SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 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

368/15

KA 13-01176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW A. DAVIS, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

MATTHEW A. DAVIS, DEFENDANT-APPELLANT PRO SE.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 18, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), burglary in the first degree and robbery in the first degree. The judgment was modified by order of this Court entered March 27, 2015 in a memorandum decision (126 AD3d 1516), and defendant and the People on September 3, 2015 were granted leave to appeal to the Court of Appeals from the order of this Court (26 NY3d 966), and the Court of Appeals on November 21, 2016 modified the order and remitted the case to this Court for consideration of the facts (___ NY3d ___ [Nov. 21, 2016]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed.

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v Davis*, ___ NY3d ___ [Nov. 21, 2016], *modfg* 126 AD3d 1516). We previously modified the judgment of conviction by reversing those parts convicting defendant of two counts of murder in the second degree (Penal Law § 125.25 [3]) and dismissing those counts of the indictment. We concluded that the People failed to prove beyond a reasonable doubt that defendant's actions caused the victim's death and thus failed to establish defendant's guilt of the two counts of felony murder (*Davis*, 126 AD3d at 1516-1517). We otherwise affirmed the judgment insofar as it convicted defendant of burglary in the first degree (§ 140.30 [2]) and robbery in the first degree (§ 160.15 [1]). In modifying our order, the Court of Appeals concluded that the evidence at trial was legally sufficient to support defendant's conviction of two counts of felony murder. The Court

wrote that, based on the evidence presented by the People, "the jury could have reasonably concluded that defendant's conduct was an actual contributory cause of the victim's death" and "that the victim's heart failure, induced by the extreme stress and trauma of such a violent assault, was a directly foreseeable consequence of defendant's conduct" (*Davis*, ___ NY3d at ___).

After addressing the issues raised by defendant on his appeal from our order, the Court of Appeals affirmed the remainder of our order and remitted the matter to this Court "for consideration of the facts" (*id.*; *see* CPL 470.40 [2] [b]). Those facts have been considered and are determined to have been established. Inasmuch as defendant did not raise any challenge to the weight of the evidence in his appeal to this Court, we do not address that issue.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

677

CA 15-01950

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

FREDERICK INGUTTI AND MARY INGUTTI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROCHESTER GENERAL HOSPITAL, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered August 3, 2015. The order, insofar as appealed from, denied that part of the motion of defendant seeking dismissal of plaintiffs' second, fourth and fifth causes of action.

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

Memorandum: Plaintiffs commenced this negligence and medical malpractice action seeking damages for injuries sustained by Frederick Ingutti (plaintiff) when he left defendant hospital after signing a form entitled "Release From Responsibility For Discharge" (RFRD) and was found approximately two hours later by the police, disoriented and with frostbitten fingers that required partial amputation. On a prior appeal, we held that Supreme Court erred in denying defendant's motion for partial summary judgment dismissing the first cause of action, for ordinary negligence (*Ingutti v Rochester Gen. Hosp.*, 114 AD3d 1302, *appeal dismissed* 23 NY3d 929). After our decision, defendant moved to dismiss the remaining causes of action in the complaint pursuant to CPLR 3211 (a) (7), which alleged medical malpractice, gross negligence, lack of informed consent and loss of consortium. The court granted the motion only in part, dismissing the cause of action for gross negligence. We affirm.

In the prior appeal, in the context of defendant's motion for partial summary judgment seeking dismissal of the ordinary negligence cause of action, we held that, pursuant to *Kowalski v St. Francis Hosp. & Health Ctrs.* (21 NY3d 480, 484-485), defendant did not have a duty to prevent plaintiff from leaving the hospital against medical advice or to ensure plaintiff's safe return home (*Ingutti*, 114 AD3d at 1302-1303). Here, we are now called upon to assess plaintiffs'

medical malpractice cause of action in the context of defendant's CPLR 3211 (a) (7) motion to dismiss. Defendant contends that *Kowalski* is dispositive of plaintiffs' medical malpractice cause of action and that there is no distinction between the duty analysis with respect to plaintiffs' ordinary negligence and medical malpractice causes of action.

Our standard of review is well established: "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87, citing CPLR 3026). Courts must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). In reviewing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by plaintiffs to remedy any defects in the complaint (*see Rovello v Orofino Realty Co.*, 40 NY2d 633, 635), and "the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275).

Although "no rigid analytical line separates the two" (*Scott v Uljanov*, 74 NY2d 673, 674), we have long recognized the distinction between an ordinary negligence cause of action against a hospital and/or a physician (*see Mancusco v Kaleida Health*, 100 AD3d 1468, 1468-1469; *White v Sheehan Mem. Hosp.*, 119 AD2d 989, 989) and a medical malpractice cause of action against a hospital and/or a physician (*see Harrington v St. Mary's Hosp.*, 280 AD2d 912, 912, *lv denied* 96 NY2d 710; *Smee v Sisters of Charity Hosp. of Buffalo*, 210 AD2d 966, 967). We note that there is no prohibition against simultaneously pleading both an ordinary negligence cause of action and one sounding in medical malpractice (*see e.g. Piccoli v Panos*, 130 AD3d 704, 705-706; *Miller v Albany Med. Ctr. Hosp.*, 95 AD2d 977, 978-979; *see generally* CPLR 3014). It is simply beyond cavil "that an action for personal injuries may be maintained, in the proper case, on the dual theories of medical malpractice or simple negligence where a person is under the care and control of a medical practitioner or a medical facility" (*Twitchell v MacKay*, 78 AD2d 125, 127). Moreover, in a proper case, both theories may be presented to the jury (*see Kerker v Hurwitz*, 163 AD2d 859, 859-860, *amended on rearg* 166 AD2d 931).

Here, the medical malpractice cause of action alleges, inter alia, that defendant did not properly assess plaintiff's medical and mental status and rendered medical care that was not in accordance with good and accepted medical practice, and that the discharge of plaintiff was not in accordance with good and accepted medical practices. In opposition to defendant's motion, plaintiffs submitted the affidavit of a physician specializing in psychiatry and forensic psychiatry who attested to numerous deviations from the standard of care in the treatment and assessment of plaintiff by defendant *prior* to the time that plaintiff signed the RFRD. We note that, although defendant contends that plaintiff was not "discharged," defendant's

own RFRD belies that contention. Plaintiffs also submitted the affidavit of a registered nurse who attested to numerous deviations from the standard of nursing care by defendant's staff in the treatment and discharge planning of plaintiff, all of which occurred leading up to and *prior* to the time that plaintiff signed the RFRD. Contrary to defendant's contention, we conclude that those allegations together with the complaint state a cause of action for medical malpractice with a duty and standard of care distinct from that alleged in plaintiffs' now-dismissed ordinary negligence cause of action (*see Fox v White Plains Med. Ctr.*, 125 AD2d 538, 538-539).

Defendant further contends that the fourth cause of action, for lack of informed consent (*see* Public Health Law § 2805-d), should have been dismissed because plaintiff's injuries did not result from an affirmative violation of his physical integrity. That contention is raised for the first time on appeal and is therefore unpreserved for our review (*see Ring v Jones*, 13 AD3d 1078, 1079). Although defendant's notice of motion and supporting attorney affirmation made reference to the fourth cause of action, the court properly noted that defendant made no specific legal or factual arguments with respect thereto, and we decline to consider that contention (*see Healthcare Capital Mgt. v Abrahams*, 300 AD2d 108, 109), particularly in light of the fact that defendant's tactical course deprived plaintiffs of the opportunity to submit affidavits to remedy any defects in the complaint (*see Rovello*, 40 NY2d at 635).

In light of our determination with respect to plaintiffs' medical malpractice and lack of informed consent causes of action, we reject defendant's contention that the court erred in denying its motion to dismiss the derivative cause of action (*cf. Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 711).

All concur except CENTRA, J.P., who dissents and votes to reverse the order insofar as appealed from in accordance with the following memorandum: I respectfully dissent and agree with defendant that Supreme Court should have granted defendant's motion to dismiss the complaint in its entirety. As noted by the majority, we held on the prior appeal that, pursuant to *Kowalski v St. Francis Hosp. & Health Ctrs.* (21 NY3d 480, 484-485), defendant did not have a duty to prevent Frederick Ingutti (plaintiff) from leaving the hospital against medical advice or to ensure plaintiff's safe return home (*Ingutti v Rochester Gen. Hosp.*, 114 AD3d 1302, 1302-1303, *appeal dismissed* 23 NY3d 929). We therefore held that the court erred in denying defendant's motion for partial summary judgment dismissing the first cause of action, for negligence (*id.* at 1302). Defendant now seeks to dismiss the remaining causes of action in the complaint pursuant to CPLR 3211 (a) (7).

With respect to the medical malpractice and lack of informed consent causes of action, I conclude that those causes of action should be dismissed for the same reason that the negligence cause of action was dismissed. Those causes of action are based on similar allegations that defendant allowed plaintiff to leave the hospital

against medical advice. In *Kowalski* (21 NY3d at 484), the plaintiff also alleged causes of action for negligence and medical malpractice, which were both dismissed on appeal. Plaintiffs here argue that defendant committed malpractice by failing to plan and provide for a proper and safe discharge of plaintiff and by failing to assess and document plaintiff's treatment and condition before he left the hospital. As in *Kowalski*, however, the gravamen of the complaint is that defendant should not have allowed plaintiff to leave the hospital (*see id*.). Here, as in *Kowalski*, "[n]othing in this record . . . supports an inference that there was any causal connection between any of the alleged departures from protocol . . . and plaintiff's injury. This case is about whether defendant[] had a duty to prevent plaintiff from leaving the hospital, and nothing else" (*id.* at 486).

Inasmuch as I conclude that the medical malpractice and lack of informed consent causes of action should be dismissed, the derivative cause of action must be dismissed as well (*see Moore v First Fed. Sav. & Loan Assn. of Rochester*, 237 AD2d 956, 957).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

715

KA 14-02132

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICHOLAS J. LOUGHLIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered November 18, 2013. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Inasmuch as defendant's counsel agreed at the hearing that it was within County Court's discretion to consider, under risk factor 9, defendant's prior person in need of supervision (PINS) adjudication involving a sexual offense, defendant waived his present challenge to the court's application of that prior adjudication in determining defendant's risk level on the ground that it is a PINS adjudication (*see generally People v Dominguez*, 257 AD2d 511, 512, *lv denied* 93 NY2d 872). We reject defendant's further contention that the court erred in considering the PINS adjudication because defendant was only 10 years old at the time he committed the sexual offense. The record reflects that the court properly considered defendant's age at the time of the offense under risk factor 8, "Age at First Sex Crime." According to the risk assessment guidelines, "[t]he offender's age at the commission of his first sex crime . . . is a factor associated with recidivism: those who offend at a young age are more prone to reoffend" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 13 [2006]).

Defendant also contends that the court improperly assessed 15 points against him under risk factor 12, "Acceptance of Responsibility," based upon his alleged refusal to participate in sex offender treatment. We agree. Here, the case summary establishes

that defendant was "removed" from his sex offender treatment program based on disciplinary violations, which under the risk assessment guidelines is "not tantamount to a refusal to participate in treatment" (*People v Ford*, 25 NY3d 939, 941; *cf. People v Jackson*, 134 AD3d 1580, 1581). However, even without those 15 points, defendant remains a level three risk (*see generally People v Laraby*, 32 AD3d 1130, 1131).

Finally, although defendant is correct that the court should have applied a preponderance of the evidence standard to his request for a downward departure from his presumptive risk level rather than a clear and convincing evidence standard (*see People v Gillotti*, 23 NY3d 841, 860-861), remittal is not required because the record is sufficient to enable us to determine under the proper standard whether the court erred in denying defendant's request (*see People v Merkley*, 125 AD3d 1479, 1479). We conclude that the court properly determined that defendant's alleged mitigating factor was not otherwise accounted for in the risk assessment guidelines (*see generally People v Watson*, 95 AD3d 978, 979), but defendant failed to meet his burden of demonstrating by a preponderance of the evidence how that alleged mitigating factor would tend to reduce the risk of his own recidivism or danger to the community (*see generally People v Johnson*, 120 AD3d 1542, 1542, *lv denied* 24 NY3d 910). Thus, the court lacked discretion to depart from the presumptive risk level (*see id.*).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

799

KA 14-01127

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRICK MANIGAULT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 24, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that his conviction of assault in the first degree is not supported by legally sufficient evidence of a serious physical injury, which includes a physical injury that causes "serious and protracted disfigurement" (§ 10.00 [10]).

"A person is 'seriously' disfigured when a reasonable observer would find [the person's] altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315), and "the injury must be viewed in context, considering its location on the body and any relevant aspects of the victim's overall physical appearance" (*id.*). Here, the evidence at trial established that defendant used a box cutter to cut the victim's face and chest, resulting in a facial wound that required five deep sutures and 20 superficial sutures to close. The victim testified at trial and lifted his shirt to show the jury a chest scar that was 12 centimeters in length. The jury was also shown photographs taken approximately one month after the incident that depicted scars on the victim's face and chest, and the victim testified that, despite some healing, at the time of the trial the scars were the same length and width and equally as visible as depicted in the photographs. Thus, the evidence established that the victim sustained a permanent scar on his chest and a permanent facial

scar that was slightly over three inches in length and was prominently located on his cheek. Viewing the evidence in the light most favorable to the People (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the evidence is legally sufficient with respect to the element of serious physical injury to support the conviction of assault in the first degree (*see People v Robinson*, 121 AD3d 1405, 1407, *lv denied* 24 NY3d 1221; *see also People v Reitz*, 125 AD3d 1425, 1425-1426, *lv denied* 26 NY3d 934, *reconsideration denied* 26 NY3d 1091; *People v Irwin*, 5 AD3d 1122, 1122, *lv denied* 3 NY3d 642).

We reject defendant's contention that the verdict is against the weight of the evidence with respect to assault in the first degree. In particular, defendant contends that the People failed to prove that he intended to cause a serious physical injury inasmuch as the evidence established that the victim's lacerations were inflicted by accident. It is well settled that a defendant may be presumed to intend the natural and probable consequences of his actions (*see People v Roman*, 13 AD3d 1115, 1116, *lv denied* 4 NY3d 802), and that the element of intent may be inferred from the totality of defendant's conduct (*see People v Mike*, 283 AD2d 989, 989, *lv denied* 96 NY2d 904). Here, the People presented evidence establishing that defendant attacked the unarmed victim with a box cutter during a fist fight, and thereby established that defendant intended to cause serious physical injury to the victim (*see People v Marzug*, 280 AD2d 974, 974, *lv denied* 96 NY2d 904). Contrary to defendant's further contention, the People disproved the defense of justification beyond a reasonable doubt (*see People v Gaines*, 26 AD3d 269, 270, *lv denied* 6 NY3d 847). Thus, viewing the evidence in light of the elements of assault in the first degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that he was denied a fair trial by prosecutorial misconduct. Initially, we note that defendant failed to preserve for our review his contentions that the prosecutor committed misconduct during summation by improperly shifting the burden of proof and denigrating the defense (*see People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849). In any event, we conclude that the challenged remarks were "fair comment upon the evidence" (*People v Mulligan*, 118 AD3d 1372, 1375, *lv denied* 25 NY3d 1075), did not exceed the broad bounds of rhetorical comment permissible in summation, and constituted a fair response to defense counsel's summation (*see People v Love*, 134 AD3d 1569, 1570, *lv denied* 27 NY3d 967). We reject defendant's contention that he was denied a fair trial by the remaining instances of prosecutorial misconduct. Specifically, the prosecutor on summation did not misstate the law with respect to justification, and we note that Supreme Court instructed the jury that it should accept the law as charged by the court (*see People v Lopez*, 96 AD3d 1621, 1623, *lv denied* 19 NY3d 998). Although we agree with defendant that the prosecutor's characterization of defendant's testimony as a "manufactured story" was improper (*see People v Morgan*, 111 AD3d 1254, 1255; *People v Seeler*, 63 AD3d 1595, 1596, *lv denied* 13 NY3d 838), we conclude that this single instance of misconduct, which was undermined

by a successful defense objection, did not cause defendant such substantial prejudice that he was denied a fair trial (*see People v Manigat*, 136 AD3d 614, 616, *lv denied* 27 NY3d 1135; *cf. People v Griffin*, 125 AD3d 1509, 1512).

