SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

OCTOBER 3, 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

653

KA 11-00492

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLIVE STOUTENGER, ALSO KNOWN AS OLIVE DELANEY,
DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered January 10, 2011. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that Supreme Court erred in admitting in evidence a recorded telephone conversation between her and her friend inasmuch as it did not fall within a recognized *Molineux* exception (*see People v Molineux*, 168 NY 264, 293-294). Contrary to defendant's contention, the telephone conversation does not present a *Molineux* issue. Inasmuch as the People sought to use the telephone conversation only to challenge defendant's credibility on rebuttal, not to establish defendant's guilt as part of their case-in-chief, we conclude that the admissibility of the telephone conversation must be analyzed pursuant to *People v Buchanan* (145 NY 1, 23-24).

Under the "door-opening" rule set forth in *Buchanan*, otherwise inadmissible evidence, such as the telephone conversation at issue here, may be admitted in evidence for the purpose of rebutting a "misleading impression" created by the defendant (*People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137; *see People v Massie*, 2 NY3d 179, 183-184; *People v Donato*, 202 AD2d 1010, 1010, *lv denied* 83 NY2d 871). Here, defendant was attempting to evoke the jury's sympathy by testifying about her remorse and anguish over the victim's death. Specifically, defendant testified that, upon learning of the

victim's death, she "started flipping out," "bouncing my head off walls," "screaming," and "going nuts." She further testified that she "didn't want to live," "refused to eat," and was "on suicide watch." We conclude that the court properly permitted the People to introduce the telephone conversation in evidence to rebut defendant's testimony of remorse and anguish (*see Cordero*, 110 AD3d at 1470; *see generally People v Whitlatch*, 294 AD2d 909, 909, *lv denied* 98 NY2d 703).

While we agree with defendant that the court erred in permitting the prosecutor to question her son about an irrelevant and immaterial fistfight between defendant and another woman (*see People v Bradley*, 20 NY3d 128, 134-135), we conclude that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no reasonable possibility that defendant would have been acquitted but for the error (*see People v Johnson*, 155 AD2d 924, 926, *lv denied* 75 NY2d 920; *see also People v Luka*, 177 AD2d 599, 600; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant contends that the court erred in conducting a colloquy with a sworn juror outside of her presence. When defendant's son completed his testimony, a juror overheard him stating that he wanted to punch "that bitch," referring to the prosecutor. The court was advised of the statement and then questioned the juror in the presence of counsel but outside the presence of the other jurors to determine what defendant's son had said and who else might have overheard it. The court then called the remaining jurors into the courtroom to address the issue. At that point, the court realized that defendant had not been present for the colloquy with the juror and counsel and offered to conduct the colloquy again in defendant's presence. Defense counsel declined. Defendant's contention is without merit because the presence of counsel alone was sufficient (*see People v Harris*, 99 NY2d 202, 212).

Defendant's further contention that prosecutorial misconduct during cross-examination of defendant deprived her of a fair trial is preserved for our review only in part, inasmuch as she failed to object to several of the allegedly improper statements (*see People v Jones*, 114 AD3d 1239, 1241). In any event, defendant's contention lacks merit. We conclude that "[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial" (*id.* [internal quotation marks omitted]; *see People v Smith*, 109 AD3d 1150, 1151, *lv denied* 22 NY3d 1090; *People v Stanley*, 108 AD3d 1129, 1131, *lv denied* 22 NY3d 959; *People v Ward*, 107 AD3d 1605, 1606-1607, *lv denied* 21 NY3d 1078).

Defendant contends in the supplemental brief submitted by appellate counsel with leave of this Court that the court failed to apprise her of a jury note and that such a failure constitutes a mode of proceedings error requiring reversal of the judgment, even if unpreserved (*see People v O'Rama*, 78 NY2d 270, 279-280; *see also* CPL 310.30). We reject defendant's contention that preservation was not required. Here, as in *People v Arnold* (107 AD3d 1526, *lv denied* 22 NY3d 953), "the record does not indicate that the court gave defense counsel notice of the contents of the note outside the presence of the

jury, but it establishes that the court read the note verbatim before the jury, defense counsel, and defendant. Defense counsel raised no objection" (*id.* at 1527). Under such circumstances, defendant was required to preserve the alleged error by objection (*see People v Kalb*, 91 AD3d 1359, 1359, *lv denied* 19 NY3d 963; *see also People v Anderson*, 116 AD3d 499, 500). We decline to exercise our power to address defendant's contention as a matter of discretion in the interest of justice (*see People v Bonner*, 79 AD3d 1790, 1790-1791, *lv denied* 17 NY3d 792).

Finally, the sentence is not unduly harsh or severe.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

851

KA 13-00614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL N. BONAVITO, DEFENDANT-APPELLANT.

ANDREW C. LOTEMPIO, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 1, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [3]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to withdraw the plea (*see People v Buske*, 87 AD3d 1354, 1355, *lv denied* 18 NY3d 882; *People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Pillich*, 48 AD3d 1061, 1061, *lv denied* 11 NY3d 793; *see People v Garner*, 86 AD3d 955, 955; *see generally People v Said*, 105 AD3d 1392, 1393, *lv denied* 21 NY3d 1019). Here, defendant's contention that he was under the influence of prescription medication at the time of the offense "did not constitute a protestation of innocence or the assertion of a defense necessitating withdrawal of the plea" (*People v Legault*, 180 AD2d 912, 913, *lv denied* 79 NY2d 1051; *see People v Di Paola*, 143 AD2d 487, 488), inasmuch as intent is not an element of the crime of criminal sexual act in the first degree based upon oral sexual conduct with a person under the age of 11 (*see People v Newton*, 8 NY3d 460, 464; *People v Washington*, 156 AD2d 496, 496-497, *lv denied* 75 NY2d 925; *Di Paola*, 143 AD2d at 488; *see generally* § 15.25).

To the extent that defendant's contention that he received

ineffective assistance of counsel survives his plea of guilty and valid waiver of the right to appeal (*see People v Strickland,* 103 AD3d 1178, 1178), we conclude that it is without merit. " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel' " (*Garner*, 86 AD3d at 956), and that is the case here (*see People v Jackson*, 90 AD3d 1692, 1694, *lv denied* 18 NY3d 958; *People v Gross*, 50 AD3d 1577, 1577).

Finally, defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015; *People v Branch*, 49 AD3d 1206, 1206-1207, *lv denied* 10 NY3d 932).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

861

CA 14-00025

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

DAVID LEATHERS AND BRENDA LEATHERS,
PLAINTIFFS-APPELLANTS,

V ORDER

ZAEPFEL DEVELOPMENT COMPANY, INC., TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY AND NORTHPOINTE COMMERCE PARK, LLC,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), AND DOLCE & PANEPINTO, P.C., FOR PLAINTIFFS-APPELLANTS.

LONDON FISCHER, LLP, NEW YORK CITY (CHRISTOPHER RUGGIERO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 25, 2013. The order, among other things, granted the motion of defendants for summary judgment.

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

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

862

CA 14-00026

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

DAVID LEATHERS AND BRENDA LEATHERS,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ZAEPFEL DEVELOPMENT COMPANY, INC., TOWN OF AMHERST INDUSTRIAL DEVELOPMENT AGENCY AND NORTHPOINTE COMMERCE PARK, LLC,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (LAWRENCE J. VILARDO OF COUNSEL), AND DOLCE & PANEPINTO, P.C., FOR PLAINTIFFS-APPELLANTS.

LONDON FISCHER, LLP, NEW YORK CITY (CHRISTOPHER RUGGIERO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 8, 2013. The judgment granted the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by David Leathers (plaintiff) when he fell from a stepladder while climbing out of a corrosion chamber owned by his employer, Bureau Veritas Consumer Products Services, Inc. (BV). BV, which provides third-party quality and safety testing for consumer products, subleased a commercial building from defendant Northpointe Commerce Park, LLC (Northpointe). Northpointe, in turn, leased the property from defendant Town of Amherst Industrial Development Agency (IDA), which owned the property under a sale and leaseback agreement with Northpointe's predecessor in interest. Defendant Zaepfel Development Company, Inc. (Zaepfel) shares common ownership with Northpointe and manages its properties.

Plaintiff worked as a senior technician at BV and was assigned to the corrosion chamber, which simulates the long-term effects of weather on metal products by exposing them to a saline solution. His job duties included cleaning the chamber between tests. On the date of the accident, plaintiff opened the lid to the chamber and noticed water on the bottom of the chamber, which indicated that the drain inside the chamber was clogged. Plaintiff took apart the PVC piping

leading to the drain and attempted to remove the clog using an air hose and fish tape. When that did not work, he sprayed water into the pipe, which broke up the clog. Plaintiff sprayed down the chamber from the outside but, because the floor of the chamber was still dirty, he climbed into the chamber to clean the floor. As plaintiff was exiting the chamber onto a stepladder, the ladder became unstable and he fell to the ground.

Supreme Court granted defendants' motion for summary judgment dismissing the amended complaint and denied plaintiffs' cross motion for partial summary judgment on liability under Labor Law § 240 (1), and this appeal ensued. We note at the outset that plaintiffs have abandoned any contention with respect to the propriety of the court's dismissal of the Labor Law § 241 (6) and common-law negligence causes of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Addressing first the Labor Law § 240 (1) cause of action, we conclude that plaintiff was not "repairing" the corrosion chamber at the time he was injured, and thus that he was not engaged in a protected activity under section 240 (1). Rather, defendants established as a matter of law that plaintiff was involved in "routine maintenance in a non-construction, non-renovation context" (*Melski v Fitzpatrick & Weller, Inc.*, 107 AD3d 1447, 1448; *see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53; *Wein v Amato Props., Inc.*, 30 AD3d 506, 507). The court therefore properly granted that part of defendants' motion with respect to that cause of action and denied plaintiffs' cross motion. Neither the corrosion chamber nor the components of the "drainage system," i.e., the floor drain and plastic piping, were in need of "repair." Rather, the drain was clogged, at least in part as a result of the normal operation of the chamber. Plaintiff testified at his deposition that the clog consisted of "paper and what looked to be like pieces of wooden dowel from like Q-tips that they use," i.e., parts of samples that had been placed in the chamber on prior occasions, as well as an unknown substance. Although plaintiff and his supervisor testified that dirty conditions in the chamber could potentially compromise test results, there is no evidence that the chamber was " 'inoperable or malfunctioning prior to the commencement of the work' " (*Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728). Further, there is no evidence that plaintiff had to use specialized tools or any tools at all to take apart the plastic piping. Indeed, defendants' expert averred that the PVC piping had no mechanical fasteners and was "merely a friction fit, therefore, it would be a routine task to remove." Plaintiff then used an air hose, metal wire, and a water hose to remove the clog, all of which were readily accessible to and used by him in the course of his employment.

Plaintiffs rely heavily on two cases for the proposition that unclogging a pipe constitutes repair work: *Benfanti v Tri-Main Dev.* (231 AD2d 855) and *Crossett v Schofell* (256 AD2d 881). We conclude that those cases are distinguishable. The injured plaintiff in *Benfanti* was an electrician who fell eight feet from a ladder to the ground "while attempting to loosen a drain pipe" (231 AD2d at 855). This Court concluded that "*removal of a portion of the drain pipe leading to the building's main sewer line* for the purpose of

unclogging *and repairing it* constitutes the repair of a structure within the meaning of Labor Law § 240 (1), rather than routine maintenance" (*id.* [emphasis added]). In *Crossett*, a dairy farmer was "forced to stop filling his silo with haylage when the fill pipe plugged up and became inoperable," and he hired plaintiff Kenneth M. Crossett (Crossett) "[t]o correct th[e] problem" (256 AD2d at 881). In order to "make the repair," Crossett had to "climb a steel ladder affixed to the silo adjacent to the fill pipe" (*id.*). As he was "reinstalling the pipe, his safety belt broke, causing him to fall 25 feet to the ground" (*id.*). The Third Department concluded that "*inasmuch as the fill pipe was inoperable or malfunctioning*, [Crossett] was engaged in repair work and, thus, may maintain a claim under Labor Law § 240 (1)" (*id.* at 882 [emphasis added]). In our view, plaintiff's actions in this case are far more akin to clearing gutters of debris, an activity that is not protected under Labor Law § 240 (1) (*see e.g. Hull v Fieldpoint Community Assn., Inc.*, 110 AD3d 961, 962, *lv denied* 22 NY3d 862; *Berardi v Coney Is. Ave. Realty, LLC*, 31 AD3d 590, 591; *Beavers v Hanafin*, 88 AD2d 683, 683-684). Because plaintiff was engaged in routine maintenance in a non-construction, non-renovation context, he is not entitled to the " 'extraordinary protections of Labor Law § 240 (1)' " (*Signs v Crawford*, 109 AD3d 1169, 1170; *see Chizh v Hillside Campus Meadows Assoc.*, 4 AD3d 743, 743-744, *affd* 3 NY3d 664; *Selca v Dutchess Heritage Sq. Partners, LLC*, 115 AD3d 734, 735).

We likewise conclude that the court properly granted that part of defendants' motion with respect to the Labor Law § 200 cause of action. Plaintiff's accident resulted from the manner in which the work was performed, not from any dangerous condition on the premises, and defendants exercised no supervisory control over the work (*see Lombardi v Stout*, 80 NY2d 290, 295; *Ortega v Puccia*, 57 AD3d 54, 62-63).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

865

KA 10-00305

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE ODUMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 3, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Defendant contends that the verdict is against the weight of the evidence because the testimony of a prosecution witness was incredible and inconsistent with prior statements he made to the police. We reject that contention. "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence, the appellate court must give '[g]reat deference . . . [to the] fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor' " (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831, quoting *People v Bleakley*, 69 NY2d 490, 495). Indeed, a jury is able to "assess [the] credibility and reliability [of the witnesses] in a manner that is far superior to that of reviewing judges[,] who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890). Here, the "[i]ssues of identification and credibility, including the weight to be given to inconsistencies in testimony, were properly considered by the jury[,] and there is no basis for disturbing its determinations" (*People v Williams*, 17 AD3d 203, 204, *lv denied* 4 NY3d 892; *see People v McMillon*, 77 AD3d 1375, 1376, *lv denied* 16 NY3d 897; *see generally Bleakley*, 69 NY2d at 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we thus conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the contention of defendant that County Court deprived him of the right to present a defense by restricting the scope of the testimony of a police witness on redirect examination. "The extent of redirect examination is, for the most part, governed by the sound discretion of the trial court" (*People v Melendez*, 55 NY2d 445, 451; *see People v Massie*, 2 NY3d 179, 183), and there is no evidence that the court abused its discretion in this case (*see People v Taylor*, 231 AD2d 945, 946, *lv denied* 89 NY2d 930).

We reject the further contention of defendant that he was deprived of a fair trial based upon comments made by the prosecutor during her summation. We conclude that the prosecutor's comments at issue were "a fair response to defense counsel's summation and did not exceed the bounds of legitimate advocacy" (*People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888). We also note that, "although the prosecutor improperly commented on facts not in evidence, the court sustained defendant's objection to those improper comments and any prejudicial effect therefore was dispelled" (*People v Davis*, 38 AD3d 1170, 1172, *lv denied* 9 NY3d 842, *cert denied* 552 US 1065).

We also reject defendant's contention that he was punished for exercising his right to a jury trial. " '[T]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial' " (*People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862), or that the court " 'placed undue weight upon defendant's ill-advised decision to reject [a] favorable plea bargain and proceed to trial' " (*People v Smith*, 21 AD3d 1277, 1278, *lv denied* 7 NY3d 763). Defendant failed to preserve for our review his contention that "the court at sentencing erroneously considered crimes of which he was not convicted," and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*People v Faison*, 113 AD3d 1135, 1136-1137, *lv denied* ___ NY3d ___ [July 24, 2014]; *see generally People v Hirsh*, 106 AD3d 1546, 1548, *lv denied* 22 NY3d 1088). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

871

KA 12-02096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BANGALY CHELLEY, DEFENDANT-APPELLANT.

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

BANGALY CHELLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 9, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second 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: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Supreme Court erred in failing to give the jury a circumstantial evidence charge. Defendant failed to preserve that contention for our review, however, inasmuch as he did not request a circumstantial evidence charge and did not object to the court's instructions as given (*see People v Recore*, 56 AD3d 1233, 1234, *lv denied* 12 NY3d 761; *People v Ponder*, 19 AD3d 1041, 1042-1043, *lv denied* 5 NY3d 809; *see generally* CPL 470.05 [2]). In any event, a circumstantial evidence charge was not required "because the People's case was not based entirely on circumstantial evidence" (*People v Way*, 115 AD3d 558, 558; *see People v Daddona*, 81 NY2d 990, 992; *People v Smith*, 90 AD3d 1565, 1566, *lv denied* 18 NY3d 998). The People offered direct evidence from two witnesses who testified that they had observed defendant fire multiple shots from a handgun in the area where the victim was fatally shot. Another witness testified that, after she had told defendant that he could not shoot straight and that he had "hit" one of his "own people," defendant had called her a "bitch" and said "I'm going to kill you too." That statement from defendant is tantamount to an admission, which constitutes direct evidence (*see generally People v Guidice*, 83 NY2d 630, 636; *People v*

Rogers, 103 AD3d 1150, 1154, *lv denied* 21 NY3d 946).

Defendant further contends that the verdict is against the weight of the evidence because the People's key witnesses were not credible. We reject that contention. Even assuming, arguendo, that a different verdict would not have been unreasonable, "the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801; *see People v Kalinowski*, 118 AD3d 1434, 1436; *People v Canfield*, 111 AD3d 1396, 1397, *lv denied* 22 NY3d 1087). 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).

We also reject defendant's challenge to the severity of his sentence. Considering that defendant's senseless actions resulted in the death of an innocent bystander, who was outside fixing his granddaughter's bicycle when he was struck in the head by a bullet from a gun fired by defendant at another person, we perceive no basis upon which to exercise our discretion to modify his sentence in the interest of justice (*see* CPL 470.15 [6] [b]).

In his pro se supplemental brief, defendant contends that the court erred in admitting into evidence the victim's autopsy report because defendant was unable to confront the medical examiner who prepared the report. That contention is unpreserved for our review, however, inasmuch as defendant failed to object to the autopsy report at trial (*see* CPL 470.05 [2]; *People v Jackson*, 117 AD3d 966, 968). In any event, the contention lacks merit because the autopsy report does not constitute testimonial evidence (*see People v Freycinet*, 11 NY3d 38, 42; *People v Green*, 110 AD3d 825, 826, *lv denied* 22 NY3d 1139).

We have reviewed the remaining contentions set forth in the pro se supplemental brief and conclude that they lack merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

877

CA 13-01025

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

IN THE MATTER OF NIAGARA PRESERVATION COALITION, INC., PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK POWER AUTHORITY, GIL C. QUINIONES, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF NEW YORK POWER AUTHORITY, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ROSE HARVEY, COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION AND MAID OF THE MIST CORPORATION, RESPONDENTS-DEFENDANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (LINDA R. SHAW OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NEW YORK POWER AUTHORITY AND GIL C. QUINIONES, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF NEW YORK POWER AUTHORITY.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION AND ROSE HARVEY, COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT MAID OF THE MIST CORPORATION.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered April 25, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the petition/complaint, vacated a temporary restraining order and denied the application of petitioner-plaintiff for injunctive relief.

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

Memorandum: Petitioner-plaintiff (petitioner) commenced this hybrid CPLR article 78 proceeding/declaratory judgment action (proceeding) seeking relief with respect to the development and

construction of a storage facility for boats owned by respondent-defendant Maid of the Mist Corporation (MOTM), located on property owned by respondent-defendant New York Power Authority (NYPA), and operated by respondent-defendant New York State Office of Parks, Recreation and Historic Preservation (Parks) as part of Niagara Falls State Park. MOTM and its predecessors in interest have operated boat excursions at the base of Niagara Falls since 1846. Consistent with MOTM's 40-year lease with Parks and 25-year lease with the Ontario (Canada) Niagara Parks Commission (NPC), the boats were dry-docked during the winter in a facility on the Canadian side of the Niagara River. NPC, however, rescinded its lease with MOTM and, in February 2012, awarded the Canadian license to Hornblower Canada (Hornblower), a California-based cruise company, thereby giving Hornblower exclusive rights to the Canadian dock facility as of January 1, 2014. On November 30, 2012, Parks, MOTM and NYPA entered into a memorandum of understanding concerning the development and construction of a storage facility for the MOTM boats, which would be located next to and over part of the former Schoellkopf Power Station No. 3, the ruins of which are listed in the National Register of Historic Places. Pursuant to the agreement, the facility would include a vertical marine lift to hoist boats out of the water, two platforms to serve as winter dry docks, and a 3,500-square-foot maintenance building, which would be built at MOTM's expense. Ownership of the facility would be subsequently transferred to Parks (*cf. Union Sq. Park Community Coalition, Inc. v New York City Dept. of Parks & Recreation*, 22 NY3d 648, 652). NYPA, with the consent of Parks, assumed lead agency status for purposes of environmental review of the project pursuant to the State Environmental Quality Review Act (SEQRA). Following the completion of a full assessment form prepared by MOTM and NYPA, together with a supporting analysis prepared by an engineering firm, NYPA issued a negative declaration of significant adverse impact on the environment on February 19, 2013. Petitioner was formed on February 20, 2013 for the purpose of challenging the project, and it is undisputed that petitioner received assistance from Hornblower in establishing organizational status.

Petitioner commenced this proceeding on April 4, 2013, seeking annulment of the SEQRA determination and certain declaratory relief. Petitioners alleged, inter alia, that respondents-defendants (hereafter, respondents) violated SEQRA insofar as the negative declaration was arbitrary and capricious; that respondents' actions constitute parkland alienation; and that respondents violated zoning ordinances of the City of Niagara Falls by eliminating historic resources. Petitioner, by order to show cause filed April 5, 2013, sought a preliminary injunction to prohibit construction, which respondents opposed, and obtained a temporary restraining order. Following oral argument on April 11, 2013, Supreme Court vacated the temporary restraining order, denied the application for a preliminary injunction, and, sua sponte, effectively dismissed the petition/complaint (petition) on the ground that, inter alia, petitioner lacked standing to commence the proceeding. We affirm.

As an initial matter, we deny respondents' motion to dismiss the appeal as moot or barred by laches (*see Matter of Camardo v City of*

Auburn, 96 AD3d 1437, 1438).

Contrary to petitioner's contention, the court properly dismissed the first cause of action on the ground that petitioner lacked standing to commence the proceeding challenging the SEQRA determination. Although respondents did not move to dismiss the petition, or interpose an answer alleging lack of standing, we reject petitioner's contention that respondents waived that defense (*see generally Pataki v New York State Assembly*, 4 NY3d 75, 88). The issue of standing was properly before the court in connection with the application for a preliminary injunction. It is well established that, "[w]hether a [petitioner] seeking relief is a proper party to request an adjudication is an aspect of justiciability which, *when challenged*, must be considered at the outset of any litigation" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [emphasis added]). Indeed, "[w]hen a party seeks an injunction, [it] 'opens the record and gives the court authority to pass upon the sufficiency of the underlying pleading' " (*Clark v New York State Off. of Parks, Recreation & Historic Preserv.*, 288 AD2d 934, 935, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 272). Parks, in opposition to the application for a preliminary injunction, asserted that petitioner had not alleged sufficient facts to establish standing to challenge the SEQRA determination; that petitioner had not alleged that it pays taxes and thus failed to establish standing as a taxpayer; and that petitioner had failed to state a basis for common-law standing.

"[S]tanding requirements are not mere pleading requirements but [instead are] an indispensable part of the [petitioner's] case[,] and therefore each element must be supported in the same way as any other matter on which the [petitioner] bears the burden of proof" (*Matter of Sierra Club v Village of Painted Post*, 115 AD3d 1310, 1311 [internal quotation marks omitted]; *see Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 306). The court properly determined that neither the petition itself nor the supplemental affidavits, which petitioner submitted in response to Parks' opposition to the petition based on lack of standing, establish petitioner's standing to challenge the SEQRA determination. It is axiomatic that, in land use matters, petitioner must demonstrate "that it would suffer direct harm, [an] injury that is in some way different from the public at large . . . [i.e.], that [it has] a direct interest in the administrative action being challenged, different in kind or degree from that of the public at large" (*Society of Plastics Indus.*, 77 NY2d at 774-775; *see Matter of Kindred v Monroe County*, 119 AD3d 1347, 1348). Where, as here, a petitioner claims associational or organizational standing to challenge a governmental action, it must meet three requirements to establish such standing: that one or more of its members would have standing to sue; that the interests it asserts are germane to its purpose to such a degree as to satisfy the court that it is the appropriate representative of those interests; and "that neither the asserted claim nor the appropriate relief requires the participation of the individual members. These requirements ensure that the requisite injury is established and that the organization is the proper party to seek redress" (*Society of Plastics Indus.*, 77 NY2d at 775; *see Matter of Clean Water Advocates*

of N.Y., Inc. v New York State Dept. of Envtl. Conservation, 103 AD3d 1006, 1007, *lv denied* 21 NY3d 862).

