SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 1, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

447

CAF 15-01246

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF SOUAD AMRANE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LOTFI BELKHIR, RESPONDENT-APPELLANT.

LOTFI BELKHIR, RESPONDENT-APPELLANT PRO SE.

SUSAN GRAY JONES, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

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

VICTORIA KING, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Maurice Strobridge, J.H.O.), entered November 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued sole custody of the minor children of the parties with petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by awarding primary physical custody of the two youngest children to respondent with visitation to petitioner and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Ontario County, to fashion an appropriate visitation schedule for those children and to determine the best interests of the second and third eldest of the minor children, in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an order that, inter alia, denied his cross petition for modification of a prior consent order and ordered that the parties' five minor children remain in the sole custody of petitioner mother, with visitation to the father.

We agree with the father that Family Court erred in determining that, in seeking a change in custody, he did not meet his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the children (*see Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405, *lv denied* 22 NY3d 864; *Matter of Cole v Nofri*, 107 AD3d 1510, 1511, *appeal dismissed and lv denied* 22 NY3d 1083). Here, the evidence that the mother was interfering with the father's visitation with the children was sufficient to establish the requisite change in

circumstances (*see Matter of Murphy v Wells*, 103 AD3d 1092, 1093, *lv denied* 21 NY3d 854; *Matter of Tyrone W. v Dawn M.P.*, 27 AD3d 1147, 1148, *lv denied* 7 NY3d 705). We further conclude that it is in the best interests of the two youngest children to be placed in the primary physical custody of the father. We therefore modify the order accordingly, and we remit the matter to Family Court to fashion an appropriate visitation schedule for those children with the mother.

The custody determination of the trial court generally is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174), but " '[s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record' " (*Cole*, 107 AD3d at 1511). "[A] long-term custodial arrangement established by agreement should [continue] 'unless it is demonstrated that the custodial parent is unfit or perhaps less fit' " (*Fox v Fox*, 177 AD2d 209, 211), and it is well settled that " '[a] concerted effort by one parent to interfere with the other parent's contact with the child[ren] is so inimical to the best interests of the child[ren] . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127). We conclude under the circumstances of this case that leaving the two youngest children in the mother's custody " 'would be tantamount to severing [their] relationship with [their] father, and [that] result would not be in [their] best interest[s]' " (*Matter of Marino v Marino*, 90 AD3d 1694, 1696; *see generally Matter of Howden v Keeler*, 85 AD3d 1561, 1562).

Here, the mother's acts of hostility toward the father include instructing the children to be uncooperative and disrespectful when in his care, and to refuse to recognize him as their father. Additionally, the record establishes that, on multiple occasions, the mother refused to allow the children to leave for the father's visitation until the father called the police; made derogatory comments about the father and his wife in front of the children; and refused to communicate with the father about the children, even failing to inform the father that one of the children underwent surgery for appendicitis. Indeed, although the court determined that the father failed to establish a change in circumstances and thus did not reach the issue whether a change in custody was in the best interests of the children, the court noted that the mother was interfering with the father's relationship with the children and concluded that it "tend[ed] to agree" with the attorney for the two youngest children that the mother's conduct was inimical to their best interests and that the mother was unfit to act as their custodian.

The attorney for the three older children informed this Court at oral argument that, in a subsequent proceeding commenced after this appeal was perfected, Family Court awarded the father temporary custody of the second and third eldest of the minor children; the eldest of the minor children remains with the mother and will be 18 years old in July. "It is well settled that we may take notice of . . . new facts . . . to the extent they indicate that the record before us is no longer sufficient for determining" the best interests of the

second and third eldest of the minor children (*Matter of Gunn v Gunn*, 129 AD3d 1531, 1532 [internal quotation marks omitted]; *see Matter of Michael B.*, 80 NY2d 299, 318), and that is the case here. We therefore further direct Family Court on remittal to determine the best interests of those children.

Finally, we conclude that the court did not abuse its discretion in refusing to find the mother in contempt of court for violating the terms of the prior custody order (*see generally Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

471

CA 15-01160

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ.

EMPIRE MEDICAL SYSTEMS, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JERAMY BERNARDONI, DEFENDANT-RESPONDENT.

JERAMY BERNARDONI, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

JASON GOTHAM AND BLAKE BEDNARZ, THIRD-PARTY DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFF-APPELLANT AND THIRD-PARTY DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ALAN J. BOZER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered December 18, 2014. The judgment, insofar as appealed from, provided that the parties may raise the issue of certain distributions with the appraiser.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, and the following language in the fifth decretal paragraph is vacated: "and as the Operating Agreement contains certain provisions relating to distributions, the parties may raise the issue of any such distributions as provided in the Operating Agreement with such appraiser."

Memorandum: Defendant-third-party plaintiff (defendant), a one-third owner and member of plaintiff, Empire Medical Systems, LLC, had his membership interest terminated by consent of third-party defendants, the remaining two members and owners of the company. Defendant disputed the termination. Plaintiff commenced this action seeking a declaration that the termination was proper and that defendant was compelled to sell his membership interest to the remaining members pursuant to plaintiff's operating agreement. Plaintiff further requested that, as provided by that agreement, the matter be submitted to an appraiser to calculate plaintiff's fair market value and the value of defendant's membership interest therein.

Defendant interposed a counterclaim seeking a declaration that the termination violated the operating agreement. Thereafter, plaintiff filed a motion for summary judgment seeking the relief set forth in its complaint, and defendant filed a cross motion for summary judgment both dismissing the complaint and granting his counterclaim.

Supreme Court issued a decision in which it determined that the termination of defendant's membership interest was proper, that defendant was obligated to sell his membership interest pursuant to the operating agreement, and that an appraiser should be selected in order to calculate the fair market value of defendant's membership interest. As the prevailing party, plaintiff submitted a "proposed order." Thereafter, defendant, for the first time, alleged that plaintiff owed him various distributions of company assets, and responded with a "proposed counter-order" directing the parties to discuss the issue of distribution payments with the appraiser. Over plaintiff's objection, the court's judgment permitted the parties to "raise the issue of any such distributions as provided by the [o]perating [a]greement with such appraiser."

Initially, we agree with plaintiff that the issue whether plaintiff owed defendant for unpaid distributions was not raised by defendant in his pleadings or during motion practice, and that plaintiff had no opportunity to be heard on the issue. We therefore conclude that the court erred in considering defendant's claim when formulating its judgment (*see generally Datwani v Datwani*, 102 AD3d 616, 616; *Quizhpe v Luvin Constr.*, 70 AD3d 912, 914; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 223-224).

Additionally, we note that, although the appraiser may consider plaintiff's debts when determining its fair market value, the operating agreement does not empower the appraiser to decide the threshold validity of defendant's claim, i.e., whether he is in fact owed for unpaid distributions. "Although there is no question that it is the appraiser who must determine which of the myriad factors are relevant to a particular valuation," it is for the court to decide the "threshold legal interpretation of the scope of the very subject of the appraisal" (*New York Overnight Partners v Gordon*, 88 NY2d 716, 721). Further, "precedents firmly establish that[,] in addition to construing disputed terms [of an agreement] in advance of an appraisal proceeding, it is also within the province of the court to identify those factors the [agreement] expressly designates or excludes in the valuation process" (*id.*; *see Goldstein v 12 Broadway Realty LLC*, 89 AD3d 590, 591). Having failed to decide the legitimacy of defendant's claim for distributions, largely owing to defendant's own failure to raise the contention prior to the court's decision and, in the absence of a provision in the operating agreement permitting the appraiser to decide such a dispute, the court erred in permitting the appraiser to consider the unestablished allegation that plaintiff owes defendant for unpaid distributions.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-00658

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE LAWRENCE, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 28, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the order of protection in favor of defendant's wife and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress a gun discovered by a police officer during a search of the residence he shared with his wife. Defendant sought suppression of the gun on the ground that he did not voluntarily consent to the search. Contrary to defendant's contention, we conclude that "the court did not err in determining, based upon the totality of the circumstances, that [defendant] voluntarily consented to the search of his residence" (*People v May*, 100 AD3d 1411, 1412, *lv denied* 20 NY3d 1063). Here, the testimony of the police officer at the suppression hearing established that defendant was not in custody when he consented to the search, that the officer did not employ threats or other coercive techniques, and that defendant was calm and compliant throughout the interaction (*see People v Caldwell*, 221 AD2d 972, 972-973, *lv denied* 87 NY2d 920). "The testimony of defendant[ ] . . . at the suppression hearing that [he] did not voluntarily consent to the search raised an issue of credibility that the court was entitled to resolve against defendant" (*People v Mills*, 137 AD3d 1690, 1691; *see People v Harris*, 132 AD3d 1281, 1283, *lv denied* 26 NY3d 1109). In light of our determination that defendant voluntarily consented to the search, we reject his further contention that his statements to the police must be suppressed as fruit of the poisonous

tree (*see People v Nichols*, 113 AD3d 1122, 1123, *lv denied* 23 NY3d 1065).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on the allegedly improper inquiry by the prosecutor during jury selection regarding the prospective jurors' perception of a victim recanting a prior allegation made against a loved one (*see* CPL 470.05 [2]), 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]). To the extent that any of the prosecutor's other remarks "could have been understood by prospective jurors as instructions on the law, any resulting prejudice was eliminated by the prosecutor's statement[s] that the trial court would instruct them later, and by the trial court's instructions to the jury" (*People v Alvarez*, 304 AD2d 313, 313, *lv denied* 100 NY2d 578; *see People v Din*, 62 AD3d 1023, 1024, *lv denied* 13 NY3d 795).