Defendant also failed to preserve for our review his contention that he was not properly sentenced as a second felony offender because the People failed to comply with the procedural requirements of CPL 400.21 (*see People v Butler*, 96 AD3d 1367, 1368, *lv denied* 20 NY3d 931). In any event, that contention is without merit. Defense counsel admitted that defendant had a prior felony conviction (*see People v Califano*, 84 AD3d 1504, 1506-1507, *lv denied* 17 NY3d 805), and the record establishes that defendant had an opportunity to controvert the allegations in the second felony offender statement but did not do so (*see People v Brown*, 140 AD3d 1740, 1741; *People v Hughes*, 28 AD3d 1185, 1185, *lv denied* 7 NY3d 790). We therefore conclude that, "under the circumstances presented here, . . . there was the requisite substantial compliance with CPL 400.21" (*People v Irvin*, 111 AD3d 1294, 1297, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930; *see generally People v Bouyea*, 64 NY2d 1140, 1142).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

824

KA 15-00812

PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER J. KELLY, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 23, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that his plea was coerced because County Court threatened to impose a greater sentence in the event of a conviction following trial (*see People v Lando*, 61 AD3d 1389, 1389, *lv denied* 13 NY3d 746). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant also failed to preserve his contention that his plea was coerced by the court's denial of his request for public funds and an adjournment to retain a psychiatric expert (*see generally People v Lesame*, 239 AD2d 801, 802, *lv denied* 90 NY2d 941). In any event, we conclude that defendant's contention is belied by the record and without merit (*see People v Hall*, 82 AD3d 1619, 1619-1620, *lv denied* 16 NY3d 895).

To the extent that defendant contends that he was denied the right to present a defense by an alleged denial of public funds to retain an expert, we conclude that, by pleading guilty, defendant forfeited the right to challenge any such denial (*see People v McGuay*, 120 AD3d 1566, 1567, *lv denied* 25 NY3d 1167). We further conclude that defendant waived his right to appellate review of this issue because defense counsel "withdrew [the application] 'before the court rendered its decision' " (*People v Hazzard*, 129 AD3d 1598, 1600, *lv*

denied 26 NY3d 968; *see People v King*, 115 AD3d 986, 987, *lv denied* 23 NY3d 1064).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

887

KA 14-00529

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSUE GONZALES, DEFENDANT-APPELLANT.

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

JOSUE GONZALES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered November 26, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Although we agree with defendant that certain actions of the prosecutor during the grand jury proceedings were improper, we conclude that County Court properly determined that the exceptional remedy of dismissal of the indictment is not warranted (*see generally People v Huston*, 88 NY2d 400, 409; *People v Elioff*, 110 AD3d 1477, 1477-1478, *lv denied* 22 NY3d 1040). To the extent that defendant challenges the sufficiency of the evidence before the grand jury, that contention is "not reviewable on this appeal from the ensuing judgment based upon legally sufficient trial evidence" (*People v Edgeston*, 90 AD3d 1535, 1535-1536, *lv denied* 19 NY3d 973). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's contention, the court did not err in allowing the prosecutor to introduce, on redirect examination, the prior consistent statement of a prosecution witness. Even assuming, arguendo, that the court erred in allowing the prior consistent

statement under the rationale that the trial testimony of the witness was "assailed—either directly or inferentially—as a recent fabrication" by defense counsel on cross-examination (*People v McDaniel*, 81 NY2d 10, 18), we conclude that the court properly determined, as a second rationale, that defense counsel had opened the door to that testimony on cross-examination (*see People v Melendez*, 55 NY2d 445, 451). It is well established that "[w]here . . . the opposing party 'opens the door' on cross-examination to matters not touched upon during the direct examination, a party has the right on redirect 'to explain, clarify and fully elicit [the] question only partially examined' on cross-examination" (*id.*). "[A] trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression" (*People v Massie*, 2 NY3d 179, 184). In our view, once defense counsel elicited selected portions of the prior statement of the witness on cross-examination, the prosecutor was free to elicit the balance of the statement in order to give the evidence before the jury its full and accurate context. Contrary to defendant's further contention on this point, the court "allow[ed] [only] so much additional evidence to be introduced on redirect as [was] necessary to 'meet what ha[d] been brought out in the meantime upon the cross-examination' " (*Melendez*, 55 NY2d at 452).

Contrary to the contention of defendant, he received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 141). Defense counsel's failure to obtain an expert on identification evidence does not constitute ineffective assistance of counsel inasmuch as " '[d]efendant has not demonstrated that such testimony was available, that it would have assisted the jury in its determination or that he was prejudiced by its absence' " (*People v Jurgensen*, 288 AD2d 937, 938, *lv denied* 97 NY2d 684). Furthermore, "[d]efense counsel's failure to request a missing witness charge did not constitute ineffective assistance of counsel [inasmuch as t]here was no indication that the witness would have provided noncumulative testimony favorable to the People" (*People v Smith*, 118 AD3d 1492, 1493, *lv denied* 25 NY3d 953). Lastly, defendant failed to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged error in failing to request an "expanded" single eyewitness jury instruction (*see generally People v Stanley*, 108 AD3d 1129, 1130, *lv denied* 22 NY3d 959).

Defendant also contends that he was deprived of a fair trial based on improper remarks from the prosecutor during the cross-examination of witnesses and during opening and closing statements. Defendant failed to preserve his contention for our review with respect to many of the instances of alleged misconduct (*see* CPL 470.05 [2]). In any event, we reject defendant's contention inasmuch as "[r]eversal on grounds of prosecutorial misconduct 'is mandated only when the conduct has caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Rubin*, 101 AD2d 71, 77, *lv denied* 63 NY2d 711). To the extent that any of the prosecutor's comments during opening or closing statements

exceeded the bounds of propriety, we conclude that they " 'were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Jackson*, 108 AD3d 1079, 1080, *lv denied* 22 NY3d 997). We reject defendant's further contention that the photo array shown to two witnesses was unduly suggestive inasmuch as it did not "create a substantial likelihood that the defendant would be singled out for identification" (*People v Chipp*, 75 NY2d 327, 336, *cert denied* 498 US 833). Additionally, we conclude that the sentence is not unduly harsh or severe.

Defendant failed to preserve for our review his contentions in his pro se supplemental brief concerning the court's questioning of potential jurors, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention in his pro se supplemental brief, we conclude that he failed to satisfy his burden of coming forward with substantial evidence that he was absent from a material stage of the trial (*see People v Andrew*, 1 NY3d 546, 547; *People v Chacon*, 11 AD3d 906, 907, *lv denied* 3 NY3d 755). "The absence of a notation in the record indicating that defendant was present is not sufficient to demonstrate that he was not present" (*People v Martin*, 26 AD3d 847, 848, *affd sub nom. People v Kisoon*, 8 NY3d 129). In any event, the bench and sidebar conferences referenced by defendant in his pro se supplemental brief "did not implicate his peculiar knowledge or otherwise present the potential for his meaningful participation" (*People v Fabricio*, 3 NY3d 402, 406). As a consequence, contrary to defendant's final contention in his pro se supplemental brief, there is no reason to remit this matter for a reconstruction hearing (*see People v Foster*, 1 NY3d 44, 49).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

913

KA 13-01708

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE MORMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 27, 2013. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by directing that the sentences shall run concurrently and as modified the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of two counts each of criminal sale of a controlled substance (CSCS) in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance (CPCS) in the third degree (§ 220.16 [1]) arising from defendant's sale of crack cocaine to an undercover police officer on two dates in January 2012. In appeal No. 2, defendant appeals from a judgment convicting him following the same jury trial of, inter alia, two counts each of CPCS in the third degree (§ 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]) arising from the discovery of cocaine, packaging materials, and a digital scale in defendant's vehicle following a traffic stop in April 2012.

Defendant contends in appeal No. 1 that County Court erred in refusing to suppress the undercover officer's identification testimony on the ground that the procedure was unduly suggestive because the single photograph that the undercover officer viewed before the controlled purchases tainted his post-purchase identifications of defendant as the seller. Defendant's contention is not preserved for our review inasmuch as he failed to raise that specific contention

either as part of his omnibus motion seeking suppression of the identification testimony or at the *Wade* hearing (*see People v Beaty*, 89 AD3d 1414, 1416, *affd* 22 NY3d 918), nor did the court expressly decide the question raised on appeal (*see* CPL 470.05 [2]; *People v Graham*, 25 NY3d 994, 997). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention in appeal No. 2 that the court erred in refusing to suppress the physical evidence recovered during an inventory search of his vehicle following the traffic stop initiated by a state trooper. "Following a lawful arrest of the driver of an automobile that must then be impounded, the police may conduct an inventory search of the vehicle" pursuant to established police regulations (*People v Johnson*, 1 NY3d 252, 255). Contrary to defendant's contention, we conclude that the initial determination of the police to impound the vehicle was proper inasmuch as defendant, who was the sole occupant of the vehicle, was placed under arrest after the Trooper discovered that he had an outstanding warrant, and thus was unable to drive the vehicle (*see People v Wilburn*, 50 AD3d 1617, 1618, *lv denied* 11 NY3d 742; *People v Figueroa*, 6 AD3d 720, 722, *lv dismissed* 3 NY3d 640). Contrary to defendant's further contention, "the police were not required to explore alternatives to impoundment" (*Wilburn*, 50 AD3d at 1618; *see People v Walker*, 20 NY3d 122, 125; *People v Schwing*, 13 AD3d 725, 725-726). The record does not support defendant's contention that the inventory search was a mere pretext to uncover incriminating evidence; rather, the testimony established that the Trooper's "intention for the search was to inventory the items in the vehicle" (*People v Padilla*, 21 NY3d 268, 273, *cert denied* ___ US ___, 134 S Ct 325). We further conclude that, consistent with the state police regulations admitted in evidence at the hearing that defined the permissible scope of an inventory search, the Trooper acted reasonably in searching the open garbage bags he observed in the rear seat of the vehicle (*see id.* at 273; *see generally Walker*, 20 NY3d at 126; *People v Galak*, 80 NY2d 715, 719). Moreover, contrary to defendant's contention, the Trooper properly prepared a meaningful inventory list (*cf. Johnson*, 1 NY3d at 256; *Galak*, 80 NY2d at 720; *see generally Walker*, 20 NY3d at 126), and "[t]he inventory search was not rendered invalid because the [Trooper] failed to secure and catalogue every item found in the vehicle" (*People v Owens*, 39 AD3d 1260, 1261, *lv denied* 9 NY3d 849).

We reject defendant's contention in both appeals that the court abused its discretion in granting the People's motion to consolidate the indictments for trial and denying defendant's subsequent request for reconsideration (*see* CPL 200.20 [4]; *see generally People v Lane*, 56 NY2d 1, 8). The offenses arising from the two sales of crack cocaine in January 2012 were joinable with the offenses arising from the traffic stop in April 2012 pursuant to CPL 200.20 (2) (b) because, under the applicable *Molineux* analysis (*see People v Coble*, 168 AD2d 981, 982, *lv denied* 78 NY2d 954), the "[t]estimony concerning defendant's prior drug sales was admissible with respect to the issue of defendant's intent to sell" the cocaine discovered as a result of

the traffic stop (*People v Whitfield*, 115 AD3d 1181, 1182, *lv denied* 23 NY3d 1044; *see People v Alvino*, 71 NY2d 233, 245; *People v Laws*, 27 AD3d 1116, 1116-1117, *lv denied* 7 NY3d 758). In addition, the offenses in the indictments were joinable under CPL 200.20 (2) (c) on the ground that they are "the same or similar in law" (*see People v Torres*, 212 AD2d 968, 969, *lv denied* 86 NY2d 742). Contrary to defendant's contention that he demonstrated prejudice sufficient to defeat the motion for consolidation, we conclude that he failed to make the requisite convincing showing that he had important testimony to give with respect to the drug sale charges and a strong need to refrain from testifying with respect to the offenses arising from the traffic stop (*see Lane*, 56 NY2d at 9-10; *People v Miller*, 43 AD3d 1381, 1382, *lv denied* 9 NY3d 1036). Defendant's remaining contentions regarding consolidation of the indictments are unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention in both appeals that he was denied his right to an impartial jury on the ground that a panel of prospective jurors was tainted by the comments of two prospective jurors indicating that defendant was already guilty (*see People v Miller*, 239 AD2d 787, 790, *affd* 91 NY2d 372; *People v Clark*, 262 AD2d 233, 233-234, *lv denied* 93 NY2d 1016). The record establishes that the comments were overheard and reported by only one other prospective juror, the two prospective jurors were promptly excused by the court, and defense counsel thoroughly explored during further voir dire any potential influence or bias arising from the comments. We thus conclude that defendant's contention that the remaining jury panel was tainted by the comments is " 'purely speculative' " (*People v Foose*, 132 AD3d 1236, 1238, *lv denied* 26 NY3d 1145, *reconsideration denied* 27 NY3d 1132).

Defendant contends in appeal No. 1 that the court abused its discretion in denying his motion for a mistrial after the People introduced identification testimony of an officer who had been conducting surveillance during one of the sales that had not been included in the pretrial CPL 710.30 notice. We reject that contention. Here, upon defense counsel's objection, the court struck the officer's testimony and instructed the jury to disregard it. We conclude that the court's curative instructions were sufficient to alleviate any prejudice to defendant resulting from that testimony, and thus the court properly exercised its discretion in denying his motion (*see People v Robinson*, 309 AD2d 1228, 1229, *lv denied* 1 NY3d 579).

Defendant failed to preserve for our review his contention in appeal No. 2 that the People elicited inadmissible hearsay testimony from a narcotics investigator (*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]). Contrary to defendant's contention, any error by defense counsel in failing to object to the admission of the purported hearsay testimony was not so egregious as to deprive defendant of a fair trial (*see People v*

Galens, 111 AD3d 1322, 1323, *lv denied* 22 NY3d 1088; *see generally People v Caban*, 5 NY3d 143, 152). We agree with defendant that the court erred in admitting the opinion testimony of the narcotics investigator that defendant was selling cocaine inasmuch as that testimony tended to usurp the jury's fact-finding function on the ultimate issue of possession with intent to sell (*see People v Hartzog*, 15 AD3d 866, 866-867, *lv denied* 4 NY3d 831). We conclude, however, that the error is harmless (*see id.* at 867).

To the extent that defendant preserved for our review his additional contention in both appeals that he was denied a fair trial by prosecutorial misconduct (*see* CPL 470.05 [2]), we conclude that it lacks merit. Here, "[t]he alleged misconduct was 'not so egregious as to deprive defendant of a fair trial' " (*People v Astacio*, 105 AD3d 1394, 1396, *lv denied* 22 NY3d 1154).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). According great deference to the jury's opportunity to "view the witnesses, hear the testimony and observe demeanor" (*id.*), we conclude that the jury was entitled to credit the testimony of the undercover officer who identified defendant as the seller in both controlled purchases (*see People v Grubbs*, 48 AD3d 1186, 1187, *lv denied* 10 NY3d 811).

Defendant did not preserve for our review his contention in both appeals that the People failed to comply with the procedural requirements of CPL 400.21 when he was sentenced as a second felony offender (*see People v Judd*, 111 AD3d 1421, 1423, *lv denied* 23 NY3d 1039; *see generally People v Pellegrino*, 60 NY2d 636, 637). In any event, we conclude that the record demonstrates that any error is harmless, and remitting the matter for the filing of an accurate predicate felony statement and the court's finding "would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142; *see People v Fuentes*, 140 AD3d 1656, 1657).

Contrary to defendant's further contention, we conclude that the sentence imposed does not constitute cruel and unusual punishment (*see People v Jeffrey*, 239 AD2d 953, 953, *lv denied* 90 NY2d 894; *see generally People v Jones*, 39 NY2d 694, 697; *People v Broadie*, 37 NY2d 100, 110-119, *cert denied* 423 US 950). Under the circumstances of this case, however, we agree with defendant that the consecutive and concurrent sentences aggregating to a term of imprisonment of 30 years is unduly harsh and severe. Therefore, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), we modify the judgment in appeal No. 1 by directing that the determinate sentences of 10 years of imprisonment for each count of CSCS in the third degree and CPCS in the third degree run concurrently, and we modify the judgment in appeal No. 2 by reducing the sentence on each count of CPCS in the third degree to a determinate term of five years of imprisonment, to run concurrently with each other and consecutively to

the counts underlying the judgment of conviction in appeal No. 1.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

914

KA 14-01018

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSE MORMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 27, 2013. The judgment convicted defendant, upon a jury verdict, of, inter alia, criminal possession of a controlled substance in the third degree (two counts), and criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence on each count of criminal possession of a controlled substance in the third degree to a determinate term of five years of imprisonment and as modified the judgment is affirmed.

Same memorandum as in *People v Morman* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

937

KA 14-01981

PRESENT: WHALEN, P.J., CENTRA, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARC MADORE, DEFENDANT-APPELLANT.

PATRICIA M. MCGRATH, LOCKPORT, FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered July 17, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that his conviction is not supported by legally sufficient evidence because the evidence of his intoxication negated the element of intent for the crimes of which he was convicted. Although there was evidence at trial that defendant consumed a significant quantity of alcohol prior to the incident, "[a]n intoxicated person can form the requisite criminal intent to commit a crime, and it is for the trier of fact to decide if the extent of the intoxication acted to negate the element of intent" (*People v Gonzalez*, 6 AD3d 457, 457, *lv denied* 2 NY3d 799; *see People v LaGuerre*, 29 AD3d 820, 822, *lv denied* 7 NY3d 814; *People v Jackson*, 269 AD2d 867, 867, *lv denied* 95 NY2d 798). Here, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant had the requisite intent (*see LaGuerre*, 29 AD3d at 822).

