SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 21, 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

923
CA 13-01411
PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND WHALEN, JJ.

GLENN FREELAND AND SUSAN FREELAND, AS LEGAL GUARDIANS FOR JALEN WALKER, INFANT AND SOLE ISSUE OF THE ESTATE OF TREVELL WALKER, DECEASED, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE COUNTY, TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF, MARK WIPPERMAN, ERIE COUNTY UNDERSHERIFF, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.
(APPEAL NO. 1.)

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 2, 2013. The order granted the motion of defendants Erie County, Timothy B. Howard, Erie County Sheriff, and Mark Wipperman, Erie County Undersheriff, to dismiss the complaint and dismissed the complaint.

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

Memorandum: These actions arose from the suicide of Trevell Walker (Trevell) on October 12, 2011, while he was incarcerated at the Erie County Holding Center. On January 5, 2012, plaintiffs filed a notice of claim with defendant Erie County (County). The notice of claim included the name and address of claimant Jalen Walker (Jalen), Trevell's infant son and sole distributee; the nature of the claims alleged; the "[t]ime, [p]lace [and] [m]anner" of the subject claim; and the injuries and items of damage claimed. Plaintiff Glenn Freeland executed the notice of claim in his capacity as "legal Guardian" to Jalen.

On December 7, 2012, plaintiffs commenced action No. 1 in their capacity as guardians of Jalen's person, alleging causes of action in appeal No. 1 for wrongful death, negligence, federal and state civil rights violations, and loss of consortium. Supreme Court granted the pre-answer motion of defendants-respondents (hereafter, defendants) pursuant to CPLR 3211 (a) (7) and dismissed the complaint in action

No. 1, determining, inter alia, that plaintiffs lacked standing to bring the lawsuit in the absence of a duly appointed representative of Trevell's estate. On July 1, 2013, plaintiffs commenced the action in appeal No. 2 both in their capacity as guardians of Jalen's person and as administrators of Trevell's estate, alleging causes of action for wrongful death, negligence, and federal and state civil rights violations. The court granted defendants' pre-answer motion pursuant to CPLR 3211 (a) (7) and dismissed the complaint in action No. 2, determining, inter alia, that plaintiffs had failed to serve a timely notice of claim and that the cause of action for wrongful death was time-barred.

The court properly granted defendants' motion and dismissed the complaint in appeal No. 1. A cause of action for wrongful death may be brought only by the personal representative of the decedent (*see* EPTL 1-2.13; 5-4.1; *Hernandez v New York City Health & Hosps. Corp.*, 78 NY2d 687, 692-693), and causes of action for negligence and civil rights violations likewise were personal to Trevell and were therefore assumed by his estate (*see Heslin v County of Greene*, 14 NY3d 67, 76). Plaintiffs commenced the action in appeal No. 1 in their capacity as guardians of Jalen's person, and had not been appointed as representatives of Trevell's estate. Plaintiffs thus lacked standing to allege causes of action for wrongful death, negligence, and civil rights violations. In addition, there can be no recovery for loss of consortium in a wrongful death action, and thus the court properly dismissed the cause of action alleging loss of consortium based upon Trevell's death (*see Liff v Schildkrout*, 49 NY2d 622, 634; *Hinckley v CSX Transp., Inc.*, 59 AD3d 969, 970).

In appeal No. 2, we initially conclude that, contrary to defendants' contention, plaintiffs' notice of claim was sufficient to alert defendants to the allegations supporting those causes of action, regardless of the purported capacity in which Freeland executed the notice of claim. Given the lack of any showing of bad faith by plaintiffs or prejudice to defendants (*see* General Municipal Law § 50-e [6]; *D'Allesandro v New York City Tr. Auth.*, 83 NY2d 891, 893), we exercise our discretion to treat the notice of claim as one filed on behalf of Trevell's estate (*see Smith v Scott*, 294 AD2d 11, 19-20; *Neal v Amityville Union Free Sch. Dist.*, 288 AD2d 450, 450-451; *Przestrzelski v Board of Educ. of Fort Plain Sch. Dist.*, 71 AD2d 743, 743-744; *see generally Sweeney v City of New York*, 225 NY 271, 273).

With respect to defendant Mark Poloncarz, Erie County Executive, the court properly dismissed the complaint in appeal No. 2 against him inasmuch as he, in his individual or official capacity, is not the subject of any allegations in that action (*see Paull v First UNUM Life Ins. Co.*, 295 AD2d 982, 984).

With respect to the County, we agree with plaintiffs in appeal No. 2 that the court erred in granting that part of defendants' motion dismissing the first cause of action, for wrongful death, insofar as it is asserted by plaintiffs as administrators of Trevell's estate, and we therefore modify the order accordingly. Plaintiffs alleged in

that cause of action that substandard housing at the Erie County Holding Center was a proximate cause of Trevell's wrongful death. The County's duty to provide and maintain the jail building is distinguishable from defendant Sheriff's duty to "receive and safely keep" prisoners in the jail over which he has custody (Correction Law § 500-c; *see* County Law § 217; *see also Matter of New York State Commn. of Correction v Ruffo*, 157 AD2d 987, 988; *Burke v Warren County Sheriff's Dept.*, 916 F Supp 181, 184-187; *see generally Matter of County of Cayuga v McHugh*, 4 NY2d 609, 613, 615-616). We disagree with the court that the wrongful death cause of action was time-barred against the County. Because the wrongful death action could not be commenced until the appointment of an administrator of Trevell's estate to serve as guardian of Jalen's property (*see* SCPA 707 [1] [a]; 1001 [2], [6]; 1723 [1]), the statute of limitations was tolled until that appointment occurred on March 7, 2013 (*see Hernandez*, 78 NY2d at 693-695; *Baker v Bronx Lebanon Hosp. Ctr.*, 53 AD3d 21, 24-27; *cf. Baez v New York City Health & Hosps. Corp.*, 80 NY2d 571, 576-577; *see generally* CPLR 208; EPTL 5-4.1 [1]). Contrary to plaintiffs' contention, the court properly dismissed the remaining causes of action against the County in appeal No. 2 because it cannot be held vicariously liable for the negligent acts of the Sheriff or his deputies (*see Mosey v County of Erie*, 117 AD3d 1381, 1385; *Marashian v City of Utica*, 214 AD2d 1034, 1034; *see also Trisvan v County of Monroe*, 26 AD3d 875, 876, *lv dismissed* 6 NY3d 891).

With respect to defendants Sheriff and Undersheriff, we agree with plaintiffs in appeal No. 2 that the court erred in granting that part of defendants' motion dismissing as time-barred the first cause of action, for wrongful death, insofar as it is asserted by plaintiffs as administrators of Trevell's estate, and we therefore further modify the order accordingly. As explained above, that cause of action was timely commenced. The toll for wrongful death is inapplicable, however, to the second cause of action, for negligence (*see Heslin*, 14 NY3d at 76-78; *Baker*, 53 AD3d at 23), and thus the relevant statute of limitations is the one-year period of CPLR 215 (1). Consequently, when the complaint in appeal No. 2 was filed in July 2013, the negligence cause of action against the Sheriff and Undersheriff was time-barred.

We agree with plaintiffs in appeal No. 2, however, that the court erred in granting that part of defendants' motion seeking dismissal of the third cause of action, for federal civil rights violations, insofar as it is asserted by plaintiffs as administrators of Trevell's estate, against the Sheriff and Undersheriff, and we therefore further modify the order accordingly. The statute of limitations for that cause of action is three years and, thus, that cause of action was not time-barred (*see* CPLR 205, 214 [5]; *Owens v Okure*, 488 US 235, 237-239, 251). Finally, we agree with defendants in appeal No. 2 that the court properly granted their motion insofar as it sought dismissal of the fourth cause of action, for state civil rights violations, against the Sheriff and Undersheriff because the identified regulation, i.e., 9 NYCRR 7010.1, does not confer a private right of action (*see generally Powlowski v Wullich*, 102 AD2d 575, 582-583), and plaintiffs

did not make any state constitutional claims.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

926

CA 13-01305

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

IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE LORIE DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS.

LORIE M. DEHIMER, PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE J. STEVEN DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS.

J. STEVEN DEHIMER, PETITIONER-APPELLANT;

HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS.

IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE WILLIAM DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS.

WILLIAM S. DEHIMER, PETITIONER-APPELLANT;

HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS.

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

BOUSQUET HOLSTEIN PLLC, SYRACUSE (CECELIA CANNON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeals from an order of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered December 4, 2012. The order, insofar as appealed from, granted the motions of respondents to dismiss the petitions pursuant to CPLR 3211 (a) (7).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of respondents' motions to dismiss the claim in each petition for breach of fiduciary duty, and reinstating each petition to that extent, and as modified

the order is affirmed without costs.

Memorandum: Respondents are trustees of certain irrevocable inter vivos trusts and, in proceedings to rescind those trusts, petitioners appeal from an order granting the pre-answer motions of respondents seeking to dismiss the petitions pursuant to CPLR 3211 (a) (7). We agree with petitioners that Surrogate's Court erred in granting that part of respondents' motions with respect to the claim for breach of fiduciary duty in each petition, and we therefore modify the order accordingly.

In considering a motion to dismiss pursuant to CPLR 3211, the Surrogate must afford the petition a liberal construction and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). "Whether a [petitioner] can ultimately establish [his or her] allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19). To state a claim to recover damages for breach of fiduciary duty, petitioners herein must allege: "(1) the existence of a fiduciary relationship, (2) misconduct by [respondents], and (3) damages directly caused by [respondents'] misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777; *see Armentano v Paraco Gas Corp.*, 90 AD3d 683, 684-685; *McGuire v Huntress* [appeal No. 2], 83 AD3d 1418, 1420, *lv denied* 17 NY3d 712). We conclude that the petitions adequately state a claim for breach of fiduciary duty in that they allege that respondents failed to act in the best interests of petitioners with respect to their complete distribution of certain sub-trusts under which petitioners were beneficiaries, and the use of 55% of those distributions to fund newly-created inter vivos trusts under which petitioners have no beneficial interest.

We have considered petitioners' remaining contentions and conclude that they are without merit.

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

928
CA 14-00266
PRESENT: CENTRA, J.P., CARNI, VALENTINO, AND WHALEN, JJ.

GLENN FREELAND AND SUSAN FREELAND, AS
ADMINISTRATORS FOR THE ESTATE OF TREVELL WALKER,
DECEASED, AND AS GUARDIANS OF THE INFANT
AND SOLE ISSUE JALEN WALKER,
PLAINTIFFS-APPELLANTS,

V   MEMORANDUM AND ORDER

ERIE COUNTY, MARK POLONCARZ, ERIE COUNTY
EXECUTIVE, TIMOTHY B. HOWARD, ERIE COUNTY SHERIFF
AND MARK WIPPERMAN, ERIE COUNTY UNDERSHERIFF,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

KEVIN T. STOCKER, TONAWANDA, FOR PLAINTIFFS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ANTHONY B. TARGIA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 2, 2014. The order granted defendants' motion to dismiss the complaint and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the first cause of action by plaintiffs as administrators of the estate of Trevell Walker, deceased, against defendants Erie County, Timothy B. Howard, Erie County Sheriff, and Mark Wipperman, Erie County Undersheriff, and the third cause of action by plaintiffs as administrators of the estate of Trevell Walker, deceased, against defendants Timothy B. Howard, Erie County Sheriff, and Mark Wipperman, Erie County Undersheriff, and as modified the order is affirmed without costs.

Same Memorandum as in *Freeland v Erie County* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014   Frances E. Cafarell
                                          Clerk of the Court

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

954
KA 13-00457
PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SKIPPY B. WOOLSON, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered February 7, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the second degree (four counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, four counts of criminal sexual act in the second degree (Penal Law § 130.45 [1]). Shortly before the trial was scheduled to begin, defense counsel requested an adjournment of the trial on the ground that he was too ill to try the case. County Court initially denied the request and resolved certain pretrial matters, but then adjourned the trial. On appeal, defendant contends that the court abused its discretion in denying the initial request for an adjournment. It is well settled that the "granting of an adjournment for any purpose is a matter of discretion for the trial court" (*People v Singleton*, 41 NY2d 402, 405; *see People v Spears*, 64 NY2d 698, 699-700; *People v Green*, 74 AD3d 1899, 1900-1901, *lv denied* 15 NY3d 852), and a " 'court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956; *see People v Bones*, 50 AD3d 1527, 1528, *lv denied* 10 NY3d 956; *see generally People v Dashnaw*, 37 AD3d 860, 862-863, *lv denied* 8 NY3d 945). Here, we conclude that defendant failed to establish that he was prejudiced by the initial denial of defense counsel's request for an adjournment. We reject defendant's contention that the court was required to hold the matter in abeyance pursuant to CPLR 321 (c). Even assuming, arguendo, that the statute applies to criminal proceedings (*cf.* CPL 1.10; *People v Silva*, 122 AD2d 750, 750), there is no indication in the record that defense counsel was "physically or mentally incapacitated" (CPLR 321 [c]).

Defendant further contends that he was denied effective assistance of counsel based upon several acts or omissions on the part of defense counsel. “To prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations” for defense counsel’s allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712-713), and defendant failed to make such a demonstration here. With respect to defendant’s claim that defense counsel was ineffective for failing to produce an expert witness to rebut the expert testimony introduced by the People, defendant has not established that such expert “testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence” (*People v West*, 118 AD3d 1450, 1451 [internal quotation marks omitted]; *see Aikey*, 94 AD3d at 1487). With respect to defendant’s claim that defense counsel was ineffective for failing to make certain motions, it is well settled that an attorney’s “failure to ‘make a motion or argument that has little or no chance of success’ ” does not amount to ineffective assistance (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287), and we conclude that defendant’s claims of ineffectiveness involve motions that had virtually no chance of success. Defendant’s remaining claims concerning ineffective assistance of counsel “involve[] matters outside the record on appeal, and thus the proper procedural vehicle for raising [those] claim[s] is by way of a motion pursuant to CPL 440.10” (*People v Wilson*, 49 AD3d 1224, 1225, *lv denied* 10 NY3d 966; *see People v Hall*, 50 AD3d 1467, 1469, *lv denied* 11 NY3d 789). 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).

Defendant’s motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal, and thus he failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 Bleakley*, 69 NY2d at 495). “Resolution 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 “those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record” (*People v Lane*, 7 NY3d 888, 890). Contrary to the dissent’s conclusion that a possible discrepancy in the date of the offense requires a different verdict, “any inconsistencies in the testimony of the victim with respect to the date[] of [the] crime[] merely presented a credibility issue for the jury to resolve” (*People v Furlong*, 4 AD3d 839, 841, *lv denied* 2 NY3d 739). Furthermore, we respectfully disagree with the dissent’s reliance upon the

circumstances under which the victim disclosed the abuse as a reason to reject his testimony. The People produced expert testimony establishing that victims of sexual abuse often, as part of the sexual abuse accommodation syndrome, exhibit a "delayed, conflicted and unconvincing disclosure" of the abuse, which would explain the circumstances upon which the dissent relies. Thus, although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent. Although I agree with the majority with respect to the other issues raised on appeal, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), I conclude that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). I therefore would reverse the judgment, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

I agree with defendant that, given the combination of the victim's mental illness, his past false accusation of similar sexual abuse, his motivation to lie, and the timing of his accusation against defendant, this is one of those rare cases in which we should conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Goff*, 68 AD3d 1796, 1796-1797; *People v Wallace*, 306 AD2d 802, 802-803; *see generally Bleakley*, 69 NY2d at 495). Here, the record establishes that the victim has a history of mental illness and an inability to control his behavior. The victim's history also includes one false accusation of sexual abuse, which is remarkably similar to the accusation made in this case. Further, the victim's testimony that the abuse continued to occur into April 2011 while the victim's mother was working for defendant's aunt is at odds with the testimony of defendant's aunt that the victim's mother stopped working for her on March 25, 2011. Moreover, the victim's stated desire to have defendant leave the home in which the victim lived with the victim's mother, coupled with the suspicious and self-serving timing of the accusation, leads to the conclusion that the victim's testimony is "impossible of belief" (*Wallace*, 306 AD2d at 802).

Indeed, the record establishes that the victim claimed to have been sexually abused by defendant nearly every day between late December 2010 and approximately April 11, 2011. On April 11, 2011, the victim held a knife to the throat of a developmentally challenged youth during the theft of the youth's bicycle. After that incident, defendant punched the victim and gave the victim a black eye. The victim, in turn, "flipped out" and punched a wall after the victim's mother sided with defendant in a dispute about the punch. Sometime between April 11, 2011 and April 13, 2011 the victim left the home shared by defendant and the victim's mother and entered a placement.

On April 13, 2011, the victim refused to leave that placement to return to the home shared by defendant and the victim's mother. The next day, the victim accused defendant of assaulting him, telling an Oswego County mental health worker that he was "sick of [defendant]," did not want to live with him, and "want[ed] him arrested." On April 15, 2011, the victim was sent to a different facility for a psychiatric evaluation and, while at that facility on April 16, 2011, he told staff that defendant had punched him, but he did not disclose any sexual abuse. On April 18, 2011, defendant told staff that he did not want to return home because defendant had punched him, and only later that day did the victim disclose the alleged sexual abuse to his sister. Defendant's conviction hinged on the testimony of the victim and, given the foregoing flaws in that evidence, I cannot agree with the majority that the jury was "justified in finding . . . defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

973
CA 13-01419
PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND VALENTINO, JJ.

JANICE MAZELLA, AS ADMINISTRATRIX OF THE ESTATE
OF JOSEPH MAZELLA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM BEALS, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

GALE GALE & HUNT, LLC, SYRACUSE, MEISELMAN, PACKMAN, NEALON, SCIALABBA & BAKER P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEL DUCHETTO & POTTER, SYRACUSE (ERNEST A. DEL DUCHETTO OF COUNSEL), AND ALESSANDRA DEBLASIO, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered March 18, 2013. The order denied the motion of defendant William Beals, M.D., to set aside a jury verdict, granted the motion of plaintiff for judgment and denied the cross motion of defendant William Beals, M.D., to adjust the award of damages.

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: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

974
CA 13-01420
PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND VALENTINO, JJ.

JANICE MAZELLA, AS ADMINISTRATRIX OF THE ESTATE
OF JOSEPH MAZELLA, DECEASED,
PLAINTIFF-RESPONDENT,

V ORDER

WILLIAM BEALS, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

GALE GALE & HUNT, LLC, SYRACUSE, MEISELMAN, PACKMAN, NEALON, SCIALABBA & BAKER P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEL DUCHETTO & POTTER, SYRACUSE (ERNEST A. DEL DUCHETTO OF COUNSEL), AND ALESSANDRA DEBLASIO, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered April 29, 2013. The judgment, insofar as appealed from, awarded plaintiff money damages upon a jury verdict.

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

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

975
CA 13-01421
PRESENT: SMITH, J.P., FAHEY, LINDLEY, AND VALENTINO, JJ.

JANICE MAZELLA, AS ADMINISTRATRIX OF THE ESTATE
OF JOSEPH MAZELLA, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM BEALS, M.D., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 3.)

GALE GALE & HUNT, LLC, SYRACUSE, MEISELMAN, PACKMAN, NEALON, SCIALABBA & BAKER P.C., WHITE PLAINS (MYRA I. PACKMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DEL DUCHETTO & POTTER, SYRACUSE (ERNEST A. DEL DUCHETTO OF COUNSEL), AND ALESSANDRA DEBLASIO, NEW YORK CITY, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Onondaga County (John C. Cherundolo, A.J.), entered May 21, 2013. The amended judgment, insofar as appealed from, awarded plaintiff money damages upon a jury verdict.

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

Memorandum: In this medical malpractice and wrongful death action, William Beals, M.D. (defendant) appeals from an amended judgment awarding money damages to plaintiff. We reject defendant's contention that Supreme Court erred in denying his posttrial motion seeking to set aside the verdict on the ground that plaintiff had failed to establish a prima facie case of medical malpractice. To establish his entitlement to that relief, defendant was required to establish that the evidence was legally insufficient to support the verdict, i.e., "that there [was] simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). On this record, we conclude that "there is a valid line of reasoning supporting the jury's verdict that defendant deviated from the applicable standard of care in [his treatment] of plaintiff's [decedent] . . . , and that such deviation was a proximate cause of [the] injuries" of plaintiff's decedent (*Winiarski v Harris* [appeal No. 2], 78 AD3d 1556, 1557; *see generally Sacchetti v Giordano*, 101 AD3d 1619, 1619-1620). We also reject defendant's alternative

contention in support of his posttrial motion that the verdict is against the weight of the evidence, i.e., that the evidence so preponderated in defendant's favor that the verdict in favor of plaintiff could not have been reached on any fair interpretation of the evidence (*see generally Lolik v Big V Supermarkets*, 86 NY2d 744, 746). Here, we conclude that "the 'trial was a prototypical battle of the experts, and the jury's acceptance of [plaintiff's] case was a rational and fair interpretation of the evidence' " (*Holstein v Community Gen. Hosp. of Greater Syracuse*, 86 AD3d 911, 912, *affd* 20 NY3d 892). With respect to our dissenting colleague's summary of the testimony of plaintiff's expert, we respectfully note that there may have been more than one proximate cause of decedent's injuries (*see generally Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 560 n 2), and that the jury was entitled to credit plaintiff's theory that defendant's actions constituted one of those proximate causes.

Defendant further contends that the verdict must be set aside and a new trial granted because, inter alia, he was denied a fair trial by the admission in evidence of certain documents of the Office of Professional Medical Conduct. Even assuming, arguendo, that the court erred in admitting those documents in evidence, defendant's contention lacks merit inasmuch as "that . . . error 'would not have affected the result'[,] and . . . any such error therefore is harmless" (*Cook v Oswego County*, 90 AD3d 1674, 1675).

Contrary to defendant's further contention, the court's failure to submit a special verdict sheet to the jury was not prejudicial and does not require a new trial (*see Suarez v New York City Health & Hosps. Corp.*, 216 AD2d 287, 287; *see also Kolbert v Maplewood Healthcare Ctr., Inc.*, 21 AD3d 1301, 1301-1302). We have considered defendant's remaining contentions and, to the extent that they are properly before us, we conclude that they lack merit.

All concur except SMITH, J.P., who dissents and votes to reverse the amended judgment insofar as appealed from in accordance with the following Memorandum: Because I disagree with the majority's conclusion that the negligence of defendant William Beals, M.D. (defendant) was a proximate cause of the suicide of Joseph Mazella (decedent), I respectfully dissent. I would reverse the amended judgment insofar as appealed from, grant defendant's motion to set aside the verdict as against the weight of the evidence (*see generally Dentes v Mauser*, 91 AD3d 1143, 1145-1146, *lv denied* 19 NY3d 811; *Rivera v Greenstein*, 79 AD3d 564, 568-569), and dismiss the complaint with respect to defendant.

The evidence at trial established that defendant treated decedent for depression and other mental health conditions for many years before 2009 by, inter alia, prescribing medications. The evidence further established that defendant did not personally see decedent during approximately the last 10 years of that time, and defendant admitted that such was negligent conduct. Decedent's condition flared up again and, on August 9, 2009, he telephoned defendant, who was on vacation. There is evidence in the record from which the jury could have concluded that decedent had either reduced the dosage of the

medication prescribed by defendant or had stopped taking the medication prior to telephoning defendant, although there is also evidence in the record from which the jury could have drawn the contrary conclusion. During that telephone call, defendant changed the dosage of decedent's medication and prescribed an additional medication. During a telephone call the next day, defendant again adjusted decedent's medications.