Defendant further contends that reversal of the judgment is required because the court erred in permitting the People to present evidence of a prior bad act, i.e., a witness's testimony that she had seen defendant in possession of the subject gun two years prior to the instant crime. We reject that contention. To the extent that defendant contends that the People's motion in limine concerning the witness's testimony was untimely because it was brought just before jury selection on the first day of trial, we conclude that his contention lacks merit. "[A] defendant is not entitled as a matter of law to pretrial notice of the People's intention to offer evidence pursuant to *People v Molineux* (168 NY 264 [1901]) or to a pretrial hearing on the admissibility of such evidence" (*People v Small*, 12 NY3d 732, 733; *see generally People v Ventimiglia*, 52 NY2d 350, 362; *People v Holmes*, 104 AD3d 1288, 1289-1290, *lv denied* 22 NY3d 1041). Nonetheless, the Court of Appeals "outlined in . . . *Ventimiglia* a procedure to be followed in order to avoid unfairness to the defendant," whereby "a prosecutor seeking to introduce *Molineux* evidence 'should ask for a ruling out of the presence of the jury' . . . , and . . . any hearing with respect to the admissibility of such evidence should occur either before trial or, at the latest, 'just before the witness testifies' " (*Small*, 12 NY3d at 733). The Court of Appeals emphasized that "there is no requirement that such inquiry or ruling occur before trial commences" (*id.*). Here, when the court initially reserved decision on the People's motion with respect to the witness's testimony regarding defendant's past possession of the gun, it ruled, in effect, that the People would not be allowed to introduce such evidence of a prior bad act or uncharged crime as part of their case-in-chief unless defendant opened the door to such testimony by denying knowledge and/or possession of the gun (*see generally People v Ortiz*, 259 AD2d 979, 980, *lv denied* 93 NY2d 1024). Although the prosecutor improperly referenced the witness's proposed testimony during her opening statement, defense counsel did not object and, thereafter, opened the door to the witness's testimony by arguing during his opening statement that defendant's wife owned the gun and knew its exact location in the residence, and that defendant was stunned by the discovery of the gun and had no knowledge of it (*see People v Kidd*, 112 AD3d 994, 995-996, *lv denied* 23 NY3d 1039; *People v*

Cimino, 49 AD3d 1155, 1156, *lv denied* 10 NY3d 861; *see generally People v Rojas*, 97 NY2d 32, 34-39).

With respect to the admission of the witness's testimony, it is well established that "[e]vidence of . . . prior uncharged crime[s] [or prior bad acts] may not be admitted solely to demonstrate a defendant's bad character or criminal propensity, but may be admissible if linked to a specific material issue or fact relating to the crime[s] charged, and if its probative value outweighs its prejudicial [effect]" (*People v Blair*, 90 NY2d 1003, 1004-1005; *see Kidd*, 112 AD3d at 995). Here, contrary to defendant's contention, the testimony that he had previously possessed the gun and had shown it to the witness in the residence after retrieving it from a safe "was relevant and probative of a material element of a crime charged, namely, defendant's knowing possession of the gun" (*Kidd*, 112 AD3d at 995; *see People v Delarosa*, 84 AD3d 832, 834, *lv denied* 17 NY3d 815). "Although the court arguably could have better 'recited its discretionary balancing of the probity of such evidence against its potential for prejudice' . . . , we conclude that, viewing the record in its entirety, the court conducted the requisite balancing test" (*Holmes*, 104 AD3d at 1290). Contrary to defendant's contention, the court properly concluded that the probative value of the witness's testimony outweighed its prejudicial effect (*see Kidd*, 112 AD3d at 995). In any event, the court minimized any prejudicial effect by instructing the jury immediately after the witness's testimony and during the jury charge that the testimony was to be considered only with respect to the allegation that defendant knowingly possessed the gun and was not to be considered as evidence of a propensity to commit the crime charged (*see People v Hernandez*, 103 AD3d 433, 433-434, *lv denied* 22 NY3d 1041; *Delarosa*, 84 AD3d at 834; *see generally Small*, 12 NY3d at 733).

We reject defendant's contention that the conviction is not supported by legally sufficient evidence. " 'To meet their burden of proving defendant's constructive possession of the [gun], the People had to establish that defendant exercised dominion or control over [the gun] by a sufficient level of control over the area in which [it was] found' " (*People v Diallo*, 137 AD3d 1681, 1682; *see People v Manini*, 79 NY2d 561, 573-574). Here, the People presented evidence that the police officer discovered the stolen, loaded gun in the slightly opened safe located inside a bedroom in defendant's residence, and that the safe also contained ammunition, a holster, and mail addressed to defendant (*see People v Diaz*, 24 NY3d 1187, 1189-1190). The People presented further testimony that defendant used and had authority over the safe in which the gun was located (*see People v Ortiz*, 61 AD3d 779, 780, *lv denied* 13 NY3d 748). Viewing the evidence in the light most favorable to the People, we conclude that defendant exercised dominion and control over the gun by a sufficient level of control over the area in which it was discovered, and thus the evidence is legally sufficient to establish beyond a reasonable doubt that defendant constructively possessed the gun (*see id.*). In addition, "there was sufficient evidence that defendant's possession of the [gun] was knowing, [inasmuch] as[,] '[g]enerally, possession

suffices to permit the inference that the possessor knows what he possesses, especially, but not exclusively, if it is . . . on his premises' " (*Diaz*, 24 NY3d at 1190).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), 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, 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506, *lv denied* 24 NY3d 1218, *reconsideration denied* 25 NY3d 1070).

We further conclude that, contrary to defendant's contention, the court did not err in denying his motion for a trial order of dismissal at the close of the People's proof on the ground that the People failed to comply with CPL 200.60 (3). Defendant waived the procedural requirements of that statute when he stipulated on the day of the suppression hearing to the correctness of his prior conviction as enumerated in the special information filed by the People (*see People v Ward*, 57 AD3d 582, 583, *lv denied* 12 NY3d 789; *People v Santiago*, 244 AD2d 263, 263, *lv denied* 91 NY2d 879).

Defendant further contends that the court erred in permitting the People to impeach the trial testimony of defendant's wife with prior inconsistent statements by playing for the jury an audio recording of a telephone call that she made to the police reporting that defendant possessed a gun and had threatened her. Initially, upon our review of the record, we conclude that effective appellate review of defendant's contention is not precluded by the fact that the audio recording has been lost (*see People v Cruz*, 134 AD3d 1455, 1456; *see generally People v Yavru-Sakuk*, 98 NY2d 56, 60-61). Although the court erred in permitting the People to play the audio recording because they failed to lay a proper foundation for it (*see People v Ely*, 68 NY2d 520, 527; *People v Joyner*, 240 AD2d 282, 286-287, *lv denied* 90 NY2d 906; *People v Concepcion*, 175 AD2d 324, 327, *lv denied* 78 NY2d 1010), the court gave a limiting instruction that minimized any prejudice (*see generally People v Barner*, 30 AD3d 1091, 1092, *lv denied* 7 NY3d 809), and we conclude that the error is harmless inasmuch as the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant in the absence of the audio recording (*see generally People v Crimmins*, 36 NY2d 230, 241-242; *People v Fineout*, ___ AD3d ___, ___, [May 6, 2016]).

Even assuming, arguendo, that defendant's contentions with respect to the court's consideration of certain information in reaching its sentence are preserved for our review, we conclude that they are without merit. "Generally, as a matter of due process, an offender may not be sentenced on the basis of materially untrue

assumptions or misinformation, and the sentencing court must be assured that the information upon which it bases the sentence is reliable and accurate" (*People v Crawford*, 55 AD3d 1335, 1336, *lv denied* 11 NY3d 896 [internal quotation marks omitted]; *see People v Naranjo*, 89 NY2d 1047, 1049). Here, the court properly relied on defendant's criminal history as contained in the presentence investigation report and the additional information in the People's sentencing memorandum documenting those same crimes (*see People v Weinsheimer*, 68 AD3d 901, 902, *lv denied* 14 NY3d 807). To the extent that defendant contends that the People's sentencing memorandum was untimely (*see* CPL 390.40 [2]), we note that he raised no such objection at sentencing and that he has therefore failed to preserve that contention for our review (*see People v De Torres*, 96 AD2d 609, 609-610). Contrary to his further contention, " '[t]he court did not base its sentence on a crime of which defendant had been acquitted . . . , but rather sentenced him based on all the relevant facts and circumstances surrounding the crime of which he was convicted' . . . , as it was required to do" (*People v Lipford*, 129 AD3d 1528, 1531, *lv denied* 26 NY3d 1041; *cf. People v Flowers*, 97 AD3d 693, 693, *lv denied* 19 NY3d 1102). We reject defendant's contention that the sentence is unduly harsh and severe.

We agree with defendant, however, that the court erred in granting an order of protection in favor of his wife inasmuch as defendant, having previously been convicted of a crime, was found guilty of possessing a loaded firearm in his home (Penal Law § 265.03 [3]; *see* § 265.02 [1]), which is not a "crime or violation between spouses, between a parent and child, or between members of the same family or household" (CPL 530.12 [5]; *see People v Petrusch*, 306 AD2d 889, 890). We therefore modify the judgment accordingly.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

519

CA 15-01485

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

PATRICIA PAGE AND JAMES PAGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
CURLIN MEDICAL INC., B. BRAUN MEDICAL, INC.,
AND MOOG INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA FALLS MEMORIAL MEDICAL CENTER.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CURLIN MEDICAL INC., B. BRAUN MEDICAL, INC. AND MOOG INC.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered November 24, 2014. The order, insofar as appealed from, granted the motions of defendants to dismiss the amended complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs, defendants' motions are denied, the amended complaint is reinstated, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: In appeal No. 1, plaintiffs appeal from an order that, among other things, granted defendants' motions pursuant to CPLR 3126 (3) seeking dismissal of the amended complaint. In appeal No. 2, plaintiffs appeal from an order denying their motion seeking leave to reargue. At the outset, we dismiss plaintiffs' appeal from the order in appeal No. 2 inasmuch as the order denying the motion for leave to reargue is not appealable (*see Serrano v Rajamani*, 6 AD3d 1191, 1192; *Ireland v Wilenzik*, 296 AD2d 771, 773).

With respect to appeal No. 1, it is well established that " '[a] trial court has broad discretion in supervising the discovery process, and its determinations will not be disturbed absent an abuse of that discretion' " (*Daniels v Rumsey*, 111 AD3d 1408, 1409). Nonetheless,

"where discretionary determinations concerning discovery and CPLR article 31 are at issue, [we are] vested with the same power and discretion as [Supreme Court, and thus we] may also substitute [our] own discretion *even in the absence of abuse*" (*id.* [internal quotation marks omitted]; *see generally Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845). Under the circumstances of this case, we substitute our own discretion for that of the court, and we conclude that dismissal of the amended complaint pursuant to CPLR 3126 (3) is not warranted. We therefore reverse the order insofar as appealed from, and we remit the matter to Supreme Court for further proceedings not inconsistent with this decision. We note that, upon remittal, the court may impose alternative penalties.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

520

CA 15-01486

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

PATRICIA PAGE AND JAMES PAGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
CURLIN MEDICAL INC., B. BRAUN MEDICAL, INC.,
AND MOOG INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF COUNSEL), FOR DEFENDANT-RESPONDENT NIAGARA FALLS MEMORIAL MEDICAL CENTER.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CURLIN MEDICAL INC., B. BRAUN MEDICAL, INC. AND MOOG INC.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 13, 2015. The order denied the motion of plaintiffs seeking leave to reargue their opposition to the motions of defendants to dismiss the amended complaint.