We reject defendant's further contention that the verdict is against the weight of the evidence because the People failed to disprove his defense of justification beyond a reasonable doubt. The justification defense "does not apply to a crime based on the possession of a weapon" (*People v Pons*, 68 NY2d 264, 265), and thus it is not applicable to the charge of criminal possession of a weapon in

the third degree. With respect to the crime of assault in the first degree, although the victim was the initial aggressor, the People established that the victim merely challenged defendant to a "fist fight" (*see People v Goley*, 113 AD3d 1083, 1083-1084) and, as the two men began to trade blows, defendant took a knife from the victim's person and used it to stab him repeatedly (*see People v Martinez*, 149 AD2d 438, 438, *lv denied* 74 NY2d 814). The People also established that the victim neither threatened defendant with the knife nor brandished the knife during the altercation (*see People v Haynes*, 133 AD3d 1238, 1239, *lv denied* 27 NY3d 998). Thus, viewing the evidence in light of the elements of the crime of assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the jury's rejection of the justification defense is not against the weight of the evidence (*see Haynes*, 133 AD3d at 1239; *Goley*, 113 AD3d at 1084; *see generally People v Comfort*, 113 AD2d 420, 425, *lv denied* 67 NY2d 760).

Defendant contends that his conviction of assault in the first degree must be reversed because it was based upon the same evidence offered in support of the charge of attempted murder in the second degree, but the jury returned a verdict of not guilty on that charge. We note that, although defendant frames this as a challenge to the legal sufficiency of the evidence, he is in fact contending that the verdict is repugnant. Defendant failed to preserve that contention for our review because he "failed to object to the alleged repugnancy of the verdict before the jury was discharged" (*People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172). In any event, defendant's contention is without merit. "[A] conviction will be reversed [as repugnant] only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered" (*People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039; *see People v McLaurin*, 50 AD3d 1515, 1516). Contrary to defendant's contention, "the verdict acquitting . . . defendant of attempted murder [in the second degree] is not conclusive as to the necessary elements" of assault in the first degree, of which he was convicted (*People v Brown*, 158 AD2d 528, 529, *lv denied* 76 NY2d 731).

We reject defendant's further contention that the conviction of assault in the first degree is not supported by legally sufficient evidence and the verdict is against the weight of the evidence with respect thereto because the People failed to establish that he intended to cause serious physical injury (*see* Penal Law § 120.10 [1]). It is well established that criminal intent may be inferred from the totality of the circumstances (*see People v Mike*, 283 AD2d 989, 989, *lv denied* 96 NY2d 904). Intent may also be inferred from the natural and probable consequences of defendant's conduct (*see People v Roman*, 13 AD3d 1115, 1115, *lv denied* 4 NY3d 802). Here, the People presented evidence establishing that defendant took a knife from the victim and used it to stab the victim multiple times, causing "life-threatening" injuries. We therefore conclude that the evidence is legally sufficient to sustain the conviction of assault in the first degree, inasmuch as there is a "valid line of

reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495). Moreover, although defendant testified that the victim initially attacked him with the knife and that the victim had been injured by an "inadvertent stabbing" committed in self-defense, the verdict is not against the weight of the evidence because the jury was entitled to reject defendant's testimony and credit the testimony of the victim and an eyewitness that the victim did not use a knife against defendant (*see Goley*, 113 AD3d at 1084; *People v Thomas*, 105 AD3d 1068, 1070-1071, *lv denied* 21 NY3d 1010; *see generally Bleakley*, 69 NY2d at 495).

With respect to the conviction of criminal possession of a weapon in the third degree, we reject defendant's contention that the conviction is based upon legally insufficient evidence and is against the weight of the evidence because the People failed to disprove his defense of temporary lawful possession of the weapon. "[A] person may be found to have had temporary and lawful possession of a weapon if he or she took the weapon from an assailant in the course of a fight" (*People v Hicks*, 110 AD3d 1488, 1488, *lv denied* 22 NY3d 1156), but in such circumstances there must be "facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" (*People v Williams*, 50 NY2d 1043, 1045). Here, the evidence establishing that defendant possessed the knife for the purpose of inflicting serious physical injury to the victim and that he did not immediately turn over the weapon to the police is "utterly at odds with [defendant's] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor" (*People v Snyder*, 73 NY2d 900, 902 [internal quotation marks omitted]; *see People v Robinson*, 63 AD3d 1634, 1635, *lv denied* 13 NY3d 799). We therefore conclude that the evidence is legally sufficient to support the conviction of criminal possession of a weapon in the third degree (*see generally Bleakley*, 69 NY2d at 495), and that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

939

KA 14-02102

PRESENT: WHALEN, P.J., CENTRA, CARNI, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY L. MARTIN, 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 (MICHAEL HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 28, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant contends that Supreme Court failed to comply with the mandatory requirements of CPL article 730, and thus denied him due process of law and erred in finding him competent to stand trial. At the outset, we note that defendant was not required to preserve that contention for our review (*see People v Armlin*, 37 NY2d 167, 172; *People v Winebrenner*, 96 AD3d 1615, 1615-1616, *lv denied* 19 NY3d 1029; *People v Meurer*, 184 AD2d 1067, 1068, *lv dismissed* 80 NY2d 835, *lv denied* 80 NY2d 907). Nonetheless, we conclude that the record contains no indication that the court failed to comply with the requirements of CPL article 730 (*see generally Winebrenner*, 96 AD3d at 1616). Upon determining that defendant may be an incapacitated person, the court properly issued an order of examination (*see* CPL 730.30 [1]). Contrary to defendant's contention, the order of examination was "issued to an appropriate director" (CPL 730.10 [2]), inasmuch as it was issued to "the director of community mental health services of the county where the criminal action [was] pending" (22 NYCRR 111.2 [a]).

Defendant further contends that the experts who testified at a competency hearing were not specialists in the field of developmental disabilities and therefore were not qualified to offer an opinion whether defendant was an incapacitated person. We reject that

contention. The director appointed two psychiatrists to examine defendant (*see* CPL 730.20 [1]), and at a competency hearing held upon defendant's motion (*see* CPL 730.30 [2]), the parties stipulated to the qualifications and expertise of the psychiatric examiners to obviate the need for an extensive evaluation of their credentials (*see generally People v Vandemark*, 225 AD2d 716, 716, *lv denied* 88 NY2d 943). Indeed, we note that one of those psychiatrists testified that he worked specifically with persons who suffer from developmental disabilities and routinely performed mental competency evaluations on such persons.

Contrary to defendant's further contention, the statute does not require the court to issue a written decision containing any particular findings. After reviewing the evidence presented at the hearing, the court, being "satisfied that the defendant is not an incapacitated person," properly ordered the criminal action to proceed (CPL 730.30 [2]).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence that he unlawfully entered a dwelling (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Danielson*, 9 NY3d 342, 349). A dwelling is "a building which is usually occupied by a person lodging therein at night" (Penal Law § 140.00 [3]; *see People v McCray*, 23 NY3d 621, 625-626, *rearg denied* 24 NY3d 947), and this building was used for that purpose. Although the building that defendant unlawfully entered contained a restaurant, at trial the People introduced photographs of the interior of the building that depicted bedrooms, a bathroom with shower, and a washer and dryer. Moreover, the restaurant's owner testified that he, his wife, and his son slept in the building every night, including the night of the burglary.

We conclude that defendant failed to preserve his further contention that Penal Law § 140.25 (2) is unconstitutionally vague as applied to him inasmuch as he did not move to dismiss the indictment on that ground (*see People v Iannelli*, 69 NY2d 684, 685, *cert denied* 482 US 914; *People v Knapp*, 79 AD3d 1805, 1807, *lv denied* 17 NY3d 807).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

949

CA 15-01830

PRESENT: WHALEN, P.J., CENTRA, CARNI, CURRAN, AND TROUTMAN, JJ.

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

V MEMORANDUM AND ORDER

LERRYL SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered August 18, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that respondent be confined in a secure treatment facility.

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

Memorandum: In appeal No. 1, respondent appeals from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement, and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). In appeal No. 2, respondent appeals from an order that denied his motion for leave to reargue the determination that he is a dangerous sex offender requiring confinement and for an order stating the facts deemed essential to Supreme Court's determination. Initially, we dismiss the appeal from the order in appeal No. 2 insofar as it denied leave to reargue because no appeal lies therefrom (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

With respect to appeal No. 1, we note that respondent does not challenge the determination that he violated his SIST conditions (*see* Mental Hygiene Law § 10.11 [d] [1], [4]). He contends, however, that the court's determination that he is a dangerous sex offender requiring confinement (*see* § 10.07 [f]) is against the weight of the evidence inasmuch as respondent's SIST violations did not involve sexual misconduct directed at any victims. We reject that contention. Respondent's SIST violations are "highly relevant regarding the level of danger that respondent poses to the community with respect to his

risk of recidivism" (*Matter of State of New York v Donald N.*, 63 AD3d 1391, 1394; *see Matter of State of New York v DeCapua*, 121 AD3d 1599, 1600, *lv denied* 24 NY3d 913), and we conclude that petitioner established by clear and convincing evidence that respondent is a dangerous sex offender requiring confinement (*see Matter of State of New York v Connor*, 134 AD3d 1577, 1578, *lv denied* 27 NY3d 903; *DeCapua*, 121 AD3d at 1600). Contrary to respondent's contention, the court did not err in crediting the testimony of petitioner's expert over that of respondent's expert (*see Connor*, 134 AD3d at 1578; *DeCapua*, 121 AD3d at 1600).

We further conclude that respondent's contention that he should be permitted to appear anonymously in this proceeding is not properly before this Court. We previously denied such an application by respondent, and he failed to move for leave to renew or reargue that determination (*see generally* 22 NYCRR 1000.13 [p]). Finally, we conclude in appeal No. 1 that, inasmuch as defendant has been confined to a secure treatment facility, his contentions regarding the lack of treatment during the pendency of the evidentiary hearing have been rendered moot (*see generally Matter of Jeanty v Commissioner of Corr. Servs.*, 92 AD3d 1160, 1161).

In appeal No. 2, we reject respondent's contention that the court failed to state in its decision "the facts it deem[ed] essential" to its determination (CPLR 4213 [b]; *see Matter of Skinner v State of New York*, 108 AD3d 1134, 1134). Here, the court's "decision, despite its brevity, fully complies" with section 4213 (b) (*Vance Metal Fabricators v Widell & Son*, 50 AD2d 1062, 1063). We also reject respondent's contention that he was denied due process because the court failed to set forth detailed findings of fact in support of its decision. There is no such requirement in Mental Hygiene Law article 10 and, in any event, we conclude that the court's decision adequately sets forth the basis for its determination (*see Matter of State of New York v Brusso*, 105 AD3d 1435, 1435).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

950

CA 15-01831

PRESENT: WHALEN, P.J., CENTRA, CARNI, CURRAN, AND TROUTMAN, JJ.

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

V MEMORANDUM AND ORDER

LERRYL SMITH, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (MARGOT S. BENNETT OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 18, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, denied respondent's motion for leave to reargue.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is affirmed without costs.

Same memorandum as in *Matter of State of New York v Smith* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

954

KA 15-01108

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN SMALLWOOD, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered March 26, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). County Court imposed on defendant a determinate term of imprisonment of two years in accordance with section 70.70 because the crime herein constituted defendant's second felony drug offense, with the term of imprisonment to be followed by 1½ years of postrelease supervision. The court also directed the Department of Corrections and Community Supervision to enroll defendant in the shock incarceration program (*see* § 60.04 [7] [a]). Defendant was removed from the shock incarceration program prior to completion, finished the remainder of his determinate sentence in prison, and was subsequently released to parole supervision.

Inasmuch as defendant has completed his term of incarceration and is currently on parole, his contention that he was entitled to placement in an "alternative-to-shock-incarceration program" during incarceration is moot (Penal Law § 60.04 [7] [b] [i]; *see generally People ex rel. Dickerson v Unger*, 62 AD3d 1262, 1263, *lv denied* 12 NY3d 716), and none of the issues raised by defendant fall within the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Contrary to the further contention of defendant, we conclude that

the sentence is not unduly harsh and severe. However, we note that the certificate of conviction and the uniform sentence and commitment form should be amended because they incorrectly reflect that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Oberdorf*, 136 AD3d 1291, 1292-1293, *lv denied* 27 NY3d 1073).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

958

KA 11-01423

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered October 15, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment of Monroe County Court (Marks, J.) convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]) and, in appeal No. 2, he appeals from a decision and order of the same court (Argento, J.), which denied his CPL article 440 motion to vacate the judgment of conviction in appeal No. 1. In appeal No. 3, defendant appeals from another judgment of the same court (Piampiano, J.), convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]).

In appeal No. 1, defendant contends in his pro se supplemental brief that the court erred in failing to conduct a sufficient inquiry pursuant to *People v Outley* (80 NY2d 702) into his violation of the conditions of the plea agreement and drug treatment court contract before imposing an enhanced sentence (*see People v Goree*, 107 AD3d 1568, 1568, *lv denied* 21 NY3d 1074; *see generally People v Scott*, 101 AD3d 1773, 1774-1775, *lv denied* 21 NY3d 1019). Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]). In any event, defense counsel conceded that defendant had been rearrested in

violation of the conditions of his plea agreement, and thus the court had no duty to conduct a further inquiry (*see People v Harris*, 197 AD2d 930, 930, *lv denied* 82 NY2d 850). Defendant further contends in his pro se supplemental brief with respect to appeal No. 1 that the court erred in terminating his drug court placement because the drug court contract did not contain a no-rearrest clause. That contention, however, is belied by the drug court contract in the record before us.

With respect to appeal No. 2, we reject defendant's contention in his pro se supplemental brief that the court erred in denying without a hearing his motion pursuant to CPL article 440. In that motion, defendant contended that trial counsel in appeal No. 1 was ineffective in failing to challenge the court's determination that defendant violated the conditions of his drug court contract. That contention, however, is based on defendant's contention that there was no clause in the drug court contract prohibiting rearrest, which, as noted above, is belied by the record. The court therefore had discretion to deny the motion pursuant to CPL 440.30 (4) (d), because "the allegations essential to support the motion are contradicted by the record and there is no reasonable possibility that they are true" (*People v Bonilla*, 6 AD3d 1059, 1061; *see People v Crenshaw*, 34 AD3d 1315, 1316, *lv denied* 8 NY3d 879).

With respect to appeal No. 3, defendant contends in his main brief that the part of the judgment convicting him of criminal possession of a controlled substance in the third degree is not supported by legally sufficient evidence that he intended to sell the cocaine, and that the verdict is contrary to the weight of the evidence for the same reason. Initially, we reject the contention of the People that defendant failed to preserve that contention for our review, and we conclude that defendant incorrectly concedes this issue on appeal. The Court of Appeals has "held that where[, as here,] the trial court reserves decision on a defendant's motion to dismiss, the preservation rules do not bar review of defendant's claim" that the evidence is legally insufficient (*People v Nicholson*, 26 NY3d 813, 830; *see People v Payne*, 3 NY3d 266, 273, *rearg denied* 3 NY3d 767; *People v Ubbink*, 120 AD3d 1574, 1574-1575; *People v Evans*, 59 AD3d 1127, 1127, *lv denied* 12 NY3d 815).

Nevertheless, we conclude that the evidence is legally sufficient to establish defendant's intent to sell the drugs (*see People v King*, 137 AD3d 1572, 1573-1574, *lv denied* 27 NY3d 1134; *see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, with respect to defendant's contention that the verdict under both counts of the indictment is contrary to the weight of the evidence, viewing the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see People v Freeman*, 28 AD3d 1161, 1162, *lv denied* 7 NY3d 788; *see generally Bleakley*, 69 NY2d at 495).

With respect to appeal No. 3, defendant further contends in his main brief that the court erred in its *Sandoval* ruling. "By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve that contention for our review" (*People v Poole*, 79 AD3d

1685, 1685, *lv denied* 16 NY3d 862; *see People v Taylor*, 140 AD3d 1738, 1739; *People v Kelly*, 134 AD3d 1571, 1572, *lv denied* 27 NY3d 1070). In any event, any error in the court's *Sandoval* ruling is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Arnold*, 298 AD2d 895, 896, *lv denied* 99 NY2d 580; *see generally People v Grant*, 7 NY3d 421, 424-425).