We conclude that petitioner failed to establish either an injury, or that it is the proper party to seek redress. Although petitioner submitted a supplemental affidavit of one of its members stating that he has a longtime personal and professional interest in the gorge trail and the ruins of the former hydroelectric plant, " 'interest' and 'injury' are not synonymous . . . A general—or even special—interest in the subject matter is insufficient to confer standing, absent an injury distinct from the public in the particular circumstances of the case" (*Matter of Citizens Emergency Comm. to Preserve Preserv. v Tierney*, 70 AD3d 576, 576, *lv denied* 15 NY3d 710; *see Clean Water Advocates of N.Y., Inc.*, 103 AD3d at 1008). "Appreciation for historical and architectural [artifacts] does not rise to the level of injury different from that of the public at large for standing purposes" (*Matter of Heritage Coalition v City of Ithaca Planning & Dev. Bd.*, 228 AD2d 862, 864, *lv denied* 88 NY2d 809). Here, petitioner failed to establish an injury distinct from members of the public who use the gorge trail to access the ruins of the former hydroelectric plant (*cf. Save the Pine Bush, Inc.*, 13 NY3d at 305-306), and thus it lacks standing to contest the SEQRA determination.

With respect to petitioner's fourth cause of action alleging a violation of unspecified provisions of the City of Niagara Falls Zoning Ordinance, petitioner contends that its members "have been in Niagara Falls for years" and that they "use and enjoy the recreational benefits of the Niagara Reservation Park." Petitioner therefore seeks a declaration that, unless the City of Niagara Falls conducts the balancing test as set forth in *Matter of Monroe County v City of Rochester*, (72 NY2d 338) to determine whether the public interest will be served by the improvements, the project should be enjoined. "[T]o maintain a private action at common law to enjoin a[n alleged] zoning violation, [petitioner] must establish that [it] has standing to do so by demonstrating that special damages were sustained due to [respondents'] activities" (*Zupa v Paradise Point Assn., Inc.*, 22 AD3d 843, 843). Although a property owner may have standing to seek judicial review of an alleged zoning violation without pleading and proving special damages because adverse effect can be inferred from proximity (*see Stumpo v DeMartino*, 283 AD2d 954, 954), here, petitioner failed to allege that it, or any of its members, owns property in proximity to the site (*cf. Clean Water Advocates of N.Y., Inc.*, 103 AD3d at 1007-1008; *Nemeth v K-Tooling*, 100 AD3d 1271, 1273-1274; *Zupa*, 22 AD3d at 843-844).

Even assuming, arguendo, that petitioner has standing to allege alienation of parkland (*see generally Matter of Committee to Preserve Brighton Beach & Manhattan Beach v Planning Commn. of City of N.Y.*, 259 AD2d 26, 31-32), as it alleges in its third cause of action, we conclude that the court properly refused to issue a declaration that respondents Parks and NYPA were required to obtain legislative approval for the construction of the facility within the confines of Niagara Falls State Park. It is well established "that parkland is impressed with a public trust, requiring legislative approval before

it can be alienated or used for an extended period for non-park purposes" (*Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623, 630). It is undisputed, however, that there is no case law in New York applying the "public trust" principle to state parks. The cases apply only to municipal parks (*see e.g. Capruso v Village of Kings Point*, 23 NY3d 631, 636; *Union Sq. Park Community Coalition, Inc.*, 22 NY3d at 652; *Friends of Van Cortlandt Park*, 95 NY2d at 627; *Matter of Mansour v County of Monroe*, 1 AD3d 976, 976, *lv denied* 1 NY3d 508; *Committee to Preserve Brighton Beach & Manhattan Beach*, 259 AD2d at 28). Even assuming, arguendo, that parks operated by Parks are governed by the " 'public trust doctrine' " (*Capruso*, 23 NY3d at 637), which respondents dispute (*see Handbook on the Alienation and Conversion of Municipal Parkland in New York*, 20, available at http://www.nysparks.com/publications/documents/AlienationHandbook.pdf [accessed Sept. 23, 2014]), "what [petitioner] show[s here] is a dispute with public authorities about what is desirable for the park[,] . . . not a demonstration of illegality" (*795 Fifth Ave. Corp. v City of New York*, 15 NY2d 221, 225; *see Mansour*, 1 AD3d at 976-977; *cf. Friends of Van Cortlandt Park*, 95 NY2d at 630). As we note above with respect to the first cause of action, because petitioner sought a preliminary injunction, it gave the court "authority to pass upon the sufficiency of the underlying pleading" (*Clark*, 288 AD2d at 935). Even accepting the allegations in the third cause of action as true (*see generally Guggenheimer*, 43 NY2d at 275), i.e., that the alterations to improve accessibility to the lower gorge and the construction of the winter storage facility for excursion boats constituted non-park purposes, we nevertheless conclude that petitioner failed to state a cause of action (*see* CPLR 3211 [a] [7]; *cf. Capruso*, 23 NY3d at 638; *Friends of Van Cortlandt Park*, 95 NY2d at 630). Thus the court properly denied the request for declaratory relief.

Petitioner has abandoned on appeal its contentions with respect to the remaining causes of action in the petition (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

880

CA 13-00879

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

MARCIA ALLEN, PLAINTIFF,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

MARCIA ALLEN, PLAINTIFF,

V

WAL-MART STORES EAST, LP, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

MELVIN BRESSLER, ESQ., APPELLANT.

(APPEAL NO. 1.)

MELVIN BRESSLER, ROCHESTER, APPELLANT PRO SE.

BROWN HUTCHINSON LLP, ROCHESTER (R. ANDREW FEINBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 25, 2012. The order, insofar as appealed from, directed appellant to pay the sum of $2,090 to counsel for defendant.

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

Memorandum: Plaintiff commenced these actions seeking damages for personal injuries that she allegedly sustained in two separate falls at defendant's store. In appeal No. 1, plaintiff appeals from an order in both actions granting that part of defendant's motion pursuant to 22 NYCRR 130-1.1 and imposing sanctions in the amount of $2,090 on nonparty Melvin Bressler, the attorney for plaintiff. As a preliminary matter, we note that, although plaintiff's notice of appeal recites that plaintiff is appealing from the order in appeal No. 1, she is in fact not aggrieved by the imposition of sanctions against her attorney (*see Moore v Federated Dept. Stores, Inc.*, 94 AD3d 638, 639, *appeal dismissed* 19 NY3d 1065). Nevertheless, we deem the notice of appeal in appeal No. 1 to have been filed on behalf of the nonparty attorney, and we therefore reach the issue raised in that

appeal (*see* CPLR 2001; *Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606; *Joan 2000, Ltd. v Deco Constr. Corp.*, 66 AD3d 841, 842). In appeal No. 2, plaintiff appeals from an order granting defendant's motion pursuant to CPLR 3126 (3) to strike the complaint and to dismiss action No. 2 for failure to comply with discovery orders.

In appeal No. 1, we conclude that, under the circumstances, Supreme Court did not abuse its discretion in imposing sanctions on plaintiff's attorney for what the court characterized as "excessive and inexcusable delay" in providing discovery responses (*see Hughes v Farrey*, 48 AD3d 385, 385). In appeal No. 2, we reject plaintiff's contention that the court applied an incorrect legal standard in striking the complaint and dismissing action No. 2. "[T]he type and degree of sanction [for a discovery violation] will be left to the discretionary authority of the trial court which will remain undisturbed absent an abuse thereof" (*Osterhoudt v Wal-Mart Stores*, 273 AD2d 673, 674; *see* CPLR 3126). "While the nature and degree of the penalty to be imposed on a motion pursuant to CPLR 3126 is a matter of [the court's] discretion . . . , striking a pleading is appropriate where there is a clear showing that the failure to comply with discovery demands is willful, contumacious, or in bad faith" (*Birch Hill Farm v Reed*, 272 AD2d 282, 282). Here, the court properly determined that defendant met its initial burden of establishing willful, contumacious or bad faith conduct by plaintiff, thereby shifting the burden to plaintiff to offer a reasonable excuse (*see Hill v Oberoi*, 13 AD3d 1095, 1096; *Herrera v City of New York*, 238 AD2d 475, 476). Plaintiff failed to meet her burden (*see Hill*, 13 AD3d at 1096; *Nunn v GTE Sylvania*, 251 AD2d 1089, 1091), and we therefore conclude that the court properly exercised its discretion by striking the complaint in action No. 2.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

881

CA 13-00880

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

MARCIA ALLEN, PLAINTIFF,

V MEMORANDUM AND ORDER

WAL-MART STORES, INC., DEFENDANT.
(ACTION NO. 1.)

MARCIA ALLEN, PLAINTIFF-APPELLANT,

V

WAL-MART STORES EAST, LP, DEFENDANT-RESPONDENT.
(ACTION NO. 2.)

(APPEAL NO. 2.)

MELVIN BRESSLER, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN HUTCHINSON LLP, ROCHESTER (R. ANDREW FEINBERG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 30, 2012. The order granted the motion of defendant to strike the complaint and dismiss action No. 2 pursuant to CPLR 3126.

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

Same Memorandum as in *Allen v Wal-Mart Stores, Inc*. ([appeal No. 1], ___ AD3d ___ [Oct. 3, 2014]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

884

CA 14-00252

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

IN THE MATTER OF HORNBLOWER YACHTS, LLC,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROSE HARVEY, COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ANDY BEERS, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, MAID OF THE MIST CORPORATION, GIL C. QUINIONES, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NEW YORK POWER AUTHORITY AND NEW YORK POWER AUTHORITY,
RESPONDENTS-RESPONDENTS.

KING & SPALDING LLP, NEW YORK CITY (EDWARD G. KEHOE OF COUNSEL), AND JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS, FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR RESPONDENTS-RESPONDENTS ROSE HARVEY, COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION, ANDY BEERS, EXECUTIVE DEPUTY COMMISSIONER, NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION AND NEW YORK STATE OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION.

DAMON MOREY LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR RESPONDENT-RESPONDENT MAID OF THE MIST CORPORATION.

NEW YORK POWER AUTHORITY, WHITE PLAINS (JAVIER E. BUCOBO OF COUNSEL), FOR RESPONDENTS-RESPONDENTS GIL C. QUINIONES, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NEW YORK POWER AUTHORITY AND NEW YORK POWER AUTHORITY.

Appeal from a judgment of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered September 3, 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 commenced this CPLR article 78 proceeding

seeking, among other things, to compel respondent New York State Office of Parks, Recreation and Historic Preservation (Parks) to conduct competitive, public bidding with respect to a public concession license to operate scenic boat tours and to conduct related services on the Niagara River (hereafter, license). Parks had granted the license to respondent Maid of the Mist Corporation (MOTM) in 2002 for a 40-year term, and this proceeding was commenced when Parks and MOTM thereafter sought to amend the provisions of the license. We agree with petitioner that Supreme Court erred in determining that it lacks standing to seek the relief requested (*see Albert Elia Bldg. Co. v New York State Urban Dev. Corp.*, 54 AD2d 337, 341-342). With respect to the substantive merits, however, we conclude that the court properly dismissed the petition inasmuch as petitioner failed to demonstrate "a 'clear legal right' to the relief requested" (*Matter of Council of City of N.Y. v Bloomberg*, 6 NY3d 380, 388). Contrary to petitioner's contention, we conclude that Parks, Recreation and Historic Preservation Law § 3.09 does not require competitive, public bidding for the work authorized by the amendment of the license. Contrary to petitioner's additional contention, we conclude that the amendment was in furtherance of MOTM's 2002 license and the business conducted thereunder, and the amendment did not "so alter[ ]" the terms, "the essential identity or [the] main purpose of the [2002 license] that it constitute[d] a new undertaking" rendering the work authorized by the amendment subject to competitive, public bidding (*Albert Elia Bldg. Co.*, 54 AD2d at 343).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

889

KA 13-01956

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL R. WIDEMAN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 13, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of marihuana in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress tangible property is granted, the indictment is dismissed, and the matter is remitted to Erie County Court for proceedings pursuant to CPL 470.45.

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]) and criminal possession of marihuana in the fifth degree (§ 221.10 [2]), defendant contends that County Court erred in refusing to suppress a handgun and marihuana obtained by the police during a warrantless search of his vehicle. We agree. At approximately 9:45 p.m., two uniformed police officers in Buffalo observed a vehicle with excessively tinted windows. The vehicle was parked on the side of the street and defendant, the only occupant, sat in the driver's seat. The officers pulled up behind the vehicle and approached on foot. As they did so, the officers observed another person approaching the vehicle as well, but that person abruptly changed direction and began to walk away. The officers stopped and frisked that person before allowing him to go on his way, and they then approached defendant's vehicle, one on each side. The officer who approached defendant asked for his driver's license, and defendant produced a valid license. After ascertaining that the vehicle was registered to defendant's mother, the officer asked defendant whether there were any guns or drugs in the vehicle. Defendant answered no, whereupon the officer asked if he could look inside the vehicle. Defendant said, "Yeah." He was then removed from the vehicle, patted

down, and placed in the patrol vehicle while the search was conducted. The officer found a bag of marihuana and a firearm hidden under a loose panel next to the gear shift. The marihuana weighed less than two ounces. Defendant was thereafter charged with criminal possession of a weapon in the second degree and criminal possession of marihuana in the fifth degree.

At the suppression hearing, the officer who conducted the search testified on direct examination that, "at some point" while he was standing next to the vehicle questioning defendant, he noticed the smell of raw marihuana emanating from the vehicle. Using his flashlight, the officer also observed small pieces of marihuana inside the vehicle. On cross-examination, the officer was asked whether he saw and smelled raw marihuana before he asked defendant whether there were any guns or drugs in the vehicle, and the officer answered, "I don't remember the sequence of events." When asked again, the officer answered, "I don't remember if I saw the drugs first or smelled the marihuana first, or how that sequence went down." In refusing to suppress the evidence, the court determined, inter alia, that the two officers smelled the "strong odor" of marihuana as soon as they approached the vehicle and before defendant was asked whether he had any guns or drugs. Defendant later pleaded guilty to the crimes charged and was sentenced to a term of imprisonment of 3½ years.

The law is well settled that the police may not ask an occupant of a lawfully stopped vehicle if he or she has any weapons unless they have a founded suspicion that criminality is afoot (*see People v Garcia*, 20 NY3d 317, 324). It is equally well settled that the police may not ask for consent to search a vehicle absent that same degree of suspicion (*see People v Battaglia*, 86 NY2d 755, 756; *People v Mercado*, 120 AD3d 441, 442-443). Here, as both defendant and the People recognize, the legality of the police conduct turns on whether the officer who engaged defendant at the side of his vehicle smelled or observed marihuana in the vehicle *before* asking defendant whether he had any guns or drugs and *before* asking for consent to search. We conclude that there is no basis in the record to support the court's finding that the officers smelled marihuana as soon as they approached the vehicle. The officer who engaged defendant frankly acknowledged at the hearing that he did not know the relevant sequence of events. Although the other officer testified that he smelled raw marihuana while his partner was talking to defendant, that officer did not testify that he smelled the marihuana before his partner asked whether defendant had any guns or drugs and asked for consent to search. In any event, it cannot be assumed that the two officers smelled the marihuana at the same time. We also note that neither officer testified that he detected a "strong odor" of marihuana while standing outside the vehicle, as the court stated in its finding of fact. The only testimony about a "strong odor" of marihuana came from the officer who conducted the search, and he testified that he made that observation while he was inside the vehicle conducting the search.

In the absence of exigent circumstances, which did not exist here, "all warrantless searches presumptively are unreasonable per se," and the People have the burden of overcoming the presumption

(*People v Hodges*, 44 NY2d 553, 557). The People also have a "heavy burden" of proving that a defendant voluntarily consented to a search (*People v Gonzalez*, 39 NY2d 122, 128; *see People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104). Here, in the absence of any evidence that the officers smelled marihuana before engaging defendant in a common-law inquiry and asking for consent to search his vehicle, we conclude that the People failed to prove that the police conduct was justified by a founded suspicion that criminality was afoot. We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress tangible property seized from his vehicle, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

890

KA 12-02256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TEDDERICK A. GILMER, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 23, 2012. The judgment convicted defendant, upon a nonjury verdict, of attempted 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 nonjury verdict of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as his motion for a trial order of dismissal at the close of his proof was not specifically directed at the alleged error raised on appeal (*see People v Beard*, 100 AD3d 1508, 1509; *People v Neary*, 56 AD3d 1224, 1224, *lv denied* 11 NY3d 928). In any event, defendant's challenge is without merit. At trial, the victim testified that someone broke in the front door to her home, broke a small plexiglass window adjacent to the front door, and stole various items from her home. In addition, the People presented evidence that defendant's fingerprints were found on an unopened window and on a piece of plexiglass from a broken window adjacent to the front door. The People also presented evidence that defendant told the police that he went to the victim's home for the purpose of breaking in and that he unsuccessfully tried to open a window to the home, but that he never entered the home. Contrary to defendant's contention, the evidence is legally sufficient to establish that he "must have engaged in conduct that came dangerously near commission of the completed crime" of burglary in the second degree (*People v Naradzay*, 11 NY3d 460, 466, *rearg dismissed* 17 NY3d 840 [internal quotation marks omitted]; *see People v Van Etten*, 162 AD2d 976, 976-977, *lv denied* 76 NY2d 1025). Contrary to defendant's further contention, viewing the evidence in

light of the elements of the crime in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Gaines*, 26 AD3d 742, 742-743, *lv denied* 6 NY3d 847; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he did not waive his *Miranda* rights before making a statement to the police (*see generally People v Rumrill*, 40 AD3d 1273, 1274, *lv denied* 9 NY3d 926; *People v Hightower*, 39 AD3d 1247, 1248, *lv denied* 9 NY3d 845). In any event, defendant's contention lacks merit. "Where, as here, a defendant has been advised of his *Miranda* rights and within minutes thereafter willingly answers questions during interrogation, 'no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights' " (*People v Goncalves*, 288 AD2d 883, 884, *lv denied* 97 NY2d 729, quoting *People v Sirno*, 76 NY2d 967, 968; *see People v Hale*, 52 AD3d 1177, 1178).

Defendant contends that he was denied his right to counsel when the police questioned him concerning the instant crime while he was in custody and represented by counsel in another case. We reject that contention. According to the testimony of a police detective at the *Huntley* hearing, defendant had been sentenced on an unrelated case before the detective questioned him regarding this crime, and "[Supreme] Court therefore properly determined that the police were not precluded from questioning him regarding the instant crime[]" (*People v Koonce*, 111 AD3d 1277, 1278; *see People v Robles*, 72 NY2d 689, 695).

We reject defendant's contention that he was denied effective assistance of counsel during the pretrial plea negotiations on the ground that defense counsel allegedly failed to inform him of the prosecution's plea offer. Here, the record establishes that defense counsel informed defendant of the plea offer in writing and during a meeting shortly before defendant provided testimony to the grand jury, and thus defendant is unable to meet his burden of establishing " 'that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer' " (*People v Fernandez*, 5 NY3d 813, 814; *see People v Howard*, 12 AD3d 1127, 1128). Contrary to defendant's further contention, reversal is not warranted on the ground that defense counsel took a position adverse to defendant in contradicting defendant's assertion that he failed to inform defendant of the plea offer. The court cured any prejudice to defendant by assigning new counsel for defendant and conducting a hearing on the issue whether defendant's initial attorney failed to inform him of the plea offer (*see People v Stephens*, 291 AD2d 841, 841-842; *People v Santana*, 156 AD2d 736, 737; *see generally People v Lewis*, 2 NY3d 224, 228-229).

Finally, we conclude that the court did not abuse its discretion in directing that defendant's sentence was to run consecutively to, rather than concurrently with, a sentence imposed for an unrelated conviction (*see* Penal Law § 70.25 [2-b]; *see generally People v Elder*,

71 AD3d 1483, 1484, *lv denied* 16 NY3d 743, *reconsideration denied* 16 NY3d 858).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

893

KA 12-01719

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL R. ESCALERA, 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 (ALICIA M. LILLEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered September 12, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), defendant contends that Supreme Court erred in denying his motion to suppress the cocaine found by his parole officer during a search of his apartment. According to defendant, the warrantless search of his apartment was unlawful because the parole officer was acting as an agent of the United States Drug Enforcement Agency (DEA), which lacked sufficient evidence to obtain a warrant. Defendant failed to preserve his contention for our review, inasmuch as he contended at the suppression hearing that his parole officer, in conducting the search in question, was acting as a de facto agent of the local police while, on appeal, he contends that the parole officer was acting on behalf of the DEA (*see* CPL 470.05 [2]). In any event, we reject defendant's present contention.

A parolee's right to be free from unreasonable searches and seizures is not violated if a parole officer's search of the parolee's person or property "is rationally and reasonably related to the performance of his duty as a parole officer" (*People v Huntley*, 43 NY2d 175, 179; *see People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820). A parole officer's search is unlawful, however, when the parole officer is "merely a 'conduit' for doing what the police could not do otherwise" (*People v Mackie*, 77 AD2d 778, 779). Stated

differently, "a parolee's status ought not to be exploited to allow a search which is designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation" (*People v Candelaria*, 63 AD2d 85, 90).

Here, defendant's contention that the parole officer was acting as an agent of the DEA is undermined by the uncontroverted testimony of the parole officer that she was informed by a DEA agent prior to the search that the federal prosecutor "will most likely not want to get involved" in the case if an arrest were made, and by the fact that no federal charges were ever lodged against defendant. Rather, the parole officer testified that she conducted the search because she received credible information from law enforcement sources that defendant possessed a large quantity of cocaine in his apartment, which violated his parole conditions, and the court found her testimony in that regard to be credible. We thus conclude that the court properly determined that the search was rationally and reasonably related to the performance of the parole officer's duties, and that suppression was therefore not warranted (*see People v Davis*, 101 AD3d 1778, 1779, *lv denied* 20 NY3d 1060; *People v Johnson*, 94 AD3d 1529, 1531-1532, *lv denied* 19 NY3d 974).

By pleading guilty, defendant forfeited his contention that he was deprived of his right to testify before the grand jury (*see People v Ross*, 113 AD3d 877; *People v Straight*, 106 AD3d 1190, 1191). Defendant, who pleaded guilty after three days of trial, correctly concedes that he failed to preserve for our review his further contention that he was deprived of a fair trial by prosecutorial misconduct because he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lopez*, 71 NY2d 662, 665; *People v McKeon*, 78 AD3d 1617, 1618, *lv denied* 16 NY3d 799). In any event, that contention is also forfeited by his guilty plea (*see generally People v Parris*, 4 NY3d 41, 49, *rearg denied* 4 NY3d 847).

We have reviewed defendant's remaining contentions and conclude that, even assuming, arguendo, that they survive his guilty plea, they lack merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

894

CAF 12-02212

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

IN THE MATTER OF JOSLYN U., DANZARIO E., ANASIAH L. AND ARIEL L.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

HEATHER L., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

LESLEY C. GERMANOW, MEXICO, FOR PETITIONER-RESPONDENT.

JOHN W. SPRING, JR., ATTORNEY FOR THE CHILD, PHOENIX.

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

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

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered October 15, 2012 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oswego County, for further proceedings in accordance with the following Memorandum: Respondent mother appeals from an order determining that she neglected the subject children. The record establishes that the mother failed to appear at the fact-finding hearing and that her attorney withdrew and did not participate therein. We agree with the mother that Family Court erred in allowing her attorney to withdraw and in proceeding with the hearing in the mother's absence, inasmuch as the attorney failed to provide reasonable notice to the mother that she planned to withdraw (*see Matter of Meko M.*, 272 AD2d 953, 954). The mother's attorney did not make a written motion to withdraw as counsel and merely sent the mother a letter six days before the hearing stating she may withdraw if the mother did not appear for the hearing and thus failed to give the mother proper notice and time to respond. We note that, although the record fully supports a finding that the mother neglected the subject children, " 'such a finding may not stand [where, as here, the mother] was denied due process' " (*id.*). We therefore reverse the order and remit the matter to Family Court for the assignment of new

counsel and a new hearing on the petition.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

895

CAF 13-00930

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

IN THE MATTER OF VALERIE L. PITKA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEWART PITKA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ELIZABETH A. SAMMONS, WILLIAMSON, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered July 17, 2012 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of the Support Magistrate.

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

Memorandum: In appeal No. 1, respondent father contends that Family Court erred in denying his objections to the order of the Support Magistrate, which directed him to pay for his daughter's support as if the parties did not have another child for whom the father already paid 17% of his income in support. In appeal No. 2, the father appeals from an order that modified a prior order to require payment of a sum certain for daycare expenses instead of a percentage of the total daycare costs, and determined that he owed child support arrears in the amount of $10,236.33 and was in willful violation of the support order.

At the outset, we reject the father's contention with respect to both appeals that the court lacked jurisdiction over the paternity and support proceedings commenced by petitioner mother because the Support Magistrate previously dismissed the paternity petition. Family Court may exercise jurisdiction over a nonresident where that person submits to the jurisdiction of New York "by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction" (Family Ct Act § 580-201 [2]). Here, in response to the mother's paternity petition, the father appeared before the court on September 6, 2011, and admitted that he was the subject child's father. The father's voluntary appearance through the course of this litigation clearly indicated

that he consented to New York's personal jurisdiction over him (*see Matter of Spak v Specht*, 216 AD2d 705, 707). Upon making a finding of paternity, the Support Magistrate then converted the mother's paternity petition to a petition for an order of support (*see* § 545).