The day after that, plaintiff telephoned defendant and informed him that she was concerned about decedent's condition. Defendant advised her to take decedent to a nearby hospital's Comprehensive Psychiatric Emergency Program (CPEP), which she did, and decedent was hospitalized overnight. Defendant met with decedent and plaintiff at defendant's office several days later, on August 17, 2009. Although the record contains varying descriptions of the interactions between those three people during that meeting, it is clear that defendant's last contact with decedent occurred at that time, and defendant referred decedent to CPEP for further treatment.

Even assuming, arguendo, that the above evidence and the other evidence introduced by plaintiff at trial was sufficient to establish that defendant was negligent in his treatment of decedent up until that time, it is undisputed that decedent received significant medical treatment after his last contact with defendant. The evidence at trial established that, after his last meeting with defendant, decedent went to CPEP, where the physicians recommended that decedent enter an inpatient psychiatric facility, but decedent declined to follow that advice. Decedent was treated overnight at CPEP and then released, and the treating physician who released decedent prescribed different medications than those that had been prescribed by defendant. The physician at CPEP thought that decedent should not be released, but decedent and plaintiff convinced the physician that plaintiff and decedent's other family members could care for him at home. Decedent returned to CPEP the next day and was admitted, and he was later transferred to the inpatient psychiatric unit of another hospital. Decedent remained there for about a week, during which time another psychiatrist changed his medications again and prescribed other treatment for his condition. Decedent was released from that facility because the physicians there concluded that he was not suicidal, and that his condition had improved sufficiently to allow him to continue treatment on an outpatient basis. None of the medical professionals who saw decedent during the week after his discharge from the inpatient psychiatric unit thought he was suicidal, and plaintiff wrote a note during that time frame indicating that she thought decedent was "80-90% better."

Decedent was released from inpatient psychiatric treatment under a regimen of medications that was different from the medications prescribed by defendant, and some of those medications carried warnings that they were not to be prescribed to those at risk of suicide. Rather than referring decedent to a psychiatrist upon discharge, the psychiatrist at the hospital referred him to a psychiatric clinic that had approximately a four-week intake process. When plaintiff spoke with the hospital's psychiatrist after decedent's

discharge and expressed concern regarding the newly-prescribed medications, the psychiatrist told her to have decedent continue taking one of the medications, but also said that decedent could discontinue the other. Before decedent's application to be accepted for treatment at the psychiatric clinic was completed, decedent committed suicide.

"The standard for determining whether the jury's verdict is against the weight of the evidence is whether the evidence so preponderated in [the aggrieved party's] favor that the verdict could not have been reached on any fair interpretation of the evidence" (*Paterson v Ellis*, 284 AD2d 981, 981; *see Lolik v Big V Supermarkets*, 86 NY2d 744, 746; *Nicastro v Park*, 113 AD2d 129, 134). Here, I agree with defendant that the jury's finding that the intervening acts of the other medical providers involved in decedent's care was not an intervening, superseding cause of decedent's injuries is not supported by the weight of the evidence.

"Ordinarily, a plaintiff asserting a medical malpractice claim must demonstrate that the doctor deviated from acceptable medical practice, and that such deviation was a proximate cause of the plaintiff's injury" (*James v Wormuth*, 21 NY3d 540, 545). "To establish proximate cause, a 'plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury' " (*Pomeroy v Buccina*, 289 AD2d 944, 945, quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784; *see Kush v City of Buffalo*, 59 NY2d 26, 32-33). Here, I agree with defendant that the verdict is against the weight of the evidence under the circumstances presented because plaintiff failed to establish that defendant's negligence was a proximate cause of decedent's suicide. To the contrary, I conclude that the psychiatric treatment provided to decedent after defendant's involvement in the case ended constituted an intervening act that severed any causal connection between defendant's negligence and decedent's suicide. " 'An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act . . . so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant' " (*Gardner v Perrine*, 101 AD3d 1587, 1587-1588, quoting *Kush*, 59 NY2d at 33). Thus, "[i]f the negligent act of the third party is extraordinary under the circumstances and unforeseeable as a normal and probable consequence of defendant's negligence, then the third party's negligence supersedes that of the defendant and relieves defendant of liability" (*DePesa v Westchester Sq. Med. Ctr.*, 239 AD2d 287, 288-289).

Here, the weight of the evidence establishes that decedent's condition improved after defendant stopped treating him, and that the immediate cause of his death was either the disease from which he suffered or the medications that he took prior to his suicide. It is undisputed that defendant did not prescribe any medications for decedent for approximately one month prior to his death, and defendant obviously did not cause the underlying disease that all of the defendants were involved in treating.

Plaintiff offered the testimony of a medical expert who opined that defendant was negligent in prescribing decedent’s medication, which caused decedent to become so overmedicated that he was in a toxic state, and that defendant was additionally negligent by refusing to provide care for decedent thereafter. That same expert, however, testified that the later treatment providers were negligent and, most notably, that the psychiatrist who released decedent from the inpatient psychiatric unit at the hospital was “where the buck stops. The buck stops with the psychiatrist to make sure [decedent] got help, . . . [and] if the social worker hadn’t got the job done, to make sure somebody else got it done.” Thus, even according to the testimony of plaintiff’s expert, liability for decedent’s suicide lay with the final treating psychiatrist.

Consequently, based on the different regimen of medications that decedent had been prescribed, which were different from the medications that decedent had taken while under the care of defendant, plus the extensive medical treatment provided by other medical professionals for several weeks, and their prescription of medications that have an increased risk of suicide, all of which took place after defendant’s treatment of decedent ended, I conclude that any causal connection between defendant’s prior negligent treatment of decedent and decedent’s suicide was severed. Thus, “there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial” (*Cohen v Hallmark Cards, Inc.*, 45 NY2d 493, 499).

I further conclude that defendant was deprived of a fair trial by an evidentiary error, i.e., the admission in evidence of a consent agreement that defendant had signed with the Office of Professional Medical Conduct (OPMC), and that such error undoubtedly contributed to the legal error of the jury’s determination of defendant’s liability. The OPMC had charged defendant with negligence regarding 13 patients, and decedent is listed as patient A in OPMC’s charges against defendant. Defendant thereafter signed a consent agreement with OPMC, in which he agreed not to contest the allegations with respect to those who were designated patients B through M in the consent agreement.

During cross-examination at trial, defendant admitted that he had failed to appropriately monitor decedent while he was on medication. Plaintiff’s attorney then asked whether that constituted medical malpractice. After Supreme Court overruled the objection of defendant’s attorney, defendant indicated that it was not. The court then permitted plaintiff’s attorney to introduce the consent agreement in evidence and to use it to impeach defendant. That was error.

First, the question that plaintiff’s attorney asked defendant called for defendant to admit that he had committed medical malpractice with respect to his treatment of decedent. Defendant admitted that he was negligent in his care of certain patients but, as noted above, it is well settled that the elements of “a medical malpractice [claim] are a deviation or departure from accepted

community standards of practice and evidence that such departure was a proximate cause of injury or damage” (*Geffner v North Shore University Hosp.* 57 AD3d 839, 842; *see Foster-Sturrup v Long*, 95 AD3d 726, 727). Inasmuch as defendant did not admit to either medical malpractice or all the elements of a claim of medical malpractice by signing the consent agreement, the court should have sustained the objection of defendant’s attorney to the question as asked.

Next, even assuming, arguendo, that defendant had admitted to medical malpractice by signing the consent agreement, and that it was permissible for plaintiff to use an alleged prior inconsistent statement to impeach the credibility of a witness that she herself had called (*see generally Jordan v Parrinello*, 144 AD2d 540, 541), it is clear that defendant did not admit to any negligence in the consent agreement with respect to decedent. Moreover, because defendant admitted in the consent agreement to negligence only with respect to the 12 other patients, the consent agreement did not constitute a prior inconsistent statement in the context of the issues at trial and defendant’s testimony, both of which concerned only decedent. Given the highly prejudicial nature of the statements in the consent agreement, i.e., that decedent admitted that he failed to provide proper care to 12 patients other than decedent, as well as the complete lack of either probative value to the issues at trial or relevance for impeachment purposes, I conclude that defendant was deprived of a fair trial by the admission of the consent agreement in evidence, and by permitting plaintiff’s attorney to cross-examine defendant regarding it.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

989
CA 14-00139
PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, AND VALENTINO, JJ.

DONALD WIRTH AND SONJA WIRTH,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LIBERTY MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

JOSEPH A. ERMETI, SIDNEY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered June 11, 2013. The order, inter alia, denied defendant's cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the cross motion seeking to strike the claim for funeral expenses and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover under a policy of insurance issued by defendant to plaintiffs, as named insureds, after their son was killed in a single vehicle accident while driving a pickup truck and livestock trailer owned by plaintiffs. Following the accident, plaintiffs reported to the police that the vehicles, which were a total loss, were stolen by their son and being operated without their permission at the time of the accident. Plaintiffs' son was not identified as a "driver" on the declarations page of the policy. Defendant disclaimed coverage for the loss to the vehicles and attendant towing and related expenses on the ground that neither vehicle had collision coverage under the policy. Defendant now appeals from an order that, inter alia, denied its cross motion for summary judgment dismissing the complaint.

Although defendant is correct that neither vehicle had "collision" coverage under the policy, plaintiffs rely on a policy provision entitled "Coverage for Damage to Your Auto," which covers loss caused by "other than collision." The policy states that such loss includes "Theft or larceny." Although the policy does not define those terms, defendant contends that the policy terms "theft" and "larceny" should be equated with the definition of "larceny" in Penal Law § 155.05 (1), thus requiring plaintiffs to establish their son's

criminal intent under Penal Law standards in operating the vehicles. We reject that contention, and instead conclude that the court properly determined that the loss sustained herein could be deemed one ensuing from theft.

"Every clause or word in an insurance contract is deemed to have some meaning" (*Theatre Guild Prods. v Insurance Corp. of Ireland*, 25 AD2d 109, 111, *affd* 19 NY2d 656), and "a policy's terms should not be assumed to be superfluous or to have been idly inserted" (*Bretton v Mutual of Omaha Ins. Co.*, 110 AD2d 46, 50, *affd* 66 NY2d 1020). Contrary to defendant's contention, in interpreting the provisions used by defendant in its policy, we give effect to the ordinary definition of "theft," as distinct from "larceny," and "are guided by what would be the reasonable expectations and purpose of an ordinary [consumer] in making such a contract" (*Pangburn v Travelers Ins. Co.*, 259 AD2d 1044, 1045, *lv dismissed* 94 NY2d 782). In this regard, we note that defendant's policy also uses, but does not define, the term "stolen" to describe an insured's duty to notify it of this type of loss. It has been observed that terms such as "steal," "robbery" and the like are "misused even by the [criminal law] experts" (*People v Pauli*, 130 AD2d 389, 393, *appeal dismissed* 70 NY2d 911), and we reject defendant's attempt to impose the technical construction and interpretation of the Penal Law on the ordinary consumer in applying its policy provisions. We thus conclude that the court properly determined that the intention of the parties, as expressed by the policy language, was that the loss at issue could be deemed to be the result of a theft (*see id.*; *see also Bolling v Northern Ins. Co. of N.Y.*, 253 App Div 693, 694-695, *affd* 280 NY 510). Nevertheless, we agree with defendant that, although the policy provides for a death benefit, it does not provide coverage for funeral expenses, and that plaintiffs lack standing to recover those expenses in any event (*see* EPTL 5-4.3). We therefore modify the order accordingly.

Finally, we reject defendant's further contention that, as a matter of law, plaintiffs did not "[p]romptly notify the police [that the vehicles were] stolen" as required by the policy. Defendant's policy does not define what constitutes prompt notification and, in view of all of the facts and circumstances, we conclude that plaintiffs raised an issue of fact whether such notice was given within a reasonable time (*see Utica First Ins. Co. v Vazquez*, 92 AD3d 866, 867).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1043
CA 14-00281
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

CHERYL D. MAYER, AS ADMINISTRATRIX OF THE ESTATE
OF BRANDON M. ACKER, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW J. CONRAD AND AMY M. CONRAD,
DEFENDANTS-APPELLANTS.

MATTHEW J. CONRAD AND AMY M. CONRAD,
THIRD-PARTY PLAINTIFFS-APPELLANTS-RESPONDENTS,

V

FISHER CONCRETE, INC., THIRD-PARTY
DEFENDANT-RESPONDENT-APPELLANT.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS-RESPONDENTS.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP, WHITE PLAINS (DEBRA A. ADLER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (R. CHARLES MINER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered May 23, 2013. The order, among other things, denied in part the motions of third-party defendant and defendants-third-party plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of third-party defendant in part and dismissing the third-party complaint insofar as it seeks common-law indemnification and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this wrongful death action arising out of a construction site accident, alleging violations of the Labor Law and common-law negligence, and defendants thereafter commenced a third-party action seeking common-law indemnification or contribution from third-party defendant, Fisher Concrete, Inc. (Fisher). Defendants hired Fisher to perform excavation work on their

property in connection with the construction of a new home. Several weeks prior to the accident, Fisher excavated a portion of the property to prepare for the construction of a walk-out basement, which resulted in a seven- to nine-foot-high vertical embankment on the south side of the basement (hereafter, south bank or embankment). On the date of the accident, Fisher was installing footers for the basement retaining walls, which involved digging small trenches next to the north and south walls and pouring concrete into the trenches. Plaintiff's decedent, a Fisher employee, was working in the south trench smoothing concrete for the footer when the south bank collapsed onto him, inflicting fatal injuries. Supreme Court granted those parts of the motions of defendants and Fisher for summary judgment dismissing the claims pursuant to Labor Law §§ 240 (1) and 241 (6), and defendants contend on appeal that the court should have granted their motion for summary judgment dismissing the complaint in its entirety. Fisher contends that the court likewise should have granted its motion for summary judgment dismissing the complaint in its entirety, as well as the third-party complaint insofar as it seeks common-law indemnification. We conclude that the court properly refused to dismiss the complaint in its entirety, but should have granted that part of Fisher's motion for summary judgment dismissing the third-party complaint to that extent. We therefore modify the order accordingly.

Labor Law § 200 is a codification of the common-law duty imposed on property owners and general contractors to provide workers with a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.,* 91 NY2d 343, 352; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). "Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d 54, 61). "Where a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident" (*id.; see Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416). Where, however, the worker's injuries stem from the manner in which the work was being performed, no liability attaches to the owner under the common law or under Labor Law § 200 "unless it is shown that the [owner] had the authority to supervise or control the performance of the work" (*Ortega*, 57 AD3d at 61; *see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877; *Lombardi v Stout*, 80 NY2d 290, 295).

Defendants and Fisher contend that this is a "manner and method of work" case and thus that defendants are entitled to summary judgment dismissing the Labor Law § 200 claim and common-law negligence cause of action because they did not have the authority to supervise or control the work. We reject that contention. Although there is no question that Fisher's excavation work created the dangerous condition at issue here, i.e., the unsecured embankment, we conclude that the embankment was "transformed . . . into a premises condition" inasmuch as it remained in that condition for several weeks prior to decedent's accident and neither decedent nor any other

employee of Fisher were working on the embankment at the time of the accident (*Slikas v Cyclone Realty, LLC*, 78 AD3d 144, 148; *see Rodriguez v BCRE 230 Riverdale, LLC*, 91 AD3d 933, 934-935; *Soskin v Scharff*, 309 AD2d 1102, 1105-1106; *cf. Mohammed v Islip Food Corp.*, 24 AD3d 634, 635-638). We therefore conclude that the court properly denied those parts of the motions of defendants and Fisher seeking to dismiss the Labor Law § 200 claim and common-law negligence cause of action.

We further conclude that defendants and Fisher failed to establish that defendant-third-party plaintiff Matthew J. Conrad (defendant) lacked actual or constructive notice of the dangerous condition on the premises (*see Baker v City of Buffalo*, 90 AD3d 1684, 1685; *Ozimek*, 83 AD3d at 1416). The record establishes that defendant visited the construction site every morning, including on the date of the accident (*see Burton v CW Equities, LLC*, 97 AD3d 462, 462); that he engaged in regular conversations about the project with Fisher's owner, defendant's uncle, during those site visits; that the condition had existed for two to three weeks prior to the accident (*see DePaul v NY Brush LLC*, 114 AD3d 609, 609-610; *Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512; *Crandall v Wright Wisner Distrib. Corp.*, 66 AD3d 1515, 1516-1517); and that it was visible as opposed to latent (*see Burton*, 97 AD3d at 462; *cf. Lopez v Dagan*, 98 AD3d 436, 438-439, *lv denied* 21 NY3d 855). Further, although defendant denied that he had any specialized training or expertise in excavation, he testified that he works "in construction," that he cleared and graded the site in preparation for construction, and that he owned one of the excavators that Fisher used during the course of the project. We thus conclude that there is an issue of fact whether Conrad knew or should have known that the seven- to nine-foot-high unsecured embankment posed a danger to the workers at the work site, and whether he should have taken steps to remedy that condition (*see Ford v Caliendo & Sons*, 305 AD2d 368, 369; *cf. Hockenberry v Mehlman*, 93 AD3d 915, 916-917).

With respect to the third-party complaint, we agree with Fisher that defendants' claim for common-law indemnification should be dismissed inasmuch as "there are no circumstances under which [defendants] could be held vicariously liable to [plaintiff] based on the negligence of a third party such as [Fisher]" (*Village of Palmyra v Hub Langie Paving, Inc.*, 81 AD3d 1352, 1353; *see Genesee/Wyoming YMCA v Bovis Lend Lease LMB, Inc.*, 98 AD3d 1242, 1244-1245; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381-382).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1050
KA 11-00299
PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

WILLIAM J. MILLER, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

WILLIAM J. MILLER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered March 13, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts) and attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [1], [3]) and one count of attempted robbery in the first degree (§§ 110.00, 160.15 [2]) in connection with the shooting death of his sister's boyfriend. Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction on the element of intent (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968; *see generally People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence established that defendant sought the assistance of his girlfriend's brother to obtain a gun and/or locate a person who was willing to kill the victim; he stated several times during the day of the murder that he was going to "get" the victim; and he directed his sister to contact the victim to come to her house, where the victim was shot by a codefendant in defendant's presence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention in his main brief that he was denied effective assistance of counsel based both on defense counsel's failure to exercise a for-cause or peremptory challenge with respect to a prospective juror (*see People v Simmons*, 119 AD3d 1343, 1344; *see generally People v Barboni*, 21 NY2d 393, 407), and on defense counsel's failure to call defendant's sister as a witness after he was advised that she would exercise her Fifth Amendment right to remain silent (*see generally People v Thomas*, 51 NY2d 466, 472-473). We likewise reject defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel based on defense counsel's failure to request a charge on intoxication, in view of the testimony of a prosecution witness that defendant was intoxicated. Even assuming, arguendo, that the charge was warranted (*see People v Sirico*, 17 NY3d 744, 745), we conclude that defendant failed to show the absence of a strategic explanation for the failure of defense counsel to request the charge (*see People v Anderson*, 120 AD3d 1549, 1549; *see generally People v Caban*, 5 NY3d 143, 152). Indeed, the record establishes that defense counsel's strategy was to attack the credibility of the prosecution witness rather than to advance a theory that defendant's intoxication negated an element of the respective crimes (*see* Penal Law § 15.25). Defendant's remaining allegations of ineffective assistance of counsel contained in his main and pro se supplemental briefs also are without merit, and we conclude that defendant received meaningful assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's contention in his main brief that Supreme Court erred in denying his pro se motion seeking new counsel to represent him on his pro se CPL 330.30 motion to set aside the verdict on the grounds of juror misconduct and ineffective assistance of counsel, and for sentencing. Defense counsel did not take a position adverse to defendant and, indeed, supported the allegations of juror misconduct contained in the pro se motion (*see People v Jones*, 261 AD2d 920, 920, *lv denied* 93 NY2d 972; *cf. People v Simon*, 71 AD3d 1574, 1576, *lv denied* 15 NY3d 757, *reconsideration denied* 15 NY3d 856). In any event, we note that the court decided defendant's motion without consideration of defense counsel's comments (*see Simon*, 71 AD3d at 1576). Finally, the sentence is not unduly harsh or severe.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1052
KA 12-01621
PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT DUKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered June 19, 2012. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, rape in the first degree (three counts), criminal sexual act in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal sexual act in the first degree and rape in the first degree under counts four and six of the indictment and dismissing those counts without prejudice to the People to re-present any appropriate charges under those counts of the indictment to another grand jury, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), criminal sexual act in the first degree (§ 130.50 [1]), and three counts of rape in the first degree (§ 130.35 [1]), defendant contends that County Court erred in denying his request to appoint new counsel for him at trial. Although defendant requested a new attorney several weeks before trial, the record demonstrates that, after an extensive colloquy with the court and a private conference with assigned counsel, defendant informed the court that his attorney answered his questions and that he was satisfied with his attorney’s answers. When asked by the court whether he wanted his attorney to continue to represent him, defendant answered, “Yes, sir,” and defendant did not thereafter request new counsel. Under the circumstances, we conclude that defendant withdrew his request for assignment of new counsel and thereby waived his present contention (*see People v Jones*, 79 AD3d 1665, 1665).

We agree with defendant, however, that counts four and six of the indictment were rendered duplicitous by the victim's trial testimony. "Even if a count facially charges one criminal act, that count is duplicitous if the evidence makes plain that multiple criminal acts occurred during the relevant time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict" (*People v Dalton*, 27 AD3d 779, 781, *lv denied* 7 NY3d 754, *reconsideration denied* 7 NY3d 811; *see People v Casiano*, 117 AD3d 1507, 1510; *People v Foote*, 251 AD2d 346, 346). Here, count four charged criminal sexual act in the first degree regarding an alleged instance in which defendant forcibly compelled the victim to perform oral sex on him during the summer of 2010, while count six, charging rape in the first degree, related to an incident in the summer of 2010 during which defendant had sexual intercourse with the victim by forcible compulsion. At trial, however, the victim testified that defendant regularly and repeatedly forced her to engage in sexual intercourse with him during the summer of 2010, and she did not testify about any one specific incident. She offered similarly general testimony about alleged instances of oral sexual conduct during the summer of 2010.

Because each act of alleged intercourse and oral sexual conduct constitutes "a separate and distinct offense" (*People v Russell*, 116 AD3d 1090 [internal quotation marks omitted]; *see People v Beauchamp*, 74 NY2d 639, 640), the victim's testimony that numerous such acts occurred during the summer of 2010 rendered counts four and six duplicitous, inasmuch as it is impossible to determine whether the jury reached a unanimous verdict on those counts. It is also impossible to determine whether defendant was convicted of an act for which he was not indicted (*see People v McNab*, 167 AD2d 858, 858). Although defendant did not preserve for our review his contention that counts four and six were rendered duplicitous at trial, preservation is not required because the "right of an accused to be tried and convicted of only those crimes and upon only those theories charged in the indictment is fundamental and nonwaivable . . . , as is the right to a unanimous verdict" (*People v Boykins*, 85 AD3d 1554, 1555, *lv denied* 17 NY3d 814 [internal quotation marks omitted]; *see People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025). Furthermore, where, as here, there was no testimony of a specific incident constituting the indicted offense (*cf. People v Spencer*, 119 AD3d 1411, 1412-1413, *lv denied* 24 NY3d 965), but instead only testimony of a general nature that several incidents occurred during the specified time frame, we are unable to determine whether defendant's protection against double jeopardy would be violated by a second prosecution (*see generally People v Gause*, 19 NY3d 390, 394-395). We therefore modify the judgment accordingly, and we grant the People leave to re-present appropriate charges under counts four and six, if any, to another grand jury.