With respect to appeal No. 3, defendant also contends in his main brief that he was denied effective assistance of counsel because his attorney failed to request a lesser included offense with respect to the first count of the indictment. It is well settled that, in order "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712; *People v Schumaker*, 136 AD3d 1369, 1372, *lv denied* 27 NY3d 1075, *reconsideration denied* 28 NY3d 974), and defendant failed to make such a showing here. Indeed, we note that counsel explained his strategy on the record when he declined to request the lesser included offense at issue, and thus defendant's current contention is no more than a mere "disagreement with trial strategy, which does not constitute ineffective assistance of counsel" (*People v Cheatom*, 295 AD2d 959, 960, *lv denied* 98 NY2d 729; *see People v Flores*, 84 NY2d 184, 187; *Rivera*, 71 NY2d at 708-709).

In his main and pro se supplemental briefs, defendant makes further claims of ineffective assistance of counsel in all three appeals. We conclude with respect to all of defendant's claims of alleged ineffective assistance of counsel 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).

Defendant also contends in his main brief that the court punished him for exercising his right to trial in appeal No. 3. Contrary to the People's contention, "the record establishes that this issue is preserved for our review; the court 'was aware of, and expressly decided, the [issue] raised on appeal' " (*People v Collins*, 106 AD3d 1544, 1546, *lv denied* 21 NY3d 1072, quoting *People v Hawkins*, 11 NY3d 484, 493). Nevertheless, we conclude that the sentence does not constitute a punishment for defendant's exercise of his right to go to trial. " 'Given that the *quid pro quo* of the bargaining process will almost necessarily involve offers to moderate sentences that ordinarily would be greater . . . it is . . . to be anticipated that sentences handed out after trial may be more severe than those proposed in connection with a plea' " (*People v Smith*, 21 AD3d 1277, 1278, *lv denied* 7 NY3d 763, quoting *People v Pena*, 50 NY2d 400, 412, *rearg denied* 51 NY2d 770). We take particular note that the court specifically stated that it was not punishing defendant for exercising his right to go to trial. In addition, "although the appeal by defendant from the judgment convicting him of the predicate conviction

upon which his adjudication as a second felony offender is based remain[ed] pending [at the time of sentencing],” we nevertheless reject his contention in his pro se supplemental brief that “the court could not use that conviction as the basis for that adjudication” (*People v Bailey*, 90 AD3d 1664, 1666, *lv denied* 19 NY3d 861). With respect to defendant’s contention in appeal No. 3, which is raised in his pro se supplemental brief, that the court erred in imposing a fine without holding a hearing or otherwise determining that the amount of the fine corresponded to defendant’s gain from the offense, “ ‘[a] fine for a felony, when initially authorized by article 60, may be imposed, irrespective of whether the defendant gained money or property [L. 1977, c. 352; (Penal Law) § 80.00]’ ” (*People v McFarlane*, 18 AD3d 577, 578, *lv denied* 5 NY3d 791, quoting William C. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, Book 39, Penal Law art 80, at 5; *see People v Ortiz* [appeal No. 1], 104 AD3d 1202, 1203). The sentence is not unduly harsh or severe.

We have considered defendant’s remaining contentions in all three appeals in his main and pro se supplemental briefs, and we conclude that none warrant reversal or modification of the judgments or order.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

959

KA 11-01097

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Victoria M. Argento, J.), entered April 19, 2011. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

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

Same memorandum as in *People v Nowlin* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

960

KA 13-00958

PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

QUINTIN A. NOWLIN, DEFENDANT-APPELLANT PRO SE.

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 April 12, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Same memorandum as in *People v Nowlin* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

978

KA 16-00854

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

RICHARD A. RODAS, JR., DEFENDANT-RESPONDENT.

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (DAVID G. MASHEWSKE OF COUNSEL), FOR APPELLANT.

TIFFANY M. SORGEN, CANANDAIGUA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), dated April 7, 2016. The order, among other things, granted the motion of defendant to suppress certain statements.

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

Memorandum: In this criminal action arising from defendant's alleged conspiracy with his girlfriend to sexually abuse the girlfriend's daughter, the People appeal pursuant to CPL 450.20 (8) from an order granting defendant's motion to suppress statements that he made, as well as letters that he gave, to a Yates County Department of Social Services child protective caseworker during a series of interviews conducted at the Yates County Jail, where defendant was in custody on an unrelated charge on which he was represented by counsel. At the outset, we note that the "factual findings and credibility determinations of a hearing court are entitled to great deference on appeal, and will not be disturbed unless clearly unsupported by the record" (*People v Collier*, 35 AD3d 628, 629, *lv denied* 8 NY3d 879, *reconsideration denied* 9 NY3d 841; *see People v Hogan*, 136 AD3d 1399, 1400, *lv denied* 27 NY3d 1070). Likewise, "in the event the proof permits the drawing of conflicting inferences, the choice is for the [hearing court] and should be upheld unless unsupported by the evidence" (*People v Davis*, 221 AD2d 358, 359, *lv denied* 87 NY2d 920 [internal quotation marks omitted]).

Here, we conclude that County Court properly determined that the caseworker obtained the statements and letters in violation of defendant's right to counsel (*see generally People v Lopez*, 16 NY3d 375, 380), inasmuch as there was such a degree of investigatory cooperation between the caseworker and a Village of Penn Yan police investigator that the caseworker acted as the agent of the police in questioning defendant and obtaining the letters from him outside the

presence of defense counsel (*see People v Wilhelm*, 34 AD3d 40, 46-50; *People v Greene*, 306 AD2d 639, 640-641, *lv denied* 100 NY2d 594; *see generally People v Rodriguez*, 135 AD3d 1181, 1184-1185, *lv denied* 28 NY3d 936). In the weeks before the caseworker's interviews with defendant, she and the investigator communicated at least four times and kept each other closely apprised of their respective investigatory findings. Right before the caseworker first interviewed defendant, she called the investigator again to let him know what she was doing and to ask him to accompany her to the jail. The investigator informed the caseworker that he could not do so because defendant was represented by counsel on the unrelated charge and had told the investigator that defendant would not speak to him in the absence of counsel. Although both the investigator and the caseworker testified at the suppression hearing that the investigator did not give the caseworker instructions or directions before she interviewed defendant, the caseworker also testified that the investigator specifically asked her not to "focus on" certain letters that might be possessed by defendant at the jail, to avoid defendant's destruction of those letters before the investigator could obtain a warrant for their seizure. Additionally, during the interviews, the caseworker told defendant that she was "working together" with "law enforcement" and would be "sharing" with the police any information that she obtained from him (*see Greene*, 306 AD2d at 641; *see generally Wilhelm,* 34 AD3d at 47-48).

Moreover, after the caseworker interviewed defendant, she briefed the investigator on the substance of defendant's statements and turned over copies of the letters that she had obtained from defendant (*see Wilhelm*, 34 AD3d at 47-48). In turn, the investigator allowed the caseworker to read and make copies of letters that he had acquired from defendant's girlfriend. The caseworker further shared with the investigator other information that she had learned during the investigation, including the location of yet another set of letters. We thus conclude that defendant's right to counsel, the nature and effect of which the caseworker specifically had been apprised before she interviewed defendant (*cf. id.* at 49), was circumvented because the caseworker was acting as an agent of the police at the time that she interviewed defendant (*see id.* at 48-49; *Greene*, 306 AD2d at 641). In light of our determination, the indictment must be dismissed because " 'the unsuccessful appeal by the People precludes all further prosecution of defendant for the charges contained in the accusatory instrument' " (*People v Moxley*, 137 AD3d 1655, 1656-1657).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

982

KA 13-01619

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY FORD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 6, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, those parts of the motion seeking to suppress physical evidence and statements are granted, the indictment is dismissed, and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). The charges arose from the seizure by police officers of a quantity of cocaine from defendant following the stop of the vehicle in which he was a passenger. Defendant moved, inter alia, to suppress the cocaine and statements he made to the police as the fruit of illegal police conduct. The evidence at the suppression hearing established that, after the stop, a police officer directed defendant to exit the vehicle. When defendant asked why he was being directed out of the vehicle, the officer physically removed him from the vehicle, placed him face down on the ground, handcuffed him and patted him down, which resulted in the seizure of three bags of crack cocaine from defendant's pants pocket and defendant's statement that he possessed the drugs.

Defendant contends that Supreme Court erred in denying his motion to suppress the cocaine. At the outset, we note that "[d]efendant failed to preserve for our review his contention that the conduct of the police following the stop . . . constituted a de facto arrest for

which the police did not have probable cause" (*People v Andrews*, 57 AD3d 1428, 1429, *lv denied* 12 NY3d 850; *see People v Cash J.Y.*, 60 AD3d 1487, 1489, *lv denied* 12 NY3d 913). We see no reason to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]), inasmuch as we find merit in defendant's alternative, preserved contention that the patdown was unlawful.

We also note that defendant does not dispute that the vehicle was lawfully stopped based upon a police officer's observation of a Vehicle and Traffic Law violation (*see People v Robinson*, 97 NY2d 341, 349; *People v Grimes*, 133 AD3d 1201, 1202), or that the officers were thereafter entitled to direct defendant to exit the vehicle "as a precautionary measure and without particularized suspicion" (*People v Garcia*, 20 NY3d 317, 321; *see People v Robinson*, 74 NY2d 773, 775, *cert denied* 493 US 966). Defendant contends, however, that the patdown was not justified inasmuch as the police officers lacked the requisite reasonable basis to suspect that he was concealing a weapon or that they were otherwise in danger (*see generally People v Goodson*, 85 AD3d 1569, 1570, *lv denied* 17 NY3d 953; *People v Everett*, 82 AD3d 1666, 1666). We agree.

Based upon the evidence at the suppression hearing, we conclude that "the officers did not have any 'knowledge of some fact or circumstance that support[ed] a reasonable suspicion that the [defendant was] armed or pose[d] a threat to [their] safety' " (*Everett*, 82 AD3d at 1666, quoting *People v Batista*, 88 NY2d 650, 654). Defendant's evident nervousness as the officers approached the vehicle was not an indication of criminality or a threat to officer safety (*see Garcia*, 20 NY3d at 324; *People v Hightower*, 136 AD3d 1396, 1397). Nor was the patdown justified by the fact that the vehicle was in a high crime area (*see People v Carr*, 103 AD3d 1194, 1195; *People v Riddick*, 70 AD3d 1421, 1423, *lv denied* 14 NY3d 844), particularly when the stop occurred on a busy street during rush hour (*see People v Savage*, 137 AD3d 1637, 1639). Moreover, "there was no suggestion that a weapon was present or that violence was imminent" (*People v Butler*, 127 AD3d 623, 624). Finally, neither defendant's initial refusal to exit the vehicle nor his demand for an explanation why he was being asked to exit the vehicle gave rise to a reasonable suspicion that he posed a threat to the officers' safety (*see People v Driscoll*, 101 AD3d 1466, 1467-1468).

Inasmuch as the patdown was unlawful, the cocaine seized by the police and defendant's statements should have been suppressed. We therefore reverse the judgment, vacate the plea, grant that part of defendant's motion seeking suppression of physical evidence and statements, dismiss the indictment and remit the matter to Supreme Court for proceedings pursuant to CPL 470.45.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

986

KA 12-01527

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW V. NOCE, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 25, 2012. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that County Court abused its discretion in denying his motion to withdraw his plea without a hearing. We agree.

This case arises from an incident in which defendant unlawfully entered his ex-girlfriend's home, found a man sleeping in her bed, and repeatedly struck him about the head with a blunt object. During the plea colloquy, it was noted that defendant "had some kind of brain surgery" in the weeks before the assault. The court asked defendant if he had discussed with defense counsel whether the recent brain surgery "would raise any issue," and defendant responded, "I'm told no." Defendant thereafter submitted a sentencing memorandum that included a report from a neurologist who stated that, only 22 days before the assault, defendant underwent resection of a portion of his brain and was prescribed multiple medications.

Before sentencing, defendant discharged his counsel and moved through new counsel to withdraw his guilty plea. In his affidavit in support of the motion, defendant stated that he had wanted to go to trial and assert a psychiatric defense instead of pleading guilty, but his prior defense attorney had falsely told him that such a defense was unavailable because his neurosurgeon had refused to testify at trial. Defendant also submitted an affidavit from his neurosurgeon, who stated that he never spoke to defendant's prior attorney and never

refused to testify. In a responding affirmation, the prosecutor stated that, upon information and belief, defendant's prior attorney did not tell defendant that his neurosurgeon had refused to testify.

It is well settled that the determination whether to grant a motion to withdraw a guilty plea is within the court's discretion and that a defendant is entitled to an evidentiary hearing only in rare instances (*see People v Manor*, 27 NY3d 1012, 1013; *People v Henderson*, 137 AD3d 1670, 1670-1671). The denial of such a motion is not an abuse of discretion "unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*Henderson*, 137 AD3d at 1671 [internal quotation marks omitted]). Here, if the allegations in defendant's affidavit are true, then defendant's plea was not voluntarily and intelligently entered inasmuch as it was based upon a mistaken belief that a psychiatric defense was unavailable (*see id.*). We therefore conclude that defendant's motion was not "patently insufficient on its face" (*People v Mitchell*, 21 NY3d 964, 967), and that the court abused its discretion in denying the motion without an evidentiary hearing (*see Henderson*, 137 AD3d at 1671). Thus, we hold the case, reserve decision, and remit the matter to County Court for a hearing on defendant's motion.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

990

CA 16-00252

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

WILLIAM J. KUHN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM GIOVANNIELLO AND LORRAINE GIOVANNIELLO,
DEFENDANTS-RESPONDENTS.

PULOS AND ROSELL, LLP, HORNELL (WILLIAM W. PULOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, ROCHESTER (TIFFANY D'ANGELO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Steuben County (Peter C. Bradstreet, A.J.), entered May 7, 2015. The order granted the motion of defendants for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for partial summary judgment.

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

Memorandum: In this Labor Law § 240 (1) action, plaintiff seeks damages for injuries he allegedly sustained while he was removing and replacing a sewer pipe in the basement of defendants' pizzeria. Contrary to plaintiff's contention, Supreme Court properly granted defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability. According to plaintiff, while standing at ground level, he was struck in the shoulder by a falling pipe that weighed approximately 60 pounds. "Liability may . . . be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97, *rearg denied* 25 NY3d 1195, quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603). Although there is conflicting deposition testimony concerning the exact elevation of the pipe, it is undisputed that the pipe was, at most, one foot above plaintiff's head, and that the pipe was always within his reach. We therefore conclude that plaintiff's injury did not fall within the scope of section 240 (1) inasmuch as "any height differential between plaintiff and the [pipe] that fell on him was de minimis" (*Joseph v Lakeside Bldrs. & Devs.*, 292 AD2d 840, 841; *see Capparelli v Zausmer Frisch Assoc.*, 96 NY2d 259, 269-270; *Christiansen v Bonacio Constr., Inc.*, 129 AD3d 1156, 1158-1159).

All concur except WHALEN, P.J., and PERADOTTO, J., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. Unlike the majority, we cannot conclude that the elevation differential here was de minimis and that plaintiff is thus deprived of the protection of Labor Law § 240 (1). Plaintiff sustained an injury when a section of iron sewer pipe that he was engaged to cut and replace broke loose, fell, and struck him in the shoulder. Defendants submitted evidence that the section of pipe that fell was five to seven feet long and weighed between 60 and 80 pounds. In our view, plaintiff's "activity clearly posed a significant risk to [his] safety due to the position of the heavy [pipe] above [his head], even if such elevation differential was slight, and [it] was thus a task where a . . . securing device of the kind enumerated in the statute was . . . necessary and expected" (*Cardenas v One State St., LLC*, 68 AD3d 436, 437; *see Zimmer v Town of Lancaster Indus. Dev. Agency*, 125 AD3d 1315, 1316). Indeed, it is undisputed that, earlier in the project, plaintiff had used such a securing device, i.e., straps, to protect himself from the risk of a pipe falling and striking him. The evidence was thus sufficient to establish as a matter of law that "plaintiff's injuries were 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 would therefore modify the order by denying that part of defendants' motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action and reinstating that cause of action.

We join the majority, however, in affirming that part of the order denying plaintiff's cross motion seeking partial summary judgment on Labor Law § 240 (1) liability, inasmuch as defendants submitted evidence that the straps that had previously been used on the project remained available at the jobsite and that plaintiff did not use them to secure the pipe that fell and struck him. That evidence raised triable issues of fact whether plaintiff's conduct was the sole proximate cause of the accident (*see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39-40; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1403-1404).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

991

CA 16-00338

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

SARAH MCKEON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MCLANE COMPANY, INC., TRANSCO, INC.,
STEVEN M. PEPPENELLI, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (JEREMY M. SHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered January 12, 2016. The order denied the motion of defendants McLane Company, Inc., Transco, Inc. and Steven M. Peppenelli for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendants McLane Company, Inc., Transco, Inc., and Steven M. Peppenelli in part and dismissing the amended complaint, as amplified by the bill of particulars, against them with respect to the permanent consequential limitation category of serious injury within the meaning of Insurance Law § 5102 (d) and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that she allegedly sustained as the result of a motor vehicle collision. Following discovery, McLane Company, Inc., Transco, Inc., and Steven M. Peppenelli (defendants) moved for summary judgment dismissing the amended complaint against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Contrary to defendants' contention, we conclude that Supreme Court properly denied their motion with respect to the 90/180-day category of serious injury. Defendants' own submissions establish that plaintiff sustained "a medically determined injury or impairment of a non-permanent nature" (Insurance Law § 5102 [d]), i.e., a lumbosacral myofascial sprain or strain (*see Cook v Peterson*, 137 AD3d 1594, 1598), and defendants' submission of plaintiff's deposition testimony "fails to establish as a matter of law that plaintiff was

not ‘curtailed from performing [her] usual activities to a great extent rather than some slight curtailment’ ” (*Winslow v Callaghan*, 306 AD2d 853, 854; *see Cook*, 137 AD3d at 1598).