We also reject the father's contention in appeal No. 1 that the Support Magistrate erred in failing to calculate his child support obligation based on 25% of his income. Here, the support dispute before the court concerned only one of the children. A court in the State of Virginia had previously granted the parties a divorce and, inter alia, directed the father to pay child support for the parties' other child. Later, when the father moved to the State of Alaska, the mother commenced this proceeding concerning the subject child, who was born after the divorce was finalized. Inasmuch as the Support Magistrate in this proceeding had no jurisdiction over the support issue decided by the Virginia court concerning the parties' other child, she properly used the presumptive percentage of 17% in calculating the father's child support obligation for the subject child (*see* Family Ct Act § 413 [1] [b] [3]) and, before determining his annual adjusted gross income, the Support Magistrate properly deducted the amount that the father was paying for the other child's support (*see* § 413 [1] [b] [5] [vii] [D]). Furthermore, the Support Magistrate properly complied with Family Court Act § 413 (1) (f) (10) and (1) (g) in finding that it would be unjust to order the father to pay $644.31 in support and in further reducing that amount based on the fact that the father was already paying support for another child.

The father contends in appeal No. 2 that the Family Court Act requires payments for daycare expenses as a percentage, and the Support Magistrate therefore erred in requiring him to pay a sum certain for such expenses. We reject that contention (*see* § 413 [c] [6]), and conclude that the Support Magistrate properly ordered the father to pay $155 for child care services through the support collection unit.

Contrary to the father's further contention in appeal No. 2, there was competent evidence presented at the hearing that he owed arrears in the amount of $10,236.33. We likewise reject the father's contention in appeal No. 2 that the Support Magistrate erred in determining that he was in willful violation of the support order. Evidence of a parent's failure to pay child support as ordered constitutes prima facie evidence of a willful violation (*see* Family Ct Act § 454 [3] [a]) and, " '[o]nce a prima facie showing has been made, the burden shifts to the party that owes the support to offer some competent, credible evidence of his or her inability to make the required payments' " (*Matter of Rottman v Coull*, 112 AD3d 837, 839). The record establishes that, despite being asked to provide the Support Magistrate with full financial documentation, the father failed to do so. Similarly, there is no evidence in the record before this Court to support the father's contention that he was paying approximately 65% of his income in child support and could not afford to make the payments. The father failed to satisfy his burden of demonstrating that his failure to pay was not willful (*see Matter of*

Huard v Lugo, 81 AD3d 1265, 1267, *lv denied* 16 NY3d 710).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

896

CAF 13-02222

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

IN THE MATTER OF VALERIE L. PITKA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEWART PITKA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ELIZABETH A. SAMMONS, WILLIAMSON, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered June 4, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent and affirmed the decision of the Support Magistrate.

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

Same Memorandum as in *Pitka v Pitka* ([appeal No. 1] ___ AD3d ___ [Oct. 3, 2014]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

899

CA 14-00150

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

HARRIS BEACH PLLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EBER BROS. WINE & LIQUOR CORP.,
DEFENDANT-APPELLANT.

BOND SCHOENECK & KING PLLC, ROCHESTER (JOSEPH S. NACCA OF COUNSEL), FOR DEFENDANT-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (JOSEPH D. PICCIOTTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered April 25, 2013. The order granted plaintiff's motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the motion is denied in accordance with the following Memorandum: Plaintiff, the longtime general counsel for defendant, commenced this action seeking to recover approximately $750,000 in costs, disbursements, legal fees, and interest thereon for services rendered to defendant in the defense of a tort and breach of contract action in which defendant had been sued (underlying action). The underlying action was commenced on October 5, 2006, and, at that time, defendant was insured by Illinois National Insurance Company (Illinois National) pursuant to a policy of directors, officers and private company liability insurance (Illinois National policy) effective for the period from March 31, 2006 to March 31, 2007. The coverage under the Illinois National policy was limited to claims made and reported during the period in which that policy was effective, as was the coverage afforded defendant under a policy of directors, officers, and private company liability insurance issued by National Union Fire Insurance Company of Pittsburgh, Pa. (National Union) for the period from March 31, 2008 to March 31, 2009 (National Union policy). On August 7, 2008, i.e., approximately two years after the commencement of the underlying action, plaintiff wrote to M&T Insurance Agency, from which defendant had obtained the National Union policy, and, inter alia, tendered the defense of defendant in the underlying action pursuant to what the record reflects was the National Union policy. Both Illinois National and National Union are part of the AIG group of insurers, and by letter dated September 24, 2008, a claims analyst employed by AIG Domestic Claims, Inc. rejected plaintiff's tender on the ground that it was untimely.

In its answer, defendant denied that it "failed to pay any legal bills justly due to [plaintiff]." Defendant also asserted 10 affirmative defenses, only two of which are relevant on appeal. In the fifth affirmative defense defendant alleged that plaintiff's claims are barred by the doctrine of unclean hands, and in the sixth affirmative defense defendant alleged that any recovery by plaintiff must be reduced by sums presently owing or found to be owed to defendant arising from plaintiff's professional negligence and breach of fiduciary duty. Defendant also asserted two counterclaims, including a counterclaim for professional negligence alleging, in relevant part, that plaintiff was negligent in failing to provide defendant's insurer with timely notice of the claim that was the underlying action. Defendant alleged that, had plaintiff given timely notice of the claim, coverage for defendant in that matter would not have been denied and, "[defendant's] insurer would have advanced the very defense costs that [plaintiff] now seeks to recover from [defendant]." Plaintiff thereafter moved for partial summary judgment dismissing the subject affirmative defenses as well as the subject counterclaim insofar as it is based on the alleged late reporting of the underlying action. Supreme Court granted the motion, and we reverse.

In order to establish legal malpractice by plaintiff, defendant " 'must demonstrate that [plaintiff] failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that [plaintiff's] breach of this duty proximately caused [defendant] to sustain actual and ascertainable damages . . . To establish causation, [defendant] must show that [it] would have prevailed in the underlying action or would not have incurred any damages, but for [plaintiff's] negligence" (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442; *see Utica Cutlery Co. v Hiscock & Barclay, LLP*, 109 AD3d 1161, 1161). In the context of this motion by plaintiff for partial summary judgment, the burden was on plaintiff to present "evidence . . . in admissible form establishing that [defendant] is unable to prove at least one of [the] essential elements of a malpractice cause of action" (*Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303, 303; *see Compis Servs., Inc. v Greenman*, 15 AD3d 855, 855, *lv denied* 4 NY3d 709). More specifically, plaintiff was required to establish in this case that, even if plaintiff had timely tendered defendant's defense in the underlying action, defendant's insurer *would not* have furnished defense dollars in the underlying action, and thus that defendant *could not* have been harmed by plaintiff's untimely notice of the underlying action. We conclude that plaintiff failed to do so and that the court therefore erred in granting the motion.

In deciding this issue, we must examine the terms of the Illinois National policy, which was effective at the time of the commencement of the underlying action and pursuant to which plaintiff should have promptly tendered the defense and indemnification of defendant in the underlying action. That contract provides, inter alia, that Illinois National did not assume any duty to defend defendant, but that defendant had the option of either timely tendering its defense to Illinois National or seeking an advance of defense costs from Illinois

National prior to the final disposition of the claim. If Illinois National advanced defense costs, it was entitled to recoupment of those costs to the extent that defendant was not entitled to payment of the loss in question under the terms of the Illinois National policy. The Illinois National policy also contains a clause requiring notice "as soon as practicable" and either "during the Policy Period or during the Discovery Period" as a condition precedent to coverage under that agreement.

In spite of that timely notice provision, plaintiff did not tender the defense of defendant to any insurer until August 7, 2008, and it appears from the record before us that plaintiff never tendered the defense of defendant or sought an advance of defense costs for defendant under the Illinois National policy. As a result of those omissions, plaintiff never asked Illinois National to take a position on coverage for defendant under the Illinois National policy, and thus the record is silent as to how Illinois National would have responded to such a tender. Indeed, this matter presents a question of claim handling, i.e., how Illinois National would have processed a request for coverage under the Illinois National policy. Consequently, we conclude that plaintiff did not meet its initial burden on the motion for partial summary judgment (*see Utica Cutlery Co.*, 109 AD3d at 1162; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore reverse the order in its entirety, deny the motion for partial summary judgment, reinstate that part of defendant's counterclaim for professional negligence based on plaintiff's alleged failure to provide defendant's insurer with timely notice of the underlying claim, and reinstate defendant's fifth and sixth affirmative defenses. We decline to address defendant's remaining contention herein.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

900

CA 13-01162

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

WILLIAM T. LESIO AND ELEANOR LESIO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DAVID M. ATTARDI, D.M.D. AND Q DENTAL GROUP, P.C.,
DEFENDANTS-APPELLANTS.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-APPELLANT DAVID M. ATTARDI, D.M.D.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANT-APPELLANT Q DENTAL GROUP, P.C.

DAVIDSON FINK LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an amended order of the Supreme Court, Monroe County (William P. Polito, J.), entered May 1, 2013. The amended order granted the motion of plaintiffs to set aside a verdict and ordered a new trial on liability.

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

Memorandum: William T. Lesio (plaintiff) and his wife commenced this action seeking damages arising from the alleged malpractice of David M. Attardi, D.M.D. (defendant), an employee of defendant Q Dental Group, P.C. On May 21, 2008, when plaintiff was 79 years old, defendant extracted teeth 22 and 23 from plaintiff's lower left jaw. Those teeth were loose due to periodontal disease, from which plaintiff had suffered since at least 1995. Plaintiff had already lost multiple teeth, and defendant was hoping to save tooth 24, which appeared to be in danger. After extracting teeth 22 and 23 with forceps, defendant removed the scar tissue and cleaned the sites with the use of a curette, a knife-like instrument. Defendant then placed Bioplant — a synthetic material that is used to stimulate bone growth — into the socket of tooth 23, mixing the Bioplant with plaintiff's blood. Defendant hoped that the Bioplant would restore and preserve the bony ridge adjacent to tooth 24. Defendant placed gel foam over the Bioplant to secure it in the socket, and closed the socket with a suture. Plaintiff returned to the office for several follow-up examinations, and his mouth appeared to be healing normally.

Approximately four months after inserting Bioplant into plaintiff's mouth, defendant examined plaintiff and observed that a large piece of bone was extruding from the gum area in his lower left jaw. Plaintiff informed defendant that, while at home, he had pulled out an even larger piece of bone from his mouth. After determining that the bone was necrotic, defendant cleaned the area, prescribed antibiotics for plaintiff, and instructed him to see an oral surgeon immediately. Plaintiff saw an oral surgeon eight days later, and tests showed that plaintiff had contracted actinomycosis, a rare bacterial infection. Plaintiff continued to be seen by an oral surgeon and an infectious disease specialist for more than a year, but the infection spread to plaintiff's jaw bones. He later underwent two surgeries to remove necrotic bone, leaving his face disfigured.

At trial, plaintiffs alleged that defendant was negligent in: (1) inserting Bioplant into an infected site; and (2) failing to debride the socket of tooth 23 before inserting Bioplant. The jury rendered a unanimous verdict in favor of the defense, finding that defendant was not negligent. Plaintiffs thereafter moved to set aside the verdict pursuant to CPLR 4404 (a), contending that the verdict was contrary to the weight of the evidence. Supreme Court granted the motion and ordered a new trial. We now reverse.

"A verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734 [internal quotation marks omitted]; *see Alger v University of Rochester Med. Ctr.*, 114 AD3d 1209, 1210; *Lenhard v Max Finkelstein, Inc.*, 225 AD2d 1101, 1101, *lv denied* 88 NY2d 806). "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v Univ. of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [internal quotation marks omitted]), and the trial court "should not set aside [a] verdict unless it is palpably irrational or wrong" (*Pecora v Lawrence*, 41 AD3d 1212, 1213 [internal quotation marks omitted]).

Here, we conclude that it cannot be said that the jury's finding that defendant was not negligent is palpably irrational or wrong. With respect to the first theory of negligence, plaintiffs asserted in their posttrial motion that, because his infectious disease specialist testified that Bioplant should not be placed in an infected site, and defendant admitted that periodontitis is an infectious disease, it necessarily follows that defendant was negligent and the verdict is therefore against the weight of the evidence. The trial court agreed with plaintiffs' analysis, but we do not. As an initial matter, we note that defendants' expert witness testified that chronic periodontitis is not an infectious disease. Nevertheless, even assuming that it is so, we note that the infection for which plaintiff was treated by his infectious disease specialist and which caused the loss of his jaw bone was not periodontitis; rather, it was actinomycosis, and there is no evidence in the record that plaintiff

had actinomycosis when defendant placed Bioplant into his mouth. Indeed, plaintiff's infectious disease specialist acknowledged at trial that he does not know when plaintiff contracted actinomycosis.

Moreover, plaintiffs' expert witness testified that, in his opinion, the infection "began following the insertion of the Bioplant." In other words, according to plaintiffs' expert, the Bioplant caused actinomycosis. If that is true, it stands to reason that plaintiff became infected after defendant placed Bioplant into his mouth, which is contrary to plaintiffs' first theory of negligence. We also note that plaintiffs' expert acknowledged that, "with appropriate precautions being taken," it was within the accepted standard of care to place "graft material into a site that has periodontitis," even immediately following the extraction of a tooth that is pulled due to periodontitis. Defendants' expert went further, testifying that placing Bioplant into the socket of a tooth that has been removed due to periodontitis is the "ideal" way to use the bone graft material. Based on the above testimony, the jury could reasonably have rejected the proffered theory that defendant was negligent because he placed Bioplant into plaintiff's mouth when he suffered from periodontal disease.

Plaintiffs' remaining theory of negligence is based largely on semantics. The instructions for Bioplant state that, before inserting the bone graft material into a patient's mouth, the treatment provider should "[d]ebride the socket or treatment site." Because defendant admitted several times at trial that he did not "debride" the tooth socket before inserting Bioplant, plaintiffs conclude, ipso facto, that he was negligent. Defendant went on to explain, however, that, in his view, debridement is defined as the "removal of necrotic tissue," and that, because there was no necrotic tissue in plaintiff's tooth socket, there was no need for debridement. Defendant further testified that he performed "curettage" of the socket by using a surgical instrument to scrape, clean and remove tissue in the socket after the tooth was extracted. Defendant also irrigated and sterilized the area where Bioplant was to be placed. Notably, defendants' expert witness testified that defendant's cleaning of the area "is consistent with debridement" as that term is used in the Bioplant instructions. "Where, as here, conflicting expert testimony is presented, the jury is entitled to accept one expert's opinion and reject that of another expert" (*Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588; *see Radish v DeGraff Mem. Hosp.*, 291 AD2d 873, 874), and, unlike the trial court, we perceive no reason to disregard the testimony of defendants' expert.

Inasmuch as the evidence does not "so preponderate in favor of plaintiff[s] that the verdict could not have been reached upon any fair interpretation of the evidence" (*Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677), we conclude that the court erred in setting aside the verdict as against the weight of the evidence (*see e.g. Brongo v Town of Greece*, 98 AD3d 1260, 1261; *Lauria v Downey-Goodlen El. Corp.*, 63 AD3d 1561, 1561-1562).

Finally, we conclude that there is no basis in the record to support the court's alternative finding, made sua sponte, that the verdict should be set aside in the interest of justice on the ground that the jury rushed its verdict to avoid deliberating on Christmas Eve day.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

901

CA 14-00141

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

DONNA MASCELLINO AND LUCIAN MASCELLINO,
PLAINTIFFS-RESPONDENTS,

V ORDER

ROBERT M. CHICK, D.D.S., ET AL., DEFENDANTS,
SHAKEEL AHMAD, M.D., DONALD W. HOHMAN, JR., M.D.,
GRANT SORKIN, M.D., OCTAVIA F. BALAN, M.D. AND
KALEIDA HEALTH, DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MELISSA L. ZITTEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 17, 2013. The order denied the motion of defendants Shakeel Ahmad, M.D., Donald W. Hohman, Jr., M.D., Grant Sorkin, M.D., Octavia F. Balan, M.D., and Kaleida Health for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 11, 2014,

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

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

909

KA 10-00801

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROOSEVELT ROBERTS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 8, 2009. The appeal was held by this Court by order entered October 4, 2013, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (110 AD3d 1466). The proceedings were held and completed before Supreme Court, Onondaga County (John J. Brunetti, A.J.).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the seventh degree under count four of the indictment, vacating the sentence imposed thereon, and dismissing that count of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), and criminal possession of a controlled substance in the seventh degree (§ 220.03). In a prior determination with respect to this appeal, we concluded that defendant had been denied a full and fair opportunity to litigate his motion to suppress certain statements that he made to a Syracuse police detective who was transporting him to the jail for booking purposes. Consequently, we held the case, reserved decision, and remitted the matter to County Court for a hearing that would give defendant the "opportunity to explore the issues of spontaneity or the effect of the previously-given *Miranda* warnings, or to raise any other issues regarding the admissibility of those statements" (*People v Roberts*, 110 AD3d 1466, 1468). The matter is now before us following remittal.

Based on the evidence introduced at the original suppression

hearing as well as at the additional hearing on remittal, we conclude that the court properly found that those statements were not the result of custodial interrogation. The evidence at the hearings establishes that the statements were not caused by "words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response" (*Rhode Island v Innis*, 446 US 291, 302; *see People v Ferro*, 63 NY2d 316, 322-323, *cert denied* 472 US 1007). We thus agree with the court that " '[n]o response [from defendant] was called for [under] the circumstances' " (*People v Huffman*, 61 NY2d 795, 797; *see People v Allnutt*, 148 AD2d 993, 993, *lv denied* 74 NY2d 736; *cf. People v Paulman*, 5 NY3d 122, 129; *People v Brown*, 52 AD3d 1175, 1176, *lv denied* 11 NY3d 923). We reject defendant's further contention that the court abused its discretion in refusing to allow defense counsel to review a witness' medical records after the court's in camera review of them, in light of the collateral nature of the information sought (*see generally People v Guagenti*, 264 AD2d 427, 427, *lv denied* 94 NY2d 823).

Defendant contends that the court's error in handling a jury note constitutes a mode of proceedings error and thus that reversal is required pursuant to *People v O'Rama* (78 NY2d 270) despite his failure to preserve the issue for our review. We reject that contention. No mode of proceedings error occurred because, "[w]here, as here, defense counsel had notice of a jury note and 'failed to object . . . when the error could have been cured,' lack of preservation bars the claim" (*People v Williams*, 21 NY3d 932, 935). 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 [6] [a]).

Defendant also failed to preserve for our review his contention that the court failed to follow the statutory procedure in sentencing him as a persistent felony offender (*see People v Proctor*, 79 NY2d 992, 994; *People v Korber*, 89 AD3d 1543, 1544, *lv denied* 19 NY3d 864; *People v Daggett*, 88 AD3d 1296, 1297, *lv denied* 18 NY3d 956). 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]). In addition, defendant failed to preserve for our review his contention that the persistent felony offender sentencing scheme is unconstitutional. In any event, it is well settled that the persistent felony offender statute is constitutional (*see People v Battles*, 16 NY3d 54, 59, *cert denied* ___ US ___, 132 S Ct 123). Furthermore, because a motion challenging the constitutionality of the persistent felony offender statute had no chance of success, defense counsel was not ineffective in failing to bring such a motion. "There can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152). We have reviewed defendant's remaining alleged instances of ineffective assistance and conclude that they are without merit.

We agree with defendant, however, that his conviction under the fourth count of the indictment cannot stand. As the People correctly concede, that count, charging defendant with criminal possession of a

controlled substance in the seventh degree, is a lesser inclusory concurrent count of the third count, charging defendant with criminal possession of a controlled substance in the fifth degree (*see People v Greer*, 217 AD2d 1003, 1004). Although defendant failed to preserve this contention for our review, the People also correctly concede that "we may review the issue as a matter of law despite defendant's failure to raise it in the trial court" (*People v Robertson*, 217 AD2d 989, 990, *lv denied* 86 NY2d 846; *see People v Moore*, 41 AD3d 1149, 1152, *lv denied* 9 NY3d 879, *reconsideration denied* 9 NY3d 992). We therefore modify the judgment accordingly.

Finally, the sentence is not unduly harsh or severe.

Frances E. Cafarell

Entered: October 3, 2014

Clerk of the Court

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

912

KA 12-01679

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AIMAN H. ABUJUDEH, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN N. BAUERSFELD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered April 5, 2012. The judgment convicted defendant, upon a jury verdict, of willful possession or transport of unstamped cigarettes, unlicensed operation of a motor vehicle and speeding in a work zone.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, willful possession or transport of unstamped cigarettes (*see* Tax Law § 1814 [c] [1]). We reject defendant's challenges to County Court's exercises of discretion. The court properly exercised its discretion in conducting the trial in his absence (*see People v Parker*, 57 NY2d 136, 142). The court issued repeated *Parker* warnings to defendant and, when defendant failed to appear, it conducted a sufficient inquiry to warrant the conclusion that his "nonappearance constituted a waiver of his right to be present at trial" (*People v Williams*, 170 AD2d 968, 969, *lv denied* 77 NY2d 968; *see People v Toomer*, 272 AD2d 990, 991, *lv denied* 95 NY2d 872). The court also properly exercised its discretion in limiting defendant's cross-examination of a prosecution witness (*see People v Bryant*, 73 AD3d 1442, 1443, *lv denied* 15 NY3d 850).

Contrary to defendant's contention, we conclude that the People established a proper foundation for the admission of the cigarettes in evidence (*see People v Foley*, 257 AD2d 243, 254, *affd* 94 NY2d 668, *cert denied* 531 US 875; *People v Jackson*, 306 AD2d 910, 910-911, *lv denied* 100 NY2d 595, *reconsideration denied* 1 NY3d 540), and "any irregularities in the chain of custody went to the weight of the evidence rather than its admissibility" (*People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870). Viewing the evidence in light of

the elements of the crime of willful possession or transport of unstamped cigarettes 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). Finally, defendant's contention with respect to the alleged violation of his right to seek remission of his forfeited bail is not properly raised on the appeal from his judgment of conviction (*see People v Baron*, 133 AD2d 833, 834-835, *lv denied* 70 NY2d 929).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

915

KA 14-00015

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. KREUTTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Michael L. D'Amico, A.J.), rendered February 1, 2013. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree, sexual abuse in the third degree and endangering the welfare of a child.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that County Court failed to conduct a "searching inquiry" before granting his prehearing request to proceed pro se. We reject that contention. "A defendant in a criminal case may invoke the right to defend [pro se] provided: (1) the request is unequivocal and timely asserted, (2) there has been a knowing and intelligent waiver of the right to counsel, and (3) the defendant has not engaged in conduct which would prevent the fair and orderly exposition of the issues" (*People v McIntyre*, 36 NY2d 10, 17). "If a timely and unequivocal request has been asserted, then the trial court is obligated to conduct a 'searching inquiry' to ensure that the defendant's waiver is knowing, intelligent, and voluntary" (*Matter of Kathleen K. [Steven K.]*, 17 NY3d 380, 385; *see People v Crampe*, 17 NY3d 469, 481-482, *cert denied sub nom. New York v Wingate*, ___ US ___, 132 S Ct 1746). As the reviewing court, we may "look to the whole record, not simply to the waiver colloquy, in order to determine if a defendant effectively waived counsel" (*People v Providence*, 2 NY3d 579, 583). Based on our review of the whole record, we conclude that defendant knowingly, intelligently and voluntarily waived his right to counsel (*see People v Malone*, 119 AD3d 1352, 1353; *People v Chandler*, 109 AD3d 1202, 1203, *lv denied* 23 NY3d 1019).

Defendant contends that he was subjected to coercive and

threatening questioning by a sheriff's investigator under circumstances in which a reasonable person would conclude that he was not free to leave and thus his statements to that investigator should have been suppressed. He further contends that the erroneous admission in evidence of those statements is not harmless error. We reject those contentions and conclude that the court properly denied defendant's motion to suppress those statements (*see People v Zuke*, 87 AD3d 1290, 1291, *lv denied* 18 NY3d 887; *People v Schroo*, 87 AD3d 1287, 1288, *lv denied* 19 NY3d 977). Defendant contends that he was denied effective assistance of counsel at trial when standby counsel purportedly conceded that defendant was subject to noncustodial interrogation. That contention lacks merit inasmuch as the proof at trial established that defendant was not subject to custodial interrogation when he was interviewed by a sheriff's investigator (*see generally People v Centano*, 76 NY2d 837, 838; *Schroo*, 87 AD3d at 1288).

Defendant's contentions that the conviction is not supported by legally sufficient evidence and that the court abused its discretion in not defining the parameters of standby counsel's representation are not preserved for our review (*see generally People v Gray*, 86 NY2d 10, 19), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (CPL 470.15 [6] [a]). Defendant's further contention that a mode of proceedings error occurred as a result of the court's failure to define the parameters of standby counsel's representation is raised improperly for the first time in defendant's reply brief and therefore is not properly before us (*see People v Ford*, 69 NY2d 775, 777, *rearg denied* 69 NY2d 985; *People v Hall*, 106 AD3d 1513, 1514, *lv denied* 22 NY3d 956). Defendant proceeded pro se at trial and did not object to the court's jury charge or verdict sheet, and thus his further contentions attributing errors to standby counsel with respect to those matters also lack merit (*see generally People v Brockenshire*, 245 AD2d 1065, 1065-1066, *lv denied* 91 NY2d 940). Moreover, defendant may not use the alleged errors of standby counsel to raise unpreserved challenges to the court's charge and verdict sheet (*see* CPL 470.05 [2]; *see generally People v Duda*, 45 AD3d 1464, 1466, *lv denied* 10 NY3d 764).