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

Same memorandum as in *Page v Niagara Falls Mem. Med. Ctr.* ([appeal No. 1] ___ AD3d ___ [July 1, 2016]).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

525

CA 15-01717

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN CITY
OF LOCKPORT, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

LOCKPORT PROFESSIONAL FIREFIGHTERS
ASSOCIATION, INC., RESPONDENT-RESPONDENT.

GOLDBERGER AND KREMER, ALBANY (BRIAN S. KREMER OF COUNSEL), FOR PETITIONER-APPELLANT.

THE SAMMARCO LAW FIRM, LLP, BUFFALO (ANDREA L. SAMMARCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 22, 2014 in a proceeding pursuant to CPLR article 75. The order denied the petition for a stay of arbitration and granted the cross motion of respondent to compel arbitration.

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

Memorandum: Respondent is the exclusive bargaining representative for all firefighters employed by petitioner, except for the fire chief. Pursuant to the parties' collective bargaining agreement (CBA), petitioner agreed, among other things, that it would "staff all equipment with adequate firefighters to assure that any evolutions [that] the firefighters are called upon to perform can be conducted with enough firefighters to assure the safety of the staff performing the evolution." Another provision of the CBA provided that petitioner was permitted to transfer dispatch communication duties out of the fire department and, in exchange, the parties agreed that petitioner would thereafter be entitled to maintain a minimum staffing level of nine firefighters per shift, which was one less than the minimum level set forth in a prior arbitration award (hereafter, staffing provision). The staffing provision further provided that "nothing contained herein shall prohibit [petitioner], subject to the terms of the parties' agreements and applicable law, from adjusting staffing levels to account for changes in population, technology, apparatus, or other relevant circumstances," and that the parties would "meet cooperatively for the purpose of discussing issues relating to firefighter and public safety issues[,] and logistical issues[,] associated with the transfer of dispatch duties."

Petitioner's Board of Fire Commissioners subsequently voted to remove an ambulance from service and to reduce the minimum staffing level to seven firefighters per shift, and such operational changes were then implemented by the fire chief. Respondent filed a grievance pursuant to the procedures set forth in the CBA and thereafter demanded arbitration seeking a determination that petitioner violated the CBA and restoration of the minimum staffing level to nine firefighters per shift. Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration. Supreme Court denied the petition, and granted the "cross-motion" of respondent to dismiss the petition and compel arbitration. We affirm.

"It is well settled that, in deciding an application to stay or compel arbitration under CPLR 7503, the court is concerned only with the threshold determination of arbitrability, and not with the merits of the underlying claim" (*Matter of Alden Cent. Sch. Dist. [Alden Cent. Schs. Administrators' Assn.]*, 115 AD3d 1340, 1340; *see* CPLR 7501; *Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 142-143). In making that determination, the court must conduct a two-part analysis. First, the court must determine whether "there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 278). Second, "[i]f no prohibition exists, [the court then determines] whether the parties in fact agreed to arbitrate the particular dispute by examining their collective bargaining agreement" (*Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513, 519; *see Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233).

With respect to the first part of the analysis, petitioner contends that the staffing provision of the CBA constitutes a job security provision that is not arbitrable on public policy grounds because it is not explicit, unambiguous, and comprehensive (*see Matter of Johnson City Professional Firefighters Local 921 [Village of Johnson City]*, 18 NY3d 32, 37, *rearg denied* 18 NY3d 937). We reject that contention. "This State has a strong public policy favoring arbitration of public sector labor disputes . . . , and 'judicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships' " (*Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.]*, 133 AD3d 1358, 1359-1360, quoting *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 80). Consistent with those principles is the general approach employed in arbitration cases, namely, that "any doubts as to whether [an] issue is arbitrable will be resolved in favor of arbitration" (*Matter of BRG Sports, LLC v Zimmerman*, 127 AD3d 499, 499; *see State of New York v Philip Morris Inc.*, 30 AD3d 26, 31, *affd* 8 NY3d 574). Here, contrary to petitioner's contention, we conclude that the court did not err in

determining that the staffing provision constituted a safety provision, i.e., a condition of employment, rather than a job security provision that could be subject to the public policy exception to arbitration. "A job security provision insures that, at least for the duration of the agreement, the employee need not fear being put out of a job" (*Matter of Board of Educ. of Yonkers City Sch. Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268, 275). Unlike a job security provision containing a "no-layoff clause," the staffing provision here does not purport to guarantee a firefighter his or her employment while the CBA is in effect (*cf. Johnson City Professional Firefighters Local 921*, 18 NY3d at 36-38; *Board of Educ. of Yonkers City Sch. Dist.*, 40 NY2d at 272). Further, contrary to petitioner's contention, the staffing provision does not operate to mandate a total number of firefighters that must be employed, nor does its stated intent relate to job protection; rather, the staffing provision relates solely to the minimum number of firefighters required to be present for each shift (*cf. Matter of Burke v Bowen*, 40 NY2d 264, 266-267). The record establishes that in drafting and agreeing to the staffing provision, the parties expressly sought to ensure firefighter and public safety associated with the transfer of dispatch communication duties that allowed for the reduction in the minimum per shift staffing level. We thus conclude that the court properly determined that the staffing provision is not a job security provision, and therefore not subject to analysis under the narrow public policy exception to arbitration.

With respect to the second part of the analysis, it is undisputed that the parties agreed to arbitrate all grievances arising from the CBA. Whether the reduction of the minimum staffing level to seven firefighters per shift based on the removal of an ambulance from service constitutes a violation of the CBA goes to the merits of the grievance itself, not to its arbitrability, and it is therefore a matter for the arbitrator to resolve (*see Matter of Village of Horseheads [Horseheads Police Benevolent Assn., Inc.]*, 94 AD3d 1191, 1192-1193, *lv denied* 19 NY3d 899).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

561

KA 11-00093

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERIBERTO SOTO, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (SCOTT MYLES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered January 4, 2011. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96). We reject defendant's contention that he was denied his right to be present at a sidebar conference during which Supreme Court spoke directly with the child victim. The court "informed defendant of his right to be present at sidebar conferences and his ability to waive that right . . . Defendant's failure to attend [the subject] sidebar conference[] after having been informed of the right to do so constitutes a waiver of that right" (*People v Yeldon*, 251 AD2d 1047, 1048, *lv denied* 92 NY2d 908).

Defendant failed to object when the court asked him questions during cross-examination, and he therefore failed to preserve for our review his contention that the court assumed the role or appearance of the prosecutor (*see* CPL 470.05 [2]; *People v Pollard*, 70 AD3d 1403, 1405, *lv denied* 14 NY3d 891). In any event, we reject that contention. It is well established that a court may intervene "in order to clarify a confusing issue" (*People v Arnold*, 98 NY2d 63, 67), and we conclude that the court's questioning of defendant to clarify two points, i.e., when defendant received grand jury minutes and the age of one of the child victim's siblings, did not constitute an abuse of discretion (*see id.* at 67-68; *Pollard*, 70 AD3d at 1405).

Defendant failed to preserve for our review his contention that

he was denied a fair trial based on prosecutorial misconduct (*see People v Douglas*, 60 AD3d 1377, 1377, *lv denied* 12 NY3d 914), 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 further contention, neither defense counsel's failure to object to the alleged instances of prosecutorial misconduct nor any of defense counsel's other alleged shortcomings constituted ineffective assistance of counsel (*see generally People v Walker*, 50 AD3d 1452, 1453-1454, *lv denied* 11 NY3d 795, *reconsideration denied* 11 NY3d 931). Rather, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

568

CA 15-00907

PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ.

LAURIE MILLS AND DENNIS MILLS,
PLAINTIFFS-RESPONDENTS,

V ORDER

BUFFALO GENERAL HOSPITAL AND KALEIDA HEALTH,
DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (AMANDA C. ROSSI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (DOMINIC J. POMPO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered April 13, 2015. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

584

KA 15-01259

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

BRENDA E. ROTH, DEFENDANT-RESPONDENT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE (WENDY LEHMANN, NEW YORK PROSECUTORS TRAINING INSTITUTE, INC., ALBANY, OF COUNSEL), FOR APPELLANT.

DONALD R. GERACE, UTICA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Lewis County Court (Daniel R. King, J.), dated June 18, 2015. The order, insofar as appealed from, granted that part of defendant's omnibus motion seeking to dismiss the first three counts of the indictment.

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

Memorandum: The People appeal from an order insofar as it granted that part of defendant's omnibus motion seeking to dismiss the first three counts of the indictment on the ground that they were not supported by legally sufficient evidence. Defendant was charged in those counts with manslaughter in the second degree (Penal Law § 125.15 [1]), criminally negligent homicide (§ 125.10), and tampering with physical evidence (§ 215.40 [2]), arising from the death of the 15-year-old victim from a drug overdose in defendant's home. We reverse.

"The standard for reviewing the legal sufficiency of the evidence before the grand jury is whether the evidence, viewed in the light most favorable to the People, if unexplained and uncontradicted, would be sufficient to warrant conviction by a trial jury" (*People v Bianco*, 67 AD3d 1417, 1418-1419, *lv denied* 14 NY3d 797 [internal quotation marks omitted]). "On a motion to dismiss, the reviewing court's inquiry is confined to the legal sufficiency of the evidence and the court is not to weigh the proof or examine its adequacy" (*People v Galatro*, 84 NY2d 160, 164). " 'In the context of the [g]rand [j]ury procedure, legally sufficient means prima facie, not proof beyond a reasonable doubt' " (*People v Deegan*, 69 NY2d 976, 978-979). Further,

the fact "[t]hat other, innocent inferences could possibly be drawn from the facts is irrelevant on this pleading stage inquiry, as long as the [g]rand [j]ury could rationally have drawn the guilty inference" (*id.* at 979; *see People v Raymond*, 56 AD3d 1306, 1307, *lv denied* 12 NY3d 820).

