY3d 629, 641-642). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

960

KA 11-00286

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. DUKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered August 17, 2010. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal sexual act 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 Supreme Court, Monroe County, for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and criminal sexual act in the first degree (§ 130.50 [1]). We agree with defendant that Supreme Court erred in accepting his plea without ensuring that he was making an informed decision to waive a potential affirmative defense to the robbery charge. We therefore reverse the judgment of conviction, vacate the plea and remit the matter to Supreme Court for further proceedings on the indictment.

The indictment alleged, inter alia, that defendant and an accomplice robbed a store in Rochester by displaying what appeared to be a firearm. At the outset of the plea colloquy, defense counsel stated that, although defendant told the police that he used a .45 caliber handgun in the robbery, the weapon he had used was actually a BB gun. Defense counsel further stated, however, that defendant would waive the affirmative defense set forth in Penal Law § 160.15 (4), which applies where the weapon used in the robbery "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged." During the ensuing plea colloquy, defendant stated that the gun he had used was a BB gun that looked like a revolver, not a .45 caliber handgun as he had told

the police. At the end of the plea colloquy, defense counsel, in response to concerns expressed by the prosecutor, again stated that defendant was waiving the affirmative defense set forth in section 160.15 (4). The court then accepted defendant's plea.

Although "no catechism is required in connection with the acceptance of a plea" (*People v Goldstein*, 12 NY3d 295, 301), it is well established that, "where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea, . . . the trial court has a duty to inquire further to ensure that [the] defendant's guilty plea is knowing and voluntary" (*People v Lopez*, 71 NY2d 662, 666; *see People v Serrano*, 15 NY2d 304, 308-309). "Where the court fails in this duty and accepts the plea without further inquiry, the defendant may challenge the sufficiency of the allocution on direct appeal," despite having failed to make that challenge in a "postallocution motion" directed to the plea court (*Lopez*, 71 NY2d at 666).

Here, we conclude that reversal is mandated by the reasoning of *People v Mox* (20 NY3d 936). In that case, the defendant, who was offered the opportunity to plead guilty to a reduced charge of manslaughter in the first degree, stated during the plea colloquy that he was hearing voices on the day of the homicide, was in a psychotic state, and had not taken his prescribed medication for several days. County Court nevertheless accepted the defendant's plea. Immediately after the plea was entered, defense counsel stated that she had discussed with the defendant the potential defense of not guilty by reason of mental disease or defect, and that the defendant was willing to waive that defense in order to accept the People's plea offer. The court then asked the defendant if that was correct, and the defendant answered in the affirmative. The Court of Appeals vacated the plea, concluding that County Court had a duty to "inquire further into whether defendant's decision to waive a potentially viable insanity defense was an informed one such that his guilty plea was knowing and voluntary" (*Mox*, 20 NY3d at 939). According to the Court of Appeals, County Court's "single question to defendant verifying that he discussed that defense with his attorney and opted not to assert it was insufficient to meet that obligation" (*id.*)

Here, as noted, defendant made statements during the plea colloquy indicating that he had a potentially viable affirmative defense to the charge of robbery in the first degree. Thus, the court was obligated under the holding of *Mox* and the rule set forth in *Lopez* to ensure that defendant was aware of that defense and that he was knowingly and voluntarily waiving it. Although defense counsel stated that he had discussed the potential defense with defendant and that defendant was waiving it in order to accept the plea offer, the court did not ask any questions of defendant regarding the potential defense. Thus, the facts of the instant case present an even stronger basis for vacatur of the plea than those in *Mox*, where the plea court took the additional step—one not taken here—of asking the defendant whether it was true that he had discussed the applicable affirmative defense with his attorney and was willing to waive it (*see Mox*, 20

NY3d at 939; *see also People v Grason*, 107 AD3d 1015, 1016).