Defendant's contention that he was denied effective assistance of counsel by his prior attorney's failure to allow him to testify before the grand jury "involves matters outside the record on appeal and thus is properly raised by way of a motion pursuant to CPL article 440" (*People v Frazier*, 63 AD3d 1633, 1634, *lv denied* 12 NY3d 925). To the extent that defendant contends that the verdict is against the weight of the evidence, we have reviewed the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), and we conclude that an acquittal would have been unreasonable based upon the weight of the credible evidence presented at trial, and thus the verdict is not against the weight of the evidence (*see generally id.* at 348; *People v Bleakley*, 69 NY2d 490, 495).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

917

KA 10-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES M. THOMAS, SR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), rendered April 21, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05). Contrary to defendant's contention, he is not entitled to summary reversal of the conviction based upon the People's posttrial loss of the recording of the robbery victim's 911 call that was admitted in evidence at trial (*see People v Yavru-Sakuk*, 98 NY2d 56, 59). The content of the 911 call, however, is significant to several of the contentions raised on appeal, and the information contained in the missing recording cannot otherwise be obtained from the record on appeal (*cf. People v Melendez*, 71 AD3d 530, 531, *affd* 16 NY3d 869; *Yavru-Sakuk*, 98 NY2d at 61). Inasmuch as the present record on appeal does not permit us to review those contentions, we hold the case, reserve decision and remit the matter to Supreme Court to conduct a reconstruction hearing with respect to the missing recording (*see People v Glass*, 43 NY2d 283, 286; *People v Lopez*, 176 AD2d 218, 219; *see also People v Fullen*, 118 AD3d 1297, 1298).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

927

CA 13-02149

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

MARY BEEBE AND ROBERT BEEBE,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

ST. JOSEPH'S HOSPITAL HEALTH CENTER,
DEFENDANT,
ASSOCIATES FOR WOMEN'S MEDICINE, PLLC,
CHRISTOPHER LARUSSA, M.D.,
DEFENDANTS-APPELLANTS-RESPONDENTS,
AND SUCHITRA KAVETY, M.D., DEFENDANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (MICHAEL P. RINGWOOD OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KUEHNER LAW FIRM, PLLC, SYRACUSE (KEVIN P. KUEHNER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 4, 2013. The order, among other things, granted in part plaintiffs' posttrial motion and ordered a new trial as to defendants Christopher LaRussa, M.D. and Associates for Women's Medicine, PLLC.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the posttrial motion in its entirety and reinstating the verdict in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this medical malpractice action seeking damages for injuries sustained by Mary Beebe (plaintiff) as the result of an infection that developed following an emergency cesarean section. Defendant Christopher LaRussa, M.D., performed the cesarean section and provided pre- and postoperative care to plaintiff. Defendant Suchitra Kavety, M.D., discharged plaintiff from the hospital following the cesarean section and spoke to plaintiff on the telephone several hours following the discharge. At the time, Dr. LaRussa and Dr. Kavety were employed by defendant Associates for Women's Medicine, PLLC (Associates).

Plaintiffs alleged that plaintiff's postoperative infection was the result of Dr. LaRussa's negligence in ordering and administering a single antibiotic prophylaxis for the cesarean section rather than dual antibiotic prophylaxis, and in failing to order appropriate

testing and treatment for plaintiff at a follow-up office visit. Plaintiffs alleged that Dr. Kavety was negligent in discharging plaintiff without conducting further inquiry into the drainage from the surgical incision, and in failing to direct plaintiff to go to the emergency room after plaintiff reported certain symptoms during the telephone call on the day of discharge. A jury trial was conducted, and the jury returned a verdict finding that neither Dr. LaRussa nor Dr. Kavety was negligent. Supreme Court subsequently granted plaintiffs' posttrial motion to set aside the verdict insofar as plaintiffs sought "a new trial . . . as to [Dr. LaRussa], and also as to [Associates]" for the latter's "vicarious liability."

We conclude that the court erred in granting that part of plaintiffs' motion to set aside the verdict in favor of Dr. LaRussa and Associates on the ground that it should not have given an error in judgment charge to the jury with respect to Dr. LaRussa's alleged malpractice in failing to order and administer dual antibiotic prophylaxis for the cesarean section, and on the alternative ground that the verdict in favor of Dr. LaRussa was against the weight of the evidence. We therefore modify the order accordingly. Based upon Dr. LaRussa's testimony that he exercised his professional judgment in choosing between acceptable alternatives, along with expert testimony that there were such acceptable alternatives, we conclude that the court properly gave an error in judgment charge (*see Scofield v Moreland*, 23 AD3d 1082, 1082; *Graney v Ryan*, 19 AD3d 1172, 1173). There was also evidence that Dr. LaRussa considered and chose between medically acceptable treatment alternatives at plaintiff's postoperative office visit, and thus the charge was also appropriately given with respect to his postoperative care of plaintiff (*see Graney*, 19 AD3d at 1173; *Petko v Ghoorah*, 178 AD2d 1013, 1014). Furthermore, we conclude that "the preponderance of the evidence in favor of plaintiff[s] is not so great that the verdict [finding that Dr. LaRussa was not negligent] could not have been reached upon any fair interpretation of the evidence" (*Kettles v City of Rochester*, 21 AD3d 1424, 1425).

Contrary to plaintiffs' contention on their cross appeal, the court properly denied their posttrial motion insofar as it sought an order setting aside the verdict in favor of Dr. Kavety. We conclude that the court properly gave an error in judgment charge with respect to Dr. Kavety's conduct in discharging plaintiff and thereafter "electing to wait and observe her condition rather than undertaking immediate [treatment or testing]" upon receiving plaintiff's telephone call (*Lenzini v Dessler*, 48 AD3d 220, 221). Finally, the verdict in favor of Dr. Kavety is supported by a fair interpretation of the evidence (*see Radish v DeGraff Mem. Hosp.*, 291 AD2d 873, 874).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

932

KA 12-01745

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW J. HAMPTON, DEFENDANT-APPELLANT.

DAVID A. MURANTE, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered October 11, 2011. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and gang assault 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 manslaughter in the first degree (Penal Law § 125.20 [1]) and gang assault in the first degree (§ 120.07). Defendant failed to preserve for our review his contention that Supreme Court erred in failing to give an accomplice in fact instruction to the jury with respect to two prosecution witnesses (*see People v Green*, 43 AD3d 1279, 1281, *lv denied* 9 NY3d 1034; *People v Navares*, 162 AD2d 422, 424, *lv denied* 76 NY2d 942). In any event, the record contains ample corroborative evidence that the crimes of which he was convicted were committed, and thus the statutory corroboration requirement was met (*see People v Chico*, 90 NY2d 585, 589-590; *Green,* 43 AD3d at 1281; *People v Rutledge*, 286 AD2d 962, 962, *lv denied* 97 NY2d 687). Defendant failed to preserve for our review his further contention that the court erred in admitting the testimony of certain prosecution witnesses on the ground that it improperly bolstered the testimony of two other prosecution witnesses (*see People v West*, 56 NY2d 662, 663; *see also People v Comerford*, 70 AD3d 1305, 1306). In any event, the challenged testimony did not constitute improper bolstering, inasmuch as it consisted of the chronological, historical recitation of the fact that prior statements were made by certain witnesses without reference to the substance of those statements (*see People v Smith*, 22 NY3d 462, 465-466). Even assuming, arguendo, that the challenged testimony may have given the jury an "exaggerated idea of the probative force of [the People's] case" (*id.* at 466), we conclude that any error in its admission is harmless (*see People v*

McNeill, 107 AD3d 1430, 1431, *lv denied* 22 NY3d 957; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We note that defendant was acquitted of the most serious crime charged in the indictment (*see People v Ott*, 30 AD3d 1081, 1081). Defendant's sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

933

KA 12-01069

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLARENCE E. SCARVER, ALSO KNOWN AS "C,"
DEFENDANT-APPELLANT.

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

CLARENCE E. SCARVER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 16, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts) and robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentence imposed on count three shall run concurrently with the sentences imposed on counts one and two and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the first degree (Penal Law § 160.15 [4]) and two counts of burglary in the first degree (§ 140.30 [2], [4]). The most incriminating evidence at trial was defendant's parole identification card, bearing his name and image, which had fallen out of the pocket of a sweatshirt worn by one of the two perpetrators and was recovered by the victim of the robbery. We reject defendant's contention, advanced in his main and pro se supplemental briefs, that Supreme Court erred in admitting the parole identification card in evidence, inasmuch as the card was highly relevant to the issue of identity and its probative value exceeded its prejudicial effect (*see generally People v Clemmons*, 83 AD3d 859, 860, *lv denied* 19 NY3d 971; *People v Moore* [appeal No. 2], 78 AD3d 1658, 1659). We note that the court minimized the prejudicial effect of the evidence by redacting information on the card to make it less clear that defendant was a parolee; in fact, as the court observed, one could look at the redacted card and reasonably believe that it was an employee identification card showing that defendant worked for the New York State Department of Correctional Services.

Defendant further contends that the court erred in admitting in evidence the recordings of two telephone calls he made from jail following his arrest. During the first call, defendant said to an unknown female, "Tell him [defendant's father] what happened to my ID." Defendant was referring to his claim that his jacket, containing his parole identification card, had been stolen from his father's car. During the second call, an unknown female informed defendant that his father told the police that his car had not been running for "a long-ass time," and in response defendant instructed the female to tell his father "not to mention" that the car was not running. We reject defendant's contention that his own above-referenced statements constitute inadmissible hearsay. The statements in question were not offered for the truth of the matters asserted (*see generally People v Tosca*, 98 NY2d 660, 661; *People v Jones*, 92 AD3d 1218, 1218-1219, *lv denied* 19 NY3d 962); instead, they were offered to show that defendant appeared to be fashioning an innocent explanation for the fact that his parole identification card was found at the crime scene. Defendant failed to preserve for our review his contention that the statement made by the unknown female during the second call constituted inadmissible hearsay. In any event, that statement was admissible to put defendant's responding statement into context by providing "necessary background information to the jury" (*People v Johnson*, 40 AD3d 1011, 1012, *lv denied* 9 NY3d 923; *see People v Sukhdeo*, 103 AD3d 673, 674, *lv denied* 21 NY3d 914).

Defendant contends that the court abused its discretion in allowing the People to introduce evidence showing that the codefendant, while in jail with defendant awaiting trial, used defendant's six-digit inmate control number and confidential four-digit personal identification number to place multiple telephone calls from jail. According to defendant, that evidence was inadmissible on relevancy grounds. We reject that contention. The evidence that the codefendant used defendant's confidential identification numbers to make telephone calls from jail was relevant because it "tended to establish that defendant and the codefendant were acquaintances, since persons are more likely to commit crimes with acquaintances than strangers" (*People v Berry*, 267 AD2d 102, 102, *lv denied* 95 NY2d 793; *see People v Martinez*, 95 AD3d 677, 678, *affd* 22 NY3d 551). Although it is possible that defendant may have become acquainted with the codefendant after the crimes were committed as a result of being charged jointly and being incarcerated together pending trial, that possibility "merely goes to the weight to be accorded such evidence, not its admissibility" (*People v Cohens*, 81 AD3d 1442, 1444, *lv denied* 16 NY3d 894; *see People v Brown*, 2 AD3d 1423, 1424, *lv denied* 1 NY3d 625).

We agree with defendant, however, that his sentence is unduly harsh and severe. The court sentenced defendant to determinate terms of imprisonment of 25 years plus five years of postrelease supervision (PRS) on each of the three counts of the indictment. The sentences for the two counts of burglary in the first degree are directed to run concurrently with each other but consecutively to the sentence imposed for robbery in the first degree, resulting in an aggregate sentence of 50 years. We note that the codefendant, who has a more extensive

criminal history than defendant, was convicted following a separate trial before a different judge and was sentenced to an aggregate prison term of 25 years plus a period of PRS. Although we agree with the People that defendant committed separate crimes and could therefore lawfully be sentenced consecutively, we conclude as a matter of discretion in the interest of justice that concurrent sentences are more appropriate (*see generally* CPL 470.15 [6] [b]). We therefore modify the judgment accordingly.

We have reviewed defendant's remaining contentions in his main and pro se supplemental briefs and conclude that none warrants reversal or modification of the judgment of conviction.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

940

CAF 13-01403

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

IN THE MATTER OF CHRIS SAWYER FEWELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STACEY A. RATZEL, RESPONDENT-RESPONDENT.

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

GERARD R. ROUX, II, EAST AMHERST, FOR RESPONDENT-RESPONDENT.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered July 24, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking visitation.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, petitioner father appeals from an order that denied his petition to modify a prior consent order of custody and visitation with respect to the parties' eight-year-old son. The father was sentenced in 2006 to a determinate term of imprisonment of 20 years based upon his conviction of rape in the first degree (Penal Law § 130.35) and criminal sexual act in the first degree (§ 130.50). Although Family Court concluded that the father had demonstrated a change in circumstances, it nevertheless determined based on the evidence presented at the hearing, including the uncontroverted testimony of the child's psychologist, that it was not in the best interests of the child to have visitation with the father at the correctional facility. We affirm.

It is well settled that "[v]isitation with a noncustodial parent is presumed to be in a child's best interests even when the parent is incarcerated" (*Matter of Chambers v Renaud*, 72 AD3d 1433, 1434), but the presumption may be rebutted when it is shown, "by a preponderance of the evidence, that visitation would be harmful to the child" (*Matter of Granger v Misercola*, 21 NY3d 86, 92). The court should consider the "totality of the circumstances" in determining whether visitation would be harmful to the child (*Matter of Culver v Culver*,

82 AD3d 1296, 1297, *appeal dismissed* 16 NY3d 884, *lv denied* 17 NY3d 710). Here, the record demonstrates that the father "failed to establish a meaningful relationship with the child" (*Matter of Butler v Ewers*, 78 AD3d 1667, 1667). The father had been incarcerated since the child was in utero, he had never met the child, and the child indicated that he did not want to visit the father. Furthermore, the child's psychologist testified that visitation would be detrimental to the child and that the father was "a total stranger" to the child (*see Matter of Lonobile v Betkowski*, 295 AD2d 994, 994-995). We conclude that there is "a sound and substantial basis in the record" to support the court's determination (*Matter of Nicole J.R. v Jason M.R.*, 81 AD3d 1450, 1451, *lv denied* 17 NY3d 701).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

941

CAF 13-00477

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

IN THE MATTER OF ANASTASIA S., ALEXIA S., JADEN S., JOCELYN S. AND DRAVEN S.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MICHAEL S., RESPONDENT-APPELLANT.

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 8, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: On appeal from an order terminating his parental rights based on a finding of permanent neglect pursuant to Social Services Law § 384-b, respondent father contends that petitioner, the Cattaraugus County Department of Social Services (DSS), failed to fulfill its statutory duty to make diligent efforts to strengthen his relationship with the subject children. We reject that contention. To establish permanent neglect, DSS had the burden of proving by clear and convincing evidence, inter alia, that "it made diligent efforts to encourage and strengthen the relationship between the [father] and [the children] by providing services and other assistance aimed at ameliorating or resolving the problems preventing [the children's] return to [the father's] care" (*Matter of Makayla S. [David S.—Alicia P.]*, 118 AD3d 1312, 1312 [internal quotation marks omitted]; *see* § 384-b [7] [a]). Here, DSS referred the father for mental health counseling, parenting classes, and a drug and alcohol evaluation, none of which he pursued. DSS also gave the father guidance on obtaining housing, providing him with a list of landlords and financial service providers. Moreover, DSS arranged for the father to have weekly visitation prior to his incarceration, and arranged for one visit while he was incarcerated.

The father complains that DSS did not provide him with financial assistance to obtain a suitable apartment, but the record establishes that he had already exhausted all the financial relief available to him. We note that DSS had previously paid the father's rent for an entire year notwithstanding the fact that he was working at the time and one of his children was receiving Social Security disability benefits. Although it may be true, as the father asserts, that the DSS caseworker contemplated adoption as an eventual outcome for the subject children shortly after they were removed from the father's home, DSS is permitted to "evaluate and plan for other potential future goals where reunification with a parent is unlikely" (*Matter of Dakota F. [Angela F.]*, 92 AD3d 1097, 1099, n 4), and "[s]imultaneously considering adoption and working with a parent is not necessarily inappropriate" (*Matter of Maryann Ellen F.*, 154 AD2d 167, 170, *appeal dismissed* 76 NY2d 773).

Based on our review of the record, we conclude that, as Family Court properly determined, DSS made the requisite diligent efforts to strengthen the father's relationship with his children (*see Matter of Noah V.P. [Gino P.]*, 96 AD3d 1472, 1473; *Matter of Tiosha J. [Kachoya H.]*, 96 AD3d 1498, 1498). The father does not dispute that he failed to plan for the future of his children, and we thus conclude that the court properly terminated his parental rights based on permanent neglect.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

944

CA 14-00391

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

RICHARD W. BARBER, AS EXECUTOR OF THE ESTATE OF
RICHARD A. BARBER, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

ACCO BRANDS CORPORATION, ET AL., DEFENDANTS,
AND G.H. MINER CO., INC., DEFENDANT-APPELLANT.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, NEW YORK CITY (JUDY C. SELMECI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BELLUCK & FOX, LLP, NEW YORK CITY (SETH A. DYMOND OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Charles C. Merrell, J.), entered January 14, 2014. The order denied the motion of defendant G.H. Miner Co., Inc. for summary judgment dismissing all causes of action against it.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 17, 2014,

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

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

945

CA 14-00204

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

MONICA FERRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID FERRIS, DEFENDANT-APPELLANT.

BRIAN MICHAEL MIGA, UTICA, FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Oneida County (Joan E. Shkane, A.J.), dated June 27, 2013. The order, among other things, directed defendant to pay plaintiff the sum of $16,215.36.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first, second, and fourth ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Oneida County, for further proceedings in accordance with the following Memorandum: Defendant husband appeals from an order that, inter alia, granted those parts of plaintiff wife's motion seeking to enforce a judgment of divorce that incorporated but did not merge the terms of the parties' oral stipulation. The judgment provided, inter alia, that the husband would pay $100,000 to the wife by June 18, 2012 and would continuously list the marital residence with Assist 2 Sell.

Although the husband contends that the wife failed to meet her burden of proving contempt, we note at the outset that there is no finding of contempt against the husband in the order appealed from, and there is no other order in the record containing such a finding. "There is thus no appealable civil contempt determination" (*Matter of Mercado v Frye*, 104 AD3d 1340, 1342, *lv denied* 21 NY3d 859). We reject the husband's further contention that Supreme Court's determination that he willfully failed to comply with the parties' judgment of divorce when he "fail[ed] to relist the property with Assist 2 Sell . . . and fail[ed] to renew the listing with a different agency" is not supported by the record. Having determined that the husband's conduct was willful, the court was also required to award counsel fees in favor of the wife (*see* Domestic Relations Law § 237 [c]). We agree with the husband, however, that a hearing is required to determine the amount of reasonable counsel fees (*see Ott v Ott*, 266 AD2d 842, 842; *cf. Beal v Beal*, 196 AD2d 471, 473). We therefore modify the order by vacating the amount of counsel fees awarded, and we remit the matter to Supreme Court to determine the amount of such fees following a hearing on that issue.

The husband also contends that the court erred in ordering him to pay interest on the $100,000 owed to the wife based on his failure to make that payment by June 18, 2012. However, we are unable to determine on this record whether the court found that the husband's failure to pay the wife was willful, to require the award of interest pursuant to Domestic Relations Law § 244 (*see Piacente v Piacente*, 93 AD3d 1189, 1190; *cf. Goldkranz v Goldkranz*, 82 AD3d 699, 700). We therefore further modify the order by vacating that part awarding such interest to the wife, and we direct the court on remittal to make a determination whether the husband's conduct was willful, to require the award of interest.

We have considered the husband's remaining contentions and conclude that they are without merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

946

CA 14-00340

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

ALICE H. REARDON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEORGE S. BROADWELL AND SHANE E. BROADWELL,
DEFENDANTS-RESPONDENTS.

KIRWAN LAW FIRM, P.C., EAST SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (THOMAS J. FUCILLO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 23, 2013. The order and judgment granted the motion of defendants for summary judgment and settled title of certain real property.

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

Memorandum: Plaintiff commenced this action pursuant to RPAPL 871 seeking an order directing defendants to remove several structures that allegedly encroach upon her property. Defendants, the owners of adjacent property, asserted a counterclaim seeking a declaration that they are the fee title owners of the disputed land based on adverse possession. Supreme Court granted defendants' motion for summary judgment on their counterclaim and dismissed the complaint. We now affirm.

"To establish a claim of adverse possession, the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)" (*Estate of Becker v Murtagh*, 19 NY3d 75, 81; *see Walling v Przybylo*, 7 NY3d 228, 232; *Corigliano v Sunick*, 56 AD3d 1121, 1121). "In addition, where, as here, the claim of right is not founded upon a written instrument, the party asserting title by adverse possession must establish that the land was 'usually cultivated or improved' or 'protected by a substantial inclosure' " (*Becker*, 19 NY3d at 81, quoting RPAPL former 522). "The type of cultivation or improvement sufficient under the statute will vary with the character, condition, location and potential uses for the property . . . and need only be

consistent with the nature of the property so as to indicate exclusive ownership" (*City of Tonawanda v Ellicott Cr. Homeowners Assn.*, 86 AD2d 118, 122-123, *appeal dismissed* 58 NY2d 824; *see Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159-160).

Here, the evidence submitted by defendants in support of their motion for summary judgment — namely, the affidavits of George A. Broadwell and defendant Shane E. Broadwell, with attached exhibits — establishes their counterclaim for adverse possession as a matter of law. Those affiants assert that the Broadwell family had continuously and exclusively used the disputed area since at least the 1980s, and cultivated the disputed area during that time period. The affiants further assert that they never observed plaintiff or any member of her family using the disputed area, and that plaintiff never gave them permission to use the property. Accepted as true, those assertions establish that defendants' possession of the disputed area was hostile and under a claim of right, actual, open and notorious, exclusive, and continuous for over 10 years (*see Becker*, 19 NY3d at 81; *Walling*, 7 NY3d at 232; *Corigliano*, 56 AD3d at 1121). The assertions, if true, also establish that defendants made improvements to the disputed area that were consistent with the nature of their property (*see Ellicott Cr. Homeowners Assn.*, 86 AD2d at 122-123).

The burden of proof thus shifted to plaintiff to raise an issue of fact, and plaintiff failed to meet that burden (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). The only evidence submitted by plaintiff in opposition to the motion is her own affidavit, with exhibits, but plaintiff's affidavit actually supports defendants' position. Plaintiff states, in sum and substance, that she did not realize that defendants had encroached on her property because she and her family very rarely visited the property since their cabin was vandalized in the "late 1980s," thereby rendering the property "unusable." Plaintiff further states that she had "no knowledge of the correct and actual boundary line" until she had a survey prepared in December 2001. By that time, however, defendants had exclusively and continuously used, cultivated and improved the disputed area for the requisite 10-year period. Plaintiff's ignorance of both the correct boundary line and defendants' use of the disputed area is not a defense to their claim of adverse possession.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

952

CA 14-00366

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

ONEBEACON INSURANCE COMPANY,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

UNILAND PARTNERSHIP OF DELAWARE, L.P.,
DEFENDANT-RESPONDENT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (RYAN L. GELLMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (ROBERT W. MICHALAK OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 20, 2013. The judgment denied defendant's motion for summary judgment and denied plaintiff's cross motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting plaintiff's cross motion and granting judgment in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that plaintiff properly exercised the early termination provision in the lease and terminated the lease as of February 28, 2011

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiff appeals and defendant cross-appeals from a judgment that denied defendant's motion seeking, inter alia, partial summary judgment on liability on its counterclaim and denied plaintiff's cross motion for summary judgment seeking a declaration in its favor. Plaintiff and defendant entered into a lease agreement, whereby plaintiff leased from defendant commercial office space. The lease contained an early termination provision. The parties entered into a first amendment to the lease on July 30, 2003 and a second amendment to the lease on October 31, 2005. We agree with plaintiff that it properly exercised its early termination rights under the lease, and that Supreme Court thus erred in denying plaintiff's cross motion seeking a declaration to that effect. We therefore modify the judgment accordingly.

We reject defendant's contention that the second amendment to the

lease redefined the lease term and commencement date such that plaintiff prematurely exercised its early termination rights. We must examine the lease and second amendment to the lease as a whole, "giv[ing] effect to the intent of the parties as revealed by the language and structure of [both]" (*Reda v Eastman Kodak Co.* [appeal No. 2], 233 AD2d 914, 914). Upon our review of those documents, we conclude that the lease as amended is not " 'reasonably susceptible of more than one interpretation' " and thus is not ambiguous (*McCabe v Witteveen*, 34 AD3d 652, 654, quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573). Here, the primary purpose of the second amendment to the lease, as expressed in the third "Whereas" clause, was to increase the square footage that plaintiff leased from defendant. The sections relied on by defendant in support of its contention that the second amendment redefined the lease term and commencement date merely set forth the date by which plaintiff paid additional rent for occupying the increased square footage. Indeed, the second amendment to the lease contained the same lease termination date as the original lease. Thus, we conclude that a fair and reasonable interpretation of the parties' intent in entering into the second amendment to the lease was to increase the square footage and not to alter the lease term or the early termination date (*see Matter of Cromwell Towers Redevelopment Co. v City of Yonkers*, 41 NY2d 1, 6).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

953

KA 11-01376

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO MCCRAY, ALSO KNOWN AS "MURDER," ALSO KNOWN AS "MURDER MATT," ALSO KNOWN AS "MATT," ALSO KNOWN AS "MAC," DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered June 2, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (three counts), attempted murder in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of three counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]), two counts of attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [viii]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that his right to counsel indelibly attached when several people informed the police that he was represented by an attorney, and that County Court therefore erred in refusing to suppress the statements that he thereafter made to the police. We reject that contention. The evidence admitted at the suppression hearing, which includes video recordings, establishes that defendant, accompanied by a community activist and others, went to a television station in order to surrender himself to the police. Before the attorney arrived, however, the police placed defendant in custody. The community activist who had accompanied defendant to the television station informed the police that an attorney was on the way to that location. The police nevertheless took defendant to a police station and administered *Miranda* warnings, after which defendant made the statements at issue. The above evidence also establishes, unequivocally, that defendant did not inform the police that he wished to speak with an attorney, and that no attorney contacted the police

department before defendant made the statements at issue. An attorney contacted the police department approximately 15 minutes after defendant arrived at the police station, and there is no dispute that the police stopped questioning defendant at that time.