Here, we conclude that the evidence, viewed in the light most favorable to the People (*see Bianco*, 67 AD3d at 1418-1419), is legally sufficient to support the counts that were dismissed by County Court, and that the court improperly weighed the evidence (*see generally Galatro*, 84 NY2d at 163-165). With respect to the first two counts, charging manslaughter in the second degree and criminally negligent homicide, we conclude that the evidence of aggravating circumstances, including the quantity of drugs provided by defendant (*cf. People v Pinckney*, 38 AD2d 217, 220-221, *affd* 32 NY2d 749), defendant's alleged refusal to permit the other children present to call for medical assistance for the victim, and her direction to those children not to answer the cell phone calls from the victim's mother because the victim was not supposed to be at her house, is legally sufficient to establish a prima facie case that defendant's actions created a substantial and unjustifiable risk of death (*see People v Cruciani*, 44 AD2d 684, 684-685, *affd* 36 NY2d 304; *cf. People v Erb*, 70 AD3d 1380, 1381, *lv denied* 14 NY3d 840; *Bianco*, 67 AD3d at 1418-1419). With respect to the third count, charging tampering with physical evidence, we likewise conclude that the court failed to view the evidence in the light most favorable to the People and improperly weighed the evidence in concluding that the evidence was legally insufficient to support that count (*see generally People v Hafeez*, 100 NY2d 253, 259-260).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

586

CA 15-01630

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

BRIAN EISCH, AS PARENT AND NATURAL GUARDIAN OF
ISAAC EISCH, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SANDY CREEK CENTRAL SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

PETRONE & PETRONE, P.C., UTICA, CONGDON, FLAHERTY, O'CALLAGHAN, REID, DONLON, TRAVIS & FISHLINGER, UNIONDALE (CHRISTINE GASSER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ALEXANDER LAW OFFICE, PLLC, SYRACUSE (RALPH S. ALEXANDER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 13, 2015. The order, among other things, denied in part defendant's motion for summary judgment.

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

Memorandum: We affirm for reasons stated at Supreme Court in its bench decision and by the court in its written decision. We write only to note that, contrary to defendant's contention, the court properly granted plaintiff's cross motion for summary judgment dismissing the first and second affirmative defenses in their entirety. Although defendant alleged, inter alia, that the injuries sustained by plaintiff's son were caused by the negligence of "others," i.e., the student who assaulted him, we conclude that there is no view of the evidence that the student's conduct was anything but intentional (*see generally Smith v County of Erie*, 295 AD2d 1010, 1010-1011).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

592.1

CA 15-01558

PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ.

CARMEN J. FINOCCHI, JR., AND KIM ELAINE FINOCCHI,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

LIVE NATION INC., AND CPI TOURING (GENESIS-USA), LLC,
DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered March 30, 2015. The order, inter alia, denied in part the motion of defendants for summary judgment dismissing the complaint, granted that part of the cross motion of plaintiffs to amend their bill of particulars and granted in part that portion of plaintiffs' cross motion seeking sanctions pursuant to CPLR 3126.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' cross motion insofar as it sought leave to amend the bill of particulars and granting that part of defendants' motion with respect to the Labor Law § 241 (6) claim in its entirety and dismissing that claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries allegedly sustained by Carmen J. Finocchi, Jr. (plaintiff) when he attempted to load a so-called "Cadillac box" onto a truck following a September 2007 concert by the band Genesis at HSBC Arena, which is owned by nonparty Western New York Arena, LLC (hereafter, Arena). The box apparently contained materials from the concert stage, which was being dismantled after the concert. According to plaintiff, he had been instructed to hoist the box onto the truck by hand, despite the fact that the box had been taken off the truck with a forklift before the concert. When plaintiff attempted to lift the box onto the truck, the weight of the box shifted and it fell onto plaintiff, injuring him. Defendants moved for summary judgment dismissing the complaint, and plaintiffs

cross-moved, inter alia, for leave to amend their bill of particulars to add 12 NYCRR 23-2.1 (b) in support of the Labor Law § 241 (6) claim. Plaintiffs also sought discovery sanctions pursuant to CPLR 3126 based on defendants' failure to produce in a timely fashion the contract between defendant CPI Touring (Genesis-USA), LLC (hereafter, CPI), a subsidiary of defendant Live Nation Inc. (Live Nation) formed specifically to promote the 2007 Genesis Tour, and Gentour, Inc. (Gentour), the band's corporate entity for the tour. Supreme Court granted that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim based on the inapplicability of the Industrial Code regulations on which plaintiffs relied in their bill of particulars, but the court granted that part of plaintiffs' cross motion for leave to amend their bill of particulars to assert an additional Industrial Code violation, and thus the Labor Law § 241 (6) claim was not dismissed in its entirety. The court also granted plaintiffs' cross motion insofar as it sought discovery sanctions pursuant to CPLR 3126 by precluding defendants from using the contract between CPI and Gentour in furtherance of their motion for summary judgment dismissing the complaint. Defendants appeal, and plaintiffs cross-appeal.

Initially, although we agree with defendants that plaintiffs are not entitled to equitable or judicial estoppel with respect to defendants' failure to produce the contract between CPI and Gentour in a timely fashion, we reject defendants' contention that we should overturn the sanction imposed by the court for that failure pursuant to CPLR 3126. We likewise reject plaintiffs' contention on their cross appeal that we should impose more severe sanctions. A sanction for disclosure noncompliance "will remain undisturbed unless there has been a clear abuse of discretion" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc*., 22 NY3d 877, 880), and we perceive no such abuse of discretion here.

We also reject defendants' contention that the court erred in denying that part of their motion for summary judgment seeking dismissal of plaintiffs' common-law negligence/Labor Law § 200 and Labor Law § 240 (1) claims. With respect to the common-law negligence/Labor Law § 200 claim, where, as here, the accident involves only the manner in which the work was performed, CPI could be liable if it exercised supervision or control over the injury-producing work (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505). To the extent that defendants rely on the contract between Gentour and CPI, defendants were, as noted above, properly precluded from using that contract in furtherance of their instant motion. In any event, the contract between the Arena and CPI, the contract between the Arena and plaintiff's union (with which CPI was contractually obligated to comply), and section 1.7 of the contract between CPI and Gentour, read together, provided CPI with the authority and obligation to supervise and control the injury-producing work, and there are questions of fact on this record whether CPI actually exercised such supervision and control.

With respect to the Labor Law § 240 (1) claim, defendants' contention that plaintiffs abandoned that claim based on their

responses in their bill of particulars is improperly raised for the first time on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We also reject defendants' contention that CPI is not an entity that may be liable under section 240 (1). Because CPI was a licensee of the Arena and had the authority to supervise and control the injury-producing work, it may be liable under that statute (*see Grilikhes v International Tile & Stone Show Expos*, 90 AD3d 480, 483; *Fisher v Coghlan*, 8 AD3d 974, 975-976, *lv dismissed* 3 NY3d 702). Contrary to defendants' further contentions, we conclude that there are issues of fact whether the work being performed by plaintiff at the time he was injured was ancillary to the demolition of the stage, a structure (*see Seemueller v County of Erie*, 202 AD2d 1052, 1052; *see generally Scally v Regional Indus. Partnership*, 9 AD3d 865, 867), and whether plaintiff's injuries are within the ambit of section 240 (1) because they are "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603).

We agree with defendants, however, that the court erred in granting that part of plaintiffs' cross motion that sought permission to amend their bill of particulars to assert 12 NYCRR 23-2.1 (b) in support of their Labor Law § 241 (6) claim. We therefore modify the order by denying that part of plaintiffs' cross motion and granting that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) claim in its entirety. Although that regulation, which deals with the disposal of debris, is sufficiently specific to support a section 241 (6) claim (*see DiPalma v State of New York*, 90 AD3d 1659, 1661), it is inapplicable to the facts of this case. We note that plaintiffs have abandoned that portion of their cross appeal contesting the dismissal of the section 241 (6) claim by failing to address that part of the order in their brief on appeal.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

601

KA 13-01066

PRESENT: WHALEN, P.J., NEMOYER, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON JACKSON, ALSO KNOWN AS ARRON JACKSON,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (John H. Crandall, A.J.), rendered March 28, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, manslaughter in the second degree, attempted robbery in the first degree (two counts), attempted robbery in the second degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of attempted robbery in the first degree and attempted robbery in the second degree, and dismissing counts four through six of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]), two counts of attempted robbery in the first degree (§§ 110.00, 160.15 [1], [2]), and attempted robbery in the second degree (§§ 110.00, 160.10 [1]). Defendant was sentenced to concurrent terms of incarceration, the longest of which is a term of 25 years to life, to be served consecutively to a like term that defendant was serving pursuant to a previous conviction for the attempted murder of a police officer (*People v Jackson*, 120 AD3d 1601, *lv denied* 26 NY3d 1040).

We conclude that Supreme Court (Brunetti, A.J.) properly denied defendant's motion to suppress his October 28, 2011 statements to the police as taken in violation of his *Miranda* rights and his state constitutional right to counsel. Contrary to defendant's contention, his statements to police on that date were not the product of a custodial interrogation requiring the administration of *Miranda* warnings at the outset of the interview (*see People v Passino*, 53 AD3d

204, 205-206, *affd* 12 NY3d 748; *see generally People v Alls*, 83 NY2d 94, 100, *cert denied* 511 US 1090). *Miranda* warnings are required prior to the questioning of an inmate in a prison setting only "where 'the circumstances of the detention and interrogation . . . entail added constraint that would lead a prison inmate reasonably to believe that there has been a restriction on that person's freedom over and above that of ordinary confinement in a correctional facility' " (*People v Hadfield*, 119 AD3d 1224, 1225, *lv denied* 24 NY3d 1002, quoting *Alls*, 83 NY2d at 100; *see Passino*, 53 AD3d at 205-206). Moreover, defendant "failed to meet his ultimate burden by presenting evidence establishing that he was in fact represented by counsel at the time of interrogation, as defendant contended" (*People v Hilts*, 19 AD3d 1178, 1179; *see People v Holloway*, 97 AD3d 1099, 1100, *lv denied* 19 NY3d 1026; *see generally People v Rosa*, 65 NY2d 380, 388). Further, the record demonstrates that defendant's claimed invocation of his right to counsel did not relate to the matter under investigation and did not occur while he was in police custody (*see People v Vila*, 208 AD2d 781, 782, *lv denied* 85 NY2d 867; *see also People v Fridman*, 71 NY2d 845, 846; *see generally People v Grice*, 100 NY2d 318, 321; *People v West*, 81 NY2d 370, 373-374).