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

961

KA 12-01586

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. HUTCHINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

DAVID P. ELKOVITCH, 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 (Mark H. Fandrich, A.J.), rendered May 26, 2011. The judgment convicted defendant, upon a jury verdict, of bribe receiving in the third degree, receiving reward for official misconduct in the second degree, official misconduct, coercion in the second degree (three counts), falsifying business records in the first degree, offering a false instrument for filing in the second degree, falsely reporting an incident in the third degree, making a punishable false written statement, obstructing governmental administration in the second degree and harassment in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, bribe receiving in the third degree (Penal Law § 200.10), and in appeal No. 2, he appeals from a judgment convicting him upon a jury verdict of, inter alia, a separate count of bribe receiving in the third degree (*id.*).

We reject defendant's contention in both appeal Nos. 1 and 2 that his conviction for bribe receiving in the third degree is not supported by legally sufficient evidence. In each case, the People presented legally sufficient evidence from which the jury could find that defendant accepted free or discounted goods or services from local companies "upon an agreement or understanding" that defendant's "opinion, judgment, action, decision or exercise of discretion as a public servant" would be influenced thereby (Penal Law § 200.10; *see People v Bac Tran*, 80 NY2d 170, 175-176, *rearg denied* 81 NY2d 784; *People v Harper*, 145 AD2d 933, 933, *affd* 75 NY2d 313; *People v Kitsos*, 299 AD2d 291, 291-292, *lv denied* 100 NY2d 540; *People v Souvenir*, 209 AD2d 455, 455-456, *lv denied* 85 NY2d 914). Furthermore, viewing the

evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we 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 his contention that he was deprived of his right to a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's contention that County Court should have taken judicial notice of 17 NYCRR 820.13 was abandoned by his express agreement to the court's instruction to the jury on the lawful stop of a vehicle (*see People v Graves*, 85 NY2d 1024, 1027; *People v Dennis*, 55 AD3d 385, 385, *lv denied* 12 NY3d 783; *see also* CPL 470.05 [2]), which conveyed the appropriate legal standard to the jury in any event (*see People v Fields*, 87 NY2d 821, 823; *People v Rose*, 67 AD3d 1447, 1448). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

962

KA 12-01587

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. HUTCHINGS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

DAVID P. ELKOVITCH, 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 (Mark H. Fandrich, A.J.), rendered May 26, 2011. The judgment convicted defendant, upon a jury verdict, of bribe receiving in the third degree, receiving reward for official misconduct in the second degree and official misconduct (nine counts).

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

Same Memorandum as in *People v Hutchings* ([appeal No. 1] ___ AD3d ___ [Sept. 26, 2014]).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

964

CA 13-01921

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

SUSAN L. BOTTICELLI, PLAINTIFF-APPELLANT,

V ORDER

GARY A. BOTTICELLI, DEFENDANT-RESPONDENT.

LABIN & BUFFOMANTE, WILLIAMSVILLE (CLAYTON J. LENHARDT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROBERT S. STEPHENSON, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered January 18, 2013 in a divorce action. The judgment, inter alia, equitably distributed the assets of the parties.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on September 10, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

965

CA 13-02145

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

ANTHONY PAONE, JR., PLAINTIFF-APPELLANT,

V ORDER

PROGRESSIVE CASUALTY INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

ALEXANDER & CATALANO, LLC, ROCHESTER (TIMOTHY R. MANDRONICO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (SCOTT D. MANCUSO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 17, 2013. The order granted defendant's motion to vacate the default judgment entered against defendant and granted defendant's motion to dismiss plaintiff's complaint in its entirety.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

967

CA 14-00397

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

SCOTT GREEN, INDIVIDUALLY AND AS FATHER AND NATURAL GUARDIAN OF MORGAN GREEN, CLAIMANT-RESPONDENT,

V ORDER

GRAND ISLAND CENTRAL SCHOOL DISTRICT AND GRAND ISLAND SENIOR HIGH SCHOOL, RESPONDENTS-APPELLANTS.