Contrary to defendants’ further contention, we conclude that the court properly denied their motion with respect to the significant limitation of use category. Even assuming, arguendo, that defendants made “a prima facie showing that plaintiff’s alleged injuries did not satisfy [the] serious injury threshold” with respect to that category (*Pommells v Perez*, 4 NY3d 566, 574), we conclude that plaintiff’s submissions in opposition to the motion raised an issue of fact. Those submissions included an expert’s finding of at least 50% loss of range of motion in plaintiff’s lumbar spine (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350), along with an affirmation from plaintiff’s physician opining within a reasonable degree of medical certainty that the motor vehicle accident caused her injuries, including a bulging disc, an annular tear, and other spinal conditions revealed by an imaging study, and ultimately resulted in her limited range of motion (*see generally Pommells*, 4 NY3d at 579).

We nonetheless agree with defendants that the court erred in denying their motion with respect to the permanent consequential limitation category. We therefore modify the order accordingly. Defendants met their initial burden by submitting evidence that plaintiff had returned to work full time and recovered nearly full range of motion in her lumbar spine, along with the report of an independent medical examiner who concluded that plaintiff’s injuries were not permanent (*see Gates v Longden*, 120 AD3d 980, 982). In opposition, plaintiff failed to submit objective proof of a permanent injury (*see id.*; *Feggins v Fagard*, 52 AD3d 1221, 1223).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

992

CA 15-01801

PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ.

TIMOTHY SHERMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ST. ELIZABETH MEDICAL CENTER AND KEVIN LAMPHERE, R.N., DEFENDANTS-RESPONDENTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GALE GALE & HUNT, LLC, FAYETTEVILLE (MATTHEW J. VANBEVEREN OF COUNSEL), FOR DEFENDANT-RESPONDENT ST. ELIZABETH MEDICAL CENTER.

Appeal from an order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered July 8, 2015. The order, insofar as appealed from, granted the motion of defendant St. Elizabeth Medical Center to deem the original complaint to be the active pleading and denied the cross motion of plaintiff for leave to file and serve a second amended complaint.

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

Memorandum: Plaintiff commenced this negligence and medical malpractice action seeking damages for injuries that he allegedly sustained as the result of the care and treatment provided by defendants when he presented at the emergency room of defendant St. Elizabeth Medical Center (St. Elizabeth) on two successive days, suffering from a tooth abscess. In the original complaint, plaintiff alleged, inter alia, that defendant Kevin Lamphere, R.N., made several sexually inappropriate comments to plaintiff and massaged plaintiff's back as plaintiff waited for an X ray. Plaintiff further alleged that both defendants deviated from the applicable standard of care in failing to diagnose and treat his infection in a timely and proper manner, and in failing to treat the symptoms he experienced as a consequence of the infection. Plaintiff also alleged that St. Elizabeth was negligent in maintaining Lamphere on its staff because it knew that he had a history of inappropriate conduct toward patients.

Supreme Court thereafter granted plaintiff's oral motion for leave to amend the complaint to add a cause of action alleging "negligence by the hospital in failing to properly instruct, monitor and admonish its personnel with respect to proper nurse-patient

interaction." After plaintiff filed and served an amended complaint, St. Elizabeth moved for an order deeming the original complaint to be the active pleading in the action, and plaintiff cross-moved for leave to serve a second amended complaint. Plaintiff now appeals from an order that granted the motion and denied the cross motion.

Turning first to the cross motion, we note that "[t]he decision whether to grant leave to amend pleadings rests within the court's sound discretion and will not be disturbed absent a clear abuse of that discretion" (*Raymond v Ryken*, 98 AD3d 1265, 1266; *see Pagan v Quinn*, 51 AD3d 1299, 1300). We perceive no clear abuse of discretion in the court's denial of the cross motion for leave to serve a second amended complaint.

Nor did the court abuse its discretion in granting the motion of St. Elizabeth to strike the amended complaint and deem the original complaint to be the active pleading. In his papers opposing the motion and supporting the cross motion, plaintiff conceded that the amendments to the original complaint were unnecessary with respect to the allegations of malpractice and negligence because the allegations in the amended complaint were restatements of the allegations in the original complaint, as amplified by plaintiff's bills of particulars (*see Raies v Apple Annie's Rest.*, 115 AD2d 599, 600). Contrary to plaintiff's contention on appeal, however, the amended complaint otherwise "differed substantially from the proposed amended complaint that the court granted plaintiff leave to file" (*McCagg v Schulte Roth & Zabel LLP*, 74 AD3d 620, 627). We therefore conclude that, inasmuch as the amended complaint "contains a number of previously unpleaded factual allegations and new theories" (*Moon v Clear Channel Communications*, 307 AD2d 628, 630), the court properly granted the motion for an order deeming the original complaint to be the active pleading in the action.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1004

KA 15-00646

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKY GRACE, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 26, 2014. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree (three counts), assault in the first degree (three counts), criminal use of a firearm in the first degree (three counts) and 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 directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts each of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal use of a firearm in the first degree (§ 265.09 [1] [a]), and one count of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). Defendant was sentenced to a determinate term of 10 years of imprisonment for each count of attempted murder and assault, as well as a determinate term of five years of imprisonment for each count of criminal use of a firearm and for the count of criminal possession of a weapon. Supreme Court directed that the sentences on the three counts of criminal use of a firearm in the first degree were to run concurrently to each other and consecutively to all other sentences, which were to run concurrently to each other.

We note at the outset that the sentence imposed is illegal and thus the judgment must be modified accordingly. Although defendant has not raised this issue, his failure to do so "is of no moment, inasmuch as we cannot permit an illegal sentence to stand" (*People v Terry*, 90 AD3d 1571, 1572). "When more than one sentence of imprisonment is imposed on a person for two or more offenses committed

through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently" (Penal Law § 70.25 [2]). Here, we conclude that the crime of criminal use of a firearm in the first degree arose out of the same criminal transaction as its underlying violent felony, i.e., the crime of attempted murder in the second degree (*see People v Abdullah*, 298 AD2d 623, 624). Therefore, we modify the judgment by directing that the sentences imposed on the three counts of criminal use of a firearm in the first degree shall run concurrently with all other sentences (*see* § 70.25 [2]; *see generally People v Shorter*, 6 AD3d 1204, 1205-1206, *lv denied* 3 NY3d 648).

Defendant failed to preserve for our review his contention that his sentence was a vindictive punishment for proceeding to trial (*see People v Brown*, 111 AD3d 1385, 1387, *lv denied* 22 NY3d 1155). In any event, that contention has been rendered academic by our decision to run all sentences concurrently, which was promised as part of the plea negotiations (*see generally People v Eric P.*, 135 AD3d 882, 883-884). Defendant further contends that the court improperly refused to accept his plea when he attempted to plead guilty to the entire indictment. Subject to exceptions not relevant here (*see* CPL 220.10 [5]), a defendant has a statutory right to plead guilty to the entire indictment (*see* CPL 220.10 [2]), but reversal is not required where, as here, the issue is academic (*cf. People v Rosebeck*, 109 AD2d 915, 916). Here, defendant contends that he was prejudiced by this error (*see e.g. People v Best*, 132 AD2d 773, 775-776), due to an allegedly harsher sentence imposed after trial. In light of our determination to modify defendant's sentence to what would have been imposed had he been allowed to accept the plea agreement, however, we conclude that the issue of prejudice, if any, flowing from the denial of defendant's right to plead guilty to the entire indictment has been rendered academic (*see generally Eric P.*, 135 AD3d at 883-884). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

In light of our determination to modify defendant's sentence to that contained in the plea agreement, defendant's contention that he was deprived of his right to effective assistance of counsel as a result of defense counsel's alleged failure to prepare him adequately for the plea colloquy has also been rendered academic (*see generally People v Wood*, 37 AD3d 283, 284, *lv denied* 8 NY3d 992).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1012

CA 14-01777

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

IN THE MATTER OF FRANK GARCIA,
PETITIONER-APPELLANT,

V ORDER

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

FRANK GARCIA, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered July 15, 2014 in a proceeding pursuant to CPLR article 78. The judgment confirmed the determination of respondent and dismissed the petition.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1015

CA 15-01197

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

JOAQUINA MOSES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GEICO INSURANCE COMPANY, DEFENDANT-RESPONDENT.

LAW FIRM OF GARY R. EBERSOLE, ESQ., GRAND ISLAND (GARY R. EBERSOLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DANIEL R. ARCHILLA, BUFFALO (LAUREN GAUTHIER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 15, 2014. The order granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, defendant's motion is denied, the complaint is reinstated and plaintiff's cross motion is granted.

Memorandum: Plaintiff commenced this action alleging that defendant wrongfully failed to honor its obligations under an automobile insurance policy that was in effect when plaintiff's vehicle was allegedly stolen and then later recovered, indisputably "destroyed by fire." After the vehicle was stolen but before it was recovered, defendant disclaimed coverage on the ground that "theft does not qualify as a loss as defined in your policy contract." Once the vehicle was recovered, plaintiff notified defendant, whose representative allegedly informed her that her claim was denied.

We conclude that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint, upon determining that plaintiff would be unjustly enriched by any additional compensation and that such compensation would violate the provisions of the policy requiring payments to be made to plaintiff's financing company. We further conclude that the court erred in denying plaintiff's cross motion for partial summary judgment seeking a determination that the insurance contract was "operative and binding upon the Defendant."

Contrary to defendant's contentions, the issues raised by plaintiff on appeal were presented to the trial court and are

therefore preserved for our review. With respect to the merits, we agree with plaintiff that the court erred in granting defendant's motion on the ground that plaintiff would be unjustly enriched were defendant to fulfill its contractual obligations. Defendant failed to establish as a matter of law that the loan for the automobile had been forgiven by the financing company. The mere fact that the financing company had not pursued any legal remedies against plaintiff does not establish that the loan was forgiven. Indeed, plaintiff testified at her deposition that the loan still appeared on her credit report and that she was unsure if she would be required to repay that loan.

We further agree with plaintiff that defendant "failed to demonstrate that the [Loss Payable Clause] provision upon which it relies was a part of [the insurance] contract" and thus failed to establish its entitlement to judgment as a matter of law on that ground as well (*Mentesana v Bernard Janowitz Constr. Corp.*, 36 AD3d 769, 771; *see Hallmark Synthetics Corp. v Sumitomo Shoji N.Y.*, 26 AD2d 481, 484-485, *affd* 20 NY2d 871).

Under the clear and unambiguous terms of the insurance policy, defendant promised to pay plaintiff the "actual cash value," less a deductible, for loss caused by, inter alia, theft or fire. Inasmuch as defendant does not dispute that the vehicle was "destroyed by fire," plaintiff has established that defendant's obligations under the insurance policy were operative and binding on defendant and that defendant is contractually obligated to perform. Defendant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We thus grant plaintiff's cross motion for partial summary judgment on liability. We note with respect to the issue of damages that, although plaintiff has not established as a matter of law that the Loss Payable Clause provision upon which defendant relies is not part of the contract, that provision concerns whom defendant must pay under the policy, i.e., plaintiff or the lienholder, and that issue can be resolved by the court during the damages inquest.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1023

KA 14-01612

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JIBRAUN M. MOSTILLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered July 16, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of burglary in the second degree (*see* Penal Law § 140.25 [2]), defendant contends that Supreme Court failed to comply with the requirements of CPL 310.30, as set forth in *People v O'Rama* (78 NY2d 270, 276-277) in responding to certain inquiries made by the jury. We conclude that defendant failed to preserve his contention for our review (*see generally* CPL 470.05 [2]).

During deliberations, the jury issued a note in which it requested a readback of certain testimony and, after the court read the note into the record and complied with the request, one of the jurors sought permission to ask a question. The court permitted the juror to ask the question, without objection from defense counsel. After clarifying the question with the juror and the foreperson, who posed an additional question, the court asked counsel if they wished to have the jurors put their questions into a note. Defense counsel indicated that he did not, because the jurors' inquiries were on the record. The court nevertheless directed the foreperson to put the jury's inquiries in writing. After receiving the written note, the court read it into the record outside the presence of the jury, allowed counsel to inspect it, and then responded to the note. On appeal, defendant contends that the court committed mode of proceedings errors by allowing the jurors to make oral requests and responding to those requests before they were put into writing, and that the court erred in the manner in which it responded to the oral

requests.

"In *People v Nealon* (26 NY3d 152 [2015]), [the Court of Appeals] reiterated that a court complies with its responsibility to provide counsel with meaningful notice of a substantive jury inquiry by reading the precise content of the note into the record in the presence of counsel, defendant, and the jury before providing a response, even if the court departs from the *O'Rama* procedure . . . by failing to discuss the note or the court's intended response with counsel before recalling the jury into the courtroom . . . That holding was based upon [the Court's] precedent requiring preservation when the trial court departs from the *O'Rama* procedure but counsel nevertheless has meaningful notice of the jury note" (*People v Mack*, 27 NY3d 534, 539). Thus, "[t]he only errors that require reversal in the absence of preservation are those that go to the trial court's 'core responsibilities' under CPL 310.30, such as giving notice to defense counsel and the prosecutor of the contents of a jury note" (*People v Kahley*, 105 AD3d 1322, 1323, quoting *People v Tabb*, 13 NY3d 852, 853). Here, defense counsel was present in court when the jurors made their oral requests, and defense counsel acceded to the procedure used by the court. Additionally, the court directed the jury to submit its questions in the form of a jury note, read the note into the record in the presence of defense counsel, and permitted defense counsel to inspect it before responding. Consequently, we conclude that the court did not violate its core *O'Rama* responsibilities (*see People v Barnes*, 139 AD3d 1371, 1372, *lv denied* 28 NY3d 926) and, therefore, preservation was required (*see People v Brito*, 135 AD3d 627, 628-629, *lv denied* 27 NY3d 1066; *People v Simmons*, 97 AD3d 842, 843, *lv denied* 20 NY3d 935; *People v Peller*, 8 AD3d 1123, 1123-1124, *lv denied* 3 NY3d 679). We decline to exercise our power to review defendant's *O'Rama* contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court properly admitted evidence that, contemporaneously with the commission of the crime herein, a screen had been pried off of a window of the house adjacent to the scene of the crime. It is well settled that "evidence relevant to prove some fact in the case, other than the defendant's criminal propensity, is not rendered inadmissible simply because it may also reveal that the defendant has committed other crimes" (*People v Allweiss*, 48 NY2d 40, 46-47; *see People v Molineux,* 168 NY 264, 291-294). Therefore, "evidence of uncharged crimes may be relevant to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant" (*People v Alvino*, 71 NY2d 233, 242), and "[i]t has long been settled that the *Molineux* rule contains an 'exception thereto [ ] that permits such evidence when the transactions in respect to which evidence was given were all intimately connected in point of time, place[,] and circumstance with that for which the accused was indicted, so that they formed a continuous series of transactions, each throwing light upon the other, upon the question of knowledge, intent, and motive' " (*People v Larkins*, 128 AD3d 1436, 1439, *lv denied* 27 NY3d 1001). Based on that well-settled law, we agree with the People that the evidence, which

circumstantially established that defendant attempted to enter the neighboring house unlawfully at approximately the same time of the commission of the crime herein, was properly admitted to show defendant's intent, lack of mistake, and motive with respect to the crime herein (*see People v Davis*, 166 AD2d 928, 929, *lv denied* 77 NY2d 960).