We conclude that defendant was not deprived of a fair trial by alleged prosecutorial misconduct during the opening statement and on summation. The remarks in question constituted fair comment on the evidence (*see People v Rivera*, 133 AD3d 1255, 1256; *People v Lofton*, 132 AD3d 1242, 1243) as well as fair response to the summation of defense counsel (*see People v Halm*, 81 NY2d 819, 821; *People v Walker*, 117 AD3d 1441, 1442, *lv denied* 23 NY3d 1044), and those remarks did not sidetrack the jurors from their ultimate responsibility of determining the facts essential to defendant's guilt or innocence (*see generally People v Calabria*, 94 NY2d 519, 523; *People v Alicea*, 37 NY2d 601, 605).

We conclude that the evidence is legally sufficient, in terms of the requisite corroboration of defendant's statement (*see* CPL 60.50), to support defendant's conviction of felony murder (*see People v Harper*, 132 AD3d 1230, 1231; *People v Hamilton*, 121 AD2d 395, 396; *see also People v Murray*, 40 NY2d 327, 331, *rearg denied* 40 NY2d 1080, *cert denied* 430 US 948). We note that a conviction of felony murder, although requiring corroboration of defendant's confession with respect to the homicide, does not require corroboration of the confession with respect to the underlying predicate felony (*see Harper*, 132 AD3d at 1231). On the other hand, we conclude that the evidence, more particularly the corroboration of defendant's confession, is legally insufficient to support the convictions of attempted robbery in the first and second degrees under counts four through six of the indictment (*see id.*; *People v Velez*, 122 AD2d 178, 178-179), and we modify the judgment accordingly.

We have considered defendant's remaining contentions, including the challenge to the severity of the sentence, and conclude that they

are without merit.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

605

CA 15-01676

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
MONROE COUNTY SHERIFF PATRICK M. O'FLYNN
AND MONROE COUNTY, PETITIONERS-RESPONDENTS,

AND MEMORANDUM AND ORDER

MONROE COUNTY DEPUTY SHERIFFS' ASSOCIATION, INC.,
RESPONDENT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA, P.C., ROCHESTER (DANIEL P. DEBOLT OF COUNSEL), FOR RESPONDENT-APPELLANT.

MERIDETH H. SMITH, COUNTY ATTORNEY, ROCHESTER (MATTHEW D. BROWN OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 22, 2015 in a proceeding pursuant to CPLR article 75. The order granted the petition to vacate a January 28, 2015 opinion and award of an arbitrator, vacated that opinion and award and ordered a rehearing before a different arbitrator.

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

Memorandum: In April 2014, petitioners terminated the position of then Deputy Sergeant Paul Doser following his involvement in a one-car rollover accident, after which it was determined that Doser was driving while intoxicated (DWI). Petitioners charged Doser with five violations: (1) failure to obey Vehicle and Traffic Law § 1192 (3), DWI; (2) failure to obey Vehicle and Traffic Law § 1192 (2-a) (a), aggravated DWI with a blood alcohol content of .18 percent or greater; (3) failure to obey Vehicle and Traffic Law § 1192 (2-a) (b), aggravated DWI with a child in the car; (4) failure to obey Penal Law § 260.10 (1), endangering the welfare of a child; and (5) engaging in conduct unbecoming of his position. As directed by the controlling collective bargaining agreement (CBA), petitioners held a disciplinary hearing at which Doser was represented by respondent, the Monroe County Deputy Sheriffs' Association, Inc. The hearing panel unanimously sustained all five charges and terminated Doser's position. Doser filed a grievance and, pursuant to the CBA, a hearing was held before an arbitrator.

At arbitration, the arbitrator found that certain evidence, including the chemical test results measuring Doser's blood alcohol

content at .18 percent, was inadmissible. Refusing to consider that evidence, the arbitrator concluded that the second and fifth charges were not supported by clear and convincing evidence. The arbitrator dismissed those charges, and sustained charges one, three, and four only. The arbitrator then compared the decision to terminate Doser to the results of other disciplinary matters involving other officers also involved in DWI-related violations. The arbitrator found that Doser's violations were similar to those in the identified cases, noted that none of the other officers had been terminated, and concluded that Doser's termination was therefore arbitrary and capricious. The arbitrator concluded that demotion, rather than termination, was appropriate, and ordered that Doser be reinstated and compensated for lost pay.

Petitioners thereafter filed this proceeding pursuant to CPLR 7511, seeking to vacate the arbitrator's determination and award. Supreme Court found that the arbitrator exceeded his authority by improperly neglecting to consider certain evidence received at the underlying hearing, vacated the award in its entirety, and ordered a rehearing before a different arbitrator. Respondent appeals, and we affirm.

"Under CPLR 7511 (b) an arbitration award must be vacated if, as relevant here, a party's rights were impaired by an arbitrator who 'exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made' " (*Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90, quoting CPLR 7511 [b] [1] [iii]). "It is well settled that a court may vacate an arbitration award only if it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact' " (*Kowaleski*, 16 NY3d at 91, quoting *Falzone*, 15 NY3d at 534).

Here, we conclude that the arbitrator clearly exceeded his authority as provided by the CBA. The CBA mandated that "[t]he arbitrator shall review the record of the disciplinary hearing and determine if the finding of guilt was based upon clear and convincing evidence." Rather than comply with that mandate and review the record from the hearing, the arbitrator considered a portion of the record only, deciding to exclude certain evidence from his review. Having failed to review that which he was required to review, the court properly concluded that the arbitrator exceeded his authority and vacated the arbitration award (*see generally Kowaleski*, 16 NY3d at 91; *Matter of Allstate Ins. Co. v GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d 878, 879; *Matter of State of N.Y. Off. of Mental Health [New York State Correctional Officers & Police Benevolent Assn., Inc.]*, 46 AD3d 1269, 1271, *lv dismissed* 10 NY3d 826). We reject respondent's contention that any error in this regard was harmless. As the arbitrator's decision clearly states, the refusal to consider the inappropriately-excluded evidence directly resulted in the dismissal

of two out of the five charges.

We reject respondent's further contention that, even if it was error to exclude certain evidence, that error did not impact the arbitrator's determination that the imposition of the penalty of termination was arbitrary and capricious. As the arbitrator's decision stated, that determination relied on a comparison between the conduct alleged against Doser and that committed by other officers in other cases cited by respondent. Having excluded certain evidence against Doser, however, we conclude that the arbitrator made the comparison without the benefit of a full review of the record.

Finally, we reject respondent's alternative contention that the court erred in ordering a rehearing before a different arbitrator. Upon vacating an arbitration award, a court has the discretion to "order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator" (CPLR 7511 [d]; *see Matter of Wydra v Brach*, 114 AD3d 865, 866; *Goldberg v Nugent*, 85 AD3d 459, 459; *East Ramapo Cent. Sch. Dist. v East Ramapo Teachers Assn.*, 108 AD2d 717, 717). Inasmuch as the arbitrator herein exceeded his authority under the CBA, we conclude that the court did not abuse its discretion in ordering that a different arbitrator conduct the rehearing (*see Goldberg*, 85 AD3d at 459; *Matter of Alsante [Allstate Ins. Co.]*, 259 AD2d 964, 964-965).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

606

CA 15-01373

PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

PARAMITA BANDYOPADHYAY, NOW KNOWN AS PARAMITA SARKAR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

REBANTA BANDYOPADHYAY, DEFENDANT-RESPONDENT.

SERCU & SERCU, LLP, PITTSFORD (MARILEE GREEN SERCU OF COUNSEL), FOR PLAINTIFF-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (JAMES A. VALENTI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

KIMBERLY WEISBECK, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 10, 2014. The order, among other things, determined the child support obligation of plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law and in the exercise of discretion by awarding defendant child support in the amount of $378.84 per week and vacating the 8th, 9th and 12th ordering paragraphs, and as modified the order is affirmed without costs.

Memorandum: As limited by her brief, plaintiff mother appeals from that part of an order directing her to pay defendant father child support in the amount of $441 per week, plus 57% of whatever bonus income she might receive from her employment, minus credits for the costs of airline travel for her and their children to Texas. We conclude that Supreme Court failed to "articulate[] a proper basis for applying the Child Support Standards Act [CSSA] to the combined parental income in excess of the statutory cap (*see* [Domestic Relations Law] § 240 [1-b] [c] [2], [3]; *Wideman v Wideman*, 38 AD3d 1318, 1319 [2007]; *Corasanti v Corasanti*, 296 AD2d 831, 831 [2002])" (*Martin v Martin*, 115 AD3d 1315, 1316). We further conclude that the record affords no support for the court's determination to apply the child support percentage to the total combined parental income exceeding the $141,000 per year cap (*see* § 240 [1-b] [c] [1] - [3]; *see also* Social Services Law § 111-i [2] [b]). We particularly note that the court made no factual finding that the children have financial needs that would not be met unless child support were ordered to be paid out of parental income in excess of $141,000 and that, even if the court had made such a finding, there is no evidence

in the record to support it (*see Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1181; *Costanza v Costanza* [appeal No. 2], 199 AD2d 988, 990-991). "[B]lind application of the statutory formula to [combined parental income] over [$141,000], without any express findings or record evidence of the children's actual needs, constitutes an abdication of judicial responsibility and renders meaningless the statutory provision setting a cap on strict application of the formula" (*Antinora v Antinora*, 125 AD3d 1336, 1337 [internal quotation marks omitted]; *see Matter of Malecki v Fernandez*, 24 AD3d 1214, 1215).