We reject defendant's contention that his right to counsel indelibly attached when the community activist told the arresting police officers at the television station that defendant had an attorney who was on his way. "It is well settled that 'the right to counsel is personal' to the accused (*People v Bing*, 76 NY2d 331, 350 [1990]) and thus cannot be invoked by a third party on behalf of an adult defendant" (*People v Brown*, 309 AD2d 1258, 1258, *lv denied* 1 NY3d 595; *see People v Mitchell*, 2 NY3d 272, 275; *People v Grice*, 100 NY2d 318, 324 n 2). Thus, where, as here, a third party not affiliated with a lawyer or law firm indicates that defendant may have an attorney, "it would be unreasonable to require the police to cease a criminal investigation and begin a separate inquiry to verify whether the defendant is actually represented by counsel. Direct communication by an attorney or a professional associate of the attorney to the police assures that the suspect 'has actually retained a lawyer in the matter at issue' " (*Grice*, 100 NY2d at 324). Absent such direct communication, the police herein had no duty to investigate whether defendant was represented by counsel, and defendant's right to counsel did not indelibly attach until an attorney later called the police directly. Inasmuch as all questioning ceased at that time, we conclude that the court properly refused to suppress the statements defendant made before that time. Defendant's reliance upon *People v Lopez* is misplaced (16 NY3d 375). There, the defendant was held in custody on another, unrelated matter, and the Court of Appeals clearly stated that its "decision [was] premised on the fact that the right to counsel was violated on the particular matter for which the defendant was in custody" (*id.*, at 386), whereas in the case before us defendant was not in custody on another matter.

Defendant failed to make a recusal motion and thus failed to preserve for our review his contention that the court displayed actual bias in favor of the prosecution by issuing a gag order without first determining whether defendant's right to a fair trial was in danger of being impacted, by making evidentiary rulings unfavorable to defendant, and by making sarcastic comments to defense counsel (*see* CPL 470.05 [2]; *People v Prado*, 4 NY3d 725, 726, *rearg denied* 4 NY3d 795; *People v Charleston*, 56 NY2d 886, 887-888). In any event, the record does not support defendant's contention that the court displayed actual bias in its evidentiary rulings or made sarcastic comments (*see People v Persaud*, 98 AD3d 527, 529, *lv denied* 20 NY3d 1014, *reconsideration denied* 21 NY3d 913; *People v Marino*, 21 AD3d 430, 432, *lv denied* 5 NY3d 883, *cert denied* 548 US 908), and the court did not err in prohibiting all counsel from making extrajudicial statements in violation of Rule 3.6 of the Rules of Professional Conduct as set forth in 22 NYCRR 1200.0 (a) and (b) (1) (*see e.g. People v Buttafuoco*, 158 Misc 2d 174, 180-181; *see generally Sheppard v Maxwell*, 384 US 333, 358-363).

The majority of defendant's contentions with respect to the elicitation of testimony regarding his nickname, i.e., Murder or Murder Matt, are not preserved for our review. Although defendant objected to the use of those nicknames, the court gave curative instructions and defendant failed to seek a mistrial or otherwise object to those instructions. Under those circumstances, "the curative instructions must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; *see People v Lane*, 106 AD3d 1478, 1480-1481, *lv denied* 21 NY3d 1043; *People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954). In any event, defendant's preserved and unpreserved contentions are without merit. Where, as here, "several of the People's witnesses knew defendant only by his nicknames, it was permissible for the People to elicit testimony regarding those nicknames at trial for identification purposes" (*People v Tolliver*, 93 AD3d 1150, 1150, *lv denied* 19 NY3d 968; *see People v Hoffler*, 41 AD3d 891, 892, *lv denied* 9 NY3d 962; *cf. People v Collier*, 114 AD3d 1136, 1137).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct during summation inasmuch as he failed to object to any of the challenged comments (*see People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078). In any event, although we agree with defendant that the prosecutor improperly commented that the "real Murder Matt" is the person who committed the shootings rather than the mild-mannered man depicted in the video recordings at the television studio or wearing glasses at trial (*see People v Webb*, 90 AD3d 1563, 1565, *amended on rearg* 92 AD3d 1268; *People v Lauderdale*, 295 AD2d 539, 540-541), we nevertheless conclude that such " 'improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Johnson*, 303 AD2d 967, 968, *lv denied* 100 NY2d 583). We further conclude that "any error with respect to the prosecutor's use of the nicknames is harmless inasmuch as the evidence of defendant's guilt was overwhelming and there was no significant probability that defendant would have been acquitted but for the alleged error, especially in light of the court's instruction to the jury" (*Tolliver*, 93 AD3d at 1151; *People v Santiago*, 255 AD2d 63, 66, *lv denied* 94 NY2d 829). The remaining instances of alleged prosecutorial misconduct on summation were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915).

Defendant further contends that his conviction is not supported by legally sufficient evidence because the evidence fails to establish that he was the person who committed the crimes, and fails to establish that the perpetrator acted with intent, as opposed to depraved indifference, in killing the victims. Defendant did not raise the latter point in his motion for a trial order of dismissal and thus failed to preserve it for our review (*see generally People v Hawkins*, 11 NY3d 484, 492-493). 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 establish defendant's identity and intent, and thus to support the conviction of

the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention that the People's witnesses were not credible, 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 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]), and we see no reason to disturb the jury's resolution of those issues.

We reject defendant's contention that he was denied effective assistance of counsel. With respect to defendant's assertion that his attorney deprived him of effective assistance of counsel by failing to make certain motions, it is well settled that counsel is not ineffective in failing to make a motion that has little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152; *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702), and the majority of defense counsel's alleged shortcomings here involved motions that had virtually no chance of success, or involved failures to object to instances of prosecutorial misconduct that would not warrant reversal (*see People v Goley*, 113 AD3d 1083, 1085). Defendant's contention that defense counsel took a position adverse to the position of defendant in his premature CPL article 440 motion is not supported by the record. In any event, after reviewing that contention and the remainder of defendant's allegations of ineffective assistance of counsel, we conclude that "the evidence, the law and the circumstances of [this] case, viewed together and as of the time of representation, reveal that meaningful representation was provided" (*People v Satterfield*, 66 NY2d 796, 798-799; *see generally People v Baldi*, 54 NY2d 137, 147).

The sentence is not unduly harsh or severe.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

955

KA 11-01128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRI ERRINGTON, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered February 22, 2011. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree (two counts), and sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of sexual abuse in the first degree (Penal Law § 130.65 [3]) and two counts of course of sexual conduct against a child in the first degree (§ 130.75 [1] [a], [b]), defendant contends that County Court should have dismissed counts one and two of the indictment on the ground that the time periods alleged therein were unreasonably broad, thereby depriving her of adequate notice of the charges against her. We reject that contention. Count one alleged that defendant engaged in a course of sexual conduct against a child between April 10, 1998 and April 9, 2003, a period of five years, when the victim was between 6 years old and 10 years old. Count two alleged that defendant engaged in a course of sexual conduct against that same child between April 10, 2003 and April 9, 2005, when the victim was 11 years old and 12 years old. Where, as here, the crime charged in the indictment is a continuing offense, "the usual requirements of specificity with respect to time do not apply" (*People v Green*, 17 AD3d 1076, 1077, *lv denied* 5 NY3d 789; *see People v Palmer*, 7 AD3d 472, 472, *lv denied* 3 NY3d 710), and time periods more broad than those alleged in the instant indictment have been deemed specific enough to satisfy the requirements of due process (*see People v Gross*, 79 AD3d 1652, 1652, *lv denied* 16 NY3d 895; *People v Devane*, 78 AD3d 1586, 1587, *lv denied* 16 NY3d 858; *People v Furlong*, 4 AD3d 839, 841, *lv denied* 2 NY3d 739; *People v Latouche*, 303 AD2d 246, 246, *lv denied*

100 NY2d 595). Considering that the charged crimes occurred when the victim was as young as 6 years old, and that the victim was 17 years old at the time of trial, we conclude that the time periods alleged in counts one and two were not "so excessive that, on its face, [they are] unreasonable and dismissal should follow" (*People v Morris*, 61 NY2d 290, 295; *see People v Keindl*, 68 NY2d 410, 421-422*, rearg denied* 69 NY2d 823).

To the extent that defendant contends that counts one and two of the indictment are facially duplicitous, she failed to preserve that contention for our review (*see People v Johnson*, 83 AD3d 1094, 1095, *lv denied* 17 NY3d 818; CPL 470.05 [2]). In any event, the contention lacks merit because the rule against duplicitous counts of an indictment "does not apply to continuing crimes, such as course of sexual conduct against a child and endangering the welfare of a child, which by their nature occur over a period of time" (*People v Dalton*, 27 AD3d 779, 781, *lv denied* 7 NY3d 754, *reconsideration denied* 7 NY3d 811; *see generally People v First Meridian Planning Corp.*, 86 NY2d 608, 615-616; *Keindl*, 68 NY2d at 417-418).

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we reject defendant's further contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim in the counts charging course of sexual conduct against a child testified that she was raped and sexually abused for many years by her father, defendant's husband, and that defendant at times participated in the abuse. According to the victim, defendant performed oral sex upon her at least twice over a period of time not less than three months in duration when she was between the ages of 6 years old and 10 years old, and at least twice more over a period of not less than three months when she was 11 years old and 12 years old. That testimony, accepted as true, establishes the elements of course of sexual conduct against a child in the first degree as charged under counts one and two of the indictment. Although it is true, as defendant points out, that the victim's testimony was quite general as to when the specific acts of abuse took place, we conclude that such is to be expected considering the age of the victim when she was abused. The victim's testimony presented "a credibility issue for the jury to resolve" (*People v Reynolds*, 81 AD3d 1166, 1167, *lv denied* 16 NY3d 898; *see People v Gathers*, 47 AD3d 959, 960-961, *lv denied* 10 NY3d 863), and it cannot be said that her testimony was incredible as a matter of law, i.e., " 'impossible of belief because it [was] manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Garafolo*, 44 AD2d 86, 88; *see People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). We note that defendant admitted to the police that she engaged in oral sexual conduct with the victim on five occasions. Although defendant asserted that she was forced to engage in such conduct by her husband, she never reported the abuse to the police, and the jury was free to reject her claim that she acted under duress.

We have reviewed defendant's remaining contentions and conclude that none warrants modification or reversal.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

963

KAH 13-01905

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
KEVIN L. THOMAS, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, ANDREA EVANS, CHAIRWOMAN, NEW YORK STATE BOARD OF PAROLE, SANDRA AMOIA, SUPERINTENDENT, GROVELAND CORRECTIONAL FACILITY, J. LAGEORIGA, SORC, GROVELAND CORRECTIONAL FACILITY AND R. UNDERWOOD, INMATE RECORDS COORDINATOR, GROVELAND CORRECTIONAL FACILITY, RESPONDENTS-APPELLANTS.

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

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered February 25, 2013 in a habeas corpus proceeding. The judgment directed respondents to release petitioner from custody.

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

Memorandum: Respondents appeal from a judgment granting the petition for a writ of habeas corpus on the ground that petitioner had served three years of unrevoked parole, thereby requiring New York State Department of Corrections and Community Supervision (DOCCS) to terminate his sentence (*see* Correction Law § 205 (4) [formerly Executive Law § 259-j (3-a)]). We agree with respondents that petitioner did not qualify for termination of his sentence, and we therefore reverse the judgment and dismiss the petition.

The record establishes that, in September 1999, petitioner was convicted of criminal possession of a controlled substance in the second degree in violation of Penal Law § 220.18 (1), a class A-II felony offense, and was sentenced to an indeterminate term of incarceration of eight years to life. Petitioner was released to

parole supervision on May 15, 2007, but in March 2010, he was charged with multiple parole violations. A final parole revocation hearing was held on May 18, 2010, during which petitioner pleaded guilty to a parole violation he had committed on January 22, 2010. The parole violation was sustained and petitioner's parole was revoked.

"Correction Law § 205 provides, in pertinent part, that DOCCS 'must grant termination of sentence after three years of unrevoked presumptive release or parole to a person serving an indeterminate sentence for a class A felony offense defined in [Penal Law article 220 or 221]' " (*Matter of Miller v New York State Dept. of Corr. & Community Supervision*, 105 AD3d 677, 677). Although petitioner's parole was not revoked until May 18, 2010, i.e., more than three years from the date of his release to parole supervision, "that revocation had the effect of interrupting his indeterminate sentence retroactively as of the date of his delinquency," which was January 22, 2010 (*id.*; *see* Penal Law § 70.40 [3] [a]). Thus, because petitioner's sentence was interrupted as of January 22, 2010 (*see* § 70.40 [3] [a]), he was not "serving an indeterminate sentence" on May 15, 2010, i.e., three years from the date he was released to parole supervision, as required by Correction Law § 205 (4), and he therefore was not entitled to termination of his sentence.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

966

CA 14-00369

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

CERBERUS PROPERTIES, LLC AND SCOTT BULLOCK,
PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

GARY KIRKMIRE, IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF INSPECTION AND COMPLIANCE SERVICES
OF CITY OF ROCHESTER AND CITY OF ROCHESTER,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

SANTIAGO BURGER ANNECHINO LLP, ROCHESTER (MICHAEL A. BURGER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-APPELLANTS.

T. ANDREW BROWN, CORPORATION COUNSEL, ROCHESTER (SARA L. VALENCIA OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 2, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The order denied the motion of petitioners-plaintiffs for attorney's fees.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Monroe County, to determine the amount of reasonable attorney's fees to be awarded pursuant to 42 USC § 1988.

Memorandum: Petitioners-plaintiffs (plaintiffs) appeal from an order denying their motion seeking an award of attorney's fees pursuant to 42 USC § 1988. Plaintiffs made the motion after prevailing in their hybrid CPLR article 78 proceeding/declaratory judgment action against respondents-defendants (defendants). In that proceeding/action, Supreme Court (Van Strydonck, J.) determined, inter alia, that the decision of defendant Gary Kirkmire—the director of inspection and compliance services for defendant City of Rochester (City)—"to suspend and remove [plaintiffs] from the approved list of certified lead inspectors was in violation of lawful procedure." Although the court did not award monetary damages to plaintiffs, it ordered that plaintiffs "be returned to the approved list of clearance examiners." Defendants did not appeal from the court's judgment, and plaintiffs thereafter moved for an award of attorney's fees. Owing to the impending retirement of the Supreme Court Justice who entertained the underlying action, the motion was transferred to another Supreme Court Justice (Odorisi, J.), who denied the motion because, in his

view, the case did "not involve a substantial constitutional federal question." We now reverse.

The governing statute, 42 USC § 1988 (b), provides that, "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ." "Although some courts have held, as did the court in this case, that the decision whether to grant an award is entirely discretionary . . . this is incorrect . . . [T]he prevailing party ordinarily should recover reasonable fees 'unless special circumstances would render such an award unjust' " (*Matter of Johnson v Blum*, 58 NY2d 454, 458, quoting *Newman v Piggie Park Enterprises*, 390 US 400, 402). Where, as here, "relief is sought on both State and Federal grounds, but nevertheless awarded on State grounds only," attorney's fees may be awarded if a constitutional question is involved and such question is "substantial and arises out of a common nucleus of operative facts as the State claim" (*Matter of Thomasel v Perales*, 78 NY2d 561, 568 [internal quotation marks omitted]; *see Matter of Giaquinto v Commissioner of N.Y. State Dept. of Health*, 11 NY3d 179, 191). "The threshold for establishing substantiality of a Federal claim is minimal: the claim must not be 'wholly insubstantial,' 'obviously frivolous' or 'obviously without merit' " (*Thomasel*, 78 NY2d at 569, quoting *Hagans v Lavine*, 415 US 528, 537-538).

Here, we agree with plaintiffs that they are entitled to an award of attorney's fees under 42 USC § 1988 (b). Their petition/complaint clearly alleged a federal constitutional claim under the Due Process Clause and 42 USC § 1983. Although the court did not reach the federal constitutional claim because it ruled for plaintiffs on state grounds, the claim was not " 'wholly insubstantial,' 'obviously frivolous' or 'obviously without merit' " (*Thomasel*, 78 NY2d at 569), inasmuch as the court concluded that defendants' removal of plaintiffs from the list of approved contractors was made in "violation of lawful procedure." Moreover, the federal constitutional claim arose "out of a common nucleus of operative fact as the State claim," and defendants did not assert or establish—nor did the court find—that "special circumstances" exist that would render an award of attorney's fees unjust.

We note that defendants' primary contention on appeal is that plaintiffs did not allege a viable due process claim because plaintiffs do not have a *liberty interest* in remaining on the list of City-approved contractors. Defendants rely on case law holding that "one must have no ability to practice one's profession at all in order to state a claim for deprivation of a liberty interest" (*Rodriquez v Margotta*, 71 F Supp 2d 289, 296, *affd* 225 F3d 646). Plaintiffs never asserted, however, that defendants' actions infringed upon their liberty interests. Instead, plaintiffs alleged, and established, a deprivation of their property rights inasmuch as plaintiffs were deprived of the opportunity to earn money by performing inspections in the City of Rochester, and defendants do not dispute that their actions deprived plaintiffs of property rights.

We thus conclude that the court abused its discretion in denying plaintiffs' motion seeking an award of attorney's fees, and we therefore reverse the order and remit the matter to Supreme Court for a determination of the reasonable value of such fees.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

968

CA 14-00264

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

IN THE MATTER OF M.L. CACCAMISE ELECTRIC CORP.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER AND POWER & CONSTRUCTION
GROUP, INC., RESPONDENTS-RESPONDENTS.

ERNSTROM & DRESTE, LLP, ROCHESTER (JOHN W. DRESTE OF COUNSEL), FOR PETITIONER-APPELLANT.

T. ANDREW BROWN, CORPORATION COUNSEL, ROCHESTER (JOHANNA BRENNAN OF COUNSEL), FOR RESPONDENT-RESPONDENT CITY OF ROCHESTER.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (KARL S. ESSLER OF COUNSEL), FOR RESPONDENT-RESPONDENT POWER & CONSTRUCTION GROUP, INC.

COUCH WHITE, LLP, ALBANY (JOEL M. HOWARD, III, OF COUNSEL), FOR ASSOCIATED GENERAL CONTRACTORS OF NEW YORK STATE, LLC, AMICUS CURIAE.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 13, 2014 in a CPLR article 78 proceeding. The judgment denied the petition and vacated a temporary restraining order.

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

Memorandum: Petitioner, an electrical contractor, submitted the low bid for a street lighting project, which required that certain lights owned by respondent City of Rochester (City) be separated and isolated from the Rochester Gas & Electric (RG&E) electrical and distribution system. After the City rejected petitioner's bid and awarded the contract to respondent Power & Construction Group, Inc. (Power), petitioner commenced this CPLR article 78 proceeding seeking a judgment "[a]nnulling . . . the award" of the contract to Power, and "[d]irecting the award" of the contract to petitioner "as the lowest responsive and responsible bidder." Supreme Court properly denied the petition.

Contrary to petitioner's contention, the City's rejection of petitioner's bid was not affected by an error of law, and was not arbitrary and capricious, or an abuse of discretion. Section 2.1.1 of the City's invitation to bid provided that the City's intent was "[t]o

obtain the services of an [RG&E] approved electrical utility contractor with the necessary expertise to isolate/separate the specified City owned Street Lighting facilities from the [RG&E] distribution network as directed by the City." Given the unique nature of the project—notably, the existence of an agreement between the City and RG&E, and the fact that any contractor who was hired for the project would be working on private RG&E property, facilities, and equipment—we conclude that the court properly determined that section 2.1.1 included a valid precondition that did not impede competition and that had a rational relationship to obtaining the best work at the lowest price (*see Matter of P & C Giampilis Constr. Corp. v Diamond*, 210 AD2d 64, 65-66; *see also Le Cesse Bros. Contr. v Town Bd. of Williamson*, 62 AD2d 28, 31, *affd* 46 NY2d 960; *Matter of B. Milligan Contr. v State of New York*, 251 AD2d 1084, 1084). In addition, the record is clear that petitioner's bid was "non-responsive to the specific requirements set forth in [section 2.1.1]" inasmuch as petitioner was not on RG&E's list of approved contractors and did not have the requisite training and experience to work with RG&E's distribution network (*P & C Giampilis Constr. Corp.*, 210 AD2d at 65).

We reject petitioner's further contention that the City's use of RG&E's list of approved contractors was essentially a pretext for the City to avoid its purported obligations under General Municipal Law § 103 (15) to consider certain factors in compiling a list of "qualified bidders." The City did not maintain a list of "qualified bidders," as that term is used in the statute, for its public works projects, and was under no obligation to do so (*id.*).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

970

CA 13-01004

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

JOHN A. MCINTOSH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GENESEE VALLEY LASER CENTRE AND HOLLY B. HAHN, M.D., DEFENDANTS-RESPONDENTS.

JOHN A. MCINTOSH, PLAINTIFF-APPELLANT PRO SE.

HIRSCH & TUBIOLO, P.C., ROCHESTER (BRYAN KORNFIELD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered February 22, 2013. The order granted the motion of defendants to dismiss the action.

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

Memorandum: Plaintiff appeals from an order granting defendants' motion to dismiss the action based on the failure of plaintiff to comply with their demand for service of a complaint pursuant to CPLR 3012 (b). We affirm. "To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR 3012 (b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a meritorious cause of action" (*Berges v Pfizer, Inc.*, 108 AD3d 1118, 1119 [internal quotation marks omitted]).

"It is generally within the sound discretion of [Supreme Court] to determine what constitutes a reasonable excuse for the delay in serving the complaint" (*Mitchell v Erie County Med. Ctr. Corp.*, 70 AD3d 1408, 1408-1409, *lv dismissed* 14 NY3d 881 [internal quotation marks omitted]; *see Kordasiewicz v BCC Prods., Inc.*, 26 AD3d 853, 854). Here, defendants served plaintiff with a demand for service of a complaint one week after plaintiff served defendants with a summons with notice. Upon plaintiff's failure to serve a complaint by the applicable deadline (*see* CPLR 3012 [b]; *see also* CPLR 2103 [b] [2]), defendants moved to dismiss the action pursuant to CPLR 3012 (b). We conclude that plaintiff failed to provide any reasonable excuse for the delay (*see generally Fasano v J.C. Penney Corp.*, 59 AD3d 1102, 1102). Plaintiff's contention that he served a complaint upon defendants' attorney by mail is unsubstantiated by the record, and plaintiff's reliance in his reply brief on purported conversations

between himself and defendants' attorney to support his contention that he served a complaint is improper inasmuch as such conversations are outside the record on appeal (*see Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1197). Plaintiff failed to establish at a court appearance that he filed or served a complaint, and his claims concerning such filing or service are belied by a subsequent letter in which he requested permission from the court to serve a late complaint upon defendants' attorney. Moreover, the record contains neither a copy of the alleged complaint nor proof of service (*cf. Dunlop v Saint Leo the Great R.C. Church*, 109 AD3d 1120, 1121, *lv denied* 22 NY3d 858). Plaintiff asserts in his reply brief that the record on appeal failed to include the "original complaint," which he alleges was attached to a second handwritten letter that he faxed to the court. Even assuming, arguendo, that plaintiff's assertion is accurate and properly before us, it is the obligation of the appellant to assemble a proper record on appeal (*see* 22 NYCRR 1000.4 [a]; *Mergl v Mergl*, 19 AD3d 1146, 1147; *see also* CPLR 5526). Plaintiff, the appellant herein," 'submitted this appeal on an incomplete record and must [therefore] suffer the consequences' " (*Polyfusion Electronics, Inc. v AirSep Corp.*, 30 AD3d 984, 985).

In any event, we conclude that plaintiff failed to establish a meritorious cause of action. "A meritorious cause of action may be established by way of 'an affidavit of merit containing evidentiary facts sufficient to establish a prima facie case' " (*Berges*, 108 AD3d at 1119, quoting *Kel Mgt. Corp. v Rogers & Wells*, 64 NY2d 904, 905; *see Tonello v Carborundum Co.*, 91 AD2d 1169, 1170, *affd* 59 NY2d 720, *rearg denied* 60 NY2d 587), or with a verified complaint (*see Berges*, 108 AD3d at 1119; *see also* CPLR 105 [u]; *A & J Concrete Corp. v Arker*, 54 NY2d 870, 872; *Kordasiewicz*, 26 AD3d at 855). Here, plaintiff submitted neither. Plaintiff's assertion in his reply brief that he recently obtained assurances that his action is meritorious from the doctor who diagnosed and treated his condition is not properly before us because those alleged assurances are outside the record on appeal and, in any event, do not constitute an affidavit of merit. "[P]laintiff['s] failure to demonstrate the merit of [the cause of action] in response to the CPLR 3012 (b) motion . . . compels the unconditional dismissal of [the] action" (*Kordasiewicz*, 26 AD3d at 855 [internal quotation marks omitted]), and it would have been reversible error for the court to hold otherwise (*see Kel Mgt. Corp.*, 64 NY2d at 905; *Fasano*, 59 AD3d at 1102).