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as his "motion for a trial order of dismissal was not specifically directed at the same alleged shortcoming[s] in the evidence raised on appeal" (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Abon*, 132 AD3d 1235, 1235-1236, *lv denied* 27 NY3d 1127; *see generally People v Gray*, 86 NY2d 10, 19). In any event, inasmuch as there is a "valid line of reasoning and permissible inferences" that could lead reasonable persons to the conclusion reached by the jury based on the evidence presented at trial (*People v Bleakley*, 69 NY2d 490, 495), we conclude that defendant's contention is without merit (*see People v Maier*, 140 AD3d 1603, 1603-1604, *lv denied* 28 NY3d 933; *People v Pierce*, 106 AD3d 1198, 1199-1201). Furthermore, viewing the evidence in light of the elements of burglary in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1026

KA 14-00698

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM J. PLUME, ALSO KNOWN AS WILLIAM J. AGUIRRE, ALSO KNOWN AS WILLIAM J. AQUIRE, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Cattaraugus County Court (Ronald D. Ploetz, J.), entered February 19, 2014. The order denied the motion of defendant to set aside his sentence pursuant to CPL 440.20.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting defendant's motion in part and the judgment rendered September 5, 2000 is modified by directing that the sentences imposed on counts 4, 6, 7, and 9 shall run concurrently with the sentences imposed on counts 1 and 2; the sentence imposed on count 11 shall run concurrently with the sentence imposed on count 2; and the sentences imposed on counts 12 through 14 shall run concurrently with the sentences imposed on counts 1, 2, 4, 6, 7, 9 and 11, and as modified the order is affirmed.

Memorandum: Defendant appeals from an order denying his motion pursuant to CPL 440.20 seeking to set aside the sentence imposed on him with respect to a September 2000 conviction of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3] [counts 1 and 2, respectively]), two counts of assault in the first degree (§ 120.10 [1], [4] [counts 4 and 6, respectively]), two counts of assault in the second degree (§ 120.05 [1], [6] [counts 7 and 9, respectively]), one count of reckless endangerment in the first degree (§ 120.25 [count 11]), and three counts of criminal possession of a weapon in the third degree ([CPW 3d] § 265.02 [1] [counts 12 through 14]). We note that all references to count numbers refer to the counts as submitted to the jury. At sentencing and resentencing, County Court (Himelein, J.) imposed various terms of incarceration on the various counts and directed that the sentences run as follows: the sentences on the burglary counts would run concurrently with each

other; the sentences on the first-degree assault counts would run concurrently with each other but consecutively to the burglary sentences; the sentences on the second-degree assault counts would run concurrently with each other but consecutively to the sentences imposed on the burglary counts and the first-degree assault counts; the sentence on the reckless endangerment count would run consecutively to the sentences on the burglary and all assault counts; and the CPW 3d sentences would run concurrently with each other but consecutively to the sentences imposed on all other counts. Defendant now contends that the court (Ploetz, J.) erred in denying his CPL 440.20 motion challenging the imposition of consecutive sentences, and we agree.

We note at the outset that the court erred in denying the motion on the ground that this Court had affirmed the legality of the sentence on direct appeal (*People v Plume*, 306 AD2d 916, *lv denied* 100 NY2d 644), as well as when considering and denying defendant's petition for a writ of error coram nobis (*see People v Plume*, 12 AD3d 1206, *lv denied* 4 NY3d 856). "Mandatory denial of a motion pursuant to CPL 440.20 is required only when the issue 'was previously determined on the merits upon an appeal from the judgment or sentence' " (*People v Povoski*, 111 AD3d 1350, 1351, quoting CPL 440.20 [2]). As the People correctly conceded in opposition to defendant's CPL article 440 motion, defendant never challenged the *legality* of his sentence on direct appeal, and our decision did not explicitly find the sentence to be legal (*Plume*, 306 AD2d at 916-918). Contrary to the People's contention, defendant did not challenge the legality of the sentence when he previously sought a writ of error coram nobis, and this Court did not render any determination on the legality of the sentence when we denied the writ (*Plume*, 12 AD3d at 1206). In his coram nobis application, defendant contended only that appellate counsel was ineffective in failing to challenge the legality of the sentence, and the Court of Appeals has established that such a contention is categorically distinct from a challenge to the legality of the sentence itself (*see People v Borrell*, 12 NY3d 365, 367-370). In any event, as noted above, even if defendant had challenged the legality of the sentence on a prior collateral challenge to the judgment of conviction, denial of defendant's motion on that ground is not mandatory (*see Povoski*, 111 AD3d at 1351).

With respect to the merits, "[t]he Penal Law provides that concurrent sentences must be imposed 'for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other' " (*People v Laureano*, 87 NY2d 640, 643, quoting Penal Law § 70.25 [2]). In other words, concurrent sentencing is required if "the actus reus element is, by definition, the same for both offenses (under the first prong of the statute), or if the actus reus for one offense is, by definition, a material element of the second offense (under the second prong)" (*id*.). "The defendant benefits if either prong is present, and the prosecution's burden is to countermand both prongs" (*People v Day*, 73 NY2d 208, 211).

Applying those rules, we agree with defendant that the sentence imposed on count 4, for first-degree assault under Penal Law § 120.10 (1), which requires serious physical injury to any other by means of a deadly weapon or dangerous instrument, must run concurrently with the sentence imposed on count 1, for burglary under section 140.30 (2), which requires that the perpetrator cause physical injury to a nonparticipant in the crime. We further conclude that the sentence imposed on count 4 must run concurrently with the sentence imposed on count 2, for burglary under section 140.30 (3), which requires that the perpetrator use or threaten the immediate use of a dangerous instrument. In instructing the jury, the trial court did not designate any particular victim or any particular weapon as the subject of either burglary count and, therefore, "[t]he same conduct resulting in defendant's conviction [of first-degree assault] also constituted the physical injury element of one count of burglary in the first degree and the use of a dangerous instrument element of the other" (*People v Anderson*, 254 AD2d 701, 702, *lv denied* 92 NY2d 980; *see People v Lemon*, 38 AD3d 1298, 1299, *lv denied* 9 NY3d 846, *reconsideration denied* 9 NY3d 962; *People v Plater*, 235 AD2d 597, 598-599, *lv denied* 89 NY2d 1039). Contrary to the People's contention, it is impossible to ascertain from the record whether the burglary convictions were based on defendant's conduct in relation to any particular victim, and concurrent sentences are required where, as here, "it is impossible to determine whether the act that formed the basis for the jury's guilty verdict on [one] count . . . was also . . . the . . . act[] that formed the basis for its guilty verdict on [another] count" (*People v Alford*, 14 NY3d 846, 848; *see People v Parks*, 95 NY2d 811, 815; *People v Jeanty*, 268 AD2d 675, 680, *lv denied* 94 NY2d 945, 949).

We further agree with defendant that the sentence imposed on count 6, for first-degree assault under Penal Law § 120.10 (4), which requires physical injury to a nonparticipant during the commission or attempted commission of a felony, must run concurrently with the sentences imposed on counts 1 and 2, for burglary. Inasmuch as the court did not specify the underlying burglary upon which the felony assault under count 6 was predicated, and "[t]he felony upon which [the] felony assault is predicated is a material element of that crime," the sentences imposed for the burglaries must run concurrently with the sentence imposed for felony assault under count 6 (*People v Ahedo*, 229 AD2d 588, 589, *lv denied* 88 NY2d 964; *see People v Faulkner*, 36 AD3d 951, 953, *lv denied* 8 NY3d 922; *People v Williams*, 275 AD2d 967, 967).

Defendant additionally contends that the sentences on counts 12 through 14, convicting him of CPW 3d, must run concurrently with the sentences imposed on counts 1, 2, 4, and 6, covering the charges for burglary and first-degree assault. We agree. Where, as here, a person is convicted both of criminally possessing a weapon "with intent to use the same unlawfully against another" (Penal Law § 265.01 [2]; *see* § 265.02 [1]), and of substantive crimes involving the unlawful use of that weapon against another, consecutive sentencing is permitted only when the People "establish that [the defendant] possessed the [weapon] with a purpose unrelated to his intent to

[commit the substantive crimes]" (*People v Hamilton*, 4 NY3d 654, 658; *see People v Wright*, 19 NY3d 359, 365). At trial, "the People neither alleged nor proved that defendant's possession [of the weapons] was marked by an unlawful intent separate and distinct from his intent to [commit the substantive crimes]" (*Wright*, 19 NY3d at 367). Thus, "because the crime[s] of [third-]degree weapon possession [were] completed only upon the [occurrence of the substantive crimes], [the court] erred in imposing consecutive sentences" (*id.* at 367; *see Hamilton*, 4 NY3d at 659).

Finally, although not raised by defendant on this appeal, there are several other illegal aspects of the sentence that we "cannot permit . . . to stand" (*People v Abuhamra*, 107 AD3d 1630, 1631, *lv denied* 22 NY3d 1038). Specifically, the sentence imposed on count 7, for second-degree assault under Penal Law § 120.05 (1), which requires physical injury to another person, must run concurrently with the sentences imposed on the burglary counts inasmuch as it is impossible to determine whether the victim of the assault in count 7 was separate and distinct from the victim of the physical injury underlying count 1; it is also impossible to determine whether the victim of the assault in count 7 received that injury through the use of the dangerous instrument underlying count 2 (*see Anderson*, 254 AD2d at 702; *Ahedo*, 229 AD2d at 589; *see also Alford*, 14 NY3d at 848; *Parks*, 95 NY2d at 815; *Jeanty*, 268 AD2d at 680). Moreover, because the burglary was the predicate for the second-degree felony assault conviction under count 9, we conclude that the sentence imposed on count 9 must run concurrently with the sentences imposed on counts 1 and 2, i.e., the burglary counts (*see Ahedo*, 229 AD2d at 589).

We further conclude that the sentence imposed on count 11, for reckless endangerment, must run concurrently with the sentence imposed on count 2, for burglary under Penal Law § 140.30 (3) inasmuch as "the same conduct which resulted in defendant's conviction [of reckless endangerment] established that he used a dangerous instrument to commit the burglary" (*Plater*, 235 AD2d at 599; *see also Alford*, 14 NY3d at 848; *Parks*, 95 NY2d at 815). Finally, for the reasons stated above, we conclude that the sentences imposed on counts 12 through 14, for CPW 3d, must run concurrently with counts 7 and 9, i.e., for second-degree assault, and count 11, for reckless endangerment (*see Wright*, 19 NY3d at 365; *Hamilton*, 4 NY3d at 658).

We therefore modify the order and the judgment rendered September 5, 2000 in accordance with our decision herein.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1027

KA 14-01324

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT WENDEL, 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 (Russell P. Buscaglia, A.J.), rendered February 25, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of burglary in the second degree (Penal Law § 140.25 [2]). Supreme Court sentenced defendant as a second violent felony offender to nine years of imprisonment to be followed by five years of postrelease supervision.

Defendant contends that he was denied effective assistance of counsel during the pre-indictment plea negotiations on the grounds that defense counsel allegedly failed to provide meaningful representation in properly advising defendant with respect to whether he should accept or reject the offer, and that defense counsel failed to inform him that the pre-indictment plea offer was about to expire. That contention "survives his guilty plea only insofar as he contends that his plea was infected by the allegedly ineffective assistance and that he entered the plea because of his attorney's allegedly poor performance" (*People v Bethune*, 21 AD3d 1316, 1316, *lv denied* 6 NY3d 752; *see People v Petgen*, 55 NY2d 529, 534-535, *rearg denied* 57 NY2d 674). Here, defendant failed to make a showing that he entered his plea because of his attorney's allegedly poor performance. Furthermore, to the extent that defendant's contention survives his guilty plea, we conclude that it lacks merit (*see People v Rockwell*, 137 AD3d 1586, 1587; *cf. People v Abdulla*, 98 AD3d 1253, 1254, *lv denied* 20 NY3d 985). The record, including the testimony from the hearing on defendant's motion to reinstate a prior plea offer,

establishes that defendant "received 'an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Hoyer*, 119 AD3d 1457, 1458).

Defendant also contends that the court erred in refusing to suppress a photo array identification of him by a witness based upon an alleged irregularity in the way the array was compiled. We reject that contention. "The test to be used in determining the propriety of pretrial identification is one of fairness . . . based upon the totality of the surrounding circumstances" (*People v Hoyer*, 141 AD2d 973, 974, *lv denied* 72 NY2d 1046). Here, the People established both the reasonableness of the police conduct in using the vehicle identified in connection with the burglary to identify defendant, and then using his physical characteristics as obtained through a prior booking photo to compile the array, as well as the lack of any undue suggestiveness in the photo array procedure, and defendant failed to meet his burden of proving that the procedure was unreasonable or unduly suggestive (*see People v Chipp*, 75 NY2d 327, 335-336).

Finally, we conclude that defendant's sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1028

CAF 14-01924

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

IN THE MATTER OF TORRENCE P. CURRY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LATOYA D. REESE, RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

ALVIN M. GREENE, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 3, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded petitioner sole custody of the subject child.

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, inter alia, awarded sole custody of the subject child to petitioner father. Initially, we agree with the mother that Family Court failed to state for the record that there was a sufficient change in circumstances to warrant a determination whether a change in the existing custody arrangement would be in the best interests of the child. Nevertheless, "this Court has the authority to independently review the record" to ascertain whether the requisite change in circumstances existed (*Matter of Prefario v Gladhill*, 90 AD3d 1351, 1352; *see Matter of Bedard v Baker*, 40 AD3d 1164, 1165; *see generally Matter of Williams v Tucker*, 2 AD3d 1366, 1367, *lv denied* 2 NY3d 705).

Here, the evidence in the record establishes that the Erie County Department of Social Services filed a neglect petition against the mother, and that the court entered a finding of neglect against the mother based on the conditions in her home. "[T]he adjudication of neglect constituted a change in circumstances that warranted a determination whether a modification of the custody arrangement set forth in the [prior] joint custody order was in the best interests of the child" (*Matter of Christy S. v Phonesavanh S.*, 108 AD3d 1207, 1208; *see Matter of Ze'Nya G. [Nina W.]*, 126 AD3d 566, 566; *see also Matter of Palmatier v Carman*, 125 AD3d 1139, 1139-1140). "In view of the foregoing, and despite the court's failure to articulate any specific findings to support [the conclusion] that a change in

circumstances had been established, we find that the requisite change in circumstances has been shown" (*Prefario*, 90 AD3d at 1353; *see Matter of Eastman v Eastman*, 118 AD3d 1342, 1343, *lv denied* 24 NY3d 910; *Matter of Casarotti v Casarotti*, 107 AD3d 1336, 1337-1339, *lv denied* 22 NY3d 852).

We reject the mother's further contention that the child's best interests are not served by awarding sole custody of the child to the father. Although "[t]his Court has held that sibling relationships should not be disrupted 'unless there is some overwhelming need to do so' " (*White v White*, 209 AD2d 949, 950, *lv dismissed* 85 NY2d 924; *see Salerno v Salerno*, 273 AD2d 818, 819), "this rule is not absolute and may be overcome where, as the record here shows, the best interest[s] of each child lie[] with a different parent" (*Matter of Delafrange v Delafrange*, 24 AD3d 1044, 1046, *lv denied* 8 NY3d 809 [internal quotation marks omitted]). Here, the court properly concluded that it is in the child's best interests that she be separated from her siblings (*see Matter of Lowe v O'Brien*, 81 AD3d 1093, 1095, *lv denied* 16 NY3d 713; *Matter of Lightbody v Lightbody*, 42 AD3d 537, 538, *lv denied* 9 NY3d 1017; *Matter of Seymour v Seymour*, 267 AD2d 1053, 1053, *lv denied* 95 NY2d 761).

The mother further contends that the court was biased against her. "A party claiming court bias must preserve an objection and move for the court to recuse itself" (*Matter of Baby Girl Z. [Yaroslava Z.]*, 140 AD3d 893, 894; *see Matter of Ashlyn Q. [Talia R.]*, 130 AD3d 1166, 1169), and the mother failed to do so here. Therefore, her contention is not preserved for our review. In any event, "[t]he record does not establish that the court was biased or prejudiced against" the mother (*Matter of Rasyn W.*, 270 AD2d 938, 938, *lv denied* 95 NY2d 766).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1045

KA 14-01169

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY BRUNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 2, 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 contends that County Court erred in denying his motion to suppress a handgun that was discovered following a traffic stop and inventory search of the vehicle defendant was operating. We reject that contention.

At the outset, we conclude that the police were justified in stopping the vehicle based upon defendant's failure to signal his intention to turn for the requisite distance before he turned the vehicle and entered the driveway of a private residence (*see* Vehicle and Traffic Law § 1163 [b]). To the extent defendant contends that the traffic stop was pretextual and thus unlawful, we reject that contention. It is well settled that a traffic stop is lawful where, as here, a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, regardless of the primary motivation of the officer (*see People v Robinson*, 97 NY2d 341, 349; *People v Binion*, 100 AD3d 1514, 1515, *lv denied* 21 NY3d 911).

We reject defendant's further contention that he did not abandon his expectation of privacy in the vehicle, and thus that the inventory search of the vehicle was unlawful and the gun should have been suppressed. After defendant stopped the vehicle in the driveway, he

exited the vehicle and fled the scene, and the police then conducted an inventory search and found a handgun on the floor of the vehicle. We conclude that the court properly denied defendant's suppression motion inasmuch as defendant's unprovoked flight from the vehicle constituted an abandonment of the vehicle and a waiver of any claim to a reasonable expectation of privacy therein (*see People v Gonzalez*, 25 AD3d 620, 621, *lv denied* 6 NY3d 833; *People v Hanks*, 275 AD2d 1008, 1008, *lv denied* 95 NY2d 964; *see generally People v Ramirez-Portoreal*, 88 NY2d 99, 110).