In the exercise of our discretion, we fix plaintiff's basic child support obligation on the basis of the combined parental CSSA income up to the cap amount, as follows: We adopt the court's finding that the mother has CSSA income of $96,428. We adopt the court's finding that the mother, in her current job, has no history of bonuses upon which any additional income might be imputed to her beyond her base salary. We find that the father has CSSA income of $74,664. We determine on the basis of the foregoing findings that the combined parental CSSA income is $171,092. We thus find that the mother's pro rata share of the combined parental income is 56.36%. We apply that multiplier, as well as the CSSA percentage of 25% for two unemancipated children, to the $141,000 cap amount. We thus determine that the mother's basic child support obligation is $19,726 per year, or $378.84 per week. We modify the 7th ordering paragraph of the order accordingly, and we vacate the 8th, 9th and 12th ordering paragraphs.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

610

TP 14-01351

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF SAIFUDDIN ABDUS-SAMAD,
PETITIONER,

V MEMORANDUM AND ORDER

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

SAIFUDDIN ABDUS-SAMAD, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Thomas G. Leone, A.J.], entered July 22, 2014) to review a determination of respondent. The determination directed that petitioner be placed in administrative segregation.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner challenges the determination placing him in administrative segregation. We note at the outset that, as respondent correctly concedes, petitioner's release from administrative segregation did not render moot that portion of the petition seeking expungement of all references to such placement in his institutional record (*see Matter of Mauleon v Goord*, 18 AD3d 992, 992).

We reject petitioner's contention that the administrative segregation recommendation lacked sufficient detail to permit him to prepare a defense and thereby denied him due process. "A petitioner's due process rights with respect to matters of involuntary administrative segregation are 'satisfied by notice to petitioner and an opportunity to present his [or her] views' " (*Matter of Gutierrez v Fischer*, 107 AD3d 1463, 1463, *lv denied* 22 NY3d 855, *rearg denied* 23 NY3d 938). Here, the administrative segregation recommendation gave petitioner adequate notice that he was accused of participating in the organization of a facility-wide work strike and exploiting his leadership position among the Muslim inmates to facilitate the

communication of information damaging to the facility by means of an unauthorized flyer. Inasmuch as petitioner had an opportunity to call witnesses and otherwise respond to the accusations against him at the hearing, the requirements of due process were satisfied (*see generally Matter of Curtis v Coombe*, 234 AD2d 752, 753). Contrary to petitioner's further contention, he was not entitled to the disclosure of confidential information considered by the Hearing Officer (*see Matter of McDuffy v Fischer*, 107 AD3d 1190, 1190). That confidential information, moreover, provided substantial evidence that petitioner posed a threat to the safety and security of the facility, and thus supported the determination placing him in administrative segregation (*see Matter of H'Shaka v Fischer*, 121 AD3d 1455, 1456, *lv denied* 24 NY3d 913).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

611

TP 15-02095

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF KEVIN CLARK, PETITIONER,

V ORDER

JOHN B. LEMPKE, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, ET AL., RESPONDENTS.

KEVIN CLARK, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [John L. Michalski, A.J.], entered October 7, 2015) to review determinations of respondents. The determinations found after tier II hearings that petitioner had violated various inmate rules.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

612

KA 14-01276

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

MEL T. WILKINS, ALSO KNOWN AS MELZER WILKINS,
ALSO KNOWN AS MELZEE WILKINS, DEFENDANT-APPELLANT.

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

MEL T. WILKINS, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, ACTING DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered May 10, 2013. Defendant was resentenced upon his conviction of criminal possession of a weapon in the second degree.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

613

KA 14-01520

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES L. MOSLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered May 14, 2014. 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 [6]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

614

KA 14-01954

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVON FRANKLIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered September 26, 2013. 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 challenges the severity of the sentence. We conclude that the waiver of the right to appeal does not encompass defendant's challenge to the severity of the sentence "inasmuch as there is no indication in the record of the plea allocution that defendant was waiving his right to appeal the severity of the sentence[]" (*People v Doblinger*, 117 AD3d 1484, 1485). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

615

KA 14-01536

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD D. PRINCE, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (AMBER L. KERLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 7, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree and criminal contempt in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, rape in the third degree (Penal Law § 130.25 [2]). We agree with defendant that his waiver of the right to appeal is invalid because, based on County Court's statements at the plea proceeding, "defendant may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893). We nevertheless conclude that the sentence of six months of incarceration and 10 years of probation is not unduly harsh or severe. We note that the period of probation was required by law to be 10 years because rape in the third degree is a felony sexual assault within the meaning of section 65.00 (3) of the Penal Law (*see* § 65.00 [3] [a] [iii]).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

616

CAF 14-02262

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF ROSE M. GIBSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS W. MURTAUGH, JR., RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered November 18, 2014 in a proceeding pursuant to Family Court Act article 4. The order determined that respondent had willfully failed to obey a court order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 4, respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully disobeyed an order to pay child support and owed petitioner mother arrears and interest. We affirm. The findings of the Support Magistrate are entitled to great deference (*see Matter of Perez v Johnson*, 128 AD3d 1469, 1469) and, contrary to the father's contention, he failed to meet his burden of establishing that the mother voluntarily and intentionally waived her right to prospective child support payments (*see Matter of Hastie v Tokle*, 122 AD3d 1129, 1129-1130; *Matter of Wendel v Nelson*, 116 AD3d 1057, 1057-1058).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

617

CAF 15-00409

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF AZALEAYANNA S.G.-B.
AND RAJAHALEE D.G.-B.

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

QUANEESHA S.G., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

Appeal from a judgment of the Family Court, Herkimer County (John J. Brennan, J.), entered March 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The judgment, among other things, adjudged that the subject children are abandoned children and transferred respondent's guardianship and custody rights to petitioner.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

618

CAF 15-00529

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF AZALEAYANNA S.G.-B.
AND RAJAHALEE D.G.-B.

HERKIMER COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

QUANEESHA S.G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

Appeal from an amended judgment of the Family Court, Herkimer County (John J. Brennan, J.), entered March 18, 2015 in a proceeding pursuant to Social Services Law § 384-b. The amended judgment, among other things, adjudged that the subject children are abandoned children and transferred respondent's guardianship and custody rights to petitioner.

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

Memorandum: Respondent mother appeals from an amended judgment terminating her parental rights with respect to the subject children on the ground of abandonment, contending that she had sufficient significant, meaningful communications with petitioner to demonstrate that she did not abandon the subject children. We reject that contention. A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment (*see* Social Services Law § 384-b [4] [b]), a parent "evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]" (§ 384-b [5] [a]; *see Matter of Angela N.S. [Joshua S.]*, 100 AD3d 1381, 1381-1382). The mother concedes that she had no contact with the subject children during the relevant six-month period despite opportunities for visitation and, contrary to the mother's contention, her "minimal, sporadic [and] insubstantial contacts" with petitioner during that six-month period are insufficient to preclude a finding of abandonment (*Matter of Nahiem G.*, 241 AD2d 632, 633; *see Matter of*

Lamar LL. [Loreal MM.], 86 AD3d 680, 681, *lv denied* 17 NY3d 712).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

619

CAF 15-00635

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF LANCE CARROLL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RICKELLE CHUGG, RESPONDENT-APPELLANT.

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

KELIANN M. ARGY, ORCHARD PARK, FOR PETITIONER-RESPONDENT.

WENDY S. SISSON, ATTORNEY FOR THE CHILD, GENESEO.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered March 20, 2015 in a proceeding pursuant to Family Court Act article 6. The order modified visitation.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that modified a prior custody order by allowing petitioner father to take the child to a family reunion in Montana during his summer visitation with the child. Preliminarily, we note that the issue raised by the Attorney for the Child (AFC), i.e., that the father failed to establish a change in circumstances, is "beyond our review," inasmuch as the AFC did not file a notice of appeal (*Matter of Yorimar K.-M.*, 309 AD2d 1148, 1149; *see Matter of Baxter v Borden*, 122 AD3d 1417, 1418-1419, *lv denied* 24 NY3d 915). Although the mother appears to adopt the AFC's contention, "that issue is not properly before us because it is raised for the first time in [the mother's] reply brief" (*Yorimar K.-M.*, 309 AD2d at 1149).

Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that the child would benefit from visiting her relatives in Montana, and the court did not abuse its discretion in allowing the father to take her there during his summer visitation (*see Matter of Russo v Carmel*, 86 AD3d 952, 953, *lv denied* 17 NY3d 713; *see also Matter of Hermanowski v Hermanowski*, 57 AD3d 777, 778).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

620

CAF 15-00576

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

IN THE MATTER OF THE ADOPTION OF HALY S.W.

WAYNE J.W. AND AMANDA M.W.,
PETITIONERS-RESPONDENTS;

MEMORANDUM AND ORDER

MATTHEW C., RESPONDENT-APPELLANT,
AND ONEIDA COUNTY DEPARTMENT OF SOCIAL
SERVICES, RESPONDENT-RESPONDENT.

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

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

JOHN P. AMUSO, ATTORNEY FOR THE CHILD, CLINTON.

Appeal from an order of the Family Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 17, 2015. The order, among other things, adjudged that the best interests of the subject child will be promoted by the adoption of the child by petitioners.

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

Memorandum: In this adoption proceeding, Matthew C. (respondent), a biological father entitled to notice of the adoption, appeals from an order determining that the best interests of the subject child will be promoted by her adoption by petitioners, the child's foster parents. Preliminarily, we note that, contrary to respondent's contention, the gaps in the hearing transcript attributable to inaudible portions of the audio recording are not so significant as to preclude our review of the order on appeal (*see Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340, *lv denied* 24 NY3d 916). Contrary to respondent's further contention, Family Court's bench decision adequately sets forth the grounds for its determination (*see Matter of Jose L. I.*, 46 NY2d 1024, 1025-1026; *Matter of Zarhianna K. [Frank K.]*, 133 AD3d 1368, 1369; *cf. Matter of Rocco v Rocco*, 78 AD3d 1670, 1671). In any event, the record is sufficient to permit us to make our own findings (*see Matter of Dubuque v Bremiller*, 79 AD3d 1743, 1744), and we conclude that the court's determination that adoption by petitioners is in the child's best interests is supported by a preponderance of the evidence (*see Matter of Sjuqwan Anthony Zion Perry M. [Charnise Antonia M.]*, 111 AD3d 473, 474, *lv denied* 22 NY3d 864; *see generally Matter of Star*

Leslie W., 63 NY2d 136, 147-148).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

621

KAH 15-00451

PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
PHILLIP JOHNSON, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK M. O'FLYNN, SHERIFF OF MONROE COUNTY,
RESPONDENT,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION AND NEW YORK STATE DIVISION
OF PAROLE, RESPONDENTS-RESPONDENTS.