Finally, to the extent plaintiff contends that the court erred in denying his request for an additional adjournment, we conclude that the court did not abuse or improvidently exercise its discretion (*see Pitts v City of Buffalo*, 19 AD3d 1030, 1030).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

971

CA 13-01845

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

JAMES W. JONES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, AMERICAN SITE DEVELOPERS LLC, MALCOLM PIRNIE, INC., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ANDREW CONNELLY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (L. DAMIEN COSTANZA OF COUNSEL), FOR DEFENDANT-RESPONDENT COUNTY OF ERIE.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (DESTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-RESPONDENT AMERICAN SITE DEVELOPERS LLC.

SUGARMAN LAW FIRM, LLP, BUFFALO (CARLTON K. BROWNELL, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT MALCOLM PIRNIE, INC.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered July 15, 2013 in a personal injury action. The order granted the motions of defendants County of Erie, American Site Developers LLC and Malcom Pirnie, Inc. for summary judgment dismissing the plaintiff's complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell out of a tree while trimming branches. The accident occurred on property owned by defendant County of Erie (County), which had hired defendant American Site Developers LLC (ASD) as a general contractor to clean up damage caused by a storm. Defendant Malcolm Pirnie, Inc. (MP) had been hired by the County to monitor the work, and plaintiff's employer was a subcontractor retained to trim damaged branches from trees. In his complaint, plaintiff asserted causes of action against the County, ASD and MP for common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Following discovery, the County, ASD and MP each moved separately for summary judgment dismissing the complaint as against it, and Supreme Court granted the motions. We affirm.

We reject plaintiff's contention that the court erred in

dismissing his common-law negligence and Labor Law § 200 causes of action. Labor Law § 200 codifies "the common-law duty of a landowner to provide workers with a reasonably safe place to work" (*Lombardi v Stout*, 80 NY2d 290, 294; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Jock v Fein*, 80 NY2d 965, 967), and it therefore encompasses the duty underlying plaintiff's negligence cause of action. A precondition to the duty under Labor Law § 200 " 'is that the party charged with that responsibility have the authority to control the activity bringing about the injury' " (*Comes*, 82 NY2d at 877, quoting *Russin v Picciano & Son*, 54 NY2d 311, 317). Thus, liability under Labor Law § 200 cannot be imposed on a defendant if "there is no evidence that [the] defendant exercised supervisory control or had any input into *how*" the plaintiff carried out the injury-producing work (*Comes*, 82 NY2d at 877 [emphasis added]).

Here, all three moving defendants met their initial burdens of establishing as a matter of law that they did not have supervisory control over plaintiff's work and did not have input into how he performed his work. In response, plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although the County had an employee who monitored plaintiff's work on the day in question, that employee did not control the manner and method of plaintiff's work; rather, her role was limited to making sure that plaintiff completed his work. Moreover, the County did not provide plaintiff with any of his equipment, which was provided by his employer. "Absent any evidence that [the County] gave anything more than general instructions as to what needed to be done, as opposed to how to do it, [the County] cannot be held liable under Labor Law § 200 or for common-law negligence" (*O'Sullivan v IDI Constr. Co., Inc.*, 28 AD3d 225, 226, *affd* 7 NY3d 805; *see Alonzo v Safe Harbors of the Hudson Housing Dev. Fund Co., Inc.*, 104 AD3d 446, 449). With respect to ASD and MP, plaintiff acknowledged during his deposition that he never took any instruction from employees of those two parties. In sum, we conclude that, because plaintiff's injuries arose from the "manner in which removal of the branch was . . . undertaken," and none of the moving defendants "had any input into how the branch was to be removed" (*Lombardi*, 80 NY2d at 294-295; *see Byrd v Roneker*, 90 AD3d 1648, 1650), the court properly dismissed the common-law negligence and section 200 causes of action as against each of them.

Finally, we reject plaintiff's contention that the County created the dangerous condition that caused his injuries. Plaintiff's contention is premised on the fact that a County employee informed him that he had to cut one remaining damaged branch if he wished to be paid for that tree. As the County points out, however, the dangers attendant to climbing the tree were inherent in the work itself and not created by the employee's directive (*see Gasper v Ford Motor Co.*, 13 NY2d 104, 110-111; *see also Vega v Restani Constr. Corp.*, 18 NY3d 499, 506; *Anderson v Bush Indus., Inc.*, 280 AD2d 949, 950).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

976

TP 14-00043

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

IN THE MATTER OF COUNTY OF ERIE, NAMED IN THE UNDERLYING MATTER AS ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS, RESPONDENT-PETITIONER, AND MARGARET PASCALE, RESPONDENT.

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

CAROL J. DOWNEY, GENERAL COUNSEL, BRONX (MICHAEL K. SWIRSKY OF COUNSEL), FOR RESPONDENT-PETITIONER.

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, Erie County [Henry J. Nowak, Jr., J.], entered January 6, 2014) to review a determination of respondent-petitioner. The determination, among other things, found that petitioner-respondent engaged in unlawful discrimination.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by reducing the award of compensatory damages for mental anguish and humiliation to $2,500 and as modified the determination is confirmed without costs, and the cross petition is granted in part and petitioner-respondent is directed to pay respondent the sum of $2,500 with interest at the rate of 9% per annum, commencing March 26, 2013, and to pay the State of New York a civil penalty in the amount of $5,000 at the rate of 9% per annum, commencing March 26, 2013 and petitioner-respondent is directed to maintain a desktop printer at the work station of respondent.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent-petitioner, New York State Division of Human Rights (Division), that it engaged in unlawful discrimination because it failed to provide a reasonable accommodation to respondent, Margaret Pascale. The Division awarded respondent that accommodation and damages and imposed a civil penalty of $5,000. It is undisputed that respondent's left leg was amputated below the knee as the result of complications from diabetes. It also is undisputed that petitioner

implemented a county-wide program for substantially reducing the number of desktop printers and instead, utilizing all-in-one printer systems to be shared by several employees. Although the common-use printer was in proximity to respondent's work station, she requested that she be provided with a desktop printer because she used the printer "constantly" and, with her prosthetic and "bad knees," "it is very tiring" and the use of the common printer "may cause added soreness to [her] situation." Respondent provided petitioner with its required medical certification from her physician, which stated that respondent's disability was a "diabetes caused amputation [prosthetic leg]." The form listed symptoms of the disability as, inter alia, "weak knees and chronic back pain," as well as several limitations that do not directly impact respondent's request. The form did not, however, specify a recommended accommodation. Petitioner determined that the accommodation was not necessary and denied respondent's request, following petitioner's review of respondent's work space and its proximity to the common printer, along with information obtained from respondent's medical provider.

Respondent filed a complaint with the Division, which determined after a hearing that respondent met her burden of establishing a prima facie case of discrimination based upon the denial of a reasonable accommodation, i.e., that she is a person with a disability, that petitioner had notice of it, that she could perform the essential functions of her job with a reasonable accommodation, and that petitioner refused to make such accommodation (*see Matter of Abram v New York State Div. of Human Rights*, 71 AD3d 1471, 1473). We reject petitioner's contention that the Administrative Law Judge (ALJ) erred in considering a letter from respondent's physician inasmuch as the record reflects that petitioner stipulated to the admission of that letter in evidence. Although we agree with petitioner that the ALJ erred in determining that it was required to obtain additional medical evidence when it determined that the medical support provided by respondent was insufficient (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 148, *lv denied* 7 NY3d 707), we nevertheless conclude that the Division's determination, that the failure to provide a desktop printer as a reasonable accommodation to respondent's disability constitutes discrimination, is supported by substantial evidence (*see generally Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499; *Matter of Noe v Kirkland*, 101 AD3d 1756, 1757). Here, although " 'the evidence is conflicting and room for choice exists[,]' " there is a rational basis for the determination and thus " 'the judicial function is exhausted' " (*Noe*, 101 AD3d at 1757).

We nevertheless agree with petitioner that the award of $10,000 in compensatory damages is not " 'supported by the evidence' " and does not compare with other awards for similar injuries (*Matter of City of Niagara Falls v New York State Div. of Human Rights*, 94 AD3d 1442, 1444; *see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 216). Respondent testified that she was "surprised," "angry" and "depressed" by the determination to refuse to restore a desktop printer to her work station and that she was required to utilize prescription pain medication approximately once or twice per week since using the common printer. We conclude that the

award should be reduced to $2,500 (*see generally Matter of KT's Junc., Inc. v New York State Div. of Human Rights*, 74 AD3d 1910, 1911), and we therefore modify the determination accordingly. We reject petitioner's further contention that the civil penalty of $5,000 is excessive. "[J]udicial review of an administrative penalty is limited to whether the measure or mode of penalty . . . constitutes an abuse of discretion as a matter of law . . . [A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854), and here, the penalty is not an abuse of discretion as a matter of law.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

977

KA 12-02072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERICK MALLORY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 17, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that Supreme Court erred in permitting the prosecutor to exercise peremptory challenges to exclude two black prospective jurors. We agree. Pursuant to *Batson* and its progeny, "the party claiming discriminatory use of peremptories must first make out a prima facie case of purposeful discrimination by showing that the facts and circumstances of the voir dire raise an inference that the other party excused one or more [prospective] jurors for an impermissible reason . . . Once a prima facie showing of discrimination is made, the nonmovant must come forward with a race-neutral explanation for each challenged peremptory—step two . . . The third step of the *Batson* inquiry requires the trial court to make an ultimate determination on the issue of discriminatory intent based on all of the facts and circumstances presented" (*People v Smocum*, 99 NY2d 418, 421-422; *see People v James*, 99 NY2d 264, 270-271).

As the People correctly concede, because the court asked the prosecutor to place his race-neutral reasons for challenging the two prospective jurors on the record, the sufficiency of defendant's prima facie showing under step one of the *Batson* analysis is moot (*see People v Hecker*, 15 NY3d 625, 652; *People v Baxter*, 108 AD3d 1158, 1159). With respect to step two of the analysis, we conclude that the People failed to meet their burden of setting forth a "race-neutral

reason" for striking the challenged prospective jurors (*Hecker*, 15 NY3d at 656; *see Batson v Kentucky*, 476 US 79, 98; *People v Duncan*, 177 AD2d 187, 193-195, *lv denied* 79 NY2d 1048). "A race-neutral reason naturally 'means an explanation based on something other than the race of the [prospective] juror' " (*Hecker*, 15 NY3d at 655, quoting *Hernandez v New York*, 500 US 352, 360), and must be "related to the particular case to be tried" (*Batson*, 476 US at 98; *see Duncan*, 177 AD2d at 193). Although the burden on the nonmoving party at this stage of the analysis is relatively minimal, "[a] prosecutor's explanation may not be sustained where discriminatory intent is inherent in the explanation" (*Splunge v Clark*, 960 F2d 705, 709; *see People v Allen*, 86 NY2d 101, 110).

Here, the People excluded the two prospective jurors at issue solely based upon their answers to a race-based question, i.e., whether they believed that police officers "unfairly target members of the minority community" (*see Splunge*, 960 F2d at 707-708; *Turnbull v State of Florida*, 959 So 2d 275, 276-277, *review denied* 969 So 2d 1015). Notably, that question was unrelated to the facts of this case, which does not involve any allegation of racial profiling (*see Batson*, 476 US at 98; *Turnbull*, 959 So 2d at 277; *see also People v Pierrot*, 289 AD2d 511, 512). We are unpersuaded by the People's assertion that the question was "designed to ensure that the jurors would not automatically accept or reject police testimony." "[T]here are many perfectly acceptable questions that attorneys may ask to determine the prospective jurors' feelings about police officers" (*Turnbull*, 959 So 2d at 277) and, here, both the court and the prosecutor asked numerous race-neutral questions intended to ensure that the prospective jurors would fairly assess the testimony of police witnesses. Moreover, the prosecutor directed the objectionable question only to the black prospective jurors and not to their white counterparts (*see Miller-El v Dretke*, 545 US 231, 261; *cf. United States ex rel. Flores v Page*, 1998 WL 42279, *8-9 [ND Ill]). Although the prosecutor initially addressed the question to the entire panel, he singled out the three black prospective jurors for individual questioning when no one responded to his group question. The prosecutor did not follow up with any of the white prospective jurors (*see Miller-El*, 545 US at 256, 261; *cf. United States v Steele*, 298 F3d 906, 913-914, *cert denied* 537 US 1096). In addition, the prosecutor explicitly referenced race in explaining his reasons for challenging one of the prospective jurors. The first prospective juror responded to the prosecutor's question by stating her belief that "[s]ometimes" police officers unfairly target minorities. The prosecutor told the court that the prospective juror was not "a suitable juror for this case" because "she believes that police sometimes single out minorities and I have Caucasian police officers that are going to be taking the stand."

Even assuming, arguendo, that the People's proffered explanation for excluding the two prospective jurors withstands scrutiny under step two of the *Batson* analysis, we conclude that defendant met his ultimate burden of establishing that the explanation was a pretext for racial discrimination (*see Batson*, 476 US at 98; *Hecker*, 15 NY3d at

634-635; *Allen*, 86 NY2d at 104). We therefore reverse the judgment of conviction and grant a new trial (*see People v Wilmot*, 34 AD3d 1225, 1226, *lv denied* 8 NY3d 886).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In view of our determination with respect to the *Batson* issue, we do not address defendant's remaining contentions.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

978

KA 08-00633

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH H. SMITH, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI 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 (Alex R. Renzi, J.), rendered December 19, 2007. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in refusing to charge assault in the third degree as a lesser included offense. Even assuming, arguendo, that defendant preserved for our review each of the grounds that he now advances on appeal in support of his contention (*see People v Feldhousen*, 103 AD3d 1114, 1115, *lv denied* 21 NY3d 912), we conclude that his contention lacks merit. Although assault in the third degree is a lesser included offense because "it is theoretically impossible to commit assault in the second degree under [Penal Law § 120.05 (2)] without at the same time committing assault in the third degree under [Penal Law § 120.00 (1)]" (*People v Fasano*, 107 AD2d 1052, 1052), there is no " 'reasonable view of the evidence . . . that would support a finding that he committed the lesser offense but not the greater' " (*People v Stanford*, 87 AD3d 1367, 1368, *lv denied* 18 NY3d 886, quoting *People v Glover*, 57 NY2d 61, 63; *see People v Roseborough*, 118 AD3d 1347, 1347).

Contrary to defendant's further contention, he was not denied effective assistance of counsel based on defense counsel's failure to facilitate defendant's testimony before the grand jury. It is well settled that such failure "does not, per se, amount to the denial of effective assistance of counsel" (*People v Simmons*, 10 NY3d 946, 949; *see People v Bibbes*, 98 AD3d 1267, 1270, *amended on rearg* 100 AD3d 1473, *lv denied* 20 NY3d 931), and defendant has failed to demonstrate

that defense counsel was ineffective based on that single failure (*see Bibbes*, 98 AD3d at 1270). Defendant failed to establish that he was prejudiced by defense counsel's failure; he has not demonstrated "what testimony he would have offered or what evidence he would have sought to admit that might lead one to conclude that having heard it, the grand jury would have arrived at a different decision" (*People v Sutton*, 43 AD3d 133, 136, *affd sub nom. Simmons*, 10 NY3d at 947 n 1) and, notably, he did not testify at trial (*see Bibbes*, 98 AD3d at 1270; *Sutton*, 43 AD3d at 136). We conclude on the record before us that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, to the extent that defendant alleges that his right to counsel was violated when he was arraigned on the felony complaint, we conclude that any "such error was cured upon the return of the indictment" (*People v Winch*, 50 AD2d 948, 948). "It is well settled that the finding of an indictment supersedes any prior proceedings in a local criminal court" (*id.*).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

979

KA 12-01370

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BLAIR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 18, 2012. The judgment convicted defendant, upon a jury verdict, of attempted murder in the first degree (two counts), burglary in the first degree and burglary in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [v], [vii]) and one count each of burglary in the first degree (§ 140.30 [3]) and burglary in the second degree (§ 140.25 [2]). The conviction arises out of defendant's participation, along with a codefendant, in two burglaries at the same residence, and the infliction of life-threatening injuries upon the burglary victim during the second burglary. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction. In addition, 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).

We reject defendant's contention that he was denied effective assistance of counsel based upon defense counsel's failure to object to testimony concerning hearsay statements of the nontestifying codefendant that implicated defendant in the attempted murder and second burglary. Under the circumstances of this case, the decision not to object to that testimony was consistent with a legitimate trial strategy (*see People v Benevento*, 91 NY2d 708, 712-713; *cf. People v Jeannot*, 59 AD3d 737, 737, *lv denied* 12 NY3d 916). We reject

defendant's further contention that he was denied effective assistance of counsel based upon defense counsel's failure to object to the prosecutor's alleged misconduct during summation. Even assuming, arguendo, that some of the prosecutor's comments were improper, we conclude that his conduct was not so egregious that it deprived defendant of a fair trial (*see People v Benton*, 106 AD3d 1451, 1452, *lv denied* 21 NY3d 1040), and thus the "failure to object to those comments does not constitute ineffective assistance of counsel" (*People v Nicholson*, 118 AD3d 1423, 1425).

We agree with defendant, however, that Supreme Court erred in permitting the prosecutor to impeach him with the statement that he made to State University police officers. That statement had been suppressed, and defendant did not open the door to its use for impeachment by giving testimony contrary to the statement during his direct examination (*see People v Zlochevsky*, 196 AD2d 701, 704, *lv denied* 82 NY2d 854). Nevertheless, we conclude that the error is harmless. The evidence against defendant is overwhelming, and there is no reasonable possibility that the jury would have acquitted defendant absent the error (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

We reject defendant's further contention that the court erred in refusing to suppress his statements to Buffalo police officers. The record of the *Huntley* hearing supports the court's determination that there was a sufficiently pronounced break between the custodial questioning of defendant by State University police in violation of his *Miranda* rights and his subsequent questioning by Buffalo police (*see People v Paulman*, 5 NY3d 122, 130-132). The hearing record also supports the court's determination that defendant's statements to Buffalo police officers were voluntarily made following a valid waiver by defendant of his *Miranda* rights (*see People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846).

We agree with defendant, however, that the court erred in failing to rule on those parts of his pretrial motion seeking inspection of the grand jury minutes and dismissal of the indictment on the grounds that the evidence before the grand jury was legally insufficient and the grand jury proceeding was defective (*see People v Jones*, 103 AD3d 1215, 1217, *lv dismissed* 21 NY3d 944; *People v Spratley*, 96 AD3d 1420, 1421). As the People correctly concede, the court's failure to rule on the motion cannot be deemed a denial thereof (*see People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to Supreme Court to decide those parts of defendant's motion.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

984

CAF 13-00754

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

IN THE MATTER OF TYLER W., MIKELLA T., JOHN S., III AND JADEN T.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

STACEY S., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

BARBARA L. WIDRIG, MAYVILLE, FOR PETITIONER-RESPONDENT.

SHERRY A. BJORK, ATTORNEY FOR THE CHILDREN, FREWSBURG.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered April 5, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the disposition and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Chautauqua County, for a new dispositional hearing.

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order finding that she neglected the subject children and placing the children in petitioner's custody. At the outset, we reject petitioner's contention that this appeal was rendered moot when the mother consented to a subsequent finding of neglect (*see Matter of Karm'Ny QQ. [Steven QQ.]*, 114 AD3d 1101, 1101-1102), inasmuch as "the finding of neglect constitutes a permanent and significant stigma that might indirectly affect the mother's status in future proceedings" (*Matter of Jamiar W. [Malipeng W.]*, 84 AD3d 1386, 1386-1387).

We reject the mother's contention that Family Court's finding of neglect was not supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). "Where, as here, issues of credibility are presented, the hearing court's findings must be accorded great deference" (*Matter of Todd D.*, 9 AD3d 462, 463). We reject the mother's further contention that reversal is required based on the court's admission of inadmissible hearsay, i.e., a hearsay statement

made by the mother's boyfriend. Any error in the admission of that statement is harmless because " 'the result reached herein would have been the same even had such [statement] been excluded' " (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061, *lv denied* 11 NY3d 707; *cf. Matter of Leon RR*, 48 NY2d 117, 121). At the fact-finding hearing, petitioner established that the physical, mental or emotional condition of the children was in imminent danger of becoming impaired, based on evidence that the mother frequently exposed the subject children to domestic violence, drug use, her own mental instability, and other unsafe conditions (*see* § 1012 [f] [i] [B]; *Matter of Afton C. [James C.]*, 17 NY3d 1, 9; *Matter of Jayden B. [Erica R.]*, 91 AD3d 1344, 1345; *Matter of Hailey W.*, 42 AD3d 943, 943-944, *lv denied* 9 NY3d 812).

We agree with the mother, however, that the court abused its discretion in denying her attorney's request to adjourn the dispositional hearing because the mother was unable to attend. While it is not an abuse of discretion for the court to deny a request for an adjournment where no reason for the parent's absence has been given (*see Matter of Evelyn R. [Franklin R.]*, 117 AD3d 957, 957-958), here, there was "good cause" to adjourn the hearing (*see* Family Ct Act § 1048 [a]). In addition, it appears from the record that the proceedings in this matter were not protracted, and that this was the mother's first request for an adjournment (*see Matter of Nicole J.*, 71 AD3d 1581, 1582). We therefore modify the order by vacating the disposition, and we remit the matter to Family Court for a new dispositional hearing. In light of our determination, we do not reach the mother's remaining contention.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

991

CA 13-02035

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

SEYMOUR MILES AND TANISHA MILES,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

BUFFALO STATE ALUMNI ASSOCIATION, INC.,
BUFFALO STATE COLLEGE FOUNDATION HOUSING
CORPORATION, LPCIMINELLI, INC., AND LPCIMINELLI
CONSTRUCTION CORP., DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (PATRICK J. HINES OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 27, 2013. The order, among other things, granted the cross motion of defendants for summary judgment dismissing the complaint in its entirety.

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Seymour Miles (plaintiff) at a construction site for a college dormitory. At the time of the injury, plaintiff and a coworker were in a dormitory room, unloading a double sheet of drywall from a wheeled cart. The remaining drywall on the cart moved and struck them, and the cart also toppled over and allegedly struck plaintiff, causing him to fall to the floor and injure his shoulder. We note at the outset that, although Supreme Court granted in its entirety defendants' cross motion for summary judgment dismissing the complaint, plaintiffs do not contend in their brief that the court erred in granting those parts of the cross motion with respect to the Labor Law § 200 and common-law negligence causes of action. We thus deem any issues with respect thereto abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We reject plaintiffs' contention that the court erred in granting that part of the cross motion with respect to Labor Law § 240 (1). At the time of the accident, plaintiff was standing on the ground, the drywall on the cart was not being hoisted or secured, and the cart was

not being hoisted or otherwise moved vertically (*see Davis v Wyeth Pharms., Inc.*, 86 AD3d 907, 909). We conclude that plaintiff's injuries were not the direct consequence of a failure to provide blocks or stays to protect against a risk arising from a physically significant elevation differential; here, the function of such devices would not have been to protect plaintiff from the effects of gravity (*see Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663; *Guallpa v Leon D. DeMatteis Constr. Corp.*, 117 AD3d 614, 615-616). In our view, defendants established as a matter of law "that the injuries resulted from a general hazard encountered at a construction site and were not 'the direct consequence of a failure to provide' an adequate device of the sort enumerated in Labor Law § 240 (1)" (*Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002, 1003, *lv denied* 20 NY3d 859), and plaintiffs failed to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562).

We likewise conclude that the court properly granted that part of the cross motion with respect to the Labor Law § 241 (6) cause of action because the sections of the Industrial Code upon which plaintiffs rely, i.e., sections 23-2.1 (a) (1) and 23-6.1 (j) (2), are inapplicable. "A plaintiff asserting a cause of action under Labor Law § 241 (6) must demonstrate a violation of a rule or regulation of the Industrial Code which gives a specific, positive command, and is applicable to the facts of the case" (*Rodriguez v D & S Bldrs., LLC*, 98 AD3d 957, 959). Here, defendants established as a matter of law that 12 NYCRR 23-2.1 (a) (1) is inapplicable because the drywall was in use rather than in storage (*see Zamajtys v Cholewa*, 84 AD3d 1360, 1362), and that it did not constitute a "[m]aterial pile" within the meaning of the regulation (*see Thompson v BFP 300 Madison II, LLC*, 95 AD3d 543, 543-544; *Castillo v Starrett City*, 4 AD3d 320, 321-322). In opposition, plaintiffs failed to raise a triable issue of fact (*see Grygo*, 96 AD3d at 1003). Finally, the court properly determined that 12 NYCRR 23-6.1, which sets forth the requirements for material hoisting equipment, is "not applicable in the circumstances of this case" (*Brechue v Town of Wheatfield*, 241 AD2d 935, 936, *lv denied* 94 NY2d 759).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

995

CA 13-02254

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

MIDFIRST BANK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GABRIEL B. STORTO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

FRENKEL LAMBERT WEISS WEISMAN & GORDON, LLP, BAY SHORE (MICHELLE MACCAGNANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 30, 2013. The order and judgment denied the motion of plaintiff for leave to reargue a prior motion to vacate an order and judgment of dismissal.