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

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1058
CAF 13-01888
PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH E.K.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LITHIA K., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 30, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent on the ground of mental illness.

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

Memorandum: In these proceedings pursuant to Social Services Law § 384-b, respondent mother appeals from separate orders terminating her parental rights to the subject child on grounds of mental illness (appeal No. 1) and permanent neglect (appeal No. 2). With respect to appeal No. 1, we reject the mother's contention that Family Court erred in determining that petitioner established by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (§ 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). The court-appointed psychologist who conducted a mental health evaluation of the mother testified that she suffers from paranoid schizophrenia, which causes her to have delusions and "grossly erroneous beliefs." According to the psychologist, the mother, due to her mental condition, is unable to care for the child and, based on his special needs, the child would be in even greater danger if placed with the mother. Although the mother's condition was treatable, she refused to take prescribed medication. We note that one of the mother's witnesses was a psychologist who met with her once before trial. Although the psychologist testified that she saw no evidence

that the mother suffered from a major psychiatric illness, the psychologist added that she was “certainly not advocating that [the mother] be given custody of her child back today. There are issues. There are things that need to be dealt with.” It is well settled that “[t]he mere possibility that [the mother’s] condition, with proper treatment, may improve in the future is insufficient to vitiate [the court’s determination]” (*Matter of Steven M.*, 37 AD3d 1072, 1072 [internal quotation marks omitted]; *see Matter of Trebor UU.*, 295 AD2d 648, 650). We therefore conclude that the court properly granted the petition seeking to terminate the mother’s parental rights based on mental illness.

With respect to appeal No. 2, the mother contends that the court’s finding of permanent neglect must be vacated because it did not conduct separate dispositional hearings on the two petitions. Although the court conducted a dispositional hearing on the permanent neglect petition, it properly concluded that no dispositional hearing was required on the mental illness petition, inasmuch as “ ‘a separate dispositional hearing is not required following the determination that [a parent] is unable to care for [a] child because of mental illness’ ” (*Matter of Vincent E.D.G. [Rozzie M.G.]*, 81 AD3d 1285, 1286, *lv denied* 17 NY3d 703). Nevertheless, we conclude that, given the court’s finding that the mother was incapable of caring for the child based on her mental illness, the court erred in terminating her parental rights on the additional ground of permanent neglect. The mother “could not be found to be mentally ill to a degree warranting termination of [her] parental rights and at the same time be found to have failed to plan for the future of the child[ ] although physically and financially able to do so” (*Matter of Kyle K.*, 49 AD3d 1333, 1334, *lv denied* 10 NY3d 715). We therefore reverse the order in appeal No. 2 and dismiss the petition therein.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1059
CAF 13-02007

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

IN THE MATTER OF JOSEPH E.K.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

LITHIA K., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ABRAHAM J. PLATT, LOCKPORT, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered September 30, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent on the ground of permanent neglect.

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

Same Memorandum as in *Matter of Joseph E.K.* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1060
CA 14-00703

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

RICHARD J. RICE AND TAMMY A. SCHUELER, AS ADMINISTRATORS OF THE ESTATE OF ALEXANDRIA M. RICE, DECEASED, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES G. CORASANTI, M.D., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (ROBERT L. HARTFORD OF COUNSEL), AND HARRIS BEACH PLLC, BUFFALO, FOR DEFENDANT-APPELLANT.

CONNORS & VILARDO, LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 11, 2013. The order, insofar as appealed from, denied those parts of the motion of defendant seeking to dismiss all claims for punitive damages, conscious pain and suffering, preimpact terror and psychic injury.

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

Memorandum: In this wrongful death action, plaintiffs seek damages for fatal injuries sustained by decedent when she was struck by an automobile operated by defendant. The accident occurred at approximately 11:30 p.m. on July 8, 2011. At the time of the accident decedent was on a skateboard, traveling in the same direction as defendant. The collision threw decedent approximately 167 feet from the point of impact. She was transported to a nearby hospital, where she was pronounced dead at 12:04 a.m. on July 9, 2011. Defendant was prosecuted for several criminal offenses, and was convicted after a jury trial of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]).

In appeal No. 1, defendant appeals from an order that denied his motion seeking, inter alia, summary judgment dismissing plaintiffs' claims for decedent's conscious pain and suffering, preimpact terror and psychic injury, and their claim for punitive damages. In appeal No. 2, plaintiffs appeal from an order that denied in part their motion seeking a protective order to prevent disclosure of certain mental health records of decedent.

We conclude in appeal No. 1 that Supreme Court properly denied defendant's motion. While defendant submitted evidence that "decedent was unconscious when found at the scene and continued to be unconscious thereafter," his submissions fail to address the interval immediately after the impact until decedent was discovered by witnesses 167 feet from the collision (*Barron v Terry*, 268 AD2d 760, 761; *see Houston v McNeilus Truck & Mfg., Inc.*, 115 AD3d 1185, 1186). Thus, defendant failed to establish as a matter of law that decedent did not endure conscious pain and suffering (*see Houston*, 115 AD3d at 1186; *Jehle v Hertz Corp.*, 174 AD2d 812, 813). With respect to the claims for preimpact terror and psychic injury, "defendant's submissions . . . were inconclusive as to whether the decedent saw the oncoming vehicle, and thus failed to demonstrate the absence of any material issues of fact" (*Cadieux v D.B. Interiors*, 214 AD2d 323, 324; *see Houston*, 115 AD3d at 1186). Even assuming, arguendo, that defendant met his initial burden with regard to the claim for punitive damages, we conclude that plaintiffs' evidence raises triable issues of fact whether defendant's conduct warrants an award of such damages (*see Schragel v Juszczyk*, 43 AD3d 1375, 1375-1376; *Thorne v Grubman*, 21 AD3d 254, 255).

In appeal No. 2, we conclude that the court should have granted in its entirety plaintiffs' motion for a protective order with respect to decedent's mental health treatment records. Plaintiffs did not waive their right to shield those records from disclosure by consenting to the court's in camera review of the records (*see Garcia v Montefiore Med. Ctr.*, 209 AD2d 208, 209), nor did plaintiffs place decedent's emotional or mental condition in controversy (*see Churchill v Malek*, 84 AD3d 446, 446). We agree with plaintiffs, moreover, that Mental Hygiene Law § 33.13 (c) (1) prohibits release of the records at issue. As relevant to this action, that section provides that such records "shall not be released . . . except . . . pursuant to an order of a court of record requiring disclosure upon a finding by the court that the interests of justice significantly outweigh the need for confidentiality." The court made no such finding here, and the record does not support such a finding (*see Del Terzo v Hospital for Special Surgery*, 95 AD3d 551, 553).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1066
CA 14-00702
PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND DEJOSEPH, JJ.

RICHARD J. RICE AND TAMMY A. SCHUELER, AS ADMINISTRATORS OF THE ESTATE OF ALEXANDRIA M. RICE, DECEASED, PLAINTIFFS-APPELLANTS,

V — MEMORANDUM AND ORDER

JAMES G. CORASANTI, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

CONNORS & VILARDO, LLP, BUFFALO (TERRENCE M. CONNORS OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF EPSTEIN, GIALLEONARDO & HARTFORD, GETZVILLE (ROBERT L. HARTFORD OF COUNSEL), AND HARRIS BEACH PLLC, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 11, 2013. The order, insofar as appealed from, denied in part the motion of plaintiffs for a protective order to prevent the disclosure of the mental health records of plaintiffs' decedent.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and the motion is granted in its entirety.

Same Memorandum as in *Rice v Corasanti* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1090
CA 14-00572
PRESENT: SMITH, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF THOMAS C. TURNER AND KINGSLEY STANARD, PETITIONERS-PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MUNICIPAL CODE VIOLATIONS BUREAU 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 a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered June 5, 2013 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, denied the relief sought in the petition-complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and judgment is granted in favor of petitioners-plaintiffs as follows:

> It is ADJUDGED and DECLARED that section 120-175 of the Municipal Code of the City of Rochester is unconstitutional under the United States and New York Constitutions.

Memorandum: Petitioners-plaintiffs (plaintiffs) commenced this hybrid CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, to declare section 120-175 of the Municipal Code of the City of Rochester (Code) unconstitutional. Supreme Court denied the relief sought in the petition-complaint.

The ordinance at issue was enacted by the Rochester City Council to advance the health, safety, and welfare of the residents of the City of Rochester (*see* Code § 120-162). To that end, the ordinance seeks to prohibit "outdoor storage" in all districts except specifically enumerated commercial districts (*id.* § 120-175). The Code defines "outdoor storage" as "[s]torage of any materials, merchandise, stock, supplies, machines and the like that are not kept in a structure having at least four walls and a roof, regardless of

how long such materials are kept on the premises" (*id.* § 120-208).

Plaintiffs contend that Code § 120-175 is unconstitutionally void for vagueness, and we agree. We therefore reverse the judgment and declare section 120-175 of the Code to be unconstitutional. Municipal ordinances, like other legislative enactments, "enjoy an 'exceedingly strong presumption of constitutionality' " (*Cimato Bros. v Town of Pendleton*, 270 AD2d 879, 879, *lv denied* 95 NY2d 757, quoting *Lighthouse Shores v Town of Islip*, 41 NY2d 7, 11). The void-for-vagueness doctrine "embodies a 'rough idea of fairness' " (*Quintard Assoc. v New York State Liq. Auth.*, 57 AD2d 462, 465, *lv denied* 42 NY2d 805, *appeal dismissed* 42 NY2d 973, quoting *Colten v Kentucky*, 407 US 104, 110), and an impermissibly vague ordinance is a violation of the due process of law (*see People v Stuart*, 100 NY2d 412, 419).

"In addressing vagueness challenges, courts have developed a two-part test . . . [F]irst[,] . . . the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" (*id.* at 420 [internal quotation marks omitted]; *see People v Nelson*, 69 NY2d 302, 307; *see also Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256, *cert denied sub nom. Tuck-It-Away, Inc. v New York State Urban Dev. Corp.*, 562 US ___, 131 S Ct 822). "Second, the court must determine whether the enactment provides officials with clear standards for enforcement" (*Stuart*, 100 NY2d at 420; *see People v New York Trap Rock Corp.*, 57 NY2d 371, 378).

We conclude that the ordinance fails to pass either part of the test. With respect to the first part of the test, we conclude that the ordinance gives ordinary people virtually no guidance on how to conduct themselves in order to comply with it, and the language used in the ordinance makes it "difficult[] for a citizen to comprehend" the precise conduct that is prohibited (*Nelson*, 69 NY2d at 307). Moreover, with respect to the second part of the test, we conclude that the vague language of the ordinance does not provide clear standards for enforcement and, thus, a determination "whether the ordinance has been violated 'leaves virtually unfettered discretion in the hands of' the [code enforcement officer]" (*Bakery Salvage Corp. v City of Buffalo*, 175 AD2d 608, 610, quoting *People v Illardo*, 48 NY2d 408, 414).

In view of our determination, we do not address plaintiffs' remaining contentions.

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1100
KA 14-00259
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE A. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), entered May 30, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that the determination should be modified downward in the interest of justice so as to make him a level one risk. In support of that contention, defendant notes that County Court assessed 30 points against him under risk factor 9 (number and nature of prior crimes) based on an attempted robbery offense for which he was adjudicated a youthful offender. Without those 30 points, defendant would have been a presumptive level one risk. To the extent that defendant contends that the SORA court should have granted him a downward departure, that contention is unpreserved for our review "because defendant never asked the SORA court to order a downward departure" (*People v Gillotti*, 23 NY3d 841, 861 n 5; *see People v Johnson*, 11 NY3d 416, 421-422; *People v Quinones*, 91 AD3d 1302, 1303, *lv denied* 19 NY3d 802). In any event, as defendant correctly acknowledges, it is well settled that "youthful offender adjudications are to be treated as 'crimes' for purposes of assessing the defendant's likelihood of re-offending and danger to public safety" (*People v Moore*, 1 AD3d 421, 421, *lv denied* 2 NY3d 743; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 6, 13 [2006]; *People v Wilkins*, 77 AD3d 588, 588, *lv denied* 16 NY3d 703; *People v Irving*, 45

AD3d 1389, 1389-1390, *lv denied* 10 NY3d 703).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1103
KA 13-00307
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL MALDONADO, DEFENDANT-APPELLANT.

ANGEL MALDONADO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered January 7, 2013. The judgment convicted defendant, upon a jury verdict, of grand larceny in the third degree.

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

Memorandum: Defendant, proceeding pro se, appeals from a judgment convicting him upon a jury verdict of grand larceny in the third degree (Penal Law former § 155.35). Contrary to defendant's contention, the People established by a preponderance of the evidence that Supreme Court, Erie County, has geographical jurisdiction (*see People v Bigness*, 28 AD3d 949, 950, *lv denied* 7 NY3d 810; *see generally People v O'Connor*, 21 AD3d 1364, 1365, *lv denied* 6 NY3d 757). Defendant's further contention that geographical jurisdiction was not established at the grand jury proceeding is not properly before us on this direct appeal from the judgment inasmuch as "prohibition is the proper remedy for . . . a challenge [to the geographical jurisdiction to indict and to prosecute]" (*Matter of Steingut v Gold*, 42 NY2d 311, 316; *see Matter of Hogan v Culkin*, 18 NY2d 330, 336).

Defendant's contention that the court erred in failing to dismiss the indictment as a sanction for the failure of the People to disclose certain audio recordings that constituted *Brady* material lacks merit. "The determination of what is [an] appropriate [sanction] is committed to the trial court's sound discretion, and while the degree of prosecutorial fault may be considered, the court's attention should focus primarily on the overriding need to eliminate prejudice to the defendant" (*People v Martinez*, 71 NY2d 937, 940; *see People v Kelly*, 62 NY2d 516, 520-521). Here, the court declared a mistrial in the first trial before the People rested their case upon learning that the People had committed a *Brady* violation by failing to disclose evidence

of certain telephone conversations between defendant and the victim, the recordings of which had been routinely destroyed following a one-year period. At the second trial, the sanction imposed by the court for the *Brady* violation was to preclude the People from using any of the audio recordings of telephone conversations in their possession. Under the circumstances of this case, we conclude that dismissal of the indictment was not required as a consequence of the *Brady* violation where, as here, a "less drastic sanction[] . . . cured any prejudice" (*Kelly*, 62 NY2d at 518-519). Defendant's further contention that the People failed to disclose certain *Rosario* material is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Defendant's contention that the second trial was barred by double jeopardy also lacks merit. Here, defendant prevented a verdict at the first jury trial by seeking a mistrial and, contrary to defendant's contention, nothing in the record reflects that the prosecutor intentionally provoked a mistrial at the first trial (*see generally Matter of Gorghan v DeAngelis*, 7 NY3d 470, 473-474; *People v Wilson*, 43 AD3d 1409, 1411-1412, *lv denied* 9 NY3d 994; *People v Abston*, 229 AD2d 970, 970-971, *lv denied* 88 NY2d 1066). To the extent that defendant contends that the second trial was barred because the evidence at the first jury trial was legally insufficient, that contention also fails. Although "[i]t is . . . true that considerations of double jeopardy will bar a second attempt by the People to adduce legally sufficient evidence of guilt after they have been unsuccessful in one *full and fair opportunity* to do so" (*Rafferty v Owens*, 82 AD2d 582, 584 [emphasis added]), here defendant moved for a mistrial before the People had a full and fair opportunity to present their case.

Viewing the evidence at the second jury trial in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence at the second trial in light of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's further contention that the court erred in denying his motion to dismiss the indictment for legal insufficiency of the grand jury evidence is not reviewable where, as here, the judgment of conviction is based on legally sufficient trial evidence (*see People v Smith*, 4 NY3d 806, 808; *People v Lane*, 106 AD3d 1478, 1481, *lv denied* 21 NY3d 1043).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1108
CA 13-02249
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

NICHOLAS D. TRBOVICH, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

JACQUELINE TRBOVICH, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO, BOUVIER PARTNERSHIP, LLP, EAST AURORA, THE COSGROVE LAW FIRM (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered September 13, 2013 in a divorce action. The order, among other things, denied plaintiff's motion for, inter alia, summary judgment.

It is hereby ORDERED that the order so appealed from is modified on the law by granting plaintiff's motion in part and vacating the award of temporary maintenance and as modified the order is affirmed without costs.

Memorandum: Plaintiff husband appeals from three orders in this matrimonial action. By the order in appeal No. 1, Supreme Court denied plaintiff's motion for, inter alia, summary judgment seeking a divorce pursuant to Domestic Relations Law § 170 (7) and to vacate a prior ex parte order awarding temporary maintenance to defendant. By the order in appeal No. 2, the court granted defendant's motion for attorneys' fees in the amount of $56,190, subject to equitable distribution and, by the order in appeal No. 3, the court, inter alia, directed plaintiff to respond to defendant's discovery demands and scheduled plaintiff's deposition.

We conclude in appeal No. 1 that the court properly denied that part of plaintiff's motion for summary judgment seeking a divorce pursuant to Domestic Relations Law § 170 (7). The requirements for a divorce under that section are (1) a statement under oath by one party that the relationship has broken down irretrievably for a period of at least six months; and (2) a resolution of "the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation

with the infant children of the marriage" (*id.*). We agree with plaintiff that the opposing spouse in a no-fault divorce action pursuant to Domestic Relations Law § 170 (7) is not entitled to litigate the other spouse's sworn statement that the relationship has broken down irretrievably for a period of at least six months (*see Palermo v Palermo*, 35 Misc 3d 1211[A], 2011 NY Slip Op 52506[U], *15, *affd for reasons stated* 100 AD3d 1453; *see e.g. Rinzler v Rinzler*, 97 AD3d 215, 218; *A.C. v D.R.*, 32 Misc 3d 293, 306). To the extent that our decision in *Tuper v Tuper* (98 AD3d 55, 59 n) suggested otherwise, we decline to follow it.

Nevertheless, plaintiff is not entitled to summary judgment under Domestic Relations Law § 170 (7) at this juncture of the litigation. The statute provides that "[n]o judgment of divorce shall be granted under this subdivision unless and until" the ancillary economic and custodial issues "have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce" (§ 170 [7]), and here the ancillary issues have not been resolved by the parties or determined by the court (*see Palermo*, 35 Misc 3d 1211[A], 2011 NY Slip Op 52506[U], *15; *A.C.*, 32 Misc 3d at 308).

In appeal Nos. 1 and 2, plaintiff contends that the court erred in granting defendant pendente lite relief in the form of housing expenses and weekly support (collectively, temporary maintenance) and in granting defendant's motion for attorneys' fees because the parties' prenuptial agreement precludes such awards. We agree. As an initial matter, we reject defendant's contention that any issue concerning the award of temporary maintenance is not properly before us. Although no appeal lies from an ex parte order (*see* CPLR 5701 [a] [2]; *Sholes v Meagher*, 100 NY2d 333, 335), here plaintiff, by way of the instant motion on notice that is the subject of appeal No. 1, sought to vacate the ex parte order awarding temporary maintenance and then took an appeal from the order in appeal No. 1, which denied his motion in all respects and continued the prior order (*see* CPLR 5701 [a] [3]; *Sholes*, 100 NY2d at 335; *Village of Savona v Soles*, 84 AD2d 683, 684-685).

With respect to the merits of plaintiff's contention, we note that "[i]t is well settled that duly executed prenuptial agreements are generally valid and enforceable given the 'strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements' " (*Van Kipnis v Van Kipnis*, 11 NY3d 573, 577, quoting *Bloomfield v Bloomfield*, 97 NY2d 188, 193; *see* Domestic Relations Law § 236 [B] [3]). "[A] prenuptial agreement is accorded the same presumption of legality as any other contract . . . and the validity of such an agreement is presumed unless the party opposing the agreement comes forward with evidence demonstrating 'fraud, duress, or overreaching, or that the agreement or stipulation is . . . unconscionable' " (*Darrin v Darrin*, 40 AD3d 1391, 1392-1393, *lv dismissed* 9 NY3d 914). "As with all contracts, prenuptial agreements are construed in accord with the parties' intent, which is generally gleaned from what is expressed in their writing" (*Van Kipnis*, 11 NY3d at 577). "When interpreting a contract, such as a prenuptial

agreement . . . , 'the court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized' " (*Noach v Noach*, 53 AD3d 602, 603; *see Kass v Kass*, 91 NY2d 554, 567).

Here, the prenuptial agreement provides that, "[i]n the event of an action for dissolution of the contemplated marriage, [defendant] and [plaintiff] each waives and releases any right she or he may have under the law now or hereinafter in effect for temporary alimony or attorneys' fees." The agreement also indicates that "maintenance" is "commonly referred to as alimony." Thus, the parties entered into a prenuptial agreement in which each waived and released any right to temporary maintenance and attorneys' fees after the institution of an action for dissolution of the marriage. "That agreement is controlling unless and until it is set aside" (*Rubin v Rubin*, 262 AD2d 390, 391). Although defendant has asserted counterclaims seeking to vacate the agreement, she has not moved for summary judgment on those counterclaims and has not proffered any evidence "to establish fraud, overreaching, concealment, misrepresentation or some form of deception on the part of [plaintiff], as required in order to overcome the presumption of legality of the agreement" (*Costanza v Costanza* [appeal No. 2], 199 AD2d 988, 989; *see Darrin*, 40 AD3d at 1392-1393). Thus, the court erred in awarding temporary maintenance and attorneys' fees inasmuch as such awards are barred by the plain terms of the valid agreement. We therefore modify the order in appeal No. 1 by granting that part of plaintiff's motion seeking to vacate the award of temporary maintenance, and we reverse the order in appeal No. 2 granting defendant's motion for attorneys' fees.

We have reviewed plaintiff's remaining contentions in appeal No. 1 and conclude that they lack merit.

Finally, the order in appeal No. 3 was issued following a compliance conference requested by defendant, and it "is not appealable as of right because it does not decide a motion made on notice" (*Koczen v VMR Corp.*, 300 AD2d 285, 285; *see* CPLR 5701 [a] [2]). We therefore dismiss plaintiff's appeal from the order in appeal No. 3.

All concur except LINDLEY, J., who concurs in the result in the following Memorandum: Although I concur in the result reached by the majority, I write separately because I respectfully disagree with its conclusion that defendant is not entitled to a trial on the issue of whether the parties' relationship has broken down irretrievably for a period of at least six months. Domestic Relations Law § 173 reads: "In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce." One of the "grounds" for divorce in New York is that "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath" (§ 170 [7]). It thus stands to reason that a defendant in a matrimonial action is entitled to contest at trial his or her spouse's sworn statement that the marital relationship has broken down irretrievably for a period of

six months. To conclude otherwise is to assume that the Legislature, when it enacted section 170 (7) in 2010, made a mistake in failing to amend section 173 so as to state that there is no right to a jury trial with respect to the no-fault grounds. It is well settled, however, that the "clearest indicator of legislative intent is the statutory text" (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583; *see Matter of Excellus Health Plan, Inc. v Serio*, 2 NY3d 166, 171), and that a court may not "by a process of judicial legislative revision" effectuate an intent that the Legislature failed to express, omitted, or excluded (*Valladares v Valladares*, 55 NY2d 388, 393; *see Pajak v Pajak*, 56 NY2d 394, 397-398). As has been stated elsewhere, if the Legislature "intended to abolish the right to trial for the grounds contained in Domestic Relations Law § 170 (7), it would have explicitly done so" (*Strack v Strack*, 31 Misc 3d 258, 263; *see Schiffer v Schiffer*, 33 Misc 3d 795, 800).