We also reject defendant's contention that he was deprived of effective assistance of counsel during the suppression hearing because his former attorney failed to present testimony from a tenant of the private residence where defendant stopped the vehicle to the effect that people unknown to the tenant frequently parked in the driveway. Such testimony would not have changed the outcome of the suppression hearing, and there can be no denial of effective assistance of counsel arising from defense counsel's failure to make an "argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [internal quotation marks omitted]). We have considered defendant's remaining claims of ineffective assistance of counsel, and we conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1046

KA 16-00297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANE K. CARLSON, DEFENDANT-APPELLANT.

BATTISTI & GARZO, P.C., BINGHAMTON (MICHAEL A. GARZO, JR., 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 (Peter C. Bradstreet, J.), rendered October 21, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts), criminally using drug paraphernalia in the second degree, assault in the second degree, tampering with physical evidence, resisting arrest and driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs.

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, two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). As part of the plea agreement, defendant was placed on interim probation and, pursuant to CPL 390.30 (6) (a), his sentencing was adjourned for one year. Defendant contends that County Court should have dismissed the indictment because sentencing did not occur until more than one year after he pleaded guilty. We reject that contention.

In pertinent part, CPL 390.30 provides that, "[i]n any case where the court determines that a defendant is eligible for a sentence of probation, the court, after consultation with the prosecutor and upon the consent of the defendant, may adjourn the sentencing to a specified date and order that the defendant be placed on interim probation supervision. *In no event may the sentencing be adjourned for a period exceeding one year from the date the conviction is entered*, except that upon good cause shown, the court may, upon the defendant's consent, extend the period for an additional one year where the defendant has agreed to and is still participating in a

substance abuse treatment program in connection with a . . . drug court" (CPL 390.30 [6] [a] [emphasis added]).

Here, defendant entered the guilty plea on June 4, 2012, and a sentencing hearing was scheduled for the morning of June 3, 2013. On that date, however, the court rescheduled the sentencing to the afternoon. Defense counsel informed the court that he was unavailable that afternoon, and sentencing was adjourned, upon the request of defense counsel, to June 17, 2013. Under the circumstances of this case, we conclude that the court properly denied defendant's subsequent motion to dismiss the indictment based on the court's failure to sentence him within one year of the date of his guilty plea inasmuch as the delay resulted from defense counsel's request for an adjournment.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1047

KA 14-02296

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TODD M. COLLINS, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 15, 2014. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [3]). We agree with defendant that the conviction must be reversed because County Court erroneously denied his challenge for cause to a prospective juror whose son is married to the daughter of the District Attorney of Ontario County, R. Michael Tantillo, and who has a grandchild in common with the District Attorney. Contrary to the People's contention, defendant's challenge is preserved for our review inasmuch as he challenged the prospective juror based upon "basically the whole Tantillo connection." We further note that, following the denial of the challenge for cause, defendant exercised a peremptory challenge against the prospective juror and later exhausted his peremptory challenges before the completion of jury selection (*see* CPL 270.20 [2]; *People v Lynch*, 95 NY2d 243, 248). We conclude that the prospective juror should have been excused from service for cause on the ground that he bears a "relationship to [the District Attorney] of such nature that it [was] likely to preclude him from rendering an impartial verdict" (CPL 270.20 [1] [c]; *see People v Branch*, 46 NY2d 645, 651-652; *People v Bedard*, 132 AD3d 1070, 1071; *People v Clark*, 125 AD2d 868, 869-870, *lv denied* 69 NY2d 878).

We also agree with defendant that reversal is required because the court erred in excluding testimony from a defense witness that the victim had said that she did not "think [defendant] did this," meaning

that defendant did not commit the alleged crime. We conclude that, on cross-examination of the victim, defense counsel had laid an adequate foundation for the admission of that prior inconsistent statement by eliciting testimony that the victim had never discussed the matter with the defense witness and had never told the defense witness that the alleged occurrence "between [her] and [defendant] might not have happened" (*see People v Bradley*, 99 AD3d 934, 936-937; *see also People v Duncan*, 46 NY2d 74, 80-81, *rearg denied* 46 NY2d 940, *cert denied* 442 US 910, *rearg dismissed* 56 NY2d 646; *see generally People v Concepcion*, 175 AD2d 324, 327, *lv denied* 78 NY2d 1010).

Contrary to defendant's further contention, however, the court did not err in refusing to preclude evidence of certain details that were allegedly included in defendant's oral statement to the police but that were omitted from the CPL 710.30 notice. Such notice need not be a "verbatim report of the complete oral statement[s]" of defendant (*People v Moss*, 89 AD3d 1526, 1528, *lv denied* 18 NY3d 885 [internal quotation marks omitted]), but merely must set forth the "sum and substance" of such statements (*People v Arroyo*, 111 AD3d 1299, 1300, *lv denied* 23 NY3d 960 [internal quotation marks omitted]). Moreover, because defendant moved to suppress all of his statements to the police and the court denied that motion after a hearing, any deficiencies in the CPL 710.30 notice are immaterial and cannot result in preclusion (*see* CPL 710.30 [3]; *People v Mikel*, 303 AD2d 1031, 1031, *lv denied* 100 NY2d 564; *People v Ginty*, 299 AD2d 922, *lv denied* 99 NY2d 582). In light of our determination, we need not reach defendant's remaining contentions.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1048

KA 13-00526

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH L. BOYD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL LLP, NEW YORK CITY (JOHN G. MCCARTHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Alex R. Renzi, J.), rendered January 16, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree (two counts), criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), and two counts each of criminal possession of a weapon in the third degree (§ 265.02 [1], [3]), and criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]).

Defendant’s conviction arises from an incident that occurred when police officers were conducting surveillance of a house following a shooting unrelated to this incident. An officer observed defendant entering the house with “a heavy object inside of his pocket . . . that he was holding onto.” About an hour later, another officer confronted defendant and others as they exited the house. When asked to explain his presence at the house, defendant told the officer, “I live here.” While the officer began to detain one of defendant’s companions, defendant reentered the house for “about five or ten seconds.” The officers thereafter obtained a search warrant, and, during the ensuing search of the house, they found a .40 caliber handgun hidden under a chair near the entrance to the house. In

addition, the officers found cocaine, plastic baggies, razors, and a digital scale of a kind used in narcotics trafficking. Some of the drugs and drug paraphernalia were found on the same shelves or in the same cabinets as documents bearing defendant's name, including a tax document listing the address of the house as defendant's address.

Contrary to defendant's contention, we conclude that his conviction of criminal possession of a weapon in the second degree and two counts of criminal possession of a weapon in the third degree is supported by legally sufficient evidence inasmuch as the People established that he had constructive possession of the gun. It is well established that, in reviewing the legal sufficiency of the evidence, we must "determine whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Williams*, 84 NY2d 925, 926). "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 Lawrence*, 141 AD3d 1079, 1082 [internal quotation marks omitted]; *see* Penal Law § 10.00 [8]). Defendant contends that there is legally insufficient evidence of constructive possession because other people had access to the area where the gun was found. We reject that contention inasmuch as it is not necessary to establish that defendant had "exclusive access" to the area (*People v Nichol*, 121 AD3d 1174, 1177, *lv denied* 25 NY3d 1205), and "several individuals may constructively possess an object simultaneously, provided each individual exercises dominion and control over the object or the area in which the object is located" (*People v Smith*, 215 AD2d 940, 941, *lv denied* 86 NY2d 802; *see generally People v Torres*, 68 NY2d 677, 679). Moreover, although a defendant's "mere presence" in the location where contraband is found "is not sufficient to establish that he exercised such dominion and control as to establish constructive possession" (*People v Diallo*, 137 AD3d 1681, 1682 [internal quotation marks omitted]), we conclude that the evidence in this case "went beyond defendant's mere presence in the residence . . . and established 'a particular set of circumstances from which a jury could infer possession' " (*People v McGough*, 122 AD3d 1164, 1166, *lv denied* 24 NY3d 1220, quoting *People v Bundy*, 90 NY2d 918, 920).

Contrary to defendant's further contention, we conclude that the conviction with respect to the remaining counts of the indictment is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to those counts (*see generally Bleakley*, 69 NY2d at 495).

Finally, " '[b]y failing to object to County Court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his present challenge to that ruling' " (*People v Mitchell*, 132 AD3d 1413,

1416, *lv denied* 27 NY3d 1072), 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]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1049

KA 13-02163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE BROWN, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered September 4, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Defendant's conviction arose from an incident in which he cut the victim's face after the victim failed to pay defendant $15 allegedly owed in connection with a drug transaction. Contrary to defendant's contention, County Court did not err in permitting the victim to testify with respect to the nature of the debt inasmuch as the court, in engaging in the requisite two-part inquiry, properly determined that the evidence was material with respect to the relationship of the parties and motive and that the probative value of the evidence outweighed its prejudicial effect (*see generally People v Cass*, 18 NY3d 553, 560). In any event, following the court's curative instruction, "defense counsel neither objected further nor requested a mistrial, and thus . . . the curative instructions must be deemed to have corrected the error to the defendant's satisfaction" (*People v Elian*, 129 AD3d 1635, 1636, *lv denied* 26 NY3d 1087 [internal quotation marks omitted]).

We reject defendant's further contention that the court erred in denying his *Batson* objections to the prosecutor's exercise of peremptory challenges for two prospective jurors. We note at the outset that defendant concedes that the court did not err in denying his *Batson* objection with respect to the exercise of a peremptory

challenge for a third prospective juror. With respect to the first prospective juror, the prosecutor explained that the prospective juror failed to disclose that she knew someone who had been convicted of a crime, i.e., her uncle; that some of her answers led the prosecutor to believe that she would not be fair to the victim; and that she knew the Chief of the Syracuse Police Department, who had well-publicized disputes with the District Attorney. The court's credibility determinations with respect to *Batson* objections are entitled to great deference (*see People v Luciano*, 10 NY3d 499, 505), and we will not disturb the court's determination that the prosecutor provided race-neutral explanations for the peremptory challenge. With respect to the second prospective juror, we conclude that the court properly determined that the prosecutor provided a race-neutral explanation for the challenge by explaining that the prospective juror had previously worked with troubled young adults, which might cause her to be biased toward defendant (*see People v Holloway*, 71 AD3d 1486, 1487, *lv denied* 15 NY3d 774).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the testimony of the victim and his girlfriend, who was an eyewitness, was not incredible as a matter of law (*see People v Hailey*, 128 AD3d 1415, 1417, *lv denied* 26 NY3d 929). Moreover, the jury was entitled to credit the testimony of the victim and his girlfriend that they had a long-standing relationship with defendant and that defendant went to the victim's home and cut his face after he failed to pay defendant $15, while rejecting the testimony of defense witnesses that defendant did not know the victim well and that he was not in the vicinity of the victim's home at the time of the crime. We perceive no basis to disturb the jury's credibility determinations (*see People v Brown*, 140 AD3d 1740, 1740).

The sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1050

CAF 15-01559

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

IN THE MATTER OF MATIGAN G. AND TATUMN G.

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

SARA E.W.-G., RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NANCY FARRELL OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered August 11, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent neglected the subject children.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order finding her in neglect of her two youngest children as the result of her mental illness.

The mother contends that her mental illness was not causally related to any actual or potential harm to the children. We reject that contention. The evidence at the hearing established that the mother exhibited bizarre paranoid delusions during the late hours of January 16, 2015, which continued into the early morning of January 17, 2015 (*see Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1403). Specifically, the mother believed she had seen and heard several intruders in her home, and they had intended to kill her (*see Matter of Kiemiyah M. [Cassiah M.]*, 137 AD3d 1279, 1280). The mother was subsequently transported to a psychiatric facility, where she was diagnosed with bipolar II disorder and tested positive for amphetamines, cocaine, and cannabinoids. The mother continued to experience episodes of vivid paranoia after her discharge from the facility, but she refused to seek additional treatment (*see Matter of Jesse DD.*, 223 AD2d 929, 931, *lv denied* 88 NY2d 803).

While there was conflicting testimony whether the subject children were present during the mother's episodes of paranoid delusions, the statements of the mother's two older children describing the harmful emotional impact they experienced as a result of the mother's behavior during her delusions demonstrated the risks faced by the subject children should they be similarly exposed to such behavior. Furthermore, the evidence established that the subject children had been present during a prior incident in which the mother called the police with a complaint of footprints outside her home, but no such footprints were found by the police. We therefore conclude that the evidence at the hearing established that "the mother engaged in bizarre and paranoid behavior toward the older child[ren] . . . and that such behavior took place in the presence of the [subject children] at times and thereby exposed [them] to a[n imminent] danger" of their physical, mental or emotional condition becoming impaired (*Thomas B.*, 139 AD3d at 1403 [internal quotation marks omitted]).

Moroever, in our view, a reasonable and prudent parent would have accepted the recommendation to seek additional mental health treatment under these circumstances (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 370). The record establishes that the mother's older children had been upset by the mother's previous irrational and impulsive behavior, the mother continued to experience episodes of vivid paranoia even after years of treatment with her personal psychiatrist, and she relapsed immediately after she was discharged from the psychiatric facility. In addition, the mother repeatedly defended the substance of her paranoid episodes during these proceedings by attempting to explain that what she saw and heard was real. We conclude that the foregoing demonstrates that the mother "displayed a lack of insight into the effect of her illness on her ability to care for the [subject] child[ren]" (*Matter of Lakiyah M. [Shacora M.]*, 136 AD3d 424, 425).

Lastly, although we agree with the mother that the statutory presumption of neglect for repeated misuse of drugs is inapplicable to the facts of this case (*see* Family Ct Act § 1046 [a] [iii]), we nevertheless conclude that Family Court could properly consider evidence that the mother voluntarily possessed and used illegal substances in conjunction with her mental health prescription medication during the episode of paranoid delusions on January 16, 2015 (*see generally Matter of Andrew DeJ. R.*, 30 AD3d 238, 239), and that she subsequently told an investigator that she "believed that other people were administering [drugs] to her so that she would test positive so that she would appear crazy."

Thus, in light of the evidence of the mother's mental illness, and "[g]iven the absence of adequate proof as to the [mother's] willingness to accept medical treatment, or as to the efficacy of whatever treatment might exist," the subject children would be faced with a " 'substantial probability of neglect' " should they be released back to the mother (*Matter of Baby Boy E.*, 187 AD2d 512, 512). We therefore conclude that the court properly determined that the children were neglected as a result of the mother's mental illness (*see Thomas B.*, 139 AD3d at 1403; *see generally Nicholson*, 3 NY3d at

368).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1057

CA 16-00344

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

MARK D. WELLS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

THE HURLBURT ROAD COMPANY, LLC, ANTHONY CILIBERTI AND ANN G. KLEIN, TRUSTEES OF THE ANN G. KLEIN MARITAL TRUST, RICHARD M. KLEIN, NANCY L. KLEIN, LAURIE KLEIN-COLETTI AND RICHARD W. COOK, TRUSTEES OF THE HURLBURT TRUST, AND RICHARD W. COOK, TRUSTEE OF THE MANLIUS-KLEIN CHILDREN'S TRUST, DEFENDANTS-RESPONDENTS.

LINDENFELD LAW FIRM, P.C., CAZENOVIA (JANA K. MCDONALD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered May 19, 2015. The order, inter alia, granted defendants' motion to dismiss plaintiff's second cause of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the second cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking, among other things, equitable relief pursuant to his second cause of action alleging a breach of trust or fiduciary duty on the part of Richard W. Cook (defendant) in his capacity as trustee of the Manlius-Klein Children's Trust (trust), in which plaintiff has a 25% beneficial interest. Plaintiff appeals from an order that, inter alia, granted defendants' CPLR 3211 (a) (7) motion to dismiss the second cause of action and denied that part of plaintiff's cross motion seeking to alter the priority in conducting depositions.

We agree with plaintiff that Supreme Court erred in granting defendants' motion. In considering a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every favorable inference, and determine only whether the facts alleged fit within a cognizable

legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88). Here, we conclude that plaintiff's second cause of action sufficiently stated a claim against defendant for breach of fiduciary duty, namely, the duty to treat all beneficiaries of the trust impartially (*see Redfield v Critchley*, 252 App Div 568, 573, *affd* 277 NY 336, *rearg denied* 278 NY 483; *Matter of George Goldberg Irrevocable Trust*, 159 Misc 2d 1107, 1108; *see also Zim Israel Nav. Co. v 3-D Imports, Inc.*, 29 F Supp 2d 186, 192). Plaintiff has adequately alleged the elements of a cause of action for breach of fiduciary duty, including the existence of a fiduciary relationship, misconduct by defendant, and damages directly caused by that misconduct (*see Matter of Lorie DeHimer Irrevocable Trust*, 122 AD3d 1352, 1352-1353; *Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777), and it cannot be determined as a matter of law that the loan transaction engaged in by defendant treated all of the beneficiaries equally (*see generally Leon*, 84 NY2d at 87-88). We modify the order accordingly.