BAXTER SMITH & SHAPIRO, P.C., WEST SENECA, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (MICHAEL REGAN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW J. CONNELLY OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered September 27, 2013. The order, insofar as appealed from, granted that part of the application of claimant seeking leave to serve a late notice of claim on behalf of Morgan Green.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

972

CA 13-01908

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

FISSURE PARTNERS LLC, PLAINTIFF-RESPONDENT,

V ORDER

MAXIMUS HILL, LLC, ET AL., DEFENDANTS,
RICHARD FERGUSON, DEFENDANT-APPELLANT,
VLADIMIR SHNEYDER AND RAY ENTERPRISES LLC,
DEFENDANTS-RESPONDENTS.

DEAN J. FERO, ESQ., RESPONDENT.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCHOP, POWELL & ALLEN, WILLIAMSVILLE (DONALD G. POWELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

HISCOCK & BARCLAY LLP, ROCHESTER (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

FERO & INGERSOLL, ROCHESTER (DEAN J. FERO OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 26, 2013. The order, among other things, denied the motion of defendant Richard Ferguson to set aside and cancel certain assignments of judgments.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

980

KA 11-00632

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 20, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i] [b]). Defendant's contention that his plea was not knowingly, voluntarily and intelligently entered is not preserved for our review because defendant did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Brown*, 115 AD3d 1204, 1205; *People v Oldham*, 24 AD3d 1289, 1289, *lv denied* 6 NY3d 779). Contrary to defendant's further contention, his factual allocution did not indicate a lack of intent or attempt, and thus County Court had no duty to make a further inquiry into those elements during the plea allocution (*see generally People v Lopez*, 71 NY2d 662, 666).

We reject defendant's contention that the court failed to make an appropriate inquiry into his complaints concerning defense counsel and in response to his request for new counsel. We conclude that the court made the requisite " 'minimal inquiry' " into defendant's reasons for requesting new counsel (*People v Porto*, 16 NY3d 93, 100). Indeed, the record establishes that "the court afforded defendant the opportunity to express his objections concerning [defense counsel], and . . . thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d 1654, 1654, *lv denied* 13 NY3d 839 [internal quotation marks omitted]; *see People v Walker*, 114 AD3d 1257, 1258, *lv denied* ___ NY3d ___ [July

24, 2014]). Finally, we reject defendant's contention that the negotiated sentence is unduly harsh and severe.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

981

KA 13-00821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM RIVERA, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

BARRY PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered November 5, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31). Contrary to defendant's contention, County Court properly refused to dismiss the indictment on the grounds that his constitutional rights to a speedy trial and to due process were violated (*see generally People v Taranovich*, 37 NY2d 442, 445). The court properly determined, following a hearing, that the People established good cause for the 13-month preindictment delay (*see generally People v Singer*, 44 NY2d 241, 254; *People v Perez*, 85 AD3d 1538, 1538-1539; *People v Cody*, 30 AD3d 1068, 1068-1069), and that there was no "indication that the defense [was] impaired by reason of the delay" (*People v Vernace*, 96 NY2d 886, 887; *cf. People v Romeo*, 12 NY3d 51, 58, *cert denied* 558 US 817). We perceive no basis to disturb the court's determination that there was good cause for the delay in the grand jury presentation, i.e., the undercover officer involved in investigating defendant also was involved in another, unrelated investigation in the rural area in which defendant resided (*see People v Lesiuk*, 81 NY2d 485, 490-491), and, if the undercover officer's identity was revealed, both the safety of the undercover officer and the success of the unrelated investigation could be jeopardized.

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

982

KA 13-01585

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARRY WYZYKOWSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered July 25, 2008. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [4]). To the extent that defendant's contention that he was denied effective assistance of counsel at sentencing survives his guilty plea, we conclude that it lacks merit (*see People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807). Defendant failed to preserve for our review his contention that Supreme Court erred in failing to recuse itself (*see People v Prado*, 4 NY3d 725, 726, *rearg denied* 4 NY3d 795; *People v Dewiel*, 100 AD3d 1524, 1525, *lv denied* 20 NY3d 1010). In any event, that contention is without merit (*see generally People v Glynn*, 21 NY3d 614, 618; *People v Moreno*, 70 NY2d 403, 405-406; *People v Williams*, 57 AD3d 1440, 1441, *lv denied* 12 NY3d 789).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

983

CAF 13-00820

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

IN THE MATTER OF KEVEN A. NUNN,
PETITIONER-RESPONDENT,

V ORDER

MARY J. NUNN, RESPONDENT-APPELLANT.