Unlike the majority, I cannot agree with the conclusion reached in *Palermo v Palermo* (35 Misc 3d 1211[A], 2011 NY Slip Op 52506[U], *affd* 100 AD3d 1453), which admittedly has gained widespread acceptance at the trial level (*see e.g. G.T. v A.T.*, 43 Misc 3d 500, 509; *Matter of Perricelli*, 36 Misc 3d 418, 424-425; *Filstein v Bromberg*, 36 Misc 3d 404, 408-409; *Townes v Coker*, 35 Misc 3d 543, 546-550; *Vahey v Vahey*, 35 Misc 3d 691, 693-695). To begin with, I do not perceive "an apparent collision of the no-fault entitlement under DRL § 170 (7), and the trial right under DRL § 173" (*Palermo*, 35 Misc 3d at *4). Section 170 (7) does not state that a divorce may be *obtained* by a sworn statement from one party that the relationship has broken down irretrievably for a period of at least six months; rather, the statute provides that "[a]n action for divorce may be *maintained*" by providing such a sworn statement (emphasis added). In my view, that language is not inconsistent with section 173 insofar as it grants parties in a matrimonial action the right to contest grounds at trial. Because there is no conflict between the two statutes, I see no need to delve into the legislative history in an attempt to discern the Legislature's intent behind section 170 (7). In any event, as noted in *Tuper v Tuper* (98 AD3d 55, 59 n), the sponsor of the no-fault bill in the New York State Assembly, Assemblyman Jonathan Bing, repeatedly stated during the debate in the Assembly that a defendant in a no-fault case will have the right to a jury trial to contest whether there exists an irretrievable breakdown in the marital relationship (*see* NY Assembly Debate on Assembly Bill A9753-A, July 1, 2010, transcript at 231-238).

Finally, although I agree that allowing a party to obtain a divorce by the mere filing of a sworn statement that there has been an irretrievable breakdown in the marital relationship will no doubt "lessen the burden on both parties and promote judicial economy by obviating the necessity of a trial on the issue of fault" (*Rinzler v Rinzler*, 97 AD3d 215, 218), that, in my view, is a policy determination that should be made by the Legislature, not the courts. In short, I submit that we should be constrained to apply the law as unambiguously set forth in Domestic Relations Law § 173, however

unwise and undesirable the result may be.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1109
CA 13-02250
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

NICHOLAS D. TRBOVICH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JACQUELINE TRBOVICH, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO, BOUVIER PARTNERSHIP, LLP, EAST AURORA, THE COSGROVE LAW FIRM (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 4, 2013 in a divorce action. The order granted the motion of defendant for an award of attorneys' fees in the amount of $56,190 subject to equitable distribution.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and defendant's motion for attorneys' fees is denied.

Same Memorandum as in *Trbovich v Trbovich* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1110
CA 13-02251
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

NICHOLAS D. TRBOVICH, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

JACQUELINE TRBOVICH, DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO, BOUVIER PARTNERSHIP, LLP, EAST AURORA, THE COSGROVE LAW FIRM (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 4, 2013 in a divorce action. The order, among other things, directed plaintiff to comply with certain discovery requests.

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

Same Memorandum as in *Trbovich v Trbovich* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014   Frances E. Cafarell
                                                                  Clerk of the Court

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

1120
CA 13-01692
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF THOMAS MANN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 19, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking to annul the Parole Board's determination denying him parole release. "This appeal must be dismissed as moot because the determination expired during the pendency of this appeal, and the Parole Board denied petitioner's subsequent request for parole release" (*Matter of Patterson v Berbary*, 1 AD3d 943, 943, *appeal dismissed and lv denied* 2 NY3d 731; *see Matter of Robles v Evans*, 100 AD3d 1455, 1455). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply here (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715; *Matter of Sanchez v Evans*, 111 AD3d 1315, 1315).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1121
TP 14-00653
PRESENT: SCUDDER, P.J., FAHEY, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF TARRIN JONES, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
AND THE FENTON GRILL, RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR 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, Chautauqua County [Deborah A. Chimes, J.], entered December 6, 2013) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint alleging unlawful discrimination.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination of respondent New York State Division of Human Rights (Division) that dismissed her complaint, which alleged unlawful discrimination by her former employer, respondent The Fenton Grill (restaurant). "[T]he scope of judicial review under the Human Rights Law is extremely narrow and is confined to the consideration of whether the Division's determination is supported by substantial evidence in the record. Courts may not weigh the evidence or reject the Division's determination where the evidence is conflicting and room for choice exists. Thus, when a rational basis for the conclusion adopted by the Commissioner is found, the judicial function is exhausted" (*Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106; *see Matter of Noe v Kirkland*, 101 AD3d 1756, 1757).

We conclude that the determination is supported by substantial evidence (*see generally Granelle*, 70 NY2d at 106). Petitioner failed to meet her burden with respect to her claim for a hostile work environment inasmuch as she failed to demonstrate that she was the subject of unwelcome sexual harassment (*see generally Vitale v Rosina Food Prods.*, 283 AD2d 141, 142; *Pace v Ogden Servs. Corp.*, 257 AD2d 101, 103). Petitioner also failed to establish a prima facie case with respect to her claim based on quid pro quo harassment (*see generally Matter of Father Belle Commmunity Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 49-50, *lv denied* 89 NY2d 809), or with

respect to her claim for retaliation (*see generally Matter of Lyons v New York State Div. of Human Rights*, 79 AD3d 1826, 1827, *lv denied* 17 NY3d 707).

Concerning text messages, the testimony at the hearing on the complaint established that the restaurant's employees used a cellular telephone that was also allegedly used by the restaurant owner to send numerous text messages of a sexual nature to petitioner. The restaurant manager testified that petitioner knew of and demonstrated a "spoof texting" application. Petitioner's expert, who extracted the text messages from petitioner's cellular telephone, did not verify the extracted messages against the records of the involved cellular telephone carriers. The administrative law judge (ALJ) who presided at the hearing was not "bound by the strict rules of evidence prevailing in courts of law or equity" (Executive Law § 297 [4] [a]), and we will not disturb the ALJ's decision to credit the testimony of certain witnesses for the restaurant over that of petitioner and her expert (*see generally Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381, *lv denied* 16 NY3d 709). Finally, petitioner's contention that the witnesses were biased because they depended upon the restaurant financially lacks merit because, at the time of the hearing, the restaurant had been closed for nearly a year.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1124
KA 13-01461
PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. WOLLEK, DEFENDANT-APPELLANT.

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

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), dated July 3, 2013. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining, following a hearing, that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, he was properly assessed 25 points under risk factor 2 for sexual contact with the victim. Our analysis differs, however, from that of County Court (*see People v Middleton*, 50 AD3d 1114, 1115, *affd* 12 NY3d 737; *see e.g. People v Parilla*, 109 AD3d 20, 30-31, *lv denied* 21 NY3d 865; *People v Ferrer*, 69 AD3d 513, 514-515, *lv denied* 14 NY3d 709), and we note that the record is sufficient for us to make our own findings of fact and conclusions of law (*see e.g. People v Bradshaw*, 60 AD3d 922, 922). The People failed to meet their burden of establishing by clear and convincing evidence that defendant engaged in aggravated sexual abuse by inserting a foreign object in the vagina of the victim (*see generally* Correction Law § 168-n [3]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 5 [2006]). The People also failed to meet their burden of establishing that defendant engaged in sexual intercourse with the victim because where, as here, "the hearsay statements of [the victim] are equivocal or inconsistent, and not substantiated by other proof, they do not rise to the level of clear and convincing evidence" (*People v Dominie*, 42 AD3d 589, 591; *see People v Stewart*, 61 AD3d 1059, 1060; *see generally People v Gonzalez*, 28 AD3d 1073, 1074). Neither insertion of a foreign object nor sexual intercourse, therefore, can serve as a basis for the assessment of the challenged 25 points.

Based on our review of the record, however, we conclude that the People established by clear and convincing evidence that defendant engaged in aggravated sexual abuse in the second degree (Penal Law § 130.67 [1] [a]) and, thus, that defendant was properly assessed the challenged 25 points and classified as a presumptive level two risk (*see* Risk Assessment Guidelines and Commentary, at 9). As relevant here, Penal Law § 130.67 (1) (a) provides that "[a] person is guilty of aggravated sexual abuse in the second degree when he . . . inserts a finger in the vagina . . . of another person causing physical injury to such person . . . [b]y forcible compulsion." Inasmuch as defendant pleaded guilty to sexual abuse in the first degree (§ 130.65 [1]), it is undisputed that he engaged in sexual contact with the victim by forcible compulsion, and the presentence report and the case summary establish that defendant touched the victim's vagina by forcible compulsion (*see People v Wilson*, 117 AD3d 1557, 1558, *lv denied* 24 NY3d 902). Moreover, the record establishes that defendant's digital penetration of the victim caused physical injury (*see* § 10.00 [9]). The medical records introduced at the hearing by defendant establish that defendant "put his fingers inside of [the victim]" forcefully and in a manner that hurt her. The results of the victim's medical examination establish that she suffered three vaginal lacerations as well as tenderness, including a two centimeter bruise on her cervix. The nurse examiner concluded that the victim suffered an "[a]ctual or potential alteration in comfort" related to her injury, and that the physical findings were consistent with sexual assault (*see People v Kruger*, 88 AD3d 1169, 1170, *lv denied* 18 NY3d 806). Further, defendant's attorney conceded at the hearing that the physical injuries were "entirely consistent with the digital penetration" to which defendant pleaded guilty. On appeal, defendant further concedes that the vaginal lacerations and cervical bruising documented during the victim's medical examination constitute "injuries . . . fully consistent with penetration by . . . [d]efendant's fingers." We thus conclude that defendant was properly assessed the challenged 25 points for aggravated sexual abuse (*see* Risk Assessment Guidelines and Commentary, at 9), which results in a total score of 80 points, rendering him a level two risk.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1150
CA 14-00672
PRESENT: CENTRA, J.P., FAHEY, SCONIERS, WHALEN, AND DEJOSEPH, JJ.

KATHLEEN CORRADO, INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF LUCAS DELGATTO, INFANT,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHOUDARY DAVULURI, M.D., ST. JOSEPH'S HOSPITAL
HEALTH CENTER'S MATERNAL CHILD HEALTH CENTER AND
ST. JOSEPH'S HOSPITAL HEALTH CENTER,
DEFENDANTS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANT-APPELLANT CHOUDARY DAVULURI, M.D.

HANCOCK ESTABROOK, LLP, SYRACUSE (ASHLEY D. HAYES OF COUNSEL), FOR DEFENDANTS-APPELLANTS ST. JOSEPH'S HOSPITAL HEALTH CENTER'S MATERNAL CHILD HEALTH CENTER AND ST. JOSEPH'S HOSPITAL HEALTH CENTER.

DEFRANCISCO & FALGIANTANO LAW FIRM, SYRACUSE (CHARLES L. FALGIATANO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered June 25, 2013. The order denied the motion of defendants for a directed verdict.

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

Memorandum: Defendants appeal from an order denying their motion for a directed verdict at the close of plaintiff's case (*see* CPLR 4401). The jury was unable to reach a verdict after the close of evidence, and Supreme Court declared a mistrial. The appeals must be dismissed. The court's order denying the motion for a directed verdict embodies "determinations in the nature of rulings by the court during the trial and is not appealable" (*Covell v H.R.H. Constr. Corp.*, 24 AD2d 566, 567, *affd* 17 NY2d 709; *see Kinker v 6409-20th Ave. Realty Corp.*, 28 AD2d 907, 908, *appeal dismissed* 20 NY2d 796; *see also Kemp v Lynch*, 283 AD2d 934, 934), either as of right or by permission (*see Radford v Sheridan Prods.*, 181 AD2d 667, 668).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1159
KA 12-01728
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE CARSON, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 23, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree, attempted robbery in the first degree and attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the first degree (Penal Law § 140.30 [4]), attempted robbery in the first degree (§§ 110.00, 160.15 [4]) and attempted robbery in the second degree (§§ 110.00, 160.10 [1]). Contrary to defendant's contention, County Court properly refused to suppress a witness's in-court identification of him. It is well settled that, "even when an identification is the product of a suggestive pretrial identification procedure, a witness will nonetheless be permitted to identify a defendant in court if that identification is based upon an independent source" (*People v Campbell*, 200 AD2d 624, 625, *lv denied* 83 NY2d 869; *see People v Wilson*, 43 AD3d 1409, 1410, *lv denied* 9 NY3d 994). Here, after conducting a hearing and reviewing the appropriate factors (*see Neil v Biggers*, 409 US 188, 199-200; *People v Lopez*, 85 AD3d 1641, 1641, *lv denied* 17 NY3d 860), the court properly concluded that the People established by clear and convincing evidence that the victim's observations of defendant during the commission of the crime provided an independent basis for the in-court identification (*see People v Young*, 20 AD3d 893, 893-894, *affd* 7 NY3d 40; *People v Small*, 110 AD3d 1106, 1106-1107, *lv denied* 22 NY3d 1043; *People v Jordan*, 96 AD3d 640, 640, *lv denied* 19 NY3d 1027).

Defendant further contends that the police lieutenant who stopped

him lacked probable cause to arrest him or reasonable suspicion to detain him, and that the court therefore erred in refusing to suppress all evidence flowing from that detention. We reject that contention. It is well settled that a police officer has reasonable suspicion to detain a suspect and transport him or her to the scene of a crime where the stop occurs close in time and location to the crime (*see People v Brisco*, 99 NY2d 596, 600; *People v Hicks*, 68 NY2d 234, 239-240). Here, the evidence at the hearing establishes that the lieutenant saw defendant running across a street three blocks from the scene of the crime, in the same direction in which the broadcast indicated that the suspects were fleeing. The lieutenant testified that, at the time when she first saw defendant running, the broadcast indicated that a crime was in progress, and defendant's description, i.e., a black male wearing blue jeans, was consistent with the broadcast description of the suspects. Contrary to defendant's contention, the slight variance between the T-shirt he was wearing at the time of the stop and the hooded sweatshirt that, according to the broadcast, the suspect was wearing does not require suppression inasmuch as the stop was in temporal and spatial proximity to the broadcast and the majority of the identifying factors were present (*see People v Richardson*, 70 AD3d 1327, 1328, *lv denied* 15 NY3d 756; *see also People v Balkum*, 71 AD3d 1594, 1595-1596, *lv denied* 14 NY3d 885). Furthermore, the lieutenant was aware that the suspects had been running through back yards in an attempt to escape from the pursuing officers and civilians, and it is not remarkable that a fleeing suspect would discard his outer clothing in an attempt to avoid pursuit (*see e.g. People v Foster*, 85 NY2d 1012, 1013; *People ex rel. Gonzalez v Warden of Anna M. Cross Ctr.*, 79 NY2d 892, 894; *People v McCullin*, 248 AD2d 277, 277-278, *lv denied* 92 NY2d 928). Finally, the lieutenant "had probable cause to arrest defendant after the victim identified him during the showup identification procedure" (*People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770; *see People v Samuels*, 113 AD3d 1117, 1118, *lv denied* 24 NY3d 964; *People v Jackson*, 78 AD3d 1685, 1686, *lv denied* 16 NY3d 743).

Defendant also contends that his conviction is not supported by legally sufficient evidence because the evidence fails to establish that he was one of the perpetrators of the crimes. 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 thus to support the conviction of the crimes charged (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant contends that the victims and the codefendant who testified against him were not credible, we note that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we see no reason to disturb the jury's resolution of those issues.

Defendant further contends that he was deprived of due process by prosecutorial misconduct during summation. Defendant objected to six instances of alleged misconduct during the prosecutor's summation, and the court sustained those objections. The court also gave curative instructions on two occasions. Defendant raises issues on appeal with respect to, inter alia, five of those alleged instances of misconduct to which he objected. "Following the Trial Judge's curative instructions, defense counsel neither objected further, nor requested a mistrial. Under these circumstances, the curative instructions must be deemed to have corrected the error[s] to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944; *see People v Medina*, 53 NY2d 951, 953; *People v Wallace*, 59 AD3d 1069, 1071, *lv denied* 12 NY3d 861). Defendant did not object to the remaining instances of alleged misconduct during summation that he now challenges on appeal, and thus failed to preserve his current contentions for our review (*see People v James*, 114 AD3d 1202, 1206-1207, *lv denied* 22 NY3d 1199; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court properly denied his motion pursuant to CPL 330.30 (2) to set aside the verdict based on alleged juror misconduct. Pursuant to that statute, the court is authorized to set aside a verdict if, "during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict" (*id.*). At a hearing on such a motion, "the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40 [2] [g]). Here, defendant failed to establish that there was improper conduct by the juror at issue inasmuch as he failed to establish by a preponderance of the evidence that the juror knew before or during the trial that one of defendant's trial attorneys represented the opposing party in the juror's Family Court proceeding. Defendant thus failed to demonstrate that there was misconduct by a juror that "may have affected a substantial right of the defendant" (CPL 330.30 [2]; *see People v Richardson*, 185 AD2d 1001, 1002, *lv denied* 80 NY2d 976; *cf. People v Brown*, 48 NY2d 388, 393-394).

The sentence is not unduly harsh or severe.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1161
KA 12-01117
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE SANTOS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered October 16, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance (CPCS) in the third degree (Penal Law § 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [3]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of CPCS in the fourth degree (§ 220.09 [1]). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). All of the pleas were entered during one plea proceeding, following the denial of defendant's suppression motion concerning all of the charges. At the outset, we reject the People's contention that defendant's waiver of the right to appeal was valid and thus encompasses his challenge in each appeal to County Court's suppression ruling. "[W]e are unable to determine based on the record before us whether the court ensured 'that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Johnson*, 109 AD3d 1191, 1191, *lv denied* 22 NY3d 997, quoting *People v Lopez* 6 NY3d 248, 256). Nevertheless, we conclude that the court properly denied defendant's motion.

Defendant contends that he was entitled to suppression because

there was an insufficient basis for issuance of the warrant to search his residence. Contrary to defendant's contention, however, the information in the search warrant application "was indicative of an ongoing drug operation at defendant's residence, and thus the application 'established probable cause to believe that a search of defendant's residence would result in evidence of drug activity' " (*People v Casolari*, 9 AD3d 894, 895, *lv denied* 3 NY3d 672; *see People v Pitcher*, 1 AD3d 1051, 1052). Defendant failed to preserve for our review his contention that the search warrant was overly broad because he "failed to raise that specific contention in his motion papers or at the [suppression] hearing" (*People v Price*, 112 AD3d 1345, 1346; *see generally People v Maxis*, 50 AD3d 922, 923; *People v Caballero*, 23 AD3d 1031, 1032, *lv denied* 6 NY3d 846). We decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Contrary to defendant's further contention, the police had probable cause for his warrantless arrest, which occurred prior to the execution of the search warrant. We thus reject defendant's contention that he was entitled to suppression of the evidence derived from the allegedly improper warrantless arrest, including, among other things, cell phones and cash from his person. The record of the suppression hearing establishes that an identified citizen told the police that he purchased heroin from defendant once on the date of the arrest and once on the day before the arrest, and another identified citizen told the police that she witnessed both of those transactions. "It is well settled that 'information provided by an identified citizen accusing another individual of the commission of a specific crime is sufficient to provide the police with probable cause to arrest' " (*People v McClain*, 67 AD3d 1480, 1480, *lv denied* 14 NY3d 803; *see People v Brito*, 59 AD3d 1000, 1000, *lv denied* 12 NY3d 814).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1162
KA 12-01118
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — MEMORANDUM AND ORDER

GEORGE SANTOS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered October 16, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Same Memorandum as in *People v Santos* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1163
KA 12-01119
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE SANTOS, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

JOHN J. RASPANTE, UTICA, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered October 16, 2009. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Same Memorandum as in *People v Santos* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1164
KA 12-01368
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK L. FLOWERS, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 13, 2012. The judgment convicted defendant, upon a jury verdict, of 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 him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [3]), defendant contends that he was denied his right to be present during a material stage of the trial. We reject that contention. "Defendant concedes that the pretrial conference[was] held to discuss a possible plea bargain, and thus his presence was not required" (*People v Daugherty*, 289 AD2d 1029, 1030; *see People v Elliot*, 299 AD2d 731, 733-734).

Defendant further contends that a police detective continued to question him after he invoked his right to remain silent, and that County Court therefore erred in refusing to suppress the video recording of his interrogation. We also reject that contention. " 'It is well settled . . . that, in order to terminate questioning, the assertion by a defendant of his right to remain silent must be unequivocal and unqualified' " (*People v Zacher*, 97 AD3d 1101, 1101, *lv denied* 20 NY3d 1015). The issue whether such a "request was 'unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant' " (*id.*, quoting *People v Glover*, 87 NY2d 838, 839). Here, we agree with the People that defendant "did not clearly communicate a desire to cease all questioning indefinitely" (*People v Caruso*, 34 AD3d 860, 863, *lv denied* 8 NY3d 879). Rather, he merely indicated that he did

not want to discuss certain topics broached by the detective, which does not constitute an unequivocal assertion of the right to remain silent (*see People v Morton*, 231 AD2d 927, 928, *lv denied* 89 NY2d 944; *see also People v Allen*, 147 AD2d 968, 968, *lv denied* 73 NY2d 1010, *reconsideration denied* 74 NY2d 660), especially in light of his continued participation in the conversation. In any event, we conclude that any error in admitting the challenged statements is harmless (*see generally People v Clyde*, 18 NY3d 145, 153-154, *cert denied* ___ US ___, 132 S Ct 1921; *People v Crimmins*, 36 NY2d 230, 237).

Defendant failed to request a jury charge on the voluntariness of his statements and did not object to the court's failure to give such a charge, and he thus failed to preserve for our review his contention that the court erred in failing to do so (*see* CPL 470.05 [2]; *People v Burch*, 256 AD2d 1233, 1233, *lv denied* 93 NY2d 871). 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]).

Contrary to defendant's further contention, the court did not err in admitting photographs of the victim's injured vagina in evidence. "[P]hotographs are admissible if they tend 'to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered' " (*People v Wood*, 79 NY2d 958, 960). Here, defendant was initially charged with predatory sexual assault against a child, which, insofar as relevant here, required that the People establish that he "commit[ed] the crime of rape in the first degree" (Penal Law § 130.96). That crime required that the People prove that defendant "engage[d] in sexual intercourse with another person . . . [w]ho is less than eleven years old" (§ 130.35 [3]), and sexual intercourse "has its ordinary meaning and occurs upon any penetration, however slight" (§ 130.00 [1]). Thus, inasmuch as the photographs were "probative on the issue of penetration, corroborated the infant victim's . . . testimony, and illustrated the medical testimony" (*People v Stebbins*, 280 AD2d 990, 990, *lv denied* 96 NY2d 925), there was no error in their admission.

We reject defendant's additional contention that the court abused its discretion in adjudicating him a persistent felony offender and in imposing a life sentence (*see People v Smart*, 100 AD3d 1473, 1475, *affd* 23 NY3d 213; *People v McCullen*, 63 AD3d 1708, 1709, *lv denied* 13 NY3d 747). The sentence is not unduly harsh or severe.