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

Memorandum: Although plaintiff has denominated the motion giving rise to the order and judgment on appeal as a motion to vacate the order and judgment of dismissal previously issued by Supreme Court, we conclude from the papers submitted in support of the motion that it was actually a motion for leave to reargue a prior motion to vacate the order and judgment of dismissal (*see Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252; *Cronin v Hudson Chelsea Assoc., LLC*, 68 AD3d 913, 913-914). "Although this second motion allegedly presented new legal arguments, no excuse was offered as to why these additional arguments could not have been presented in connection with [plaintiff's] earlier motion to vacate," the motion was in effect a motion for leave to reargue, and no appeal lies from an order denying such a motion (*Glowacki v Szatkowski*, 198 AD2d 264, 264-265). We therefore conclude that plaintiff's appeal must be dismissed (*see* CPLR 5701 [a] [2] [viii]; *Hilliard v Highland Hosp.*, 88 AD3d 1291, 1292-1293; *Cronin*, 68 AD3d at 914).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

999

KA 12-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARY SEGATOL-ISLAMI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered July 29, 2011. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting her upon a nonjury verdict of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). Contrary to defendant's contention, the evidence is legally sufficient to establish that she was the operator of her motor vehicle. A witness testified that he saw defendant drive her vehicle into a liquor store parking lot and park the vehicle, running over a parking block in the process. We reject defendant's contention that the testimony of that witness was incredible as a matter of law (*see People v Meacham*, 84 AD3d 1713, 1715, *lv denied* 17 NY3d 808), i.e., " 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Gaston*, 104 AD3d 1206, 1207, *lv denied* 22 NY3d 1156). Indeed, that witness's testimony was confirmed by the testimony of a police sergeant who observed the intoxicated defendant leaving the liquor store and approach her vehicle. Although the police sergeant testified that he never observed defendant operate her vehicle, he further testified that the parking block in front of her vehicle was displaced diagonally by 1 ½ to 2 feet, that there was no one else with her as she attempted to enter the driver's seat of her vehicle, and that she had a key to her vehicle in her purse.

While we agree with defendant that County Court erred in concluding that she could not waive her presence for the testimony of a potential witness (*see generally People v Parker*, 57 NY2d 136, 139-140; *People v Epps*, 37 NY2d 343, 349-351, *cert denied* 423 US 999;

People v Porter, 201 AD2d 881, 881-882, *lv denied* 83 NY2d 857), we conclude that the error had no impact on her decision to rest her case without calling that witness to testify. Defendant contends that the error prejudiced her because she chose to rest her case so that she could start an inpatient treatment program on the next day scheduled for trial. The court, however, informed defendant that it would not release her from jail until the trial was completed, and the proposed witness could not testify until the next trial date. We therefore conclude that defendant could not have entered the treatment program even if she was absent during her proposed witness's testimony.

Finally, we have reviewed defendant's challenge to the sentence of probation to be served after the indeterminate term of incarceration and conclude that it is without merit (*see generally* Vehicle and Traffic Law § 1193 [1] [c] [iii]; Penal Law § 60.21).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1000

KA 13-01450

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS J. SINCERBEAUX, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Dennis M. Kehoe, J.), dated May 6, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 30 points under risk factor 9 because his prior conviction of endangering the welfare of a child was nonsexual in nature. We reject that contention and conclude that " '[i]t was within the court's discretion to [classify defendant as a level three risk] . . . based upon clear and convincing evidence of the facts in support thereof' " (*People v Foster*, 13 AD3d 1117, 1118; *see People v Catchings*, 56 AD3d 1181, 1182, *lv denied* 12 NY3d 701; *People v Billingsley*, 6 AD3d 1170, 1170, *lv denied* 3 NY3d 605).

We reject defendant's further contention that the court erred in crediting the statements of the victim when assessing points under risk factor 1, for defendant's use of forcible compulsion, and risk factor 5, for the age of the victim. The People presented "reliable hearsay evidence, in the form of the victim's statement . . . ," that she was 13 years old when the sexual abuse began and that defendant had used forcible compulsion (*People v Wilson*, 117 AD3d 1557, 1558; *see People v Law*, 94 AD3d 1561, 1563, *lv denied* 19 NY3d 809). Furthermore, the victim's statement was corroborated by the statement of her sister, and we therefore conclude that the court did not err in resolving the credibility issue in favor of the People (*see People v Terrill*, 26 AD3d 846, 846-847, *lv denied* 7 NY3d 701). Finally, "[t]o the extent that defendant contends that the court improperly assessed

10 points pursuant to risk factor 1, for the use of violence, because forcible compulsion was not an element of the crime of which he was convicted, it is well settled that 'the court was not limited to considering only the crime of which . . . defendant was convicted in making its determination' " (*Wilson*, 117 AD3d at 1558).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1001

KA 12-01480

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS J. JOHNSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CAITLIN M. CONNELLY 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 Supreme Court, Erie County (John L. Michalski, A.J.), rendered May 22, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, reckless driving, and improper automobile equipment.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of criminal possession of a weapon in the third degree is dismissed and the judgment is otherwise affirmed.

Memorandum: On appeal from a judgment convicting him following a nonjury trial of, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [3]), defendant contends that Supreme Court erred in admitting DNA test results into evidence because there were gaps in the chain of custody of the gun from which the DNA was recovered. We reject that contention inasmuch as the People provided sufficient assurances of the identity and unchanged condition of the gun (*see People v Julian*, 41 NY2d 340, 342-343), and any alleged gaps in the chain of custody went to the weight of the evidence and not its admissibility (*see People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864).

We also reject defendant's contention that the People's evidence at trial impermissibly varied from the indictment and bill of particulars insofar as the People presented evidence of constructive possession of the weapon at issue. Where the People have "specified in the indictment and bill of particulars the manner in which defendant committed the crime, [they are] not free to present evidence at trial that virtually disprove[s] that theory and [to] substitute a different one" (*People v Johnson*, 227 AD2d 927, 928, *lv denied* 88 NY2d

1022, citing *People v Grega*, 72 NY2d 489, 498; *see also People v Gunther*, 67 AD3d 1477, 1478). Here, however, the People advanced only a "broad allegation" of possession prior to trial, one which did not commit them to proving any one theory of possession (*see People v Foley*, 210 AD2d 163, 163-164, *lv denied* 85 NY2d 861; *cf. Gunther*, 67 AD3d at 1477-1478). At trial, the People presented evidence supporting a theory of constructive possession, and we conclude that such evidence did not impermissibly vary from the bill of particulars, and that defendant was not hampered in his ability to prepare for trial (*see People v Charles*, 61 NY2d 321, 327).

Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction of the weapon charges. Additionally, viewing the evidence in light of the elements of those 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). Defendant's further contention that prosecutorial misconduct on summation deprived him of a fair trial is not preserved for our review, inasmuch as he failed to object to the allegedly inappropriate statements (*see People v James*, 114 AD3d 1202, 1206-1207, *lv denied* 22 NY3d 1199). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's contention that he was denied 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 generally People v Baldi*, 54 NY2d 137, 147).

All concur except FAHEY, J., who concurs in the result in the following Memorandum: I respectfully concur in the result reached by the majority, namely, the dismissal of the appeal from the judgment insofar as it imposed sentence on the conviction of criminal possession of a weapon in the third degree and the affirmance of the judgment. I write separately, however, to express my concerns with the prosecutor's mischaracterization on summation of the DNA evidence linking defendant to the weapon. Those concerns were fully addressed in another case recently before this Court involving a similar issue (*see People v Wright*, 115 AD3d 1257, 1258-1263 [Fahey and Carni, JJ., dissenting], *lv granted* 22 NY3d 1204). In the present case, the People's forensic expert testified in relevant part that her analysis established only that the DNA recovered from the weapon came from at least four individuals, and that defendant could not be excluded as a contributor to the DNA. In other words, the evidence placed defendant in a *class* of people that could have contributed to the DNA (*see id.* at 1262). The prosecutor nevertheless argued on summation that the DNA analysis *established* defendant as the DNA's contributor and that he therefore had possessed the weapon at issue. In my view, the prosecutor's mischaracterization of "evidence of class as evidence of exactitude" was improper (*id.*). I concur in the present case because, unlike *Wright*, the verdict is justified by evidence other than the results of DNA testing, and my review of the evidence establishes that

Supreme Court, as the trier of fact, would have reached the same result absent the prosecutor's misconduct (*cf. People v Mott*, 94 AD2d 415, 419; *see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1003

KA 11-00851

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEVELAND SESSONS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 12, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the period of postrelease supervision to a period of 1½ years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea to assault in the second degree (Penal Law § 120.05 [2]) and sentencing him to a three-year determinate term of imprisonment followed by a five-year term of postrelease supervision.

We conclude that the sentence is illegal insofar as it imposes a five-year period of postrelease supervision for a class D violent felony (*see* Penal Law §§ 70.02 [c]; 70.45 [2] [e]). "Although [that] issue was not raised before the [sentencing] court . . . , we cannot allow an [illegal] sentence to stand" (*People v Hughes*, 112 AD3d 1380, 1381 [internal quotation marks omitted]). We therefore modify the judgment by reducing the period of postrelease supervision to a period of 1½ years.

We have considered defendant's remaining contentions and conclude that they are moot in light of our determination (*see People v Swanson*, 43 AD3d 1331, 1332, *lv denied* 9 NY3d 1010).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1004

KA 13-01190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JARAD R. MATSULAVAGE, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered June 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the second degree (Penal Law § 130.45 [1]). Although defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256), that waiver does not encompass the denial of his request for youthful offender status because no mention of youthful offender status was made before defendant waived his right to appeal (*see People v Anderson*, 90 AD3d 1475, 1475-1476, *lv denied* 18 NY3d 991). We conclude, however, that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Frontuto*, 114 AD3d 1271, 1271, *lv denied* ___ NY3d ___ [July 21, 2014]; *People v Mix*, 111 AD3d 1417, 1418; *People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see Guppy*, 92 AD3d at 1243). Defendant's waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1005

KA 11-02047

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYRONE D. MANOR, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered April 30, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court abused its discretion in denying his motion to withdraw his guilty plea. "[A] court does not abuse its discretion in denying a motion to withdraw a guilty plea where the defendant's allegations in support of the motion are belied by the defendant's statements during the plea proceeding" (*People v Williams*, 103 AD3d 1128, 1128, *lv denied* 21 NY3d 915; *see People v Wolf*, 88 AD3d 1266, 1267, *lv denied* 18 NY3d 863; *People v McKoy*, 60 AD3d 1374, 1374, *lv denied* 12 NY3d 856; *People v Beaty*, 303 AD2d 965, 965, *lv denied* 100 NY2d 559). Here, defendant's claims that he was coerced by family members into pleading guilty, that he was intoxicated during the plea proceeding, and that he did not understand the nature of the plea or its consequences are belied by the record of the plea proceeding (*see People v Gast*, 114 AD3d 1270, 1271, *lv denied* 22 NY3d 1198; *Wolf*, 88 AD3d at 1267; *People v Thomas*, 72 AD3d 1483, 1484). Contrary to defendant's further contention, the court did not abuse its discretion in denying his motion without a hearing. The court "afforded defendant the requisite 'reasonable opportunity to present his contentions' in support of [his] motion . . . , and the court did not abuse its discretion in concluding that no further inquiry was necessary" (*People v Strasser*, 83 AD3d 1411, 1411, quoting *People v Tinsley*, 35 NY2d 926, 927; *see Wolf*, 88 AD3d at 1267-1268).

To the extent that defendant contends that his statements during the plea colloquy negated the intent element of the crime or raised a possible justification defense that required the court to conduct further inquiry, we reject that contention. "Although the initial statements of defendant during the factual allocution may have negated the essential element of his intent to cause death, his further statements removed any doubt regarding that intent" (*People v Trinidad*, 23 AD3d 1060, 1061, *lv denied* 6 NY3d 760; *see People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159). Furthermore, "nothing [defendant] said [during the plea colloquy] raised the possibility of a viable justification defense" (*People v Spickerman*, 307 AD2d 774, 775, *lv denied* 100 NY2d 624; *see People v Reyes*, 247 AD2d 639, 639, *lv denied* 92 NY2d 859).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant's contention "survives his guilty plea only to the extent that defendant contends that his plea was infected by the alleged ineffective assistance" (*People v Culver*, 94 AD3d 1427, 1427, *lv denied* 19 NY3d 1025 [internal quotation marks omitted]; *see People v Garner*, 86 AD3d 955, 956). Defendant's claim that he did not have ample time to discuss the plea offers with defense counsel is belied by his statement during the plea colloquy (*see Strasser*, 83 AD3d at 1411). To the extent that defendant contends that defense counsel failed to provide him with any advice regarding the plea offers, that contention is based upon matters outside the record and thus may be raised only by way of a motion pursuant to CPL article 440 (*see People v Gardner*, 101 AD3d 1634, 1635). On this record, we conclude that defendant received meaningful representation (*see generally People v Ford*, 86 NY2d 397, 404). Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1006

KA 12-02051

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHERISE C. WASHINGTON, ALSO KNOWN AS
CHERICE MORRIS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MICHAEL A. JONES, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered September 24, 2012. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the third degree (Penal Law § 140.20) and petit larceny (§ 155.25). Defendant contends that the delay following her initially scheduled sentencing date divested County Court of jurisdiction (*see* CPL 380.30 [1]; *People v Drake*, 61 NY2d 359, 366-367). Defendant failed to preserve her contention for our review inasmuch as she did not move to dismiss the indictment on that ground or otherwise object to the delay (*see People v Dissottle*, 68 AD3d 1542, 1543, *lv denied* 14 NY3d 799; *see also People v Diggs*, 98 AD3d 1255, 1256, *lv denied* 20 NY3d 986), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1008

CAF 13-00423

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

IN THE MATTER OF TALEEYA M.

CAYUGA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RANESHA S., RESPONDENT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR RESPONDENT-APPELLANT.

FREDERICK R. WESTPHAL, COUNTY ATTORNEY, AUBURN (DIANE K. DONNELLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered March 1, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her daughter on the ground of permanent neglect. The mother stipulated to the finding of permanent neglect, but we reject petitioner's contention that she thereby waived her right to appeal Family Court's determination terminating her parental rights (*cf. Matter of Edelyn S.*, 62 AD3d 713, 713; *see generally* Family Ct Act § 1112). In any event, the evidence supports the court's determination that termination of the mother's parental rights is in the best interests of the child (*see Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525). The mother's short-term progress in her service plan " 'was not sufficient to warrant any further prolongation of the child's unsettled familial status' " (*id.* at 1525).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1009

CAF 13-00284

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

IN THE MATTER OF LINDA VAN DYKE,
PETITIONER-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

TRACY COLE, RESPONDENT-RESPONDENT-APPELLANT,
AND SERIE COLE, RESPONDENT-RESPONDENT.

IN THE MATTER OF SERIE COLE,
PETITIONER-RESPONDENT,

V

TRACY COLE, RESPONDENT-RESPONDENT-APPELLANT,
AND LINDA VAN DYKE,
RESPONDENT-APPELLANT-RESPONDENT.

IN THE MATTER OF TRACY COLE,
PETITIONER-RESPONDENT-APPELLANT,

V

LINDA M. VAN DYKE,
RESPONDENT-APPELLANT-RESPONDENT,
AND SERIE COLE, RESPONDENT-RESPONDENT.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-APPELLANT-RESPONDENT AND RESPONDENT-APPELLANT-RESPONDENT.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (LYLE T. HAJDU OF COUNSEL), FOR RESPONDENT-RESPONDENT-APPELLANT AND PETITIONER-RESPONDENT-APPELLANT TRACY COLE.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT SERIE COLE.

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

Appeals from an order of the Family Court, Cattaraugus County (Judith E. Samber, R.), entered January 2, 2013 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted Linda Van Dyke and Serie Cole joint custody of the subject child and designated Serie Cole as the primary residential parent.

It is hereby ORDERED that said appeal taken by Tracy Cole is unanimously dismissed, the appeal taken by Linda Van Dyke insofar as it concerns primary residential custody and visitation is dismissed, and the order is otherwise affirmed without costs.

Memorandum: In February 2009, petitioners Linda Van Dyke (mother), Tracy Cole (father), and Serie Cole, the father's wife, stipulated to an order granting Cole custody of the mother's and the father's child, with unsupervised visitation to the mother. The order provided that the mother or the father could petition for custody of the child once the child was discharged from out-of-home treatment. In late 2009 and early 2010, the mother and the father filed petitions seeking custody of the child, while Cole filed a petition seeking an order requiring visitation between the mother and the child to be supervised. After a trial, Family Court entered an order granting joint custody of the child to Cole and the mother, designating Cole as the primary residential parent, and granting the mother unsupervised visitation, and the mother and the father now appeal from that order. We note, however, that an order was subsequently entered upon stipulation of the parties regarding custody and visitation of the child.

We reject the contention of the Attorney for the Child that the mother's appeal in its entirety is moot because a subsequent order was entered in this case. The mother contends, inter alia, that the court erred in finding extraordinary circumstances warranting consideration of the best interests of the child. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of 'surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances' " (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981, quoting *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544). Once a court makes a finding that extraordinary circumstances exist, that issue cannot be revisited in a subsequent proceeding seeking to modify custody (*see Matter of Guinta v Doxtator*, 20 AD3d 47, 48, 51) and, thus, such a finding may have "enduring consequences" for the parties (*Matter of New York State Commn. on Judicial Conduct v Rubenstein*, 23 NY3d 570, ___). We therefore conclude that the mother's challenge to the court's determination with respect to extraordinary circumstances is not moot.

We conclude that the court properly determined that Cole met her burden of establishing the existence of extraordinary circumstances warranting consideration of the best interests of the child (*see Gary G.*, 248 AD2d at 981). The mother continually demonstrated an inability or unwillingness to place the child's best interests above that of the mother's husband, who had various mental health issues and refused treatment and medication. The mother testified that she saw no reason to restrict her husband's access to the child, and continually ignored court orders prohibiting her husband from having contact with the child. Based on the mother's inability to provide a safe home environment for the child, we conclude that the court's finding of extraordinary circumstances was proper.

The mother's appeal insofar as she contends that the court erred in designating Cole as the primary residential parent, and the father's appeal in which he contends that the court erred in granting the mother unsupervised visitation with the child, are moot (*see Matter of Morgia v Horning*, 119 AD3d 1355, ___).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1010

CAF 13-00504

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

IN THE MATTER OF LYLLY M.G., MARY L.G. AND JOSEPH R.G.

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

CHRISTINA T., RESPONDENT, AND THEODORE T., RESPONDENT-APPELLANT.

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

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

FRANCIS I. WALTER, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered March 4, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Theodore T. had abused one of the subject children and derivatively neglected the other two subject children.

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

Memorandum: Respondent stepfather appeals from an order of fact-finding and disposition determining that he sexually abused his stepdaughter and derivatively neglected his other stepchildren. We reject the contention of the stepfather that Family Court abused its discretion in excluding him from the courtroom during his stepdaughter's testimony. Although the court did not have before it an affidavit attesting to the harm the stepdaughter could suffer if she were compelled to testify in open court, the court stated that it had considered various factors, including: the stepdaughter's age; the serious nature of the allegations; the fact that the stepdaughter had previously testified in camera at the stepfather's criminal trial; the undisputed fact that the stepdaughter was seeing a therapist; the fact that the stepfather did not controvert the point that it would be in the stepdaughter's psychological best interest to have her testimony conducted in camera; and the fact that the stepfather's interests would be safeguarded by his counsel's presence and ability to cross-examine the stepdaughter (*see generally Matter of Ian H.*, 42

AD3d 701, 703, *lv denied* 9 NY3d 814). Under the circumstances, the court properly balanced the respective interests of the parties and reasonably concluded that the stepdaughter would suffer emotional trauma if compelled to testify in the stepfather's presence (*see Matter of Donna K.*, 132 AD2d 1004, 1004-1005; *see generally Matter of Alesha P. [Audrey B.–Michael B.]*, 110 AD3d 1461, 1461; *Matter of Lynelle W.*, 177 AD2d 1008, 1009; *cf. Matter of Robert U.*, 283 AD2d 689, 690-691). Moreover, inasmuch as "[the stepfather's] counsel was permitted to be present while the child testified and . . . was also given the right to cross-examine her," the stepfather's constitutional rights were not violated by his exclusion from the courtroom (*Donna K.*, 132 AD2d at 1005; *see Matter of Kyanna T. [Winston R.]*, 99 AD3d 1011, 1014, *lv denied* 20 NY3d 856).

Contrary to the stepfather's further contention, the court's finding of sexual abuse is supported by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). " 'A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490, *lv denied* 17 NY3d 708; *see* § 1046 [a] [vi]). Courts have " 'considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse' " (*Nicholas J.R.*, 83 AD3d at 1490). Here, the out-of-court statements of the stepdaughter were sufficiently corroborated by her sworn in camera testimony describing the incidents of sexual abuse by the stepfather (*see Matter of Aaliyah B. [Clarence B.]*, 68 AD3d 1483, 1484; *Matter of Heather S.*, 19 AD3d 606, 608; *see generally Matter of Christina F.*, 74 NY2d 532, 535-537). Furthermore, "[a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] . . . sexual conduct enhances the reliability of those out-of-court statements" (*Nicholas J.R.*, 83 AD3d at 1490-1491 [internal quotation marks omitted]). We note that the stepfather denied that he abused the stepdaughter, but his "denial of the[ ] allegations, along with other contrary evidence, merely presented a credibility issue for [the court] to resolve" (*Matter of Zachary Y.*, 287 AD2d 811, 814). "We accord great weight and deference to [the court]'s determinations, 'including its drawing of inferences and assessment of credibility,' and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862; *see Matter of Peter C.*, 278 AD2d 911, 911).

Finally, we reject the contention of the stepfather that the court erred in determining that he derivatively neglected his other stepchildren. "The record supports the determination of the court that the [stepfather]'s sexual abuse of the [stepdaughter] demonstrated fundamental flaws in [his] understanding of the duties of parenthood and warranted a finding of derivative neglect with respect to the [other stepchildren]" (*Matter of Leeann S. [Michael S.]*, 94

AD3d 1455, 1455 [internal quotation marks omitted]; *see Matter of Michelle M.*, 52 AD3d 1284, 1284).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1013

CA 14-00099

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

MAISHA JACKSON, AS PARENT AND NATURAL GUARDIAN OF KIAYRA JUNE, AN INFANT UNDER THE AGE OF EIGHTEEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HELENA VATTER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF HAROLD VATTER, DECEASED, DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

SCHNITTER CICCARELLI MILLS PLLC, EAST AMHERST (PATRICIA S. CICCARELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (ZACHARY J. WOODS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered May 7, 2013 in a personal injury action. The order denied the motion for summary judgment brought by defendant Helena Vatter, individually and as administratrix of the Estate of Harold Vatter.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries allegedly sustained by her infant child as a result of the child's exposure to hazardous lead paint conditions on certain properties in Rochester, New York, including property owned by Helena Vatter (defendant) and her deceased husband. We conclude that Supreme Court properly denied defendant's motion for summary judgment. Although defendant established as a matter of law that she lacked actual notice of any hazardous lead paint condition on the property she owned, we conclude that there is a triable issue of fact whether she had constructive notice of such a hazard.

In the absence of proof that an out-of-possession landlord had actual notice of the existence of a hazardous lead paint condition, a plaintiff can establish that the landlord had constructive notice of such condition by showing that the landlord: "(1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the

premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*Chapman v Silber*, 97 NY2d 9, 15).

We note that defendant appears to have conceded before the motion court the second *Chapman* factor, i.e., that the house at issue was constructed at a time before lead-based interior paint was banned. We further note that defendant's contention concerning the first *Chapman* factor was not properly before the motion court inasmuch as defendant raised that contention for the first time in her reply submissions (*see Korthas v U.S. Foodservice, Inc.*, 61 AD3d 1407, 1408; *Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188). The only factors at issue on appeal, therefore, concern the third, fourth, and fifth factors. Even assuming, arguendo, that defendant met her initial burden of establishing as a matter of law that she lacked constructive notice of a lead paint hazard at the premises, we conclude that plaintiff raised issues of fact with respect to those three factors (*see generally Zuckerman v City of New York*, 45 NY2d 557, 562). Specifically, with respect to the third and fifth factors, plaintiff submitted evidence from which it may be inferred that defendant knew that paint was peeling on the premises and that a young child resided there (*see Jackson v Brown*, 26 AD3d 804, 805). With respect to the fourth factor, we conclude that plaintiff also raised an issue of fact whether defendant knew of the hazards of lead-based paint to young children (*see id.*). Notably, plaintiff submitted evidence establishing that defendant subscribed to local Rochester newspapers, and that those newspapers had carried a number of articles about the hazards of lead-based paint to young children. Inasmuch as defendant failed to eliminate all triable issues of fact with respect to the five *Chapman* factors, we conclude that the court properly denied the motion (*see McDonald v Farina*, 119 AD3d 1432, 1433; *see generally Heyward v Shanne*, 114 AD3d 1212, 1214).