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

JAY D. CARR, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Steuben County (Peter C. Bradstreet, J.), entered May 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner primary physical placement of the subject child.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

985

CAF 13-00744

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

IN THE MATTER OF KAHLIN T.D.W.

ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

BETSEY J.D., RESPONDENT-APPELLANT.

IN THE MATTER OF BRADLEY A.W.,
PETITIONER-RESPONDENT,

V

BETSEY J.D., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

THOMAS A. MINER, COUNTY ATTORNEY, BELMONT (CARISSA M. KNAPP OF COUNSEL), FOR PETITIONER-RESPONDENT ALLEGANY COUNTY DEPARTMENT OF SOCIAL SERVICES.

DAVID E. CODDINGTON, ATTORNEY FOR THE CHILD, HORNELL.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered April 9, 2013. The order, among other things, awarded petitioner Bradley A.W. custody of the subject child.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

986

CAF 13-00952

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

IN THE MATTER OF KAHLIN T.D.W.

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

BETSEY J.D., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

THOMAS A. MINER, COUNTY ATTORNEY, BELMONT (CARISSA M. KNAPP OF COUNSEL), FOR PETITIONER-RESPONDENT.

DAVID E. CODDINGTON, ATTORNEY FOR THE CHILD, HORNELL.

Appeal from an order of the Family Court, Allegany County (Terrence M. Parker, J.), entered May 14, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

987

CA 14-00262

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

TIFFANE ELLINGTON, PLAINTIFF-APPELLANT,

V ORDER

JOHN ELLINGTON, DEFENDANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO J. ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered October 7, 2013. The order, among other things, ordered plaintiff's counsel to pay defendant's counsel the sum of $4,000 as partial reimbursement for expenses for a neuropsychological examination scheduled by defendant, which plaintiff failed to attend.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

988

CA 13-01818

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

CONLEY & SON EXCAVATING CO., LTD.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

THE DELTA ALLIANCE, LLC, ET AL., DEFENDANTS,
AND MCDONALD'S REAL ESTATE COMPANY OF COLUMBIA,
MARYLAND, DEFENDANT-APPELLANT.

BOUSQUET HOLSTEIN PLLC, SYRACUSE (JAMES L. SONNEBORN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHEATS & BAILEY, PLLC, BREWERTON (JASON B. BAILEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered September 18, 2013. The order, among other things, denied the cross motion of defendant McDonald's Real Estate Company of Columbia, Maryland for a protective and confidentiality order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second through fourth ordering paragraphs and granting the cross motion insofar as it sought to condition disclosure upon plaintiff's execution of a confidentiality agreement, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, inter alia, to foreclose on a mechanic's lien arising out of a construction project on property owned by defendant McDonald's Real Estate Company of Columbia, Maryland (MREC). Plaintiff had entered into a subcontract with defendant The Delta Alliance, LLC (Delta), the general contractor on the construction project, to provide building and site demolition in connection with the rebuilding of a McDonald's restaurant. Plaintiff moved to compel MREC to disclose, inter alia, the original contract between Delta and MREC and any amendments thereto. MREC asserted that the requested documents contained confidential, proprietary business information, and cross-moved for a protective order pursuant to CPLR 3103 (a). We agree with MREC that Supreme Court abused its discretion in denying the cross motion insofar as it sought to condition disclosure of the documents on plaintiff's execution of a confidentiality agreement (*see Kimmel v State of New York*, 302 AD2d 908, 908; *see generally Herbenson v*