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1168
CAF 13-00953
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF JEROMY J. AND ANDRE J.

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

LATANYA J., RESPONDENT-APPELLANT,
AND ANDREW J., RESPONDENT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 1, 2013 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Latanya J. had neglected the subject children.

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

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent mother contends that Family Court's determination that she neglected her children, issued following a fact-finding hearing, is not supported by legally sufficient evidence. Inasmuch as the petition alleged that the mother neglected the children in violation of Family Court Act § 1012 (f) (i) (B), the burden was on petitioner to "demonstrate by a preponderance of the evidence 'first, that [the] child[ren]'s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child[ren] is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child[ren] with proper supervision or guardianship' " (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166, quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368; *see* §§ 1012 [f] [i] [B]; 1046 [b] [i]). Furthermore, the trial court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Kaleb U. [Heather V.-Ryan U.]*, 77 AD3d 1097, 1098; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401, *lv denied* 21 NY3d 862). Here, based upon the evidence presented by petitioner, we agree with petitioner and the Attorney for the Children that there is

a sound and substantial basis in the record for the court's finding that "the child[ren were] in imminent danger of impairment as a result of [the mother's] failure to exercise a minimum degree of care" in providing proper supervision or guardianship (*Matter of Paul U.*, 12 AD3d 969, 971; *see Matter of Christopher L.*, 286 AD2d 627, 628, *lv dismissed* 97 NY2d 716; *see generally Matter of Trina Marie H.*, 48 NY2d 742, 743).

Finally, " '[e]ven assuming, arguendo, that we agree with the [mother] that the court did not adequately state the grounds for its determination, we conclude that the error is harmless because the determination is amply support[ed] by the record' " (*Matter of Gada B. [Vianez V.]*, 112 AD3d 1368, 1369; *see generally* Family Ct Act § 1051 [d]).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1169
CAF 14-00547
PRESENT: SMITH, J.P., PERADOTTO, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

IN THE MATTER OF KAYLA F.,
RESPONDENT-APPELLANT.
---------------------------------- MEMORANDUM AND ORDER
MONROE COUNTY PRESENTMENT AGENCY,
PETITIONER-RESPONDENT.

BRIAN STRAIT, ATTORNEY FOR THE CHILD, ROCHESTER, FOR
RESPONDENT-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (BRETT GRANVILLE OF
COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Monroe County (John B. Gallagher, Jr., J.), entered December 11, 2013 in a proceeding pursuant to Family Court Act article 3. The amended order adjudicated respondent to be a juvenile delinquent and placed her in the custody of the Commissioner of Health and Human Services of Monroe County for a period of 12 months.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the facts and the law by substituting for respondent's adjudication as a juvenile delinquent a finding that she is a person in need of supervision and as modified the amended order is affirmed without costs.

Memorandum: Respondent appeals from an amended order adjudicating her a juvenile delinquent based upon the finding that she committed an act that, if committed by an adult, would constitute the crime of assault in the third degree (Penal Law § 120.00 [2]). Respondent contends that Family Court abused its discretion in denying her motion pursuant to Family Court Act § 311.4 (2) to substitute a finding that she is a person in need of supervision (PINS) for a finding that she is a juvenile delinquent, inasmuch as she demonstrated no danger to the community at large and could have received the same placement under a PINS disposition. We agree (*see Matter of Devon R.*, 278 AD2d 15, 15, *lv denied* 96 NY2d 707). A PINS is "[a] person less than eighteen years of age who[, inter alia,] . . . is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of a parent or other person legally responsible for such child's care" (Family Court Act § 712 [a]; *see Matter of Gabriela A.*, 103 AD3d 888, 889, *affd* 23 NY3d 155). Under the circumstances of this case, we conclude that respondent's conduct was consistent with PINS behavior, not with juvenile delinquency (*see Matter of Jeffrey C.*, 47 AD3d 433, 434, *lv denied* 10 NY3d 707; *see also Matter of Daniel*

I., 57 AD3d 666, 668). We therefore modify the amended order by substituting a finding that respondent is a person in need of supervision for the adjudication that she is a juvenile delinquent. We have reviewed respondent's remaining contentions and conclude that they are without merit.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1183
KA 11-02176
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARIO WOODS, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 26, 2011. Defendant was resentenced upon his conviction of burglary in the first degree (two counts), attempted robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of two counts of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]), two counts of burglary in the first degree (§ 140.30 [1], [2]), attempted robbery in the first degree (§§ 110.00, 160.15 [2]), criminal possession of a weapon in the second degree (§ 265.03), and resisting arrest (§ 205.30), and he now appeals from a resentence with respect to that conviction. County Court originally sentenced defendant to, inter alia, concurrent determinate terms of 10 years' imprisonment for the counts of burglary, attempted robbery, and criminal possession of a weapon, and we affirmed the judgment of conviction (*People v Woods*, 284 AD2d 995, *lv denied* 96 NY2d 926). The sentencing court failed, however, to impose periods of postrelease supervision as required by Penal Law § 70.45 (1). To remedy that *Sparber* error (*see* Correction Law § 601-d; *People v Sparber*, 10 NY3d 457, 465), the court resentenced defendant prior to the completion of his sentence to the same terms of imprisonment and imposed the requisite periods of postrelease supervision (*see* Penal Law § 70.45 [1]).

We reject defendant's contention that the court abused its discretion when it imposed the periods of postrelease supervision. In the absence of the People's consent, the court was required to impose the mandatory periods of postrelease supervision (*see* Penal Law §

70.85; *People v Williams*, 14 NY3d 198, 213, *cert denied* ___ US ___, 131 S Ct 125; *People v Wright*, 85 AD3d 1316, 1316).

Defendant failed to preserve for our review his contention that the court abused its discretion in failing to order an updated presentence report prior to resentencing. The record demonstrates that "[d]efendant did not request that the court order an updated presentence report or otherwise object to sentencing in the absence of such a report" (*People v Stachnik*, 101 AD3d 1590, 1592, *lv denied* 20 NY3d 1104; *see People v Lard*, 71 AD3d 1464, 1465, *lv denied* 14 NY3d 889). In any event, defendant's contention is without merit because "the decision whether to obtain an updated report at resentencing is a matter resting in the sound discretion of the sentencing Judge" (*People v Kuey*, 83 NY2d 278, 282).

Defendant also failed to preserve for our review his contentions that his due process rights were violated, i.e., that he did not receive notice that he was a "designated person" under Correction Law § 601-d (1), and that there was an "unreasonable delay" between his original sentencing and the resentencing (CPL 380.80 [1]; *see generally People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Finally, defendant's contention that he was denied effective assistance of counsel is unreviewable to the extent that it involves matters outside the record (*see generally People v Robinson*, 221 AD2d 1029, 1029). To the extent that the record permits review of his claims of ineffective assistance of counsel, we conclude that they are without merit (*see generally People v Caban*, 5 NY3d 143, 152; *People v Baldi*, 54 NY2d 137, 147). It is well settled that the "failure to make a motion or [an objection] that has little or no chance of success . . . is not ineffective" (*People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945 [internal quotation marks omitted]), and defendant otherwise has failed to show the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 712).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1185
KA 13-00948
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER J. KESSLER, ALSO KNOWN AS ALEXANDER
JACOB KESSLER, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered March 5, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree, criminal sexual act in the third degree, sexual abuse in the first degree, endangering the welfare of a child and unlawfully dealing with a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [2]), criminal sexual act in the third degree (§ 130.40 [2]), and sexual abuse in the first degree (§ 130.65 [2]). Defendant is convicted of engaging in oral and manual contact with the vaginal area of his 16-year-old victim, who was in a physically helpless condition after drinking alcohol and smoking marijuana with defendant at a party hosted by defendant and his wife, the victim's sister. Defendant failed to preserve for our review his contention that the People failed to present legally sufficient evidence with respect to the victim's age (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit inasmuch as the victim stated her date of birth during her testimony and explained that she was testifying on her 17th birthday (*see People v Chaffee*, 30 AD3d 763, 764, *lv denied* 7 NY3d 846).

We reject defendant's further contention that the evidence was legally insufficient to establish that he was over the age of 21. The victim testified that defendant was 26 years old, and a police witness testified that defendant was not less than 25 years old. In addition, defendant's friend testified that he and defendant had been friends

since they started high school 14 years before and that everyone at the party, with the exception of the victim, was over the age of 21. We reject defendant's further contention that the evidence was legally insufficient to establish that the victim was physically helpless and thus incapable of consenting to the sexual acts. The victim testified that she was very intoxicated and that she "passed out" and awoke to feeling defendant's finger in her vagina, that she passed out again and awoke during the time that defendant's mouth was on her vagina, and that she awoke in the morning to find her pants and underwear on the floor. That evidence is legally sufficient to support the jury's finding that the victim was physically helpless at the time the offenses occurred (*see People v Fuller*, 50 AD3d 1171, 1174, *lv denied* 11 NY3d 788). Indeed, "a person who is sleeping is physically helpless for the purposes of consenting to [sexual contact and oral sexual conduct], particularly where the sleep was drug and alcohol induced" (*id.* [internal quotation marks omitted]; *see People v Smith*, 16 AD3d 1033, 1034, *affd* 6 NY3d 827, *cert denied* 548 US 905). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that County Court abused its discretion in denying his motion for a mistrial based upon the People's failure, prior to the beginning of the trial, to provide him with a medical report reflecting that the victim was prescribed a certain medication used to treat depression as required by their continuing *Brady* obligation and CPL 240.20 (c). Defendant argued that a potential side effect of the medication was "lucid dreams" and that, if he had been provided with the report sooner, he would have consulted with an expert. The prosecutor explained that he had just learned of the existence of the report a couple of days before trial and promptly turned it over to defense counsel. The court determined that the People should have turned over the report sooner, but denied the mistrial motion based upon the wide use of the medication and the speculative connection of a potential side effect to this case, noting that it had reviewed in camera the grand jury minutes and the victim's counseling records.

As an initial matter, we note that defendant failed to preserve for our review his contention that the failure to provide the report sooner constituted a *Brady* violation (*see People v Abuhamra*, 107 AD3d 1630, 1631, *lv denied* 22 NY3d 1038; *People v Benton*, 87 AD3d 1304, 1305, *lv denied* 19 NY3d 862). In any event, defendant received the report and used it to cross-examine the victim and her counselor (*see People v Bernard*, 115 AD3d 1214, 1215, *lv denied* 23 NY3d 1018), and we conclude that earlier disclosure of the report would not have changed the outcome of the trial (*see People v Fuentes*, 12 NY3d 259, 265, *rearg denied* 13 NY3d 766; *cf. People v Carver*, 114 AD3d 1199, 1199).

With respect to the People's violation of their duty pursuant to CPL 240.20 (c) to provide the medical report, the " 'overriding concern must be to eliminate any prejudice to the defendant while protecting the interests of society. . . ' Defendant is entitled to a

new trial only when the conduct has caused such substantial prejudice to defendant such that he or she has been denied due process of law" (*People v Davis*, 52 AD3d 1205, 1206, quoting *People v Kelly*, 62 NY2d 516, 520), and that is not the case here. Defense counsel cross-examined the victim's counselor with respect to the medication's potential side effect of lucid dreams, which the counselor described as "having a dream when you are not sure whether it's real or not," and she testified that she was unaware of any person who had experienced that potential side effect. Furthermore, the victim testified that she had found some of her clothing on the floor the morning after the party and that she had physical discomfort for three days, neither of which is consistent with a dream.

Defendant contends that the court impermissibly delegated its duty pursuant to CPL 270.35 (2) (a) "to make a reasonably thorough inquiry" with respect to whether a juror was unable to continue serving by reason of illness (*see People v Smith*, 304 AD2d 364, 365, *lv denied* 100 NY2d 566). Prior to opening statements, the court replaced a juror with an alternate, with the consent of both counsel, based upon information it had received from the Commissioner of Jurors that the absent juror was being treated at the emergency room for chest pains (*see id.*). Inasmuch as defense counsel consented to the replacement of the juror, we conclude that defendant waived his present contention. We reject defendant's further contention that the court abused its discretion in permitting the prosecutor to recall the victim to testify after a short recess following her direct testimony and before cross-examination, to ask one further question, i.e., whether she could identify the person who had committed the acts that she described in her testimony (*see People v Olsen*, 34 NY2d 349, 354; *People v Lewis*, 222 AD2d 1058, 1059, *lv denied* 87 NY2d 1021).

Contrary to defendant's contention, the court did not abuse its discretion in denying his motion to compel the People to comply with his request for a bill of particulars inasmuch as defendant failed to request a bill of particulars within 30 days of arraignment, and failed to establish good cause for the delay (*see* CPL 200.95 [3], [5]). We reject defendant's further contention that the lack of a bill of particulars coupled with the victim's testimony rendered the indictment duplicitous. The victim testified with respect to two acts committed by defendant; i.e., touching her vagina with his finger and with his mouth. To the extent that the victim's testimony that defendant touched her thigh may be construed to constitute evidence of sexual contact (*see People v Manning*, 81 AD3d 1181, 1182, *lv denied* 18 NY3d 959), we conclude that the prosecutor's summation made it clear that defendant was charged with touching only the victim's vagina and, thus, there is no reasonable possibility that the jury may have convicted defendant of different acts (*see People v Spencer*, 119 AD3d 1411, 1412-1413, *lv denied* 24 NY3d 965; *cf. People v Filer*, 97 AD3d 1095, 1096, *lv denied* 19 NY3d 1025).

We reject defendant's contention that he was deprived a fair trial by prosecutorial misconduct on summation. The prosecutor's reference to defendant as a "vicious dog" was a fair response to defense counsel's statements, made during jury selection and

summation, implying that the victim was not credible. Those statements were to the effect that, a person who had been bitten by a vicious dog would not return to the home of that dog and would defend himself or herself when attacked by the dog. We conclude that the prosecutor's remark " 'did not exceed the bounds of legitimate advocacy' " (*People v Miller*, 104 AD3d 1223, 1224, *lv denied* 21 NY3d 1017). We further conclude that the failure of defense counsel to object to the comment did not constitute ineffective assistance of counsel (*cf. People v Fisher*, 18 NY3d 964, 967). We also conclude that the failure of defense counsel to demand a bill of particulars did not deprive defendant of effective assistance of counsel (*see People v Buntley*, 286 AD2d 909, 910, *lv denied* 97 NY2d 751) and, inasmuch as a contention that testimony rendered an indictment duplicitous need not be preserved for appellate review (*see Filer*, 97 AD3d at 1096), defense counsel's failure to object to testimony of the victim on that ground does not constitute ineffective assistance of counsel. Finally, we have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1187
KA 13-00140
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES H. WASHINGTON, 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 (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 19, 2012. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and criminal sexual act 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 course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and criminal sexual act in the second degree (§ 130.45 [1]), defendant contends that he was denied effective assistance of counsel. We reject that contention. Contrary to defendant's contention, we conclude that "it is apparent from [defense counsel's] thorough cross-examination of prosecution witnesses and his overall performance that [he] had adequately prepared for trial" (*People v Adair*, 84 AD3d 1752, 1754, *lv denied* 17 NY3d 812; *see People v Miller*, 96 AD3d 1451, 1452, *lv denied* 19 NY3d 999; *People v Arroyo*, 77 AD3d 446, 448, *lv denied* 16 NY3d 741). To the extent that defendant's claim of ineffectiveness is based upon defense counsel's alleged failure to consult experts, it involves matters outside the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 or an application seeking other postconviction relief (*see People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318). We conclude that defense counsel was not ineffective in failing to call an expert witness to testify on the subject of child sexual abuse accommodation syndrome (*see People v Nicholson*, 118 AD3d 1423, 1425; *People v Green*, 108 AD3d 782, 786, *lv denied* 21 NY3d 1074; *People v Kilbury*, 83 AD3d 1579, 1580, *lv denied* 17 NY3d 860). " 'Defendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by

its absence' " (*Kilbury*, 83 AD3d at 1580; *see People v Drennan*, 81 AD3d 1279, 1280-1281, *lv denied* 16 NY3d 858, *reconsideration denied* 17 NY3d 816). We likewise conclude that defense counsel was not ineffective in failing to retain a medical expert to counter the testimony provided by the People's expert (*see People v Nelson*, 94 AD3d 1426, 1426, *lv denied* 19 NY3d 999; *People v Burgos*, 90 AD3d 1670, 1670-1671, *lv denied* 19 NY3d 862; *see also People v Flores*, 83 AD3d 1460, 1461, *affd* 19 NY3d 881). Inasmuch as "the People's medical expert testified that there were no physical signs of sexual abuse, which defense counsel carefully highlighted on cross-examination, defense counsel's failure to unnecessarily call a rebuttal medical expert did not constitute ineffective assistance" (*Green*, 108 AD3d at 786).

We reject defendant's further contention that he was denied effective assistance of counsel because defense counsel failed to object to leading questions posed to the victim by the prosecutor. Defendant "did not meet his burden of establishing the absence of any legitimate explanations for that failure" (*People v Madison*, 106 AD3d 1490, 1492 [internal quotation marks omitted]; *see People v Benevento*, 91 NY2d 708, 712-713; *People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867). Although we agree with defendant that certain remarks made by the prosecutor on summation were improper (*see People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137; *People v Benedetto*, 294 AD2d 958, 959-960; *People v Dworakowski*, 208 AD2d 1129, 1130, *lv denied* 84 NY2d 1031), we conclude that they 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 [internal quotation marks omitted]; *see People v Willis*, 79 AD3d 1739, 1741, *lv denied* 16 NY3d 864). Thus, defense counsel's failure to object to the allegedly improper comments did not constitute ineffective assistance of counsel (*see People v Koonce*, 111 AD3d 1277, 1278-1279). We have examined defendant's remaining allegations of ineffective assistance of counsel and conclude that they lack merit (*see generally People v Baldi*, 54 NY2d 137, 147).

We also reject defendant's contention that County Court abused its discretion in its *Molineux* ruling. It is well established that "[e]vidence of a defendant's prior bad acts may be admissible when it is relevant to a material issue in the case other than defendant's criminal propensity" (*People v Dorm*, 12 NY3d 16, 19). Here, the victim's testimony concerning uncharged acts of sexual abuse that preceded the events charged in the indictment was properly admitted "to complete the narrative of the events charged in the indictment . . . , and [to] provide[] necessary background information" (*People v Workman*, 56 AD3d 1155, 1156, *lv denied* 12 NY3d 789 [internal quotation marks omitted]; *see People v Griffin*, 111 AD3d 1413, 1414-1415, *lv denied* 23 NY3d 1037; *People v Justice*, 99 AD3d 1213, 1215, *lv denied* 20 NY3d 1012). Contrary to defendant's contention, the probative value of the evidence was not outweighed by its prejudicial effect, and the court's limiting instruction minimized any prejudice to defendant (*see Griffin*, 111 AD3d at 1415; *Workman*, 56 AD3d at 1157).

Finally, the sentence is not unduly harsh or severe.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1188
KA 13-00144
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DIANA KOSTY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered November 13, 2012. The judgment convicted defendant, upon her plea of guilty, of offering a false instrument for filing in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of offering a false instrument for filing in the first degree (Penal Law § 175.35). Defendant contends that her waiver of the right to appeal was invalid because County Court did not explain exceptions to the waiver. We reject that contention (*see People v Corbin*, 121 AD3d 803, ___). Defendant's contention that she did not admit to the element of intent to defraud during her plea is actually a challenge to the factual sufficiency of the plea allocution, and that challenge is encompassed by her valid waiver of the right to appeal (*see People v Gardner*, 101 AD3d 1634, 1634; *People v Bailey*, 49 AD3d 1258, 1259, *lv denied* 10 NY3d 932). In any event, defendant failed to preserve her contention for our review inasmuch as she failed to move to withdraw the plea or to vacate the judgment of conviction (*see People v Lewandowski*, 82 AD3d 1602, 1602), and this case does not fall within the "rare exception to the preservation rule" (*People v Lopez*, 71 NY2d 662, 666).

Defendant's valid waiver of the right to appeal also encompasses her contention that the court erred in directing her to pay a specified amount of restitution without conducting a hearing "inasmuch as that amount was an explicit part of defendant's agreed-upon plea bargain" (*People v Taylor*, 70 AD3d 1121, 1122, *lv denied* 14 NY3d 845; *see People v Wapniewski*, 115 AD3d 1251, 1251-1252, *lv denied* 23 NY3d 1026). In any event, defendant failed to preserve her contention for

our review by challenging the court's determination as to the amount of restitution or by requesting a hearing on the issue (*see People v Giovanni*, 53 AD3d 778, 778-779, *lv denied* 11 NY3d 832). Defendant also failed to preserve for our review her contention that the court erred in imposing a collection surcharge of 10% of the amount of restitution (*see* CPL 470.05 [2]; *People v Kirkland*, 105 AD3d 1337, 1338, *lv denied* 21 NY3d 1043). 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: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1189
CA 13-02248
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

ANTONIO TALLARICO, AN INFANT, BY AND THROUGH
DOMINIC TALLARICO AND MARY TALLARICO, HIS
PARENTS AND NATURAL GUARDIANS, AND DOMINIC
TALLARICO AND MARY TALLARICO, INDIVIDUALLY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAYASELVI KOLLI, M.D., DEFENDANT,
AND NIAGARA FALLS MEMORIAL MEDICAL CENTER,
DEFENDANT-APPELLANT.

FAGER AMSLER & KELLER L.L.P., LATHAM (NANCY E. MAY-SKINNER OF
COUNSEL), FOR DEFENDANT-APPELLANT.

DEMPSEY & DEMPSEY, BUFFALO (HELEN KANEY DEMPSEY OF COUNSEL), FOR
PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Catherine R. Nugent Panepinto, J.), entered September 25, 2013. The order, insofar as appealed from, granted that part of the motion of plaintiffs seeking to set aside a verdict with respect to defendant Niagara Falls Memorial Medical Center.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the posttrial motion is denied in its entirety and the verdict with respect to defendant Niagara Falls Memorial Medical Center is reinstated.

Memorandum: Plaintiffs, individually and on behalf of their son, commenced this medical malpractice action seeking damages for injuries allegedly sustained by the child during labor and delivery. After a trial, the jury rendered a verdict in favor of defendants, finding that defendant Jayaselvi Kolli, M.D. was not negligent and that defendant Niagara Falls Memorial Medical Center (hospital) was negligent, but that its negligence was not a proximate cause of the child's injuries. Supreme Court subsequently granted in part plaintiffs' posttrial motion to set aside the verdict as against the weight of the evidence by setting aside the verdict in favor of the hospital and ordering a new trial on the issue of proximate cause. We agree with the hospital that the court erred in granting in part plaintiffs' posttrial motion, and we therefore reverse the order insofar as appealed from, deny the posttrial motion in its entirety, and reinstate the verdict with respect to the hospital.