MICHAEL JOS. WITMER, ROCHESTER, FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John J. Ark, J.), entered March 11, 2015 in a habeas corpus proceeding. The judgment dismissed the petition.

It is hereby ORDERED that said appeal insofar as it concerns the finding of probable cause at the preliminary revocation hearing is unanimously dismissed and the judgment is affirmed without costs.

Memorandum: Petitioner appeals from an order dismissing his petition for a writ of habeas corpus. Although the order was subsumed in a subsequent judgment from which no appeal was taken, we exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the judgment (*see People ex rel. Cass v Khahaifa*, 89 AD3d 1517, 1517-1518; *see also* CPLR 5520 [c]). Petitioner's contentions in support of his request for habeas corpus relief, however, relate to a finding at a preliminary revocation hearing that probable cause existed to believe that he violated the conditions of his release to postrelease supervision (PRS), and those contentions have been rendered moot by the revocation of his PRS following a final revocation hearing. Thus, we dismiss the appeal insofar as it concerns the finding of probable cause at the preliminary revocation hearing (*see People ex rel. Chavis v McCoy*, 236 AD2d 892, 892; *see also People ex rel. Campolito v Hale*, 70 AD3d 1474, 1474). Petitioner concedes that his further contention concerning the computation of his sentence was not properly raised in the context of this habeas corpus proceeding, and we do not consider it appropriate on this record to grant his request that we exercise our power under CPLR 103 (c) to convert this proceeding into a CPLR article 78 proceeding (*see People*

ex rel. Keyes v Khahaifa, 101 AD3d 1665, 1665, *lv denied* 20 NY3d 862; *People ex rel. McCullough v New York State Div. of Parole*, 82 AD3d 1640, 1640-1641, *lv denied* 17 NY3d 704).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

622

TP 15-01810

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

IN THE MATTER OF LOVELLE G. JONES, PETITIONER,

V MEMORANDUM AND ORDER

ANTHONY ANNUCCI, RESPONDENT.

LOVELLE G. JONES, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Cayuga County [Mark H. Fandrich, A.J.], entered October 26, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including inmate rules 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visiting violation]) and 101.10 (7 NYCRR 270.2 [B] [2] [i] [sexual act]). Petitioner contends that he did not commit the offenses charged but was the victim of retaliation and that, therefore, substantial evidence does not support the determination. We reject that contention. The misbehavior report, together with the testimony of the author of the report who observed the incident, "constitutes substantial evidence supporting the determination that petitioner violated [the] inmate rule[s]" at issue (*Matter of Oliver v Fischer*, 82 AD3d 1648, 1648). Petitioner's denials of the reported misbehavior raised, at most, an issue of credibility for resolution by the Hearing Officer (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966). We reject petitioner's further contention that the Hearing Officer was biased or that the determination flowed from the alleged bias (*see Matter of Colon v Fischer*, 83 AD3d 1500, 1501-1502; *Matter of Roberts v Selsky*, 255 AD2d 977, 978).

Finally, petitioner failed to exhaust his administrative remedies with respect to his contentions that he was denied the right to call witnesses and that he was denied access to an unusual incident report.

Petitioner failed to raise those contentions in his administrative appeal, and this Court "has no discretionary power to reach [them]" (*Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

623

KA 14-00827

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD BAXTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered February 13, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of assault in the second degree (Penal Law § 120.05 [2]). Inasmuch as " 'defendant has completed serving the sentence imposed, his contention that the sentence is unduly harsh and severe has been rendered moot' " (*People v Bald*, 34 AD3d 1362, 1362). To the extent that defendant contends that the duration of the order of protection is unduly harsh and severe, we conclude that his contention is without merit (*see People v Tate*, 83 AD3d 1467, 1467).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

624

KA 11-00916

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRY L. WILLIAMS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered January 26, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal" with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

625

KA 15-00419

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEJANDRO J. MEZA, ALSO KNOWN AS CARTEL,
DEFENDANT-APPELLANT.

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

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRIAN T. LEEDS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered September 16, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We note that the certificate of conviction incorrectly states that defendant was sentenced to an indeterminate term of 1⅓ to 3 years, and it must therefore be corrected to reflect that he was actually sentenced to an indeterminate term of 1 to 3 years (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

626

KA 13-00942

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEVEN BOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 6, 2013. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

627

KA 14-00311

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CARLOS SANTIAGO, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (Victoria M. Argento, J.), rendered November 14, 2013. Defendant was resentenced upon his conviction of sexual abuse in the first degree and unlawful imprisonment in the second degree.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

628

KAH 15-01205

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
STEPHAN HOUSTON, 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 (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 13, 2015 in a habeas corpus proceeding. 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 for a writ of habeas corpus in which he sought release from state prison on the ground that his parole revocation hearing was not held within 90 days of his waiver of his right to a preliminary hearing (*see* Executive Law § 259-i [3] [f] [i]; *People ex rel. Gray v Campbell*, 241 AD2d 723, 724). Inasmuch as petitioner has again been released to parole supervision, this appeal is moot (*see People ex rel. Yourdon v Semrau*, 133 AD3d 1351, 1351; *People ex rel. Aikens v Brown*, 103 AD3d 1212, 1213). We conclude that the exception to the mootness doctrine does not apply (*see Yourdon*, 133 AD3d at 1351; *Brown*, 103 AD3d at 1213; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

630

KA 14-01744

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN O. POPE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE 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 (Michael L. Dwyer, J.), rendered May 22, 2014. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree (two counts) and criminal contempt 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 following a jury trial of, inter alia, two counts of criminal contempt in the first degree (Penal Law § 215.51 [b] [iv]). Defendant "failed to preserve for our review [his] contention that County Court, in determining the sentence to be imposed, penalized [him] for exercising [his] right to a jury trial" (*People v Garner*, 136 AD3d 1374, 1374, *lv denied* ___ NY3d ___ [Apr. 18, 2016]; *see People v Coapman*, 90 AD3d 1681, 1683-1684, *lv denied* 18 NY3d 956). In any event, that contention is without merit. "The mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting [his] right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*Garner*, 136 AD3d at 1374-1375 [internal quotation marks omitted]). Moreover, "[g]iven that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater, it is also to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea" (*People v Martinez*, 26 NY3d 196, 200 [internal quotation marks omitted]). Finally, the sentence is not unduly harsh or severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

631

KA 14-01892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH F. FIGUEROA, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered August 29, 2014. 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 that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse. The assessment is supported by reliable hearsay contained in the case summary (*see People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see generally People v Mingo*, 12 NY3d 563, 573), which provides that defendant admitted to the personnel of the Department of Corrections and Community Supervision "a substance abuse history that included alcohol and marijuana for which he has never received treatment." "Furthermore, the record establishes that defendant was [referred to] drug and alcohol treatment while incarcerated, thus further supporting the court's assessment of points for a history of drug or alcohol abuse" (*People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *see People v England*, 118 AD3d 1289, 1289). We note that defendant "presented no evidence to the contrary" but merely pointed to an inconsistent statement in the presentence report wherein he denied any alcohol or substance abuse (*People v Kyle*, 64 AD3d 1177, 1178, *lv denied* 13 NY3d 709).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

632

CA 15-01802

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

IN THE MATTER OF THE ESTATE OF ANNE RAYNETTE ROBINSON-MURPHY, DECEASED. ORDER

RAYNETTE T. ROBINSON-HUNT, PETITIONER-APPELLANT.

DAVID C. LAUB, BUFFALO, FOR PETITIONER-APPELLANT.

Appeal from a corrected order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered April 1, 2015. The corrected order denied the petition for probate.

It is hereby ORDERED that the corrected order so appealed from is unanimously affirmed without costs for reasons stated in the decision by the Surrogate.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

633

TP 15-02031

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

IN THE MATTER OF JOSE MARTINEZ, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 3, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

634

KA 14-00006

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTONIO L. JAMES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER, FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 25, 2013. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

635

KA 13-01180

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS M. CULKIN, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered February 14, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (three counts), forgery in the second degree and grand larceny 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, inter alia, three counts of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), we conclude that the valid waiver of the right to appeal does not encompass defendant's challenge to the sentence inasmuch as Supreme Court failed to advise defendant "that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Peterson*, 111 AD3d 1412, 1412). Nevertheless, on the merits, we conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

636

KA 14-00919

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY L. CERRONI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered March 11, 2014. 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: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). The waiver of the right to appeal does not encompass defendant's challenge to the severity of the sentence (*see People v Peterson,* 111 AD3d 1412, 1412). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

637

KA 14-01611

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHELBY L. WALLACE, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 5, 2014. 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 [2]). Contrary to the contention of defendant and the "concession" of the People, we conclude that defendant's valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256). Supreme Court advised defendant of the maximum sentence that could be imposed (*see People v Lococo*, 92 NY2d 825, 827), and the record, which includes an oral and written waiver of the right to appeal, establishes that defendant understood that he was waiving his right to appeal both the conviction and the sentence (*cf. People v Maracle*, 19 NY3d 925, 928).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

640

KA 14-00724

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NANETTE R.L. PETER, DEFENDANT-APPELLANT.

HUNT & BAKER, HAMMONDSPORT (BRENDA SMITH ASTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered January 22, 2014. The judgment convicted defendant, upon her plea of guilty, of reckless endangerment 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 reckless endangerment in the first degree (Penal Law § 120.25). We agree with defendant that her waiver of the right to appeal does not encompass her challenge to the severity of her sentence. " '[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal [her] conviction that [she] was also waving [her] right to appeal the harshness of [her] sentence' " (*People v Saeli*, 136 AD3d 1290, 1291). Although defendant signed a written appeal waiver that expressly encompassed a challenge to the sentence, County Court did not inquire before accepting the plea whether defendant understood the written waiver or whether she had even read the waiver (*see id.*; *People v Banks*, 125 AD3d 1276, 1277, *lv denied* 25 NY3d 1159). Nevertheless, we reject defendant's challenge to the severity of the sentence.