Carrols Corp., 101 AD3d 1220, 1221-1222). We therefore modify the order accordingly. "Discoverability of such documents involves a two-fold analysis: the moving party must show that the discovery demand would require it to reveal a trade secret, which then shifts the burden of the responding party to show that the information was indispensable to proving its [case]" (*Finch, Pruyn & Co. v Niagara Paper Co.*, 228 AD2d 834, 837, *appeal dismissed* 88 NY2d 979). Here, MREC met its burden of establishing that the documents sought by plaintiff contained information "not known by those outside the business, [and that the documents] were kept under lock and key, were the product of substantial effort and expense, and could not be easily acquired or duplicated" (*Terwilliger v Max Co., Ltd.*, 64 AD3d 1232, 1233; *see Finch, Pruyn & Co.*, 228 AD2d at 837). We nevertheless conclude that plaintiff established that the documents sought "were indispensable to [its] case and were otherwise unavailable if they could not be obtained from [MREC]" (*Terwilliger*, 64 AD3d at 1233; *see Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1047, 1048).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

990

CA 14-00090

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

KENNETH ZIOLKOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

HAN-TEK, INC. AND ZYNERGY SOLUTIONS, INC.,
DEFENDANTS-APPELLANTS.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ERIN K. SKUCE OF COUNSEL), FOR DEFENDANT-APPELLANT HAN-TEK, INC.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR DEFENDANT-APPELLANT ZYNERGY SOLUTIONS, INC.

LAW OFFICE OF THOMAS C. PARES, BUFFALO (THOMAS C. PARES OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 5, 2013. The order, among other things, denied defendants' motions for summary judgment.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

992

CA 14-00263

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

WESTERN NEW YORK IMMEDIATE MEDICAL CARE, PLLC,
PLAINTIFF-RESPONDENT,

V ORDER

HEALTHNOW NEW YORK, INC., DOING BUSINESS AS BLUE CROSS BLUE SHIELD OF WESTERN NEW YORK,
DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

NOTARO & LAING, P.C., BUFFALO (LINDA C. LAING OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered December 20, 2013. The order, insofar as appealed from, granted a preliminary injunction enjoining defendant from removing plaintiff from its list of participating providers.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on September 2, 2014, and filed in the Erie County Clerk’s Office on September 3, 2014,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

993/13

CA 12-01841

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

EUNICE KIM, AS ADMINISTRATRIX OF THE ESTATE OF YOUNG GUN WANG, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

HENRY CHANG, HYUN SUNG CHANG, ALSO KNOWN AS HYUNG SUNG CHANG AND/OR HENRY CHANG, DEFENDANT-APPELLANT.

SHAPIRO, BEILLY & ARONOWITZ, LLC, NEW YORK CITY (DAVID S. ARONOWITZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

CRAMER, SMITH & MILLER, P.C., SYRACUSE (LAUREN M. MILLER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 11, 2012. The order denied the motion of defendant for summary judgment dismissing the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 25 and 28, 2013, and filed in the Onondaga County Clerk’s Office on June 10, 2013,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1019

CA 13-01922

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

IN THE MATTER OF ATLAS HENRIETTA, LLC, ATLAS INCOME HOUSING, INC. AND ATLAS CORNHILL, INC., PETITIONERS-PLAINTIFFS-APPELLANTS,

V ORDER

TOWN OF HENRIETTA ZONING BOARD OF APPEALS AND TOWN OF HENRIETTA, RESPONDENTS-DEFENDANTS-RESPONDENTS.

WOODS OVIATT GILMAN, LLP, ROCHESTER (REUBEN ORTENBERG OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

DANIEL J. MASTRELLA, ROCHESTER, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 9, 2013 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, denied the first, second and fourth causes of action and dismissed the third cause of action.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1020

CA 13-01267

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

IN THE MATTER OF ALLEN MORRIS,
PETITIONER-APPELLANT,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ZAINAB A. CHAUDHRY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered June 10, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Sanchez v Evans*, 111 AD3d 1315).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1021.1

KA 13-01080

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN T. CARLISLE, DEFENDANT-APPELLANT.