"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[s] 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]). We conclude that there is a fair interpretation of the evidence pursuant to which the jury could have found that the labor and delivery nurses employed by the hospital were negligent, but that their negligence did not proximately cause the child's injuries. Defendants' expert testified that the child's injuries occurred in utero, no earlier than a week before delivery and, thus, that any negligence on the part of the hospital nurses did not cause or contribute to his injuries. The court improperly invaded the jury's province in rejecting that opinion and accepting the contrary opinion of the child's treating physician (*see Reilly v Ninia*, 81 AD3d 913, 915; *Barton v Youmans*, 24 AD3d 1192, 1192). Contrary to the court's determination, we conclude that the opinion of defendants' expert was neither speculative (*cf. Vergara v Scripps Howard*, 261 AD2d 302, 307, *lv denied* 94 NY2d 757), nor contrary to the evidence (*cf. Persaud v City of New York*, 307 AD2d 346, 347, *lv denied* 1 NY3d 502). "Indeed, this trial presented a classic battle of the experts on the determinative issue of causation" (*Russell v City of Buffalo*, 34 AD3d 1291, 1293), and it was for the jury to decide which expert was more credible (*see Radish v DeGraff Mem. Hosp.*, 291 AD2d 873, 874).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1192
CA 14-00541
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

NATHAN MCLEOD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARK J. TACCONE, DEFENDANT-RESPONDENT.

CELLINO & BARNES, P.C., ROCHESTER (SAREER A. FAZILI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGELIN KENT LLC, BUFFALO (BENJAMIN R. WOLF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered May 25, 2013. The order, insofar as appealed from, granted in part the motion of defendant for partial summary judgment and denied the cross motion of plaintiff to preclude testimony by a nonparty witness.

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 defendant. The accident occurred while plaintiff was attempting to cross a four-lane road from a side street controlled by a stop sign.

Supreme Court properly granted defendant's motion for partial summary judgment on the issue of plaintiff's negligence. It is well established that, with certain exceptions not relevant here, "a person riding a bicycle on a roadway is entitled to all of the rights and bears all of the responsibilities of a driver of a motor vehicle" (*Palma v Sherman*, 55 AD3d 891, 891; *see* Vehicle and Traffic Law § 1231), and that "an unexcused violation of the Vehicle and Traffic Law . . . constitutes negligence per se" (*Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392; *see Koziol v Wright*, 26 AD3d 793, 794; *Holleman v Miner*, 267 AD2d 867, 868-869). We conclude that defendant met his initial burden of establishing that plaintiff was negligent as a matter of law, and that plaintiff failed to raise a triable issue of fact (*see Trzepacz v Jara*, 11 AD3d 531, 531; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant established that plaintiff violated Vehicle and Traffic Law § 1142 (a) by "proceed[ing] into an intersection controlled by a stop sign and fail[ing] to yield the right of way to [defendant's] approaching vehicle" (*Trzepacz*, 11

AD3d at 531; *see Hyatt v Messana*, 67 AD3d 1400, 1401). Moreover, the accident occurred at night while plaintiff was wearing dark clothing, and he was operating his bicycle without lights or sufficient reflectors in violation of Vehicle and Traffic Law § 1236 (*see Green v Mower*, 302 AD2d 1005, 1005, *affd* 100 NY2d 529; *Weise v Lazore*, 99 AD2d 919, 920, *lv denied* 62 NY2d 606; *Ortiz v Kinoshita & Co.*, 30 AD2d 334, 335).

We further conclude that the court did not abuse its discretion in denying plaintiff's cross motion to preclude testimony by a nonparty witness (*see Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1464; *Andruszewski v Cantello*, 247 AD2d 876, 876-877). "The penalty of preclusion is extreme and should be imposed only when the failure to comply with a disclosure [demand] is the result of willful, deliberate, and contumacious conduct" (*Gendusa v Yu Lin Chen*, 71 AD3d 1085, 1086; *see Maillard v Maillard*, 243 AD2d 448, 449; *Malcolm v Darling*, 233 AD2d 425, 426), or when the moving party is prejudiced by the late disclosure (*see Finnegan v Peter, Sr. & Mary L. Liberatore Family Ltd. Partnership*, 90 AD3d 1676, 1677; *Koziarz v New York City Tr. Auth.*, 40 AD3d 412, 413; *Tronolone v Praxair, Inc.*, 39 AD3d 1146, 1147). Here, plaintiff failed to establish in support of his cross motion either a willful failure to disclose the existence of the nonparty witness or prejudice (*see Finnegan*, 90 AD3d at 1677; *see also Wall v Shepard*, 53 AD3d 1050, 1051). The delay in disclosing the witness was the result of an oversight rather than bad faith on the part of defendant, and plaintiff was afforded the opportunity to depose the witness (*see Finnegan*, 90 AD3d at 1677; *Gendusa*, 71 AD3d at 1086).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1194
CA 14-00215
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

DAWUD H., CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 117862.)

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, ALBANY (JAMES BOGIN OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Christopher J. McCarthy, J.), entered November 26, 2013. The order denied the motion of claimant for summary judgment.

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

Memorandum: Claimant commenced this action seeking a civil penalty and compensatory damages for the allegedly unauthorized disclosure of his "confidential HIV related information" by employees of the Department of Corrections and Community Supervision at Mid-State Correctional Facility (Public Health Law § 2780 [7]; *see* § 2783 [1] [b]). The Court of Claims properly denied claimant's motion for summary judgment inasmuch as claimant failed to establish as a matter of law that the information disclosed satisfies the definition of "confidential HIV related information" (*cf. Tatta v State of New York*, 20 AD3d 825, 826, *lv denied* 5 NY3d 716; *Doe v Roe*, 190 AD2d 463, 468, *lv dismissed* 82 NY2d 846).

We decline defendant's request to search the record and grant summary judgment dismissing the claim inasmuch as defendant failed to establish that the disclosure was authorized by statute or regulation (*see* Public Health Law § 2782 [1], [2]; 7 NYCRR 7.5 [b] [6]), or that it was otherwise entitled to judgment as a matter of law (*see generally Village of Ilion v County of Herkimer*, 63 AD3d 1546, 1547).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1198
CA 14-00061
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF GENARO DELACRUZ,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment or the Supreme Court, Wyoming County (Mark H. Dadd, A.J.) entered December 12, 2013 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board (Board) denying him parole release. We agree with petitioner that his appeal is not moot inasmuch as the determination has not expired during the pendency of this appeal, and he has not reappeared before the Board (*cf. Matter of Robles v Evans*, 100 AD3d 1455, 1455). We nevertheless reject petitioner's contention that Supreme Court erred in determining that the Board properly denied parole release. "It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259-i" (*Matter of Gssime v New York State Div. of Parole*, 84 AD3d 1630, 1631, *lv dismissed* 17 NY3d 847; *see Matter of Johnson v New York State Div. of Parole*, 65 AD3d 838, 839; *see generally Matter of King v New York State Div. of Parole*, 83 NY2d 788, 790-791). The Board is "not required to give equal weight to each of the statutory factors" but, rather, may "place[] greater emphasis on the severity of the crimes than on the other statutory factors" (*Matter of MacKenzie v Evans*, 95 AD3d 1613, 1614, *lv denied* 19 NY3d 815).

We conclude that the record establishes that the Board considered the relevant factors in determining that petitioner's release would be

incompatible with the welfare of society and would so deprecate the serious nature of his crimes as to undermine respect for the law (*see* Executive Law § 259-i [2] [c] [A]), and petitioner has made no " 'showing of irrationality bordering on impropriety' " with regard to the determination to warrant judicial intervention (*Matter of Silmon v Travis*, 95 NY2d 470, 476; *see Matter of Russo v New York State Bd. of Parole*, 50 NY2d 69, 77; *Matter of Singh v Evans*, 107 AD3d 1274, 1275). Contrary to petitioner's contention, the Board adequately set forth its reasons for denying his application for release (*see* § 259-i [2] [a] [i]; *Matter of Siao-Pao v Dennison*, 11 NY3d 777, 778, *rearg denied* 11 NY3d 885). We reject petitioner's further contention that the Board failed to comply with recent amendments to the Correction Law requiring the development of a transitional accountability plan for inmates (*see* § 71-a, L 2011, ch 62, § 1, part C, § 1, subpart A, § 16-a). "The language of the statute clearly applies only to newly admitted prisoners and is prospective in nature" and, here, petitioner was admitted to prison more than 20 years before the statutory provision took effect (*Matter of Rivera v New York State Div. of Parole*, 119 AD3d 1107, 1108-1109; *see generally Matter of Freeman v Fisher*, 118 AD3d 1438, 1439).

Contrary to petitioner's contention, we conclude that the 2011 memorandum issued by Chairwoman Andrea Evans to Board members "sufficiently establishes the requisite procedures for incorporat[ing] risk and needs principles into the process of making parole release decisions" (*Matter of Byas v Fischer*, 120 AD3d 1586, 1586 [internal quotation marks omitted]; *see* Executive Law § 259-c [4]). In any event, we note that the Board has promulgated regulations for "parole release decision-making procedures," which became effective July 30, 2014, that are consistent with the procedures set forth in the 2011 memorandum (*see* 9 NYCRR 8002.3).

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

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1200
CA 14-00773
PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, CARNI, AND SCONIERS, JJ.

PREMIER CAPITAL, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KENT R. DEHAAN, DEFENDANT-RESPONDENT.

LECLAIR RYAN, P.C., ROCHESTER (MICHAEL J. CROSNICKER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LANCE J. MARK, PLLC, MEDINA (LANCE J. MARK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered July 24, 2013. The judgment and order, insofar as appealed from, denied that part of the motion of plaintiff for summary judgment, granted the cross motion of defendant for summary judgment and dismissed the complaint.

It is hereby ORDERED that the judgment and order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied, the complaint is reinstated and that part of the motion seeking summary judgment is granted, and the matter is remitted to Supreme Court, Monroe County, for entry of a renewal judgment in favor of plaintiff.

Memorandum: On a prior appeal, this Court concluded that plaintiff, as assignee of a default judgment entered against defendant, "was entitled to commence an action for a renewal judgment without permission pursuant to CPLR 5014 (1)" (*Chase Lincoln First Bank, N.A. v DeHaan*, 89 AD3d 1476, 1477). While that appeal was pending, plaintiff commenced such an action, and thereafter moved, inter alia, for summary judgment. We conclude that Supreme Court erred in denying plaintiff's motion insofar as it sought summary judgment and granting defendant's cross motion for summary judgment dismissing the complaint, and we therefore remit the matter to Supreme Court for entry of a renewal judgment in favor of plaintiff.

Plaintiff established its entitlement to judgment as a matter of law "by demonstrating the existence of the prior judgment, that the defendant was the judgment debtor, that the judgment was docketed at least nine years prior to the commencement of th[e] action, and that the judgment remains . . . . unsatisfied" (*Rose v Gulizia*, 104 AD3d 757, 758; *see* CPLR 5014; *Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 678). In opposition, defendant failed to raise a triable issue

of fact (*see Pangburn v Klug*, 244 AD2d 394, 395; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We reject defendant's contention that the action is barred by laches inasmuch as "laches is an equitable defense which is unavailable [here, i.e.,] in an action at law commenced within the period of limitation" (*Premier Capital, LLC*, 88 AD3d at 678). Finally, contrary to defendant's further contention, plaintiff's commencement of another action seeking identical relief did not implicate the doctrine of election of remedies (*see generally Matter of City of Syracuse v Fitch St. Props., LLC*, 71 AD3d 1388, 1389).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1201
KA 13-01730
PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYLVESTER COLLINS, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

SCOTT D. MCNAMARA, DISTRICT ATTORNEY, UTICA (STEVEN G. COX OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered May 30, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the third degree (Penal Law §§ 110.00, 220.39 [1]), defendant contends that his waiver of the right to appeal and his guilty plea were not knowing, voluntary, and intelligent. We reject defendant's contention. Defendant initially pleaded guilty, but County Court permitted him to withdraw that plea. Defendant thereafter again pleaded guilty and was sentenced. With respect to the second plea, the record reflects that defendant waived the right to appeal "both orally and in writing before pleading guilty, and the court conducted an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v McGrew*, 118 AD3d 1490, 1490-1491, *lv denied* 23 NY3d 1065 [internal quotation marks omitted]; *see People v Nicholson*, 6 NY3d 248, 257). Furthermore, "[a]lthough defendant's contention that the plea was not knowingly, voluntarily or intelligently entered survives the waiver of the right to appeal, that contention is not preserved for our review because defendant failed to move to withdraw his plea or to vacate the judgment of conviction" entered upon his second guilty plea (*People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1210
CAF 13-00219
PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF DARLENEA T. AND MIRACLE T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WANDA A., RESPONDENT-APPELLANT.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILD, BUFFALO.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 8, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order revoked a suspended judgment and terminated the parental rights of respondent.

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, Erie County, for a new dispositional hearing in accordance with the following Memorandum: Respondent mother appeals from an order that, inter alia, revoked the suspended judgment entered upon a finding of permanent neglect and terminated her parental rights with respect to her children in this proceeding pursuant to Social Services Law § 384-b. We conclude that petitioner established by a preponderance of the evidence that the mother failed to comply with the terms of the suspended judgment (*see Matter of Shad S. [Amy C.Y.]*, 67 AD3d 1359, 1360). Nevertheless, based on new facts and allegations that we may properly consider, we further conclude that it is not clear that termination of the mother's parental rights is in the best interests of the children (*see id.*; *see also Matter of Leval B. v Kiona E.*, 115 AD3d 665, 667). We therefore reverse the order and remit the matter to Family Court for a new dispositional hearing to determine the children's best interests.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1211
CAF 13-01381
PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF COREY L. BAXTER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LEAH P. BORDEN, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

PALOMA A. CAPANNA, WEBSTER, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded custody of the subject children to petitioner.

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

Memorandum: The mother of the subject children, who is the respondent in appeal No. 1 and a petitioner in appeal No. 2 (mother), filed a petition pursuant to Family Court Act article 6, seeking to modify a prior custody order, and she later filed, inter alia, an amended petition seeking custody. The children's father, who is the petitioner in appeal No. 1 and a respondent in appeal No. 2, also filed a petition seeking to modify the prior custody order. In appeal No. 1, the mother appeals from an order that, among other relief, awarded custody of the children to the father, granted the mother certain specified visitation with them, and ordered the father to pay 75% of the costs of transporting the children for visits. In appeal No. 2, she appeals from an order that, inter alia, dismissed her amended custody petition.

Contrary to the mother's contention in appeal No. 1, Family Court properly determined that the relocation was in the best interests of the children after considering all relevant factors (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741), notwithstanding the fact that the father had already relocated with them (*see e.g. Matter of Baum v Torello-Baum*, 40 AD3d 750, 751; *Matter of Donald C.O. v Carolyn D. V. B.*, 224 AD2d 930, 930). "In cases involving the geographic relocation of the custodial parent, as in all other custody proceedings, the

primary focus of the court is the best interests of the child[ren], not the mere fact of relocation” (*Donald C.O.*, 224 AD2d at 930). Here, we agree with the mother that “[t]he removal of [the children] without seeking permission should not be encouraged” (*Schultz v Schultz*, 199 AD2d 1065, 1066). Nevertheless, we note that, “[a]lthough the unilateral removal of the children from the jurisdiction is a factor for the court’s consideration . . . , ‘an award of custody must be based on the best interests of the children and not a desire to punish a recalcitrant parent’ ” (*Matter of Tekeste B.-M. v Zeineba H.*, 37 AD3d 1152, 1153). Consequently, after reviewing all relevant factors (*see generally Tropea*, 87 NY2d at 740-741), we conclude that the father met his burden of establishing by a preponderance of the evidence that the relocation was in the best interests of the children (*see Matter of Wahlstrom v Carlson*, 55 AD3d 1399, 1400).

Contrary to the mother’s contention in appeal No. 2, the court properly dismissed her amended petition seeking custody of the children. We agree with the mother that she made a “ ‘showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren]’ ” (*Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1581, *lv denied* 20 NY3d 855), and there are several factors that favor an award of custody to her. In reviewing an order of custody, however, we must consider all of the “factors that could impact the best interests of the child[ren], including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child[ren]’s emotional and intellectual development and the wishes of the child[ren]” (*Matter of Marino v Marino*, 90 AD3d 1694, 1695; *see Eschbach v Eschbach*, 56 NY2d 167, 172-174). Upon such review, we conclude that the court’s determination that it is in the best interests of the children to award primary physical custody to the father is supported by a sound and substantial basis in the record (*see Matter of Weekley v Weekley*, 109 AD3d 1177, 1178-1179).

We have considered the mother’s remaining contentions in both appeals and we conclude that they are without merit. Assuming, arguendo, that the children are aggrieved by the issue raised on appeal by the Attorney for the Children (*cf. Matter of Brittni K.*, 297 AD2d 236, 240), we conclude that the issue is not before us in either appeal because the Attorney for the Children did not file a notice of appeal from either order (*see Matter of Yorimar K.-M.* [appeal No. 2], 309 AD2d 1148, 1149; *Matter of Zena O.*, 212 AD2d 712, 714).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1212
CAF 13-01382
PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF COREY L. BAXTER,
PETITIONER-RESPONDENT,

V — MEMORANDUM AND ORDER

LEAH P. BORDEN, RESPONDENT-APPELLANT.

IN THE MATTER OF LEAH P. BORDEN,
PETITIONER-APPELLANT,

V

COREY L. BAXTER, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

PALOMA A. CAPANNA, WEBSTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

SCOTT A. OTIS, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered August 1, 2013 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, dismissed the amended petition of Leah P. Borden.

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

Same Memorandum as in *Matter of Baxter v Borden* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1217
CA 13-02070
PRESENT: SMITH, J.P., CENTRA, FAHEY, LINDLEY, AND WHALEN, JJ.

PEGGY J. SMITH, PLAINTIFF-APPELLANT,

V   MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

FRANK S. FALZONE, BUFFALO (LOUIS ROSADO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 22, 2013. The order granted the motion of defendant for leave to reargue, and upon reargument, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: In this action seeking damages for injuries that plaintiff allegedly sustained when she fell into an uncovered manhole, plaintiff appeals from an order that granted defendant's motion for leave to reargue its prior motion for summary judgment dismissing the complaint and, upon reargument, granted the prior motion. In seeking reargument, defendant again asserted that it did not receive prior written notice of the dangerous condition as required by its local law. Contrary to plaintiff's contention, Supreme Court properly granted the motion for leave to reargue. The court originally denied the prior motion on the ground that issues of fact precluded summary judgment, and upon reargument the court determined that the motion raised issues of law that must be decided by the court, including whether the local law applies to this case. "A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion" (CPLR 2221 [d]). Thus, a motion for leave "to reargue 'may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision' " (*Andrea v E.I. Du Pont De Nemours & Co.* [appeal No. 2], 289 AD2d 1039, 1040-1041, *lv denied* 97 NY2d 609). Here, contrary to plaintiff's contention, the court properly granted leave to reargue after concluding that it had misapprehended the law, because the issue whether the prior written notice statute applied was

one of law for the court to decide, rather than one of fact for the jury (*see generally Cayuga Indian Nation of N.Y. v Gould*, 14 NY3d 614, 635, *cert denied* ___ US ___, 131 S Ct 353; *Matter of Held v New York State Workers' Compensation Bd.*, 58 AD3d 971, 972-973).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1223
KA 13-01583
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS S. SMITH, ALSO KNOWN AS FRANCIS SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 2, 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: In appeal No. 1 and appeal No. 2, defendant appeals from separate judgments convicting him upon his pleas of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Both pleas were entered during one plea proceeding, during which defendant waived his right to appeal. We reject defendant's challenge in each appeal to the validity of the waiver of the right to appeal. "The written waiver of the right to appeal, together with defendant's responses during the plea proceeding, establish that the waiver was voluntarily, knowingly, and intelligently entered" (*People v Griner*, 50 AD3d 1557, 1558, *lv denied* 11 NY3d 737; *see People v Ramos*, 7 NY3d 737, 738). The valid waiver of the right to appeal encompasses defendant's challenge in each appeal to the severity of the sentence, including the period of postrelease supervision (*see People v Raynor*, 107 AD3d 1567, 1568, *lv denied* 22 NY3d 1090; *People v McMullen*, 94 AD3d 1434, 1434-1435, *lv denied* 19 NY3d 964; *People v Laskowski*, 46 AD3d 1383, 1384). Although defendant's challenge in each appeal to the validity of the orders of protection issued by County Court survives his waiver of the right to appeal (*see People v Smith*, 83 AD3d 1213, 1214; *People v Victor*, 20 AD3d 927, 928, *lv denied* 5 NY3d 833, *reconsideration denied* 5 NY3d 885), he failed to preserve those challenges for our review inasmuch as he did not object to the orders of protection either during the plea proceeding or at sentencing (*see People v Russell*, 120 AD3d 1594, 1594-1595; *Smith*, 83

AD3d at 1213-1214). Indeed, defense counsel specifically advised the court that defendant had no objection to entry of the orders at issue. We therefore decline to exercise our power to review defendant's challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1224
KA 13-01584
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS S. SMITH, ALSO KNOWN AS FRANCIS SMITH,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 2, 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.

Same Memorandum as in *People v Smith* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1225
KA 13-00046
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENDRELL A. GADLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 18, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in denying his suppression motion. We reject that contention. The undisputed evidence at the suppression hearing demonstrated that the arresting officer and his partner were on routine patrol in Buffalo when they observed two men standing in front of a vacant building on the corner of Fillmore Avenue and Box Street. One of the two men was defendant. Knowing that there had been a number of burglaries in the area, the arresting officer stopped his marked police vehicle in front of the building and asked the two men what they were doing. In response, defendant said that they were "about to smoke." As he made that statement, defendant showed the officer a handful of Dutch Masters cigars, which were individually wrapped in plastic and unopened. The officer then asked defendant what they were about to smoke, whereupon the man standing next to defendant said, "Some weed." When the officer opened his car door to approach the men, defendant fled on foot. The officer pursued defendant and, while doing so, observed him discard a handgun. The officer apprehended defendant and determined that the weapon defendant had discarded was a loaded .38 caliber revolver.

Although defendant correctly concedes that the officer's initial approach and inquiry of him was lawful, he contends that the officer's

pursuit of him was unlawful inasmuch as the officer lacked reasonable suspicion to believe that he had committed or was about to commit a crime. We reject that contention. It is well settled that a "defendant's flight in response to an approach by the police, combined with other specific circumstances indicating that [he] may be engaged in criminal activity, may give rise to reasonable suspicion, the necessary predicate for police pursuit" (*People v Sierra*, 83 NY2d 928, 929; *see People v Price*, 109 AD3d 1189, 1190, *lv denied* 22 NY3d 1043). Here, defendant's flight, which commenced immediately after his companion informed the officer that they were about to smoke "[s]ome weed," furnished the requisite reasonable suspicion to believe that defendant unlawfully possessed marihuana in violation of Penal Law § 221.05, thereby justifying the subsequent police pursuit (*cf. People v Cady*, 103 AD3d 1155, 1156; *see generally People v Rainey*, 110 AD3d 1464, 1465; *People v McKinley*, 101 AD3d 1747, 1748-1749, *lv denied* 21 NY3d 1017).