Defendant's remaining contentions are not properly before us inasmuch as they were either raised for the first time in reply submissions before the motion court or are raised for the first time on appeal (*see Korthas*, 61 AD3d at 1408; *Drisdom v Niagara Falls Mem. Med. Ctr.*, 53 AD3d 1142, 1143).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1014

CA 14-00184

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

TREVOR JOHNSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ALEXA L. MURPHY AND CORRINE E. MURPHY,
DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DANIEL P. FLETCHER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered April 15, 2013. The order granted the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff to compel certain disclosure.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his bicycle collided with a motor vehicle driven by Corrine E. Murphy (defendant). Supreme Court properly granted defendants' motion for summary judgment seeking dismissal of the complaint. Defendants established that plaintiff rode his bicycle from his driveway into the road without stopping, despite the fact that his view of oncoming traffic to his left was obstructed by a commercial truck parked next to his driveway. Defendants further established that defendant, who had the right-of-way, was traveling below the speed limit and did not see plaintiff until plaintiff collided with the passenger side of her vehicle, thus giving her no time to react. Defendants therefore established that plaintiff was the sole proximate cause of the accident, and plaintiff failed to raise a triable issue of fact (*see George v Cerat*, 118 AD3d 1475, 1476; *Rosa v Scheiber*, 89 AD3d 827, 828; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

The court also properly denied plaintiff's cross motion seeking to compel defendants to provide discovery responses and for defendant "to appear at second party depositions." As a preliminary matter, we note that although the cross motion was untimely, the court properly considered it to the extent that plaintiff argued that discovery was needed to oppose the motion (*see* CPLR 3212 [f]; *see generally Guallpa*

v Leon D. DeMatteis Constr. Corp., 117 AD3d 614, 616-617; *Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702; *Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320, 321). In any event, the information sought by plaintiff at a further deposition of defendant, such as statements given by defendant to her insurance carrier, was privileged (*see Beaumont v Smyth*, 306 AD2d 921, 922; *Recant v Harwood*, 222 AD2d 372, 373-374; *Sofio v Hughes*, 148 AD2d 439, 440; *Matter of Weaver v Waterville Knitting Mills*, 78 AD2d 574, 574-575). Furthermore, plaintiff failed to establish that the documents and photographs he sought were "essential to justify opposition" to the motion (CPLR 3212 [f]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1016

CA 14-00102

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

LENAPE RESOURCES, INC.,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF AVON, TOWN OF AVON TOWN BOARD AND
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, RESPONDENTS-DEFENDANTS-RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered March 20, 2013 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment, insofar as appealed from, granted the converted motion of respondents-defendants Town of Avon and Town of Avon Town Board for summary judgment and dismissed the petition/complaint as against them.

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

Memorandum: In this combined CPLR article 78 proceeding/declaratory judgment action, petitioner-plaintiff (petitioner) challenged Town of Avon Local Law No. T-A-5-2012, insofar as it imposed a one-year moratorium on certain natural gas and petroleum extraction, exploration, and production activities within the Town of Avon. Inasmuch as the moratorium has expired pursuant to the terms of the local law, the appeal is moot and must be dismissed (*see Matter of New York Inst. of Tech. v Columbo*, 138 AD2d 489, 489-490). We reject petitioner's contention that the issues raised on appeal fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715). The substantive issues raised by petitioner were decided by the Court of Appeals in *Matter of Wallach v Town of Dryden* (23 NY3d 728), and thus this appeal does not raise "significant or important questions not previously passed on, i.e., substantial and novel issues," that would qualify as exceptions to the mootness doctrine (*Hearst Corp.*, 50 NY2d

at 715; *see People ex rel. Lynch v Poole*, 57 AD3d 1490, 1491).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1018

CA 13-02029

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

DANIEL E. BRICK, AS TRUSTEE IN BANKRUPTCY FOR DEBORAH L. HUFF AND LEWIS R. HUFF, JR., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF NIAGARA FALLS, DEFENDANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (DIANE TIVERON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CRAIG H. JOHNSON, CORPORATION COUNSEL, NIAGARA FALLS (DOUGLAS A. JANESE, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 11, 2013. The order, among other things, granted defendant's motion for summary judgment.

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

Memorandum: Deborah L. Huff and Lewis R. Huff, Jr. commenced this action to recover damages for injuries sustained by Deborah in a motor vehicle accident on one of defendant's roads. The complaint alleged that the injuries were caused by the negligence of defendant inasmuch as defendant failed to, inter alia, remedy the accumulation of snow and ice on the road. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Defendant met its initial burden on the motion by establishing as a matter of law that it did not receive prior written notice of a dangerous or defective condition, and the burden shifted to plaintiff to demonstrate the applicability of an exception to that requirement, i.e., as relevant herein, that defendant "affirmatively created" the dangerous or defective condition through an act of negligence (*Yarborough v City of New York*, 10 NY3d 726, 728; *see Pulver v City of Fulton Dept. of Pub. Works*, 113 AD3d 1066, 1066-1067). We conclude that plaintiff failed to meet his burden (*see Agrusa v Town of Liberty*, 291 AD2d 620, 621; *Gorman v Ravesi*, 256 AD2d 1134, 1135; *cf. San Marco v Village/Town of Mount Kisco*, 16 NY3d 111, 118, *rearg denied* 16 NY3d 796; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject plaintiff's further contention that it was impossible for the Huffs to comply with the prior written notice provision set forth in defendant's City Charter (*see San Marco*, 16

NY3d at 116).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1022

KA 13-00202

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO MCGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 9, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that he did not validly waive his right to appeal, and he also challenges the severity of the sentence. We agree with defendant that his waiver of the right to appeal is not valid because Supreme Court made only a minimal inquiry that was "insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see also People v Lopez*, 6 NY3d 248, 256). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1025

KA 10-02111

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELTON MANO, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO (KELLEY PROVO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered October 7, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, the superior court information is dismissed and the matter is remitted to Livingston County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance (CPCS) in the second degree (Penal Law § 220.18 [3]). After a deputy sheriff found cocaine, benzylpiperazine and hydrocodone in defendant's vehicle during a traffic stop, defendant was charged by felony complaint with two counts of CPCS in the third degree and was indicted for, inter alia, one count of CPCS in the third degree and two counts of CPCS in the fifth degree. After indictment, the prosecution announced that it intended to charge defendant with one count of CPCS in the second degree in relation to the same incident. Defendant waived indictment and agreed to be prosecuted by a superior court information (SCI) with one count of CPCS in the second degree. County Court denied defendant's motion to suppress evidence, and the court subsequently accepted defendant's guilty plea to CPCS in the second degree in satisfaction of the indictment and the SCI.

Defendant contends that the court erred in refusing to suppress, inter alia, the drugs seized by a deputy sheriff from his vehicle. We reject that contention. The record at the suppression hearing establishes that the deputy sheriff lawfully stopped defendant's vehicle for a traffic infraction (*see People v Collins*, 105 AD3d 1378, 1379, *lv denied* 21 NY3d 1003) and that the deputy sheriff was

justified in asking for defendant's consent to search the vehicle inasmuch as he "had a founded suspicion that criminal activity was afoot" (*People v McGinnis*, 83 AD3d 1594, 1595, *lv denied* 18 NY3d 926; *see People v McCarley*, 55 AD3d 1396, 1397, *lv denied* 11 NY3d 899). The record further establishes that defendant voluntarily consented to the search of the vehicle, and " '[t]hat search properly encompassed containers within the vehicle' . . . , including the [cannister] in which the drugs were found" (*People v Lowe*, 79 AD3d 1676, 1677, *lv denied* 16 NY3d 833).

Nevertheless, as the People correctly concede, the SCI is jurisdictionally defective, and we therefore reverse the judgment of conviction. The record establishes that, at the time defendant waived indictment and consented to be prosecuted by an SCI, he had already been indicted on other charges in relation to the same incident. "Given the objective and the plain language of CPL 195.10 (2) (b), the conclusion is inescapable that waiver cannot be accomplished after indictment" (*People v Boston*, 75 NY2d 585, 589; *see People v Spencer*, 87 AD3d 1284, 1286). Furthermore, the SCI charging defendant with CPCS in the second degree is also jurisdictionally defective pursuant to CPL 195.20 because defendant "was not held for action of a grand jury on that charge inasmuch as 'it was not an offense charged in the felony complaint or a lesser-included offense of an offense charged in the felony complaint' " (*People v Cieslewicz*, 45 AD3d 1344, 1345; *see People v Pierce*, 14 NY3d 564, 571).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1027

KA 13-01496

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. TRATHEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Wyoming County Court (Mark H. Dadd, J.), rendered July 11, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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 driving while intoxicated (Vehicle and Traffic Law § 1192 [3]), defendant contends that his plea was not knowing, voluntary and intelligent because County Court failed specifically to advise him that, upon his guilty plea, his driver's license would be revoked for a period of one year. Although defendant's contention survives his waiver of the right to appeal (*see People v Robinson*, 112 AD3d 1349, 1349, *lv denied* ___ NY3d ___ [July 21, 2014]; *People v Rossborough*, 101 AD3d 1775, 1776), it is not preserved for our review because defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see Rossborough*, 101 AD3d at 1776; *People v Newman* [appeal No. 1], 231 AD2d 875, 875, *lv denied* 89 NY2d 944). In any event, defendant's contention is without merit. Although a court must explain the direct consequences of a guilty plea, the court "has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions" (*People v Catu*, 4 NY3d 242, 244; *see generally People v Jones*, 118 AD3d 1360, 1361). The Court of Appeals has expressly stated that the "loss of a driver's license" is a collateral consequence of a conviction (*People v Ford*, 86 NY2d 397, 403), and we have accordingly held that a "court's failure to disclose that consequence during the plea colloquy does not warrant vacatur of the plea" (*People v Gerald*, 103 AD3d 1249, 1250). Here, the record establishes that defendant was in fact informed that, as a consequence of his guilty plea, his license would be revoked. Inasmuch as the court was not "obligat[ed] to explain . . . [even] that collateral consequence[]" (*Catu*, 4 NY3d

at 244), we reject defendant's contention that the court was obligated to advise him that the revocation period would be exactly one year. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1028

CAF 13-02021

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

IN THE MATTER OF SHANNON F.,
RESPONDENT-APPELLANT.

ONONDAGA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEMORANDUM AND ORDER

SUSAN B. MARRIS, ATTORNEY FOR THE CHILD, MANLIUS, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered October 29, 2013 in a proceeding pursuant to Family Court Act article 3. The order adjudged that respondent is a juvenile delinquent and placed him on probation.

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

Memorandum: Respondent appeals from an order of disposition adjudicating him a juvenile delinquent based on the finding that he had committed acts that, if committed by an adult, would constitute the crimes of forcible touching (Penal Law § 130.52) and endangering the welfare of a child (§ 260.10). Even assuming, arguendo, that respondent preserved for our review his contention that the evidence is legally insufficient to establish that he committed those acts by arguing that the victim's testimony was inconsistent with that of the eyewitness, we reject that contention. Viewing the evidence in the light most favorable to the presentment agency, we conclude that the evidence is legally sufficient to establish that respondent committed acts that, if he were an adult, would constitute the crimes of forcible touching (*see People v Bartlett*, 89 AD3d 1453, 1454, *lv denied* 18 NY3d 881) and endangering the welfare of a child (*see generally People v Sanderson*, 68 AD3d 1716, 1717, *lv denied* 14 NY3d 844; *People v Russell*, 50 AD3d 1569, 1569, *lv denied* 10 NY3d 939). Moreover, upon the exercise of our independent power of factual review, we are satisfied that Family Court properly credited the testimony of the two principal witnesses and that its findings are not against the weight of the evidence (*see generally Matter of Anthony S.*, 305 AD2d 689, 690). "[R]esolution of issues of credibility, as well as the weight to be accorded the evidence presented, are primarily questions to be determined by the finder of fact, which saw and heard the witnesses" (*Matter of Stephen C.*, 28 AD3d 656, 656; *see*

Matter of Kayla C. [appeal No. 1], 35 AD3d 1187, 1187).

Respondent failed to preserve for our review his contention that the court's actions, including, inter alia, its extensive participation in the questioning of witnesses, deprived him of a fair trial (*see People v Charleston*, 56 NY2d 886, 887-888; *Matter of Aron B.*, 46 AD3d 1431, 1431). In any event, that contention is without merit (*cf. People v Yut Wai Tom*, 53 NY2d 44, 57-58). Respondent also failed to preserve for our review his contention that he is entitled to a new hearing or dismissal of the petition because the appearance ticket did not conform to Family Court Act § 307.1 (1). We decline to exercise our power to review that contention in the interest of justice (*see Matter of George N.B.*, 57 AD3d 1456, 1456-1457, *lv denied* 12 NY3d 706).

We reject the contention of respondent that he was denied effective assistance of counsel. "[T]he record establishes that, viewed in the totality of the proceedings, [respondent] received meaningful representation" (*Matter of Jeffrey V.*, 82 NY2d 121, 126; *see George N.B.*, 57 AD3d at 1457).

We reject the further contention of respondent that the court failed to consider the least restrictive available alternative in placing him on probation (*see* Family Ct Act § 352.2 [2] [a]). "The court has broad discretion in determining the appropriate disposition in juvenile delinquency cases" (*Matter of Richard W.*, 13 AD3d 1063, 1064). Contrary to respondent's contention, "the record establishes that the disposition ordered by the court is 'the least restrictive available alternative . . . which is consistent with the needs and best interests of the respondent and the need for protection of the community' " (*Matter of Brendon H.*, 43 AD3d 1283, 1284, quoting § 352.2 [2] [a]).

We have considered respondent's remaining contentions, and we conclude that they are without merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1029

CAF 13-01545

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

IN THE MATTER OF STAR C.

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

BRONSON T., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered August 12, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent and transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to his daughter on the ground of mental illness. We conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the father is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188; *Matter of Alberto C. [Tibet H.]*, 96 AD3d 1487, 1488, *lv denied* 19 NY3d 813). Contrary to the father's contention, petitioner presented clear and convincing evidence establishing that he is presently suffering from a mental illness that "is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in . . . the custody of the [father], the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]; *see Matter of Destiny V. [Lynette V.]*, 106 AD3d 1495, 1495). The psychologist appointed by Family Court testified that the father has schizophrenia, which caused him to experience "intermittent and persistent auditory hallucinations." According to the psychologist, the hallucinations caused the father to become "grossly disorganized," combative, and

"agitated," which interfered with his ability to concentrate and care for the child. Further, the father failed to take his medication as prescribed, thereby exacerbating his symptoms (*see generally Matter of Roman E.A. [Danielle M.]* [appeal No. 2], 107 AD3d 1455, 1456). The psychologist's testimony was supported by the testimony of the father's caseworker and a counselor who supervised his visitation with the child (*see e.g. Matter of Corey UU. [Donna UU.]*, 85 AD3d 1255, 1257-1258, *lv denied* 17 NY3d 708; *Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1818-1819). Both witnesses testified that the father lacked the ability to provide adequate care for the child and that, as a result of his inability to concentrate, he failed to learn those skills during the course of his supervised visitation and parenting classes (*see Devonte M.T.*, 79 AD3d at 1818-1819; *see also Christopher B., Jr.*, 104 AD3d at 1188).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1031

CAF 13-01662

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

IN THE MATTER OF JENNIFER L. LANZAFAME,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT A. JONES, JR., RESPONDENT-RESPONDENT.

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

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

Appeal from an order of the Family Court, Onondaga County (Thomas Benedetto, R.), entered July 22, 2013 in a proceeding pursuant to Family Court Act article 8. The order dismissed the petition.

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

Memorandum: Petitioner appeals from an order dismissing her Family Court Act article 8 petition alleging that respondent willfully violated an order of protection directing him to stay away from petitioner. We affirm. Contrary to petitioner's contention, she failed to establish by clear and convincing evidence that respondent willfully violated the terms of the order of protection (*cf. Matter of Mary Ann YY. v Edward YY.*, 100 AD3d 1253, 1254).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1032

CAF 13-00616

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

IN THE MATTER OF MARK B. MILLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHIVON PEDERSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF MARK B. MILLER,
PETITIONER-APPELLANT,
AND SUSAN MILLER, PETITIONER,

V

CHIVON PEDERSON, RESPONDENT-RESPONDENT.

ABBIE GOLDBAS, UTICA, FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Herkimer County (John H. Crandall, A.J.), entered January 8, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petitions.

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

Memorandum: Contrary to petitioner father's contention, Family Court properly denied his petitions seeking to modify a prior order of custody and visitation by providing, inter alia, increased visitation with his son. The son is in the custody of respondent mother. " 'An order of visitation cannot be modified unless there has been a sufficient change in circumstances since the entry of the prior order [that], if not addressed, would have an adverse effect on the [child's] best interests' " (*Matter of Neeley v Ferris*, 63 AD3d 1258, 1259), and here the father failed to demonstrate such a change in circumstances.

The record does not support the father's further contention that the court drew a negative inference against him based on his failure to testify, and acted improperly in doing so. Indeed, the court merely noted in its decision that the father "did not testify in support of the subject petitions," and there is no indication in the

record that the court drew a negative inference against the father.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1034

CA 13-00483

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

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

V MEMORANDUM AND ORDER

STEVEN DECAPUA, RESPONDENT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL CONNOLLY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered February 25, 2013 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 revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Respondent concedes that he suffers from a "mental abnormality" and that he violated a SIST condition by possessing medication for erectile dysfunction, i.e., the drug Cialis (§ 10.03 [e]; *see* §§ 10.07 [f]; 10.11 [d] [1], [4]). He contends, however, that the evidence is legally insufficient to establish that he is a dangerous sex offender, and that the court's determination to that effect is against the weight of the evidence. We reject that contention. Supreme Court "was not limited to considering only the facts of the SIST violations" that prompted this revocation proceeding but, rather, it was entitled to "rely on all the relevant facts and circumstances tending to establish that respondent was a dangerous sex offender," such as his underlying offenses and past SIST violations (*Matter of State of New York v Motzer*, 79 AD3d 1687, 1688; *see Matter of State of New York v Matter*, 103 AD3d 1113, 1114). Upon our review of the record, we conclude that petitioner established by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement, and the court did not err in crediting the testimony of petitioner's expert over that of respondent's expert (*see Matter of State of New York v Adkison*, 108 AD3d 1050, 1052; *Motzer*, 79

AD3d at 1688).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1036

CA 14-00094

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

THEODORE HOLZ AND LINDA HOLZ,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

OLD ORCHARD BEACH TAXPAYERS ASSOCIATION, INC.
AND RICHARD SCHARET, SR., DEFENDANTS-RESPONDENTS.

KELLY & KELLY ESQUIRES, PERRY (DEVON M. KELLY OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

DIMATTEO LAW OFFICE, WARSAW (DAVID M. ROACH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered July 16, 2013. The judgment granted the amended motion of defendants for summary judgment, denied the cross motion of plaintiffs for summary judgment and dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the complaint insofar as it sought a declaration and granting judgment in favor of defendants as follows:

> It is ADJUDGED and DECLARED that plaintiffs have acquired no title to the lands described in paragraph 39 of the verified complaint

and as modified the judgment is affirmed without costs.

Memorandum: Defendants are entitled to judgment in their favor for reasons stated in Supreme Court's decision. Because plaintiffs seek declaratory relief, however, "the proper course is not to dismiss the complaint [in its entirety] but rather to issue a declaration in favor of the defendants" (*Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954). We therefore modify the judgment accordingly.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1038

CA 13-00541

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

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

V MEMORANDUM AND ORDER

DOUGLAS KENNEDY, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 11, 2013 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, 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. Contrary to respondent's contention, Supreme Court's determination that respondent "is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" is not against the weight of the evidence (§ 10.03 [e]; *see Matter of State of New York v Reeve*, 87 AD3d 1378, 1378, *lv denied* 18 NY3d 804; *see generally* § 10.03 [i]). The court was "in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony presented" (*Matter of State of New York v Timothy JJ.*, 70 AD3d 1138, 1144; *see Matter of State of New York v Richard VV.*, 74 AD3d 1402, 1405), and we see no reason to disturb the court's decision to credit the testimony of petitioner's expert over that of respondent's expert (*see Matter of State of New York v Boutelle*, 85 AD3d 1607, 1607; *Timothy JJ.*, 70 AD3d at 1145).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1039

CA 14-00100

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

CHERYL DOBINSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE O. LOCKHART AND MILAGROS LOCKHART,
DEFENDANTS-APPELLANTS.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DENNIS J. BISCHOF, LLC, WILLIAMSVILLE (DENNIS J. BISCHOF OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered November 15, 2013. The order denied the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she collided with a dog owned by defendants while riding her bicycle in front of defendants' house. We agree with defendants that Supreme Court erred in denying their motion seeking summary judgment dismissing the amended complaint. Here, defendants met their initial burden by establishing that they lacked actual or constructive knowledge that the dog had a propensity to interfere with traffic (*see Myers v MacCrea*, 61 AD3d 1385, 1386; *see also Smith v Reilly*, 17 NY3d 895, 896; *Buicko v Neto*, 112 AD3d 1046, 1046-1047). In opposition to the motion, plaintiff failed to raise a triable issue of fact in that respect (*see Buicko*, 112 AD3d at 1047; *Myers*, 61 AD3d at 1386; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore reverse the order, grant defendants' motion, and dismiss the amended complaint.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1043.1

CAF 13-01890

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

IN THE MATTER OF SUSAN TUTTLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BETH MATEO, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Maurice E. Strobridge, JHO), entered October 3, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the violation petition.

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

Same Memorandum as in *Matter of Tuttle v Mateo* ([appeal No. 3] ___ AD3d ___ [Oct. 3, 2014]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1043.2

CAF 14-00789

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

IN THE MATTER OF SUSAN TUTTLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BETH MATEO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an amended order of the Family Court, Ontario County (Maurice E. Strobridge, JHO), entered April 11, 2014 in a proceeding pursuant to Family Court Act article 6. The amended order denied the petition of respondent to terminate visitation.

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

Same Memorandum as in *Matter of Tuttle v Mateo* ([appeal No. 3] ___ AD3d ___ [Oct. 3, 2014]).

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1043.3

CAF 14-00850

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

IN THE MATTER OF SUSAN TUTTLE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BETH MATEO, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

ROBERT L. GOSPER, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from a second amended order of the Family Court, Ontario County (Maurice E. Strobridge, JHO), entered April 25, 2014 in a proceeding pursuant to Family Court Act article 6. The second amended order granted that part of the petition of respondent seeking to terminate petitioner's physical visitation with the child.

It is hereby ORDERED that the second amended order so appealed from is unanimously modified on the law by vacating the directive suspending petitioner's visitation and as modified the second amended order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following Memorandum: In appeal No. 1, petitioner mother appeals from an order dismissing her petition against respondent stepmother alleging the violation of Family Court's temporary visitation order, and in appeal No. 2 she appeals from an amended order clarifying the court's order in appeal No. 1 by denying the stepmother's petition to terminate the mother's visitation with the subject child. In appeal No. 3, the mother appeals from a second amended order that further clarified the order in appeal No. 1 by denying that part of the stepmother's petition seeking to terminate the mother's telephonic visitation, but granting that part of the petition seeking to terminate the mother's physical visitation. We note at the outset that the mother's appeals from the order and amended order in appeal Nos. 1 and 2 must be dismissed inasmuch as those orders were superseded by the second amended order in appeal No. 3 (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051).

With respect to the second amended order in appeal No. 3, we reject the mother's contention that the stepmother failed to establish a change in circumstances since entry of the guardianship order to warrant reexamination of the visitation arrangement (*see Matter of Fox*

v Fox, 93 AD3d 1224, 1224-1225). The record establishes that, among other things, the relationship between the mother and the child had deteriorated significantly since entry of the order to the point that the child no longer wished to have visitation with the mother (*see Matter of Rulinsky v West*, 107 AD3d 1507, 1508; *Matter of Cole v Nofri*, 107 AD3d 1510, 1511, *appeal dismissed* 22 NY3d 1083; *Matter of Susan LL. v Victor LL.*, 88 AD3d 1116, 1117).

We agree with the mother, however, that the court's suspension of her physical visitation with the child lacks a sound and substantial basis in the record (*see Fox*, 93 AD3d at 1225). Although "[v]isitation decisions are generally left to Family Court's sound discretion" (*Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1436 [internal quotation marks omitted]; *see Matter of Helles v Helles*, 87 AD3d 1273, 1274), "[t]he denial of visitation to a noncustodial parent constitutes such a drastic remedy that it should be ordered only when there are compelling reasons, and there must be substantial evidence that such visitation is detrimental to the child[ ]'s welfare" (*Vasile v Vasile*, 116 AD2d 1021, 1021; *see Matter of Diedrich v Vandermallie*, 90 AD3d 1511, 1511; *Matter of Frierson v Goldston*, 9 AD3d 612, 614). "While the wishes of the child[ ] should be given consideration . . . , '[v]isitation with a noncustodial parent is presumed to be in a child's best interests' " and, in order to "overcome this strong presumption," it must be established that "visitation would be detrimental to the child[ ]'s welfare" (*Matter of Brown v Erbstoesser*, 85 AD3d 1497, 1499).

Here, the record lacks the requisite "substantial evidence" that visitation with the mother is detrimental to the child's welfare (*Vasile*, 116 AD2d at 1021; *see Diedrich*, 90 AD3d at 1511; *Frierson*, 9 AD3d at 614). Although, as noted, the record establishes that the child no longer wished to see the mother, her wishes with respect to visitation are not determinative (*see Matter of Luke v Luke*, 90 AD3d 1179, 1181; *Matter of Bond v MacLeod*, 83 AD3d 1304, 1306; *Bubbins v Bubbins*, 136 AD2d 672, 672). We therefore modify the second amended order in appeal No. 3 by vacating the directive terminating physical visitation between the mother and the child, and we remit the matter to Family Court to determine an appropriate visitation schedule, which may include supervised visitation (*see Matter of Cameron C.*, 283 AD2d 946, 947, *lv denied* 97 NY2d 606). We have reviewed the mother's remaining contentions and conclude that they are without merit.

Entered: October 3, 2014

Frances E. Cafarell
Clerk of the Court