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

STEVEN T. CARLISLE, DEFENDANT-APPELLANT PRO SE.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 31, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a definite term of imprisonment. Defendant contends that his admission to the violation of probation was not voluntary, but "[b]y failing to move to withdraw his admission to the violation of probation or to vacate the judgment revoking the sentence of probation on that ground," defendant failed to preserve that contention for our review (*People v Rodriguez*, 74 AD3d 1858, 1858, *lv denied* 15 NY3d 809; *see People v Torres*, 294 AD2d 865, 865, *lv denied* 99 NY2d 540; *see generally People v Lopez*, 71 NY2d 662, 665-666). This case does not fall within the narrow exception to the preservation doctrine (*see Lopez*, 71 NY2d at 666), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Inasmuch as the contentions of defendant in his pro se supplemental brief relate solely to the validity of his plea of guilty to the underlying crime of sexual abuse in the first degree and the original sentence of probation, those contentions are not properly before us (*see People v Prokopienko*, 72 AD3d 1528, 1529; *People v Ralston*, 303 AD2d 1010, 1011; *see generally People v Smith*, 21 AD3d 1360, 1360, *lv denied* 5 NY3d 885; *People v*

Luddington, 5 AD3d 1042, 1042, *lv denied* 3 NY3d 643).

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1030

CAF 13-01030

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

IN THE MATTER OF MELISSA J. GETTINGS,
PETITIONER-APPELLANT,

V ORDER

DAVID L. MURACO, RESPONDENT-RESPONDENT.

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

DAVID L. MURACO, RESPONDENT-RESPONDENT PRO SE.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered May 28, 2013. The order dismissed the petitions.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1033

CA 14-00365

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

KATHLEEN MILLS, PLAINTIFF-RESPONDENT,

V ORDER

JOSEPH DAVID MILLS, SR., DEFENDANT-APPELLANT.

LEONARD BERKOWITZ, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

NUCHERENO & NAGEL, BUFFALO (CATHERINE E. NAGEL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered July 31, 2013 in a divorce action. The judgment, inter alia, confirmed the report of a referee equitably distributing the marital property of the parties.

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

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

1339/13

CA 13-00479

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

ANNE FREEMAN, PLAINTIFF-APPELLANT,

V ORDER

ANTHONY FREEMAN, DEFENDANT-RESPONDENT.

MICHAEL J. LUH, WILLIAMSVILLE, FOR PLAINTIFF-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 29, 2012. The order granted the motion of defendant to dismiss the complaint and dismissed the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on July 25, 2013, and filed in the Erie County Clerk’s Office on August 21, 2013,

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

Entered: September 26, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (2089/96) KA 07-02229. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANIEL JONES, DEFENDANT-APPELLANT. –- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1713/04) KA 02-00981. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALVIN FULTON, JR., ALSO KNOWN AS SHAIK S., ALSO KNOWN AS SHAIKH S. ABDMUQTADIR, DEFENDANT-APPELLANT. –- Motion for reconsideration denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (699/06) KA 05-01283. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MARVIN D. VASSAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1648/06) KA 04-02967. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLEOTIS MERCER, DEFENDANT-APPELLANT. –- Motion seeking renewal of direct appeal denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, FAHEY, AND LINDLEY, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (911/08) KA 04-00435. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY R. THOMAS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, WHALEN AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (657/09) KA 06-01233. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN M. CAMPBELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND CARNI, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1143/09) KA 07-02575. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE J. SINGLETON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, AND CARNI, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (269/10) KA 08-02369. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LORCEN BURROUGHS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, CARNI, AND LINDLEY, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (484/10) KA 07-00255. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHARLES S. COBB, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (433/13) TP 12-02130. -- IN THE MATTER OF JAYSON BULMAHN, PETITIONER, V NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS. -- Motion to compel denied. PRESENT: SCUDDER, P.J., PERADOTTO, LINDELY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1003/13) KA 12-00426. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD E. SHINEBARGER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., FAHEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1067/13) KA 10-02428. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JETONE JONES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1173/13) TP 13-00534. -- IN THE MATTER OF EDDIE ORTIZ, PETITIONER, V CHARLES KELLY, JR., SUPERINTENDENT, MARCY CORRECTIONAL FACILITY AND BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (164.1/14) KA 09-01253. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JESSE ROBERITES, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: SMITH, J.P., FAHEY,