Defendant failed to preserve for our review his alternative contention that "the simple possession of marijuana, even in public, is not a crime," and that the police cannot pursue someone suspected of committing a mere violation (*see generally* CPL 470.05 [2]). In any event, the fact that a perpetrator's conduct may have constituted only a violation, as opposed to a misdemeanor or felony, is not legally significant in determining whether a police intrusion was lawful (*see e.g. People v Mack*, 49 AD3d 1291, 1292, *lv denied* 10 NY3d 866; *People v Hewitt*, 247 AD2d 552, 553, *lv denied* 92 NY2d 880, *reconsideration denied* 92 NY2d 926). We thus conclude that the court properly denied defendant's motion to suppress the weapon he discarded while being pursued by the officer.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1226
KA 12-01612
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMARIO C. ALLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered August 28, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, attempted assault in the first degree, and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), attempted assault in the first degree (§§ 110.00, 120.10 [1]), and two counts of robbery in the first degree (§ 160.15 [1], [2]). The conviction arises out of an incident during which defendant shot at one man and missed, and shortly thereafter shot and robbed that man's companion. Contrary to defendant's contention, we conclude that 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 attempted assault in the first degree. Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict on that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Supreme Court properly refused to redact from defendant's tape recorded statement to the police the interrogating police officer's questions and comments (*see People v Voymas*, 39 AD3d 1182, 1184, *lv denied* 9 NY3d 852) and, in any event, "the . . . court's limiting instruction sufficed to avert any potential prejudice" (*People v Jackson*, 178 AD2d 438, 439). The court also properly denied defendant's *Batson* challenge to the prosecutor's peremptory strike of an African-American prospective juror. The prosecutor explained that

he exercised that strike based upon, inter alia, the prospective juror's acquaintance with a prosecution witness, and the court properly accepted that explanation as race-neutral and nonpretextual (*see People v Gant*, 291 AD2d 912, 912, *lv denied* 98 NY2d 675). The record supports the court's determination, following a *Cardona* hearing (*see People v Cardona*, 41 NY2d 333), that a prosecution witness was not acting as an agent of the government when defendant made inculpatory statements to him while they were incarcerated (*see People v Young*, 100 AD3d 1427, 1427-1428, *lv denied* 20 NY3d 1105).

Defendant contends that the court erred in failing to give the limiting instruction required by CPL 310.20 (2) when it provided the jury with an annotated verdict sheet distinguishing the two counts of robbery in the first degree (*see People v McCloud*, 121 AD3d 1286, ___). Contrary to defendant's further contention, the court's failure to give the required instruction does not constitute a mode of proceedings error "that may be reviewed on appeal as a matter of law even in the absence of a timely objection" (*People v Wheeler*, 257 AD2d 673, 674, *lv denied* 93 NY2d 930). Inasmuch as defendant failed to make such an objection, the contention is not preserved for our review (*see* CPL 470.05 [2]; *McCloud*, 121 AD3d at ___), and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further contention that the court failed to rule on the entirety of his pretrial motion to dismiss the indictment, the record establishes that the court denied the motion "in all respects" (*see People v Dixon*, 113 AD3d 1104, 1105, *lv denied* 23 NY3d 962; *cf. People v Spratley*, 96 AD3d 1420, 1421). Finally, consecutive sentences were authorized for the separate offenses committed against each victim (*see People v Ramirez*, 89 NY2d 444, 451), and the sentence imposed is not unduly harsh or severe.

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1229
KA 12-02178
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVIS MARTIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 18, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal trespass in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of criminal trespass in the second degree (Penal Law § 140.15 [1]), defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence based on his assertion that he had permission to enter the victim's apartment. We reject those contentions. Viewing the evidence in the light most favorable to the People (*see People v Williams*, 84 NY2d 925, 926), we conclude that it is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The victim and her daughter both testified that defendant and the victim had broken up several weeks prior to the incident and that defendant did not have permission to enter the apartment on the date at issue. Further, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that, "[b]ased on the weight of the credible evidence, [Supreme C]ourt . . . was justified in finding the defendant guilty beyond a reasonable doubt" (*id.; see People v Romero*, 7 NY3d 633, 642-643). " 'Great deference is to be accorded to the [factfinder]'s resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony' " (*People v Gritzke*, 292 AD2d

805, 805-806, *lv denied* 98 NY2d 697), and we perceive no reason to disturb the court's credibility determinations.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1230
KA 12-02179
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMMANUEL D. RODRIGUEZ, 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 (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered April 30, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the evidence is legally insufficient to establish his guilt and that the verdict is against the weight of the evidence. More specifically, defendant contends that, although he admittedly possessed a loaded .38 caliber handgun for which he did not have a permit, the People failed to disprove his defense of temporary and innocent possession of the weapon. We reject defendant's contentions and affirm.

Defendant, a six-time felon and admitted gang member, testified at trial that, on the night in question, he went to a bar in Buffalo with a friend named A.J., who subsequently became intoxicated and argumentative. After A.J. was removed from the bar by a bouncer for misbehavior, defendant heard A.J. say something about getting a gun. A.J. then entered a vehicle with another person whom defendant did not know. Defendant further testified that, while the vehicle was stopped at the intersection outside the bar, he himself approached the vehicle on foot and entered the backseat, where he saw on the floor a black sock that contained a loaded handgun. Defendant explained that he took possession of the weapon because he was concerned that A.J. might use it unlawfully against someone. When a uniformed police officer approached the vehicle moments later, defendant said "I have something on me but it's not mine." Defendant thus contends that his possession

of the weapon was temporary and innocent.

Defendant's testimony, however, was contradicted in relevant part by that of the bouncer who removed A.J. from the bar and observed defendant approach the vehicle. The bouncer, an off-duty police officer, testified that defendant was carrying what appeared to be a black pouch as he approached the vehicle, and that defendant was stopped and frisked by the uniformed officer *before* he was able to enter the vehicle. That testimony was corroborated by the uniformed officer, who testified that defendant did not enter or reach inside the vehicle. According to the officer, defendant had a black pouch in his pocket as defendant approached the vehicle. That black pouch contained the weapon that defendant was charged with possessing.

"A person may be found to have had temporary and lawful possession of a weapon if, for example, 'he found the weapon shortly before his possession of it was discovered and he intended to turn it over to the authorities' " (*People v DeJesus*, 118 AD3d 1340, 1341, *lv denied* 23 NY3d 1061, quoting *People v Almodovar*, 62 NY2d 126, 130). Here, viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621), we conclude that the testimony of the prosecution witnesses as outlined above is legally sufficient to establish that defendant did not find the weapon in the vehicle shortly before his possession of it was discovered, and that his possession of the weapon was therefore not temporary and innocent (*see People v Crawford*, 96 AD3d 964, 964-965, *lv denied* 20 NY3d 931).

Moreover, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that it cannot be said that County Court failed to give the evidence the weight it should be accorded (*see People v Kalen*, 68 AD3d 1666, 1667, *lv denied* 14 NY3d 842; *see generally Bleakley*, 69 NY2d at 495). Generally, "[w]e accord great deference to the resolution of credibility issues by the trier of fact 'because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839, quoting *People v Lane*, 7 NY3d 888, 890), and we perceive no basis in the record for disturbing the court's credibility determinations in this case.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1235
CA 14-00504
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

ETASAM, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE SYRACUSE ASSOCIATION OF ZETA PSI, INC.,
DEFENDANT-RESPONDENT,
AND THE ASSOCIATION OF PHI GAMMA DELTA OF
SYRACUSE, INC., DEFENDANT.

ROBERT F. RHINEHART, SYRACUSE, FOR PLAINTIFF-APPELLANT.

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

HANCOCK ESTABROOK, LLP, SYRACUSE (JAMES P. YOUNGS OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 5, 2013. The order, among other things, granted the converted motion of defendant The Syracuse Association of Zeta Psi, Inc. for summary judgment.

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

Memorandum: Plaintiff, a not-for-profit corporation that operates the Sigma Alpha Mu fraternity at Syracuse University, commenced this action seeking specific performance of an alleged oral lease with defendant The Syracuse Association of Zeta Psi, Inc. (Zeta Psi). By way of background, Zeta Psi owns a fraternity house that it rented to plaintiff in July 2007 pursuant to a written lease. The lease was for a renewable five-year term, and was extended for one year until July 31, 2013. On January 7, 2013, Zeta Psi notified plaintiff in writing that it elected not to renew the lease. Zeta Psi thereafter discussed with plaintiff the possibility of signing a new lease. At the same time, Zeta Psi negotiated with other fraternities interested in renting the premises, including defendant The Association of Phi Gamma Delta of Syracuse, Inc. (Phi Gamma Delta).

Plaintiff alleges that, on February 13, 2013, a member of its board of directors reached an oral agreement with Zeta Psi's vice-president whereby plaintiff would lease the premises for an additional two years. The parties did not, however, execute a written agreement. Approximately one month later, Zeta Psi signed a written lease with

Phi Gamma Delta. On March 28, 2013, while still in possession of the premises, plaintiff commenced this action, alleging, inter alia, that Zeta Psi never intended to sign a new lease with plaintiff and intentionally misled plaintiff for a variety of reasons, all rooted in bad faith. The complaint requested specific performance of the alleged oral lease between the parties.

Upon commencing the action, plaintiff moved by order to show cause for a preliminary injunction. Zeta Psi responded with a pre-answer motion to dismiss, which Supreme Court converted to a motion for summary judgment, and plaintiff thereafter served an amended complaint adding Phi Gamma Delta as a defendant. The court granted Zeta Psi's motion for summary judgment and denied plaintiff's motion for a preliminary injunction, concluding, inter alia, that the alleged two-year oral lease was barred by the statute of frauds (*see* General Obligations Law § 5-703 [1]). Although plaintiff filed a notice of appeal, it did not seek a preliminary injunction from this Court pursuant to CPLR 5518. Thus, while this appeal was pending, plaintiff's written lease expired, whereupon plaintiff vacated the premises and Phi Gamma Delta took possession pursuant to its valid lease with Zeta Psi.

We agree with Phi Gamma Delta that the appeal should be dismissed as moot because plaintiff "did not seek injunctive relief or make any other attempts to preserve the status quo during the pendency of [its] appeal" (*Matter of Graf v Town of Livonia*, 120 AD3d 944, 944; *see Matter of Yeshiva Gedolah Academy of Beth Aaron Synogogue v City of Long Beach*, 118 AD3d 901, 902; *Cuevas v 1738 Assoc., L.L.C.*, 111 AD3d 416, 416; *Matter of Wallkill Cemetery Assn., Inc. v Town of Wallkill Planning Bd.*, 73 AD3d 1189, 1190-1191; *cf. Matter of Pyramid Co. of Watertown v Planning Bd. of Town of Watertown*, 24 AD3d 1312, 1313, *lv dismissed* 7 NY3d 803). In any event, even if plaintiff had sought the appropriate injunctive relief pursuant to CPLR 5518, and even assuming, arguendo, that an issue of fact exists whether Zeta Psi should be equitably estopped from asserting the statute of frauds defense, the record establishes that plaintiff and Zeta Psi had, at most, an agreement to agree, which is unenforceable (*see Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109-110; *Plumley v Erie Blvd. Hydropower, L.P.*, 114 AD3d 1249, 1249-1250).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1237
CA 14-00652
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

DAVID P. CRAIG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF RICHMOND, DEFENDANT-APPELLANT.

LYNCH LAW OFFICE, SYRACUSE, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

FARACI LANGE, LLP, ROCHESTER (JOSEPH A. REGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered December 20, 2013. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, damages for injuries he sustained when he was thrown from his motorcycle on a road owned and maintained by defendant. Defendant moved for summary judgment dismissing the complaint, and Supreme Court granted the motion except with respect to plaintiff's claims that defendant failed to install adequate signs warning of the allegedly rough road conditions. We conclude that the court should have granted the motion in its entirety.

Defendant met its initial burden on the motion by establishing that it did not receive prior written notice of the allegedly dangerous or defective condition of the roadway as required by its local law (*see Hume v Town of Jerusalem*, 114 AD3d 1141, 1141; *Benson v City of Tonawanda*, 114 AD3d 1262, 1263) and, indeed, plaintiff does not dispute the absence of prior written notice (*see Sola v Village of Great Neck Plaza*, 115 AD3d 661, 662; *Forbes v City of New York*, 85 AD3d 1106, 1107). The burden thus shifted to plaintiff to demonstrate the applicability of an exception to that requirement (*see Brick v City of Niagara Falls*, 121 AD3d 1591, ___; *Hume*, 114 AD3d at 1141-1142; *Pulver v City of Fulton Dept. of Public Works*, 113 AD3d 1066, 1066). We agree with defendant that plaintiff failed to meet his burden (*see Brick*, 121 AD3d at ___; *Pulver*, 113 AD3d at 1067).

Although plaintiff is correct that prior written notice laws “do [ ] not apply to a municipality’s failure to erect proper speed limit or other traffic control signs” (*Herzog v Schroeder*, 9 AD3d 669, 671; *see Alexander v Eldred*, 63 NY2d 460, 467; *Doremus v Incorporated Vil. of Lynbrook*, 18 NY2d 362, 365-366), or to similar claims alleging negligence in the design or construction of a roadway (*see Hughes v Jahoda*, 75 NY2d 881, 883; *Hubbard v County of Madison*, 93 AD3d 939, 943, *lv denied* 19 NY3d 805), that principle does not apply here. Rather, plaintiff claims that defendant failed to erect signs warning motorists of the “*condition of the pavement*” i.e., a condition that requires prior written notice under defendant’s local law and for which no such notice was provided (*see Hughes*, 75 NY2d at 882; *Bacon v Arden*, 244 AD2d 940, 940-941). We agree with defendant that it has no “duty to place a warning sign for ‘a condition that would not normally come to its attention absent actual notice’ ” (*Bacon*, 244 AD2d at 941).

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1239
CA 14-00734
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

JOSEPH STEVENS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KAREN PERRIGO, ESQ., CPA, DEFENDANT-APPELLANT.

SHANE AND REISNER, LLP, OLEAN (JEFFREY P. REISNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARDSON & PULLEN, P.C., FILLMORE (RICHARD M. BUCK, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered July 12, 2013. The order denied defendant's motion to dismiss plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for breach of contract and fraudulent inducement arising from negotiations to purchase defendant's accounting practice. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7), and Supreme Court denied the motion. We affirm.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true [and] accord plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87; *see Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092). "Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88; *see Wells Fargo Bank, N.A. v Zahran*, 100 AD3d 1549, 1550, *lv denied* 20 NY3d 861). Here, contrary to defendant's contention, "[d]ismissal is not warranted under CPLR 3211 (a) (1) because the documentary evidence . . . fails to establish conclusively that there was no agreement between defendant[] and plaintiff[]" (*Watts v Champion Home Bldrs. Co.*, 15 AD3d 850, 851).

Defendant further contends that the court erred in failing to dismiss the complaint pursuant to CPLR 3211 (a) (5) inasmuch as the alleged oral agreement between the parties is void and unenforceable pursuant to the statute of frauds (*see* General Obligations Law § 5-701

[a] [1]; *see generally Hubbell v T.J. Madden Constr. Co., Inc.*, 32 AD3d 1306, 1306). We reject that contention. "As long as [an] agreement may be 'fairly and reasonably interpreted' such that it may be performed within a year, the [s]tatute of [f]rauds will not act as a bar [to enforcing it] however unexpected, unlikely, or even improbable that such performance will occur during that time frame" (*Cron v Hargro Fabrics*, 91 NY2d 362, 366; *see DeJohn v Speech, Language & Communication Assoc., SLP, OT, PT, PLLC*, 111 AD3d 1313, 1313). Here, although the parties' original agreement provided that the purchase price would be paid in monthly installments over a period of five years, the agreement was revised to provide that if plaintiff, inter alia, transferred the accounting practice or ceased to practice for a period of 30 days, plaintiff would owe defendant the remainder of the purchase price in a lump sum. Thus, because plaintiff could have fully performed the alleged agreement within the first year by paying defendant such a lump sum, defendant did not meet her burden of establishing that the statute of frauds renders the agreement void and unenforceable (*see DeJohn*, 111 AD3d at 1313-1314; *American Credit Servs. v Robinson Chrysler/Plymouth*, 206 AD2d 918, 918-919).

Contrary to the further contention of defendant, we conclude that the court properly denied that part of her motion seeking dismissal of the cause of action for fraudulent inducement pursuant to CPLR 3211 (a) (7). "In determining whether a complaint fails to state a cause of action, a court is required to 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Daley v County of Erie*, 59 AD3d 1087, 1087, quoting *Leon*, 84 NY2d at 87-88; *see generally* CPLR 3211 [a] [7]). Here, we conclude that plaintiff sufficiently alleged the elements of a cause of action for fraudulent inducement, and pleaded with the requisite specificity the alleged misrepresentations made by defendant (*see Flandera v AFA Am., Inc.*, 78 AD3d 1639, 1640; *Wright v Selle*, 27 AD3d 1065, 1067; *see generally* CPLR 3016 [b]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1240
CA 14-00275
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

JERRY SWENEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF NIAGARA, AND NIAGARA COUNTY
JAIL, DEFENDANTS-APPELLANTS.

COUNTY OF NIAGARA, THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

INTER-COMMUNITY MEMORIAL HOSPITAL OF
NEWFANE, INC., AND EASTERN NIAGARA
HOSPITAL, INC., THIRD-PARTY
DEFENDANTS-APPELLANTS.

CONNORS & VILARDO, LLP, BUFFALO (PATRICK D. MCNALLY OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-APPELLANTS.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFF-RESPONDENT.

FRANZBLAU DRATCH, P.C., NEW YORK CITY (BRIAN M. DRATCH OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered December 6, 2013. The order denied the motion of third-party defendants for summary judgment and denied the cross motion of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion and cross motion are granted, and the complaint and third-party complaint are dismissed.

Memorandum: In this medical malpractice action, plaintiff, an inmate in state prison, seeks damages for the allegedly negligent treatment of a foot injury he sustained while playing volleyball in the Niagara County Jail. The defendants named in the complaint were County of Niagara and the Niagara County Jail (collectively, County), along with plaintiff's treating physician, Dr. Robert M. Bauer. On April 7, 2010, plaintiff filed a note of issue, which Dr. Bauer moved

to strike on the ground that plaintiff had not fully complied with his discovery demands. On May 10, 2010, Supreme Court issued an order stating that, "if such discovery is not obtained within sixty (60) days by the parties, the Note of Issue shall be stricken as of July 12, 2010." It is undisputed that plaintiff failed to comply with the discovery requests by the court-imposed deadline, and that a new note of issue was never filed.

In December 2011, Dr. Bauer moved for summary judgment dismissing the complaint against him. In support of the motion, Dr. Bauer asserted, inter alia, that the motion was timely because the note of issue had been stricken. Plaintiff did not oppose the motion, which the court granted. The County thereafter commenced a third-party action against third-party defendants Inter-Community Memorial Hospital of Newfane, Inc., and Eastern Niagara Hospital, Inc. (collectively, Hospital), which had a contract with the County to provide medical services to inmates at the jail. In November 2013, the Hospital moved for summary judgment dismissing the third-party complaint, and the County filed a cross motion for summary judgment dismissing the complaint. The County did not oppose the Hospital's motion. Although plaintiff submitted no evidence in opposition to the County's cross motion, he contended that it was untimely because it was not brought within 120 days of the filing of the note of issue (*see* CPLR 3212 [a]). In response, the County argued that the 120-day deadline set forth in CPLR 3212 (a) did not apply because the note of issue filed by plaintiff had been stricken by the court's conditional order of May 10, 2010. The court, without explanation, denied both the motion and cross motion. We now reverse.

We agree with the Hospital and the County that their respective motion and cross motion were timely. A conditional, self-executing order, which requires discovery to be complied with by a specific date, becomes absolute on the specified date if the condition has not been met (*see Wilson v Galacia Contr. & Restoration Corp.*, 10 NY3d 827, 830). To obtain relief from such a conditional order, the defaulting party must demonstrate "(1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense" (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80; *see Gradaille v City of New York*, 52 AD3d 279, 282-283). If the defaulting party fails to proffer a reasonable excuse and a meritorious claim or defense, the court lacks discretion to disregard the self-executing order once it has become absolute (*Gibbs*, 16 NY3d at 80-81).

Here, as noted, the court's self-executing order of May 10, 2010 provided that the note of issue would be stricken as of July 12, 2010 if plaintiff failed to provide the requested discovery materials within 60 days. Because plaintiff undisputedly failed to provide the requested discovery materials within that time period, the note of issue was stricken as of July 12, 2010. Where, as here, a note of issue is struck by court order, it cannot commence the running of the time limit set forth in CPLR 3212 (a) (*see Williams v Peralta*, 37 AD3d 712, 713). Thus, contrary to plaintiff's contention, the Hospital's motion and the County's cross motion were not untimely.

We further conclude that the County met its initial burden of establishing entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853), thus shifting the burden to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Having submitted no evidence in opposition to the County's cross motion, plaintiff failed to meet that burden. It thus follows that the court erred in denying the cross motion. Although the County improperly designated its application for summary judgment a "cross motion," plaintiff did not challenge the application on that ground in Supreme Court. In any event, we conclude that "a technical defect of [that] nature may be disregarded where, as here, there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought" (*Daramboukas v Samlidis*, 84 AD3d 719, 721; *see* CPLR 2001; *see generally New Yorkers for Constitutional Freedoms v New York State Senate*, 98 AD3d 285, 288, *lv denied* 19 NY3d 814). Finally, as the County concedes, there was no basis for the court to deny the Hospital's unopposed motion.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1241
CA 14-00083
PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, SCONIERS, AND VALENTINO, JJ.

JOHN BISSELL, EDNA BISSELL AND KELLY BISSELL,
CLAIMANTS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF TRANSPORTATION,
DEFENDANT-RESPONDENT.
(CLAIM NO. 116958.)

LIPPES & LIPPES, BUFFALO (RICHARD LIPPES OF COUNSEL), FOR CLAIMANTS-APPELLANTS.

LAW OFFICE OF LAURIE G. OGDEN, ROCHESTER (GARY J. O'DONNELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered October 17, 2013. The order granted the motion of defendant for summary judgment and dismissed the claim.

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

Memorandum: Claimants commenced this action alleging that they sustained damage to their real and personal property as the result of defendant's reconstruction of the road adjacent to their property. The Court of Claims erred in entertaining defendant's untimely motion for summary judgment dismissing the claim and in granting the motion. Defendant made its motion more than 10 months after the expiration of the statutory deadline of 120 days and failed to show good cause for its delay in its moving papers (*see* CPLR 3212 [a]; *McNeill v Menter*, 19 AD3d 1161, 1161). The court improperly considered the "good cause" proffered by defendant for the first time in its reply papers (*see Goldin v New York & Presbyt. Hosp.*, 112 AD3d 578, 579) and, in any event, defendant's explanation for its untimeliness did not constitute good cause (*see Brill v City of New York*, 2 NY3d 648, 652; *McNeill*, 19 AD3d at 1162).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1242
KA 13-00408
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN J. BURNS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered October 30, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree (three counts), assault in the second degree (four counts), criminal obstruction of breathing or blood circulation (four counts), criminal mischief in the fourth degree (three counts), and harassment in the second degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]) and four counts of assault in the second degree (§ 120.05 [2]). Defendant contends that he was denied a fair trial by prosecutorial misconduct on summation. We note that defendant failed to object to many of the alleged instances of misconduct, and thus his challenges to those remarks are unpreserved for our review (*see* CPL 470.05 [2]; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). We decline to exercise our power to review those alleged instances of misconduct as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the alleged instances of misconduct that are preserved for our review, we conclude that any improper remarks 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).

Defendant next contends that County Court erred in refusing to admit testimony regarding the victim's psychiatric history. We reject that contention. Two of the questions posed by defense counsel would have elicited inadmissible hearsay (*see People v Romero*, 78 NY2d 355, 361), and the third question was an improper attempt to impeach the

victim's credibility by seeking contradictory testimony from another witness on a collateral matter (*see People v Pavao*, 59 NY2d 282, 288-289).