Defendant's challenge to the factual sufficiency of the plea allocution is foreclosed by her valid waiver of the right to appeal the conviction and, in any event, defendant failed to preserve that challenge for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Hicks*, 128 AD3d 1358, 1359, *lv denied* 27 NY3d 999). We reject defendant's contention that this case falls within the narrow exception to the preservation

doctrine (*see People v Lopez*, 71 NY2d 662, 666).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

641

KA 14-01672

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMIEN D. JOST, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered June 30, 2014. The judgment convicted defendant, upon his plea of guilty, of disseminating indecent materials to minors in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of disseminating indecent materials to minors in the first degree (Penal Law § 235.22). We conclude that County Court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Jackson*, 126 AD3d 1508, 1511-1512). In addition, under the circumstances of this case, including defendant's prior adjudication for similar conduct, we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see e.g. People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889; *cf. People v Shrubsall*, 167 AD2d 929, 929-931). Finally, we reject defendant's contention that the sentence is unduly harsh and severe.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

643.1

CA 16-00174

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

NICOLE MILLER, NOW KNOWN AS NICOLE BOGGS,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID MILLER, DEFENDANT-APPELLANT.

GARY MULDOON, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 1.)

GARY MULDOON, ATTORNEY FOR THE CHILDREN, ROCHESTER, APPELLANT PRO SE.

MICHAEL D. SCHMITT, ROCHESTER, FOR DEFENDANT-APPELLANT.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered February 1, 2016. The order, insofar as appealed from, dismissed defendant's application, by order to show cause, to modify the judgment of divorce by granting defendant sole custody of the parties' children and vacated the temporary order that granted defendant custody of the parties' children, with supervised visitation with plaintiff.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendant's application filed on June 17, 2015 and the temporary order signed on June 18, 2015 are reinstated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the application.

Memorandum: Defendant father sought, by order to show cause, to modify the judgment of divorce, which incorporated but did not merge the parties' agreement providing for joint custody of their two children, with physical placement with the father and extensive visitation with plaintiff mother. Supreme Court granted the father temporary custody of the parties' two children, with supervised visitation with the mother, and the matter was referred to a judicial hearing officer (JHO) to hear and determine, inter alia, the father's application to modify the judgment of divorce. The JHO granted the mother's motion to dismiss the father's application with prejudice at the close of his proof, and the court thereafter vacated the temporary order and "fully restored" the provisions of the prior agreement as incorporated but not merged in the judgment of divorce. This Court

granted the motion of the Attorney for the Child (AFC) to stay the order pending appeal. We agree with the father and the AFC that the JHO erred in granting the mother's motion and thus that the court erred in vacating the temporary order and restoring the parties' custody agreement at this juncture.

"It is well established that alteration of an established custody arrangement will be ordered only upon a showing of a change in circumstances which reflects a real need for change to ensure the best interest[s] of the child[ren] . . . Where, as here, [the mother] moves to dismiss a modification proceeding at the conclusion of the [father's] proof, the court must accept as true the [father's] proof and afford the [father] every favorable inference that reasonably could be drawn therefrom" (*Matter of McClinton v Kirkman*, 132 AD3d 1245, 1245-1246 [internal quotation marks omitted]). Accepting the father's proof as true (*see id.* at 1246), we conclude that the father established, inter alia, that the older child called 911 at the mother's suggestion, allegedly because he did not want to go to the father's house, and was taken by emergency personnel for a mental health assessment and released to the father's custody; that the mother told a neighbor on several occasions that the father had physically and/or sexually abused the children; that the mother discussed the court proceedings with the children; and that the court-appointed psychologist determined that the mother's mental health issues affected her ability to co-parent and that the stress caused by the older child's behavior affected the mother's ability to parent the children effectively. We conclude that the father met his " 'burden of demonstrating a sufficient change in circumstances to require consideration of the welfare of the child[ren]' " (*id.*).

We also agree with the father and the AFC that the JHO erred in refusing to admit in evidence the report of the court-appointed psychologist on the ground that the report was not the "best evidence" because the psychologist was available to testify. The " 'oft-mentioned and much misunderstood' best evidence rule simply requires the production of an *original writing* where its contents are in dispute and sought to be proven" (*Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [emphasis added]), and thus that rule is not applicable here (*see generally Chamberlain v Amato*, 259 AD2d 1048, 1048-1049). We reject the contention of the AFC that the court erred in requiring the admission in evidence of three cellular telephones as the best evidence of the content of text messages between, inter alia, the parties, particularly in view of the father's failure to offer in evidence an authenticated "copy-and-paste document of [the] text message conversation[s]" (*People v Agudelo*, 96 AD3d 611, 611-612, *lv denied* 20 NY3d 1095). We have considered the remaining contentions of the father and the AFC and conclude that none requires any further corrective action by this Court.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

643.2

CA 16-00913

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

NICOLE MILLER, NOW KNOWN AS NICOLE BOGGS,
PLAINTIFF-RESPONDENT,

V ORDER

DAVID MILLER, DEFENDANT-RESPONDENT.

GARY MULDOON, ESQ., ATTORNEY FOR THE CHILDREN,
APPELLANT.
(APPEAL NO. 2.)

GARY MULDOON, ATTORNEY FOR THE CHILDREN, ROCHESTER, APPELLANT PRO SE.

MAUREEN A. PINEAU, ROCHESTER, FOR PLAINTIFF-RESPONDENT.

MICHAEL D. SCHMITT, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Philip B. Dattilo, Jr., J.H.O.), entered January 29, 2016. The order granted plaintiff's motion to dismiss defendant's application, by order to show cause, to modify the judgment of divorce at the close of defendant's proof.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988; *see also* CPLR 5501 [a] [1]).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

643

KA 15-00470

PRESENT: PERADOTTO, J.P., CARNI, CURRAN, TROUTMAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKEY GAMBLE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered February 17, 2015. The order affirmed an order of City Court determining that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order of County Court that affirmed an order of City Court determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). According to defendant, City Court erred in failing to recognize that it had the discretion "not to assess" points under two risk factors based on a youthful offender adjudication and erred in instead treating defendant's request "not to assess points" as a request for a downward departure from the presumptive risk level. We reject that contention inasmuch as the court lacked discretion to decline to consider evidence of the youthful offender adjudication in determining defendant's presumptive risk level. "[I]t 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 Williams*, 122 AD3d 1378, 1379 [internal quotation marks omitted]; *see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 6, 13; *see also People v Francis*, 137 AD3d 91, 99-100).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

644

KA 13-01067

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SOLOMON L. WEEMS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered February 14, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first 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 rape in the first degree (Penal Law § 130.35 [1]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of two counts of rape in the first degree (§ 130.35 [1]). Defendant pleaded guilty to the crimes in one plea proceeding. We reject defendant's contention in both appeals that his waiver of the right to appeal was invalid. County Court " 'made clear that the waiver of the right to appeal was a condition of [the] plea, not a consequence thereof, and the record reflects that defendant understood that the waiver of the right to appeal was separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Graham*, 77 AD3d 1439, 1439, *lv denied* 15 NY3d 920, quoting *People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal encompasses defendant's further contention in both appeals that the sentence is unduly harsh and severe (*see generally Lopez*, 6 NY3d at 255-256).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

645

KA 15-00278

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER T. TOMENO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 24, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]), for which he was sentenced to a determinate term of imprisonment of six years plus a period of postrelease supervision. We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 706; *see People v Maracle*, 19 NY3d 925, 928). Moreover, although defendant signed a written waiver of the right to appeal, the written waiver failed to state that defendant was waiving his right to appeal his sentence. Nevertheless, based on our review of the record, and considering defendant's criminal history, which includes prior felony convictions, we decline to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

646

KA 13-01623

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LEROY C. HARRIS, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 8, 2013. 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.

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

649

KA 13-01068

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SOLOMON L. WEEMS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered February 14, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree (two counts).

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

Same memorandum as in *People v Weems* ([appeal No. 1] ___ AD3d ___ [July 1, 2016]).

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

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

650

KA 15-00985

PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CY T. GIBSON, DEFENDANT-APPELLANT.

SALVATORE F. LANZA, FULTON, 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 9, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the third degree.

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

Entered: July 1, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (524/07) KA 06-01067. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TONY BORDEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (608/08) KA 05-01153. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PRESTON BOYD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (58/09) KA 07-01927. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC D. CARR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (397/13) KA 10-01378. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EDDIE D. ENNIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed July 1, 2016.)

MOTION NO. (447/14) KA 12-02292. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PARISH M. STREETER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (701/14) KA 12-01916. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SEAN BARILL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (1147/15) CA 15-00220. -- BRIAN LIPPENS, PLAINTIFF-RESPONDENT, V WINKLER BACKEREITECHNIK GMBH, WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH, BAKERY ENGINEERING/WINKLER, INC., DEFENDANTS-APPELLANTS, WINKLER INTERNATIONAL CORPORATION, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed July 1, 2016.)

MOTION NO. (1148/15) CA 15-00221. -- BRIAN LIPPENS, PLAINTIFF-RESPONDENT, V WINKLER BACKEREITECHNIK GMBH, WERNER & PFLEIDERER INDUSTRIELLE BACKTECHNIK GMBH, BAKERY ENGINEERING/WINKLER, INC., DEFENDANTS-APPELLANTS, WINKLER INTERNATIONAL CORPORATION, ET AL., DEFENDANTS. (APPEAL NO. 2.) -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed July 1, 2016.)

MOTION NO. (349/16) CA 15-01561. -- CHRISTOPHER DANN, PLAINTIFF-RESPONDENT-APPELLANT, V AUBURN POLICE DEPARTMENT, CITY OF AUBURN, DEFENDANTS-APPELLANTS, CAYUGA COUNTY DISTRICT ATTORNEY'S OFFICE, AND COUNTY

OF CAYUGA, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (378/16) CA 14-01928. -- AFTERMATH RESTORATION, INC., PLAINTIFF, V NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, ALBERT F. STAGER, INC., DEFENDANTS-RESPONDENTS, AND DAVID DALE, DEFENDANT-APPELLANT. -- Motion for poor person relief denied. Motion for reargument or leave to appeal to the Court of Appeals dismissed. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed July 1, 2016.)

MOTION NO. (390/16) KA 14-00817. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JEFFREY D. PAUL, ALSO KNOWN AS JEFFREY D. LIPSON, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND TROUTMAN, JJ. (Filed July 1, 2016.)

KA 13-01528. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTOINE GARNER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel’s motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of the Erie County Court, Kenneth F. Case, J. - Robbery, 1st Degree). PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed July 1, 2016.)