VALENTINO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (264/14) CA 13-01385. -- IN THE MATTER OF SHERIDAN PARK, INC. AND AMIGONE FUNERAL HOME, INC., PETITIONERS-APPELLANTS, V NEW YORK STATE DIVISION OF CEMETERIES, NEW YORK STATE DEPARTMENT OF STATE DIVISION OF CEMETERIES, NEW YORK STATE CEMETERY BOARD, NEW YORK STATE DEPARTMENT OF STATE, RICHARD D. FISHMAN, DIRECTOR OF NEW YORK STATE DIVISION OF CEMETERIES, NEW YORK STATE DEPARTMENT OF STATE DIVISION OF CEMETERIES, CESAR A. PERALES, NEW YORK STATE SECRETARY OF STATE AND MEMBER OF NEW YORK STATE CEMETERY BOARD, NEW YORK STATE DEPARTMENT OF STATE, ERIC T. SCHNEIDERMAN, AS NEW YORK STATE ATTORNEY GENERAL AND A MEMBER OF NEW YORK STATE CEMETERY BOARD, AND NIRAV R. SHAH, M.D., M.P.H., AS NEW YORK STATE COMMISSIONER OF HEALTH AND A MEMBER OF NEW YORK STATE CEMETERY BOARD, RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (301/14) CA 13-01384. -- HILLCREST HOMES, LLC, PLAINTIFF-APPELLANT, V ALBION MOBILE HOMES, INC., DOING BUSINESS AS HERITAGE ESTATES AND RICHARD DECARLO, DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, FAHEY, PERADOTTO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (331/14) KA 12-01249. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEPHAN MERRITT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, LINDLEY, AND

VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (380/14) KA 11-01665. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CEDRIC J. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (454/14) KA 13-00064. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHUVON J. WILLIAMS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (484/14) CA 13-00391. -- PETER A. PRIOLA, III, PLAINTIFF-APPELLANT, V ATTORNEY SHEILA FALLON, MEGAN FALLON AND FALLON, FALLON & BIGSBY, LLP, DEFENDANTS-RESPONDENTS. -- Motions for reargument and leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (487/14) CA 13-00512. -- IN THE MATTER OF LAZY ACRES PARK, LLC, PETITIONER-APPELLANT, V PAUL FERRETTI, ROBIN FERRETTI AND CLAUDETTE SHELTON, RESPONDENTS-RESPONDENTS. -- Motion and cross motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: FAHEY, J.P., PERADOTTO, CARNI, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (523/14) CA 13-01990. -- IN THE MATTER OF BUFFALO NIAGARA BUSINESS PARK, LLC, PETITIONER-APPELLANT, V BOARD OF ASSESSMENT REVIEW FOR

CITY OF BUFFALO, ASSESSOR OF CITY OF BUFFALO, CITY OF BUFFALO, RESPONDENTS-RESPONDENTS, AND COUNTY OF ERIE, INTERVENOR-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (528/14) CA 13-01300. -- LAURA LANKENAU, PLAINTIFF-APPELLANT, V PATRICK K. BOLES, M & S LEASING CO., LLC, DEENA LANKENAU AND DOUGLAS LANKENAU, DEFENDANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (547/14) CA 13-00383. -- CHALINA RUIZ, PLAINTIFF-RESPONDENT, V BRENDAN L. COPE AND CITY OF SYRACUSE, DEFENDANTS-APPELLANTS. -- Motion for reargument, reconsideration, or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (648.1/14) CA 13-00560. -- DAWN STEFANIAK, PLAINTIFF, V NFN ZULKHARNAIN, DEFENDANT-RESPONDENT. ROBERTA L. REEDY, AS ADMINISTRATOR OF THE ESTATE OF KEVIN M. REEDY, DECEASED, APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (700/14) KA 12-01328. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KEITH LYMAN, ALSO KNOWN AS KEITH J. LYMAN, ALSO KNOWN AS

KEITH JOSEPH LYMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: The order of June 13, 2014 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before January 7, 2015. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (721/14) KA 13-00775. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICHARD D. SACKEL, DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, VALENTINO, AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (750/14) CA 13-01410. -- IN THE MATTER OF PAUL KAIRIS, PETITIONER-APPELLANT, V HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (759/14) CA 13-02094. -- TEHAN'S CATALOG SHOWROOMS, INC., CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 117360.) (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (760/14) CA 13-02096. -- TEHAN'S CATALOG SHOWROOMS, INC., CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO.