Defendant contends that the evidence is legally insufficient with respect to two counts each of criminal possession of a weapon in the third degree and assault in the second degree because the People failed to establish that the alleged weapons constituted "dangerous instruments." A dangerous instrument is "any instrument, article or substance . . . which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00 [13]). Serious physical injury is defined as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 10.00 [10]). Here, the evidence is legally sufficient to establish that the door was a dangerous instrument when defendant rammed it into the victim's leg (*see People v Coleman*, 82 AD3d 1593, 1594, *lv denied* 17 NY3d 793; *see also People v Smith*, 27 AD3d 894, 895-897, *lv denied* 6 NY3d 898). The evidence is also legally sufficient to establish that the knife was a dangerous instrument when defendant struck the victim's head with the handle of the knife (*see People v Wooden*, 275 AD2d 935, 935, *lv denied* 96 NY2d 740). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that the first two counts of the indictment were defective because they were unreasonably vague (*see People v Erle*, 83 AD3d 1442, 1443, *lv denied* 17 NY3d 794), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, he was not denied effective assistance of counsel by defense counsel's failure to request a *Huntley* hearing. It is well settled that "[t]here 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) and, here, defendant failed to show that a *Huntley* hearing would have resulted in the suppression of defendant's videotaped confession (*see People v Snyder*, 100 AD3d 1367, 1369-1370, *lv denied* 21 NY3d 1010).

Inasmuch as defendant failed to show good cause for substituting his second assigned attorney with a new attorney (*see People v Linares*, 2 NY3d 507, 510), the court did not err in denying defendant's application seeking new counsel. The court also properly denied defendant's request to proceed pro se because defendant's request was equivocal (*see generally People v Gillian*, 8 NY3d 85, 88; *People v Alexander*, 109 AD3d 1083, 1084). "By failing to move to dismiss the indictment within the five-day statutory period on the ground that he was denied his right to testify before the grand jury .

. . . , defendant thus waived his right to testify before the grand jury and his contention that the indictment should have been dismissed based on the denial of his right to testify before the grand jury lacks merit" (*People v Armstrong*, 94 AD3d 1552, 1552-1553, *lv denied* 19 NY3d 957; *see People v Hardy*, 49 AD3d 1232, 1232-1233, *affd* 13 NY3d 805; *People v Kyle*, 56 AD3d 1203, 1203, *lv denied* 12 NY3d 785).

The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1243
KA 13-01610
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT A. MILLIMAN, DEFENDANT-APPELLANT.

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

SCOTT A. MILLIMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 25, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). We note at the outset that, " '[a]lthough the crime of attempted assault in the second degree pursuant to Penal Law § 120.05 (3) is a legal impossibility (*see People v Campbell*, 72 NY2d 602, 607), a defendant may plead guilty to a nonexistent crime in satisfaction of an indictment charging a crime for which a greater penalty may be imposed' " (*People v McFadden*, 28 AD3d 1245, 1245, *lv denied* 7 NY3d 792). Defendant validly waived the right to appeal, and that valid waiver encompasses the challenge in defendant's main brief to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256; *see generally People v Lococo*, 92 NY2d 825, 827). Although defendant's contention in his main brief that his plea was not knowingly, intelligently, and voluntarily entered survives his waiver of the right to appeal (*see People v Bishop*, 115 AD3d 1243, 1244, *lv denied* 23 NY3d 1018), we reject that contention. "[T]he plea allocution as a whole establishes that 'defendant understood the charges and made an intelligent decision to enter a plea' " (*People v Keitz*, 99 AD3d 1254, 1255, *lv denied* 20 NY3d 1012, *reconsideration denied* 21 NY3d 913, quoting *People v Goldstein*, 12 NY3d 295, 301). Moreover, "nothing [defendant] said raised the possibility of a viable justification defense" (*People v Spickerman*, 307 AD2d 774, 775, *lv denied* 100 NY2d 624; *cf. People v Ponder*, 34 AD3d 1314, 1315).

" '[T]he challenge by defendant [in his pro se supplemental brief] to the sufficiency of the evidence before the grand jury is forfeited by his guilty plea' " (*People v Ruffin*, 101 AD3d 1793, 1793, *lv denied* 21 NY3d 1019; *see People v Anderson*, 90 AD3d 1475, 1477, *lv denied* 18 NY3d 991). Finally, we have reviewed the remaining contentions in defendant's pro se supplemental brief, and to the extent they are properly before us in the context of defendant's guilty plea, we conclude that they are without merit.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1244
KA 12-02087
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SHAWN M. HALLMARK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

R. THOMAS RANKIN, PUBLIC DEFENDER, MAYVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 1, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a forged instrument in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a forged instrument in the second degree (Penal Law § 170.25) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted criminal sale of a controlled substance in the fifth degree (§§ 110.00, 220.31). Defendant contends in each appeal that County Court erred in denying his pro se motion to withdraw his plea. However, there is no indication in the record that the court ruled on the motion. The Court of Appeals "has construed CPL 470.15 (1) as a legislative restriction on the Appellate Division's power to review issues either decided in an appellant's favor, or not ruled upon, by the trial court" (*People v LaFontaine*, 92 NY2d 470, 474, *rearg denied* 93 NY2d 849; *see People v Concepcion*, 17 NY3d 192, 197-198), and thus the court's failure to rule on the motion cannot be deemed a denial thereof. We therefore hold the case, reserve decision and remit the matter to County Court for a ruling on defendant's pro se motion (*see People v Chattley*, 89 AD3d 1557, 1558).

Entered: November 21, 2014   Frances E. Cafarell
                                               Clerk of the Court

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

1246
KA 12-01350
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RALIK J. HAMILTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered January 20, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in summarily denying his motion to withdraw his plea. We reject that contention. "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 Robertson*, 255 AD2d 968, 968, *lv denied* 92 NY2d 1053; *see People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015). " 'Only in the rare instance will defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his contentions and the court should be enabled to make an informed determination' " (*Zimmerman*, 100 AD3d at 1362, quoting *People v Tinsley*, 35 NY2d 926, 927). Here, the court "was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence[,] . . . coercion" and ineffective assistance of counsel, and the court did not abuse its discretion in discrediting those claims (*People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). The record establishes that defendant understood the consequences of his plea and that he was pleading guilty in exchange for a negotiated sentence that was less than the maximum term of imprisonment, and we thus conclude that the

plea was knowingly and voluntarily entered (*see People v Cubi*, 104 AD3d 1225, 1226-1227, *lv denied* 21 NY3d 1003).

We further reject defendant's contention that the plea colloquy was factually insufficient. Although defendant did not use the word "guilty" during the colloquy, he fully admitted to the conduct alleged in the superior court information constituting the crime of criminal possession of a controlled substance in the third degree (*see People v Sadness*, 300 NY 69, 73, *cert denied* 338 US 952; *cf. People v Bellis*, 78 AD2d 1014, 1014). Defendant's sentence is not unduly harsh or severe.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1247
KA 10-01590
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MISAIAH HYMES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered July 15, 2010. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted and the indictment is dismissed without prejudice to the People to re-present any appropriate charges under the sole count of the indictment to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). We agree with defendant that County Court erred in denying his motion to dismiss the indictment pursuant to CPL 210.20 (1) (c) because he was denied his right to testify before the grand jury. The prosecutor notified defendant and his counsel at the arraignment on the felony complaint that the matter would be presented to the grand jury the next morning, in less than 24 hours. Later that day, defense counsel notified the court that he could no longer represent defendant due to a conflict of interest. The following morning, after the grand jury voted to indict defendant, he was assigned new counsel. Defense counsel objected to the short notice of the grand jury proceeding and gave the prosecutor written notice of defendant's intent to testify. The prosecutor offered defendant the opportunity to testify before the grand jury before it filed the indictment, but refused defendant's request to testify before a different grand jury.

We agree with defendant that he was not given "reasonable time to exercise his right to appear as a witness" before the grand jury (CPL 190.50 [5] [a]). "CPL 190.50 (5) (a) does not mandate a specific time period for notice; rather, 'reasonable time' must be accorded to allow

a defendant an opportunity to consult with counsel and decide whether to testify before a [g]rand [j]ury” (*People v Sawyer*, 96 NY2d 815, 816, *rearg denied* 96 NY2d 928). Under “the particular facts” of this case (*id.*), including the less than 24 hours’ notice of the grand jury proceeding and assigned counsel’s withdrawal from representation, we conclude that defendant did not have reasonable time to consult with counsel and decide whether to testify before the case was presented to the grand jury (*see People v Degnan*, 246 AD2d 819, 820; *see also People v Fields*, 258 AD2d 593, 594; *cf. Sawyer*, 96 NY2d at 817).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1248

KA 13-00656

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY PARSON, JR., 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 (DIANE S. MELDRIM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered August 28, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that County Court erred in refusing to suppress his statements and evidence seized by the police from his vehicle. The court credited the police officer's testimony that, as he approached defendant's vehicle from the opposite direction in the late evening, he observed that the vehicle had a cracked windshield and an object hanging from the rearview mirror. The officer made a U-turn and stopped defendant's vehicle. When defendant rolled down the window, the officer smelled burnt marihuana and asked defendant if he had been using marihuana. Defendant responded yes, and the officer then asked defendant to exit the vehicle. The officer searched both defendant and the vehicle and found marihuana on defendant's person and in the vehicle, and also found a weapon inside the vehicle. Contrary to defendant's contention, the officer properly stopped defendant's vehicle upon observing violations of Vehicle and Traffic Law § 375 (22) and (30) (*see People v Robinson*, 97 NY2d 341, 349; *People v Dempsey*, 79 AD3d 1776, 1777, *lv denied* 16 NY3d 830). We accord great weight to the court's determination " 'because of its ability to observe and assess the credibility of the witnesses,' " and conclude that its findings should not be disturbed (*People v Mejia*, 64 AD3d 1144, 1145, *lv denied* 13 NY3d 861; *see People v Daniels*, 117 AD3d 1573, 1575; *see generally People v Prochilo*, 41 NY2d 759, 761).

Defendant's contentions concerning the propriety of the search of his person and his vehicle are not preserved for our review (*see* CPL 470.05 [2]; *People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Defendant next contends that he was denied effective assistance of counsel because defense counsel failed to cross-examine the police witness at the suppression hearing with a vehicle inventory form that purportedly showed that there was no damage to the vehicle. Defendant contends that such evidence supported his assertion that, contrary to the officer's testimony, the windshield was not cracked. The vehicle inventory form is not a part of the record on appeal, and therefore defendant's contention must be raised in a motion pursuant to CPL article 440 (*see People v Dizak*, 93 AD3d 1182, 1185, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932).

We disagree with our dissenting colleague that defendant was denied effective assistance of counsel based on defense counsel's failure to advance a more vigorous challenge to the officer's testimony regarding his reasons for stopping defendant's vehicle. Although defendant's contention survives his guilty plea to the extent that he contends that his plea was infected by the allegedly ineffective assistance (*see People v Neil*, 112 AD3d 1335, 1336, *lv denied* 23 NY3d 1040; *People v Brown*, 63 AD3d 1650, 1651), we conclude that it lacks 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 counsel" (*People v Ford*, 86 NY2d 397, 404). Here, defendant received an advantageous plea inasmuch as he received the minimum sentence for his conviction. Defense counsel cross-examined the officer about the object that was hanging from the vehicle's mirror, and asked the officer if the lighting conditions were "enough" to "be able to see the cracked windshield." In addition, defense counsel made a persuasive argument at the conclusion of the suppression hearing that the officer's testimony regarding the cracked windshield was not credible and that there "was really no probable cause for the stop of that vehicle." The fact that the court did not agree with defense counsel's assessment of the credibility of the officer does not amount to ineffective assistance of counsel. Indeed, " '[s]peculation that a more vigorous cross-examination might have [undermined the credibility of a witness] does not establish ineffectiveness of counsel' " (*People v Williams*, 110 AD3d 1458, 1459-1460, *lv denied* 22 NY3d 1160).

All concur except FAHEY, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent because in my view defendant was deprived of his right to effective assistance of counsel. Initially, defendant contends that he was denied effective assistance of counsel inasmuch as defense counsel did not introduce in evidence a vehicle inventory form reflecting that the windshield of the vehicle defendant was driving at the time he was stopped by the police was undamaged. The vehicle inventory form directly contradicts the testimony of the police officer who stopped

that vehicle inasmuch as that officer testified at the suppression hearing that he stopped the car because of a "pretty big" crack that "covered most of the windshield." Notably, the vehicle inventory form is attached to defendant's appellate brief and is signed by the testifying police officer. It indicates that there was "no damage" to the vehicle, contradicting the officer's testimony. Inasmuch as the vehicle inventory form is outside the record on appeal, however, I agree with the majority that defendant's contention concerning the vehicle inventory form is properly the subject of a motion pursuant to CPL article 440 (*see People v Dizak*, 93 AD3d 1182, 1185, *lv denied* 19 NY3d 972, *reconsideration denied* 20 NY3d 932).

I further conclude, however, that defendant was deprived of meaningful representation by defense counsel's deficient performance at the suppression hearing. In my view, defense counsel did not adequately explore the circumstances of the subject traffic stop. In particular, I note that he did not inquire in detail concerning the lighting conditions present at the time of the stop; the proximity of the vehicle defendant was driving to a streetlight; the weather at the time of the traffic stop; or the location of the vehicle defendant was driving in relation to the officer's location when he allegedly observed the crack in the windshield. I thus conclude that defense counsel's deficient cross-examination was tantamount to a failure to supply County Court with a rationale to grant suppression (*see People v Clermont*, 22 NY3d 931, 933-934; *cf. People v Mobley*, 120 AD3d 916, 919), and that defendant was denied effective assistance of counsel thereby (*see generally People v Baldi*, 54 NY2d 137, 147). Consequently, I would reverse the judgment, vacate the plea and remit the matter to County Court for further proceedings on the indictment.

Entered: November 21, 2014 Frances E. Cafarell
Clerk of the Court

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

1249
KA 12-02088
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN M. HALLMARK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

R. THOMAS RANKIN, PUBLIC DEFENDER, MAYVILLE (LYLE T. HAJDU OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered October 1, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the fifth degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the same Memorandum as in *People v Hallmark* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1252
KA 12-01625
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA L. MACK, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered April 23, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree (two counts).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]). Contrary to defendant's contention, the sentence is not unduly harsh or severe. We agree with defendant, however, that County Court failed to rule on his oral motion to withdraw his guilty plea. Contrary to the People's contention, we cannot "deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421; *see People v Concepcion*, 17 NY3d 192, 197-198). We therefore hold the case, reserve decision and remit the matter to County Court to determine defendant's motion.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1253
CAF 13-01169
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ZOE L. AND MAKELA L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MELISSA L. AND MATTHEW E.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 1)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT MELISSA L.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT MATTHEW E.

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

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

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 22, 2013 in proceedings pursuant to Family Court Act article 10. The order adjudged that respondents had abused and severely abused Zoe L., and derivatively abused and derivatively severely abused Makela L.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and the facts by vacating the findings that respondent Matthew E. abused Zoe L. and derivatively abused Makela L. and by vacating the findings of severe abuse with respect to Zoe L. and derivative severe abuse with respect to Makela L. and the petition is dismissed against respondent Matthew E., and as modified the order is affirmed without costs in accordance with the following Memorandum: These consolidated appeals arise from two related child protective proceedings pursuant to article 10 of the Family Court Act. Zoe L. is the younger sister of Makela L., respondent Melissa L. (mother) is the mother of both children, and respondent Matthew E. (Matthew) is the father of Makela L. but not Zoe L. By the order in appeal No. 1, Family Court concluded, following a fact-finding hearing, that respondents abused and severely abused Zoe L., and that respondents derivatively abused and derivatively severely abused Makela L. By the order in appeal No. 2, the court denied respondents' requests for a suspended judgment.

With respect to appeal No. 1, we note at the outset that we agree

with the mother that she is aggrieved by the order to the extent that it concerns the fact-finding hearing despite the fact that she entered into a contract for services in lieu of a dispositional hearing, and thus her appeal is properly before us (*see Matter of Child Welfare Admin. v Jennifer A.*, 218 AD2d 694, 695, *lv denied* 87 NY2d 804). Contrary to the contention of the mother, however, we conclude that petitioner established a prima facie case of abuse with respect to Zoe L. against her (*see Matter of Damien S.*, 45 AD3d 1384, 1384, *lv denied* 10 NY3d 701; *see also Matter of Philip M.*, 82 NY2d 238, 243), and that there is no basis upon which to disturb that finding, which was based primarily on the court's assessment of credibility (*see Damien S.*, 45 AD3d at 1384; *see generally Matter of Irene O.*, 38 NY2d 776, 777). Petitioner also established by a preponderance of the evidence that Makela L. was derivatively abused by the mother (*see Matter of Jezekiah R.-A. [Edwin R.-E.]*, 78 AD3d 1550, 1551). We also conclude, however, that the findings of the court that Matthew abused Zoe L. and derivatively abused Makela L. are against the weight of the evidence inasmuch as we cannot agree with the court's credibility determinations in this respect (*cf. Damien S.*, 45 AD3d at 1384), and we therefore modify the order in appeal No. 1 accordingly. We further conclude that there is insufficient evidence that Zoe L. was severely abused by the mother or Matthew (*see Jezekiah R.-A.*, 78 AD3d at 1552). For the same reasons, we conclude that there is insufficient evidence that the mother or Matthew derivatively severely abused Makela L. (*see id.*), and we therefore further modify the order in appeal No. 1 accordingly. We have considered the remaining contentions of the parties with respect to appeal No. 1 and conclude that they are without merit or are academic in light of our determination.

Turning to appeal No. 2, we note that the mother has not raised any issues with respect to this order in her brief on appeal, and we thus deem any such issues abandoned (*see id.* at 1551). Inasmuch as the issue whether the court erred in denying Matthew's request for a suspended judgment is moot in light of our decision in appeal No. 1, we dismiss Matthew's appeal from the order in appeal No. 2.

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1254
CAF 13-01170
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ZOE L. AND MAKELA L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MELISSA L. AND MATTHEW E.,
RESPONDENTS-APPELLANTS.
(APPEAL NO. 2.)

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT MELISSA L.

R. THOMAS BURGASSER, PLLC, NORTH TONAWANDA (R. THOMAS BURGASSER OF COUNSEL), FOR RESPONDENT-APPELLANT MATTHEW E.

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

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

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 25, 2013 in proceedings pursuant to Family Court Act article 10. The order denied respondents' requests for a suspended judgment.

It is hereby ORDERED that said appeal by respondent Matthew E. is unanimously dismissed and the order is affirmed without costs.

Same Memorandum as in *Matter of Zoe L.* ([appeal No. 1] ___ AD3d ___ [Nov. 21, 2014]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1255
CAF 14-00618
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF ANDER G., III,
RESPONDENT-APPELLANT.
-------------------------------- MEMORANDUM AND ORDER
ONONDAGA COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

MEGGESTO, CROSSETT & VALERINO, LLP, SYRACUSE (JAMES A. MEGGESTO OF COUNSEL), FOR RESPONDENT-APPELLANT.

GORDON J. CUFFY, COUNTY ATTORNEY, SYRACUSE (JOSEPH M. MILITI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered August 28, 2013 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent to be a juvenile delinquent.

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

Memorandum: Respondent appeals from an order adjudicating him to be a juvenile delinquent based on the finding that he committed an act that, if committed by an adult, would constitute the crime of manslaughter in the second degree (Penal Law § 125.15 [1]). We reject respondent's contention that the evidence is legally insufficient to support the finding that he caused the death of the victim. The evidence presented by the presentment agency established that, while participating in a "game" called "knockout," respondent and his accomplice each struck the victim with a blow to the head. Respondent's accomplice struck the first blow, after which the victim attempted to use his cell phone. Respondent then struck the victim with the second blow, and the victim immediately collapsed to the ground. According to the testimony of the Medical Examiner, the postmortem examination revealed that the victim sustained a tear or laceration of the left vertebral artery, the bleeding from which can cause immediate unconsciousness and essentially immediate death. In light of the sequence of blows and the surrounding circumstances, the Medical Examiner opined to a reasonable degree of medical certainty that the second blow was the cause of death. We reject respondent's further contention that the opinion of the Medical Examiner was legally insufficient because it was not set forth with absolute or scientific certainty (*see Matter of Anthony M.*, 63 NY2d 270, 280-281; *see also People v Krotoszynski*, 43 AD3d 450, 451-452, *lv denied* 9 NY3d 962; *People v Whitlatch*, 294 AD2d 909, 909, *lv denied* 98 NY2d 703).

Viewing the evidence in the light most favorable to the presentment agency, we conclude that a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt (*see generally People v Contes*, 60 NY2d 620, 621; *Matter of Gilbert B.*, 280 AD2d 1006, 1007).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1256
CAF 13-01035
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF KIMBERLY E. REINHARDT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE T. HARDISON, RESPONDENT-APPELLANT.

ROBERT J. GALLAMORE, OSWEGO, FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered May 24, 2013 in a proceeding pursuant to Family Court Act article 4. The order sentenced respondent to 60 days in the Jefferson County Jail for failure to pay child support.

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

Memorandum: Respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully violated an order of child support and sentencing him to a term of incarceration of 60 days. We reject the father's contention that petitioner mother failed to meet her burden of presenting prima facie evidence of his willful violation. "[P]roof that [the father] has failed to pay support as ordered alone establishes [the mother's] direct case of willful violation, shifting to [the father] the burden of going forward" (*Matter of Powers v Powers*, 86 NY2d 63, 69). Contrary to the father's further contention, he failed to meet his burden inasmuch as he failed to present competent medical evidence to support his testimony that mental health problems interfered with his ability to obtain gainful employment to meet his child support obligation (*see Matter of Yamonaco v Fey*, 91 AD3d 1322, 1323, *lv denied* 19 NY3d 803), nor did he establish that he made reasonable efforts to obtain such employment (*see Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452-1453).

The father failed to preserve for our review his contention that the Support Magistrate improperly assisted the mother with her testimony and was biased against him (*see Matter of Gina C. v Augusto C.*, 116 AD3d 478, 479, *lv denied* 23 NY3d 905; *Matter of Sheenagh O'R. v Sean F.*, 50 AD3d 480, 482-483). Finally, we reject the father's contention that he was denied effective assistance of counsel inasmuch as he did not " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see Matter of Elijah D. [Allison D.]*, 74

AD3d 1846, 1847).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court

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

1257
CAF 13-00988
PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF DELIA S., JESUS S. AND
SKYLETT A.
-- MEMORANDUM AND ORDER
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

DESIREE S., RESPONDENT-APPELLANT.

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

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

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

SHARON ANSCOMBE OSGOOD, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 13, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated respondent's parental rights with respect to the subject children.

It is hereby ORDERED that said appeal insofar as it concerns respondent's older child is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to the subject children on the ground of mental illness. We dismiss as moot the appeal from the order insofar as it concerns the mother's older child because she has attained the age of majority (*see Matter of Anthony M.*, 56 AD3d 1124, 1124, *lv denied* 12 NY3d 702). Contrary to the mother's contention, petitioner met its burden of demonstrating by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for" the remaining subject children (Social Services Law § 384-b [4] [c]; *see* § 384-b [6] [a]; *Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188). The testimony of petitioner's witnesses, including a psychologist, "established that the [mother] was so disturbed in [her] behavior, feeling, thinking and judgment that, if the [remaining subject children] were returned to [her] custody, [they] would be in danger of becoming" neglected

children (*Christopher B., Jr.*, 104 AD3d at 1188; *see* § 384-b [6] [a]).

Entered: November 21, 2014

Frances E. Cafarell
Clerk of the Court