117360.) (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (779/14) CA 13-01790. -- APRIL M. WILLIAMS, PLAINTIFF-RESPONDENT-APPELLANT, V CHARLES A. FASSINGER AND CITY OF SYRACUSE, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (782/14) CA 13-02124. -- IN THE MATTER OF OBSESSION BAR AND GRILL, INC. AND JOAN ORTIZ, PETITIONERS-RESPONDENTS, V ZONING BOARD OF APPEALS OF CITY OF ROCHESTER AND CITY OF ROCHESTER, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (789/14) KA 11-02153. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL HASSETT, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, AND LINDLEY, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (823/14) TP 14-00205. -- IN THE MATTER OF JOY ARBOGAST, PETITIONER, V NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, SPECIAL HEARING BUREAU, RESPONDENT. -- Motion for leave to appeal to the

Court of Appeals denied. PRESENT: CENTRA, J.P., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ. (Filed Sept. 26, 2014.)

MOTION NO. (1050/14) KA 11-00299. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, AND DEJOSEPH, JJ. (Filed Sept. 26, 2014.)

KA 11-01383. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYLER T. CODY, DEFENDANT-APPELLANT. –- Motion to dismiss granted. Memorandum: The matter is remitted to Monroe County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, FAHEY, AND PERADOTTO, JJ. (Filed Sept. 26, 2014.)

KA 13-02071. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KENNETH H. FORD, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Defendant’s assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38), and has submitted an affidavit in which he states that there are no meritorious issues for appeal. Upon our review of the record, we conclude that nonfrivolous issues exist concerning the determination of defendant’s risk level classification, with regard to both

the assessment of the risk factor points challenged by defendant, and the application of an automatic override for a prior felony conviction of a sex crime (*see People v Moore*, 115 AD3d 1360, 1360-1361). We therefore relieve counsel of his assignment and assign new counsel to brief these issues, as well as any other issues that counsel's review of the record may disclose. (Appeal from Order of Wayne County Court, John B. Nesbitt, J. - Sex Offender Registration Act). PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

KA 11-00547. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE J. HARRIS, JR., DEFENDANT-APPELLANT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from an Order of Supreme Court, Monroe County, Francis A. Affronti, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

KA 10-02505. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAYMOND JAMES, DEFENDANT-APPELLANT. -- Appeal dismissed as moot. Counsel's motion to be relieved of assignment granted. (Appeal from an Order of Supreme Court, Monroe County, David D. Egan, J. - Criminal Sale of a Controlled Substance, 3rd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

KA 11-00142. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROMMEL LEWIS, DEFENDANT-APPELLANT. -- Resentence unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Resentence of Monroe County Court, Patricia D.

Marks, J. - Assault, 1st Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)

KA 14-00228. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD E. MEAD, JR., ALSO KNOWN AS DONALD MEAD, JR., ALSO KNOWN AS DONALD MEAD, DEFENDANT-APPELLANT. -- The case is held, the decision is reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted upon his *Alford* plea of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38). Our review of the record reveals a nonfrivolous issue regarding the validity of defendant's plea, i.e., whether there was sufficient evidence of guilt in the record to support the *Alford* plea (*see People v Richardson*, 72 AD3d 1578, 1579-1580; *People v Oberdorf*, 5 AD3d 1000, 1001). We therefore relieve counsel of her assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Genesee County Court, Robert C. Noonan, J. - Attempted Assault, 2nd Degree). PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Sept. 26, 2014.)