Contrary to plaintiff's contention, the court did not abuse its discretion in denying that part of his cross motion seeking to alter the usual priority of depositions. There are no " 'special circumstances' " or other grounds in the record warranting such an alteration (*Serio v Rhulen*, 29 AD3d 1195, 1196-1197; *see generally Kenna v New York Mut. Underwriters*, 188 AD2d 586, 588).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1058

CA 15-01483

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

ONEWEST BANK, FSB, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN D. SPENCER, ET AL., DEFENDANTS,
AND DONNA S. SPENCER, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

REID A. HOLTER, VICTOR, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered February 2, 2015. The order, inter alia, granted the cross motion of defendant Donna S. Spencer for summary judgment dismissing all causes of action against her.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in part and reinstating the first, third, and sixth causes of action against defendant Donna S. Spencer, and as modified the order is affirmed without costs.

Memorandum: In appeal No. 1, plaintiff appeals from an order that, inter alia, granted the cross motion of Donna S. Spencer (defendant) for summary judgment dismissing the complaint against her. In appeal No. 2, plaintiff appeals from an order settling the record on appeal.

Addressing first the order in appeal No. 2, we agree with plaintiff that Supreme Court erred in excluding from the record on appeal the transcript of its bench decision. "The complete record on appeal shall include . . . the decision, if any, of the court granting the order or judgment" (22 NYCRR 1000.4 [a] [2]), as well as " 'any relevant transcripts of proceedings before the [court]' " (*Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, 1586, *lv dismissed in part and denied in part* 17 NY3d 899, *rearg denied* 18 NY3d 878; *see* 22 NYCRR 1000.4 [a] [2]). Indeed, "trial courts have an obligation to the litigants to provide a basis for their decisions" (*Cellino & Barnes, P.C. v Law Off. of Christopher J. Cassar, P.C.*, 140 AD3d 1732, 1735 [DeJoseph, J., dissenting]; *see Corina v Boys & Girls Club of Schenectady, Inc.*, 82 AD3d 1477, 1477 n). The record belies defendant's contention that the transcript in question did not

constitute the basis for the court's decision. Thus, inasmuch as our rules mandate the inclusion of the court's decision in the record on appeal, we conclude that the court erred in excluding the transcript of its bench decision (*see Kai Lin*, 82 AD3d at 1586). We therefore reverse the order in appeal No. 2 insofar as appealed from and grant plaintiff's motion to settle the record in its entirety.

With respect to appeal No. 1, we agree with plaintiff that the court erred in granting those parts of defendant's cross motion for summary judgment dismissing the first and sixth causes of action, in which plaintiff alleges in relevant part that it held an equitable mortgage on defendant's interest in a parcel of property and seeks foreclosure. "The whole doctrine of equitable mortgages is founded upon that cardinal maxim of equity which regards that as done which has been agreed to be done, and ought to have been done" (*Sprague v Cochran*, 144 NY 104, 114; *see Canandaigua Natl. Bank & Trust Co. v Palmer*, 119 AD3d 1422, 1423). " '[A] court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation' " (*Canandaigua Natl. Bank & Trust Co.*, 119 AD3d at 1424; *see Tornatore v Bruno*, 12 AD3d 1115, 1117). Such intent must "clearly appear from the language and the attendant circumstances" (*Pennsylvania Oil Prods. Ref. Co. v Willrock Producing Co.*, 267 NY 427, 434-435; *see Canandaigua Natl. Bank & Trust Co.*, 119 AD3d at 1424).

In support of her cross motion, defendant submitted an affidavit in which she stated that she was an owner of the subject property, her former husband was the only signatory to the note and mortgage instrument, and she did not sign the note or the mortgage instrument. The affidavit, however, contained no sworn statements regarding her intent, or lack thereof, to create a mortgage on her interest in the property. We thus conclude that defendant failed to meet her burden of establishing as a matter of law that plaintiff does not hold an equitable mortgage on defendant's interest in the property inasmuch as she "failed to establish that there was no intent by plaintiff and [herself] to create a mortgage [encumbering] the [entire] property" at the time the mortgage was executed (*Village of Philadelphia v FortisUS Energy Corp.*, 48 AD3d 1193, 1196).

We also agree with plaintiff that the court erred in granting that part of defendant's cross motion for summary judgment dismissing the third cause of action, for unjust enrichment. The elements of an unjust enrichment cause of action are that (1) the defendant was enriched; (2) the enrichment was at the expense of the plaintiff; and (3) it would be inequitable to allow the defendant to retain that which is claimed by the plaintiff (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182; *Canandaigua Emergency Squad, Inc. v Rochester Area Health Maintenance Org., Inc.*, 108 AD3d 1181, 1183). Here, we conclude that defendant failed to establish that she was entitled to judgment as a matter of law with respect to the cause of action for unjust enrichment (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Contrary to defendant's contention, her relationship to plaintiff is not too attenuated to sustain an unjust

enrichment cause of action inasmuch as she is an owner of the property on which plaintiff holds a mortgage (*see generally Mandarin Trading Ltd.*, 16 NY3d at 182).

We therefore modify the order in appeal No. 1 by denying the cross motion in part and reinstating the causes of action against defendant for equitable mortgage and unjust enrichment.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1059

CA 15-01484

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

ONEWEST BANK, FSB, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN D. SPENCER, ET AL., DEFENDANTS,
AND DONNA S. SPENCER, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

HARRIS BEACH PLLC, PITTSFORD (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

REID A. HOLTER, VICTOR, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered July 13, 2015. The order, insofar as appealed from, denied in part the motion of plaintiff to settle the record on appeal.

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

Same memorandum as in *OneWest Bank, FSB v Spencer* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1060

CA 16-00502

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

ONE FLINT ST. LLC AND DHD VENTURES NEW YORK, LLC,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

EXXON MOBIL CORPORATION, EXXONMOBIL OIL
CORPORATION, DEFENDANTS-APPELLANTS-RESPONDENTS,
ET AL., DEFENDANTS.

MCCUSKER, ANSELMI, ROSEN & CARVELLI, P.C., NEW YORK CITY (PATRICIA PREZIOSO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 4, 2016. The order, inter alia, denied that part of plaintiffs' cross motion seeking partial summary judgment, granted that part of plaintiffs' cross motion seeking injunctive relief, and denied the cross motion of defendants Exxon Mobil Corporation and ExxonMobil Oil Corporation for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' cross motion in its entirety and vacating the fourth ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: Exxon Mobil Corporation and ExxonMobil Oil Corporation (defendants) appeal and plaintiffs cross-appeal from an order that, inter alia, denied their respective cross motions seeking partial summary judgment on the issue whether plaintiffs are strictly liable as "dischargers" under Navigation Law § 181 (1) for petroleum contamination on two parcels of land owned by plaintiffs, which were part of the former oil refinery operations of defendants' predecessor, Vacuum Oil Company. The order also granted that part of plaintiffs' cross motion seeking injunctive relief, and denied that part of defendants' motion seeking leave to amend their answer to include claims of spoliation of evidence.

In a prior appeal, we concluded that defendants are strictly liable as dischargers under Navigation Law § 181 (1) (*One Flint St., LLC v Exxon Mobil Corp.*, 112 AD3d 1353, 1354, *lv dismissed* 23 NY3d 998), and that "plaintiffs failed to meet their initial burden of

establishing their entitlement to partial summary judgment on the issue whether they are entitled to indemnification rather than contribution" inasmuch as plaintiffs "failed to eliminate any issue of fact whether petroleum products were discharged during the period of their ownership" of the parcels (*id.* at 1355). For reasons stated in Supreme Court's decision, we conclude that the court properly denied those parts of the respective cross motions seeking partial summary judgment on the issue whether plaintiffs are strictly liable as dischargers under section 181 (1).

We agree with defendants, however, that the court erred in granting that part of plaintiffs' cross motion seeking a mandatory injunction requiring defendants "to either commence the clean-up of the site within a reasonable time of this order or immediately fund same." " 'A mandatory injunction, which is used to compel the performance of an act, is an extraordinary and drastic remedy which is rarely granted and then only under the unusual circumstances where such relief is essential to maintain the status quo pending trial of the action' " (*Zoller v HSBC Mtge. Corp. [USA]*, 135 AD3d 932, 933; *see Lexington & Fortieth Corp. v Callaghan*, 281 NY 526, 531), and that is not the case here. We therefore modify the order accordingly.

We reject defendants' further contention that the court abused its discretion in denying that part of their motion for leave to amend their answer to allege spoliation of evidence as part of the factual recitation inasmuch as such an amendment is not necessary (*cf. Ortega v City of New York*, 9 NY3d 69, 73; *see generally DeLorm v Wegmans Food Mkts.*, 185 AD2d 648, 648).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1062

KA 16-00335

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HAMID MEMON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), rendered June 25, 2015. The judgment convicted defendant, upon a nonjury verdict, of criminal obstruction of breathing or blood circulation and unlawful imprisonment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a bench trial, of criminal obstruction of breathing or blood circulation (Penal Law § 121.11 [a]), and unlawful imprisonment in the second degree (§ 135.05). Initially, we note that defendant was prosecuted in the Integrated Domestic Violence Part of Supreme Court (*see* 22 NYCRR 41.1 [a] [1]; *People v Correa*, 15 NY3d 213, 232-233), and thus the appeal properly lies in this Court (*see* CPL 450.60 [1]; *Correa*, 15 NY3d at 233 n 4).

Defendant contends that the court erred in permitting him to be cross-examined regarding prior uncharged bad acts that were strikingly similar to the acts underlying the charges in this case. We agree. The Criminal Procedure Law provides that, "[u]pon a request by a defendant, the prosecutor shall notify the defendant of all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant" (CPL 240.43). Here, however, the prosecutor failed "to advise defendant before trial that he would be questioned on uncharged acts if he testified[,] and no pretrial inquiry or determination was made by the court . . . Because the court's failure to conduct a proper pretrial inquiry may have affected defendant's decision to testify at trial, the error cannot be deemed harmless" (*People v Beasley*, 184 AD2d 1003, 1003, *affd* 80 NY2d 981,

rearg denied 81 NY2d 759; *see People v Slide*, 76 AD3d 1106, 1108-1109; *People v Montoya*, 63 AD3d 961, 963).

We also agree with defendant that the court erred in permitting the prosecutor, over objection, to elicit testimony that bolstered the testimony of the complaining witness. "The term 'bolstering' is used to describe the presentation in evidence of a prior consistent statement—that is, a statement that a testifying witness has previously made out of court that is in substance the same as his or her in-court testimony" (*People v Smith*, 22 NY3d 462, 465). Although "[p]rior consistent statements will often be less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court that he said out of it" (*id.* at 465-466), the Court of Appeals has warned that "the admission of prior consistent statements may, by simple force of repetition, give to a [factfinder] an exaggerated idea of the probative force of a party's case" (*id.* at 466). Contrary to the People's sole contention, "[i]n light of the importance of the witnesses' credibility in this case . . . , we cannot conclude that the court's error is harmless" (*People v Loftin*, 71 AD3d 1576, 1578; *see People v Thomas*, 68 AD3d 1141, 1142, *lv denied* 14 NY3d 845; *People v Caba*, 66 AD3d 1121, 1124). The evidence is not overwhelming and, "[a]lthough the trial court in a nonjury trial is presumed to have considered only competent evidence in reaching its verdict . . . , here, this presumption was rebutted" by the court's written decision, which establishes that the court considered the inadmissible evidence (*People v Ya-ko Chi*, 72 AD3d 709, 710-711).

Defendant failed to renew his motion for a trial order of dismissal after presenting evidence, and thus he failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Ghent*, 132 AD3d 1275, 1275, *lv denied* 26 NY3d 1145 [internal quotation marks omitted]; *see People v McCoy*, 100 AD3d 1422, 1422). The victim's testimony was not incredible as a matter of law (*see People v Ptak*, 37 AD3d 1081, 1082, *lv denied* 8 NY3d 949), and the court was entitled to credit the testimony of the victim and the other prosecution witnesses and to reject the testimony of defendant and the defense witnesses. "[U]pon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1073

CA 16-00266

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF THE COMPULSORY ACCOUNTING OF THE ADAM D. AND KRYSTYNA M. DIOGUARDI LIVING TRUST U/A DTD. JANUARY 28, 1997.

---------- MEMORANDUM AND ORDER

NICOLE DIOGUARDI BECK, PETITIONER-APPELLANT;

KRYSTYNA M. DIOGUARDI, AS TRUSTEE OF THE ADAM D. AND KRYSTYNA M. DIOGUARDI LIVING TRUST U/A DTD. JANUARY 28, 1997, RESPONDENT-RESPONDENT.

MICHAEL J. KIEFFER, ROCHESTER, FOR PETITIONER-APPELLANT.

WEINSTEIN & RANDISI, ROCHESTER (RICHARD C. MILLER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered May 11, 2015. The order, among other things, ordered respondent to provide an accounting of the assets of the Adam D. and Krystyna M. Dioguardi Living Trust U/A DTD. January 28, 1997, from the date of death of Adam D. Dioguardi.

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

Memorandum: Petitioner, one of the two surviving children of decedent, Adam D. Dioguardi, commenced this proceeding in Surrogate's Court seeking to compel an accounting of the Adam D. and Krystyna M. Dioguardi Living Trust U/A DTD. January 28, 1997 (Trust) from the time of decedent's incapacitation. Decedent and respondent, who is decedent's third wife and surviving spouse, created the Trust on January 28, 1997 and were named grantors therein. It is undisputed that decedent was rendered incapacitated by a stroke in January 2013. During his incapacitation and before his death on April 13, 2014, respondent made various transfers of Trust property to herself and/or third parties pursuant to her authority as trustee as well as pursuant to her authority as decedent's attorney-in-fact by virtue of a durable power of attorney. The Surrogate granted the petition in part by ordering respondent to provide an accounting only from the date of decedent's death. We affirm.

Petitioner contends that the Surrogate abused his discretion in refusing to order the accounting from the date of decedent's incapacity. We reject that contention. Contrary to petitioner's contention, the transactions undertaken by respondent as trustee

between the date of decedent's incapacity and the date of his death were entirely consistent with decedent's intent as evinced by " 'a sympathetic reading of the [Trust] as an entirety' " (*Matter of Reynolds*, 40 AD3d 320, 320, *lv denied* 9 NY3d 807). We therefore see no basis for disturbing the court's order with respect to the time parameters of the accounting (*see generally* SCPA 2205 [1]; *Matter of Mastroianni*, 105 AD3d 1136, 1138).

Contrary to petitioner's further contention, inasmuch as respondent's actions as trustee were consistent with decedent's interest and intentions, the Surrogate did not abuse his discretion in denying petitioner's request to disqualify respondent's attorney, who also had represented decedent in preparing the Trust, based on an alleged conflict of interest (*see Matter of Richardson*, 43 AD3d 1352, 1353).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1075

CA 15-02043

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

JOHN GUTHRIE, MICHAEL PEDERSEN, LAWRENCE BRESEE, JULIA BRESEE, GARY CROMER AND KAREN CROMER, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

EDWARD L. MOSSOW AND SUSAN MOSSOW, DEFENDANTS-RESPONDENTS.

GIACONA LAW, P.C., AUBURN (DOMINIC V. GIACONA OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

NORMAN J. CHIRCO, AUBURN, FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered February 12, 2015. The judgment declared that the right in common to use certain undivided lakeshore has not been extinguished and that defendants have a common right to use such property as a community beach.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by converting the action to one pursuant to RPAPL article 15, vacating the declarations, and dismissing the complaint, and as modified the judgment is affirmed without costs.

Memorandum: The parties are owners of property in the Manchester-Kilmer Tract (Tract) in the Town of Cato. The Tract, as depicted in a filed subdivision map, consists of 99 numbered parcels of equal dimensions, divided into three rows of 33 lots, bordering on an undivided strip of land along the shore of Cross Lake. Plaintiffs own lots in the row closest to the lakeshore, and defendants own lots in the row farthest from the lakeshore.

A dispute arose concerning the parties' respective rights to the use and possession of the undivided strip along the lakeshore, and plaintiffs commenced this action seeking, inter alia, judgment declaring that they are each the lawful owners in fee simple of that part of the disputed strip abutting their respective lots. Following a nonjury trial, Supreme Court concluded, inter alia, that plaintiffs failed to establish that they acquired title by adverse possession or otherwise to the disputed strip abutting their respective lots, and it issued declarations concerning the rights of the parties.

At the outset, we note that a declaratory judgment action is not the proper procedural vehicle to determine title to disputed property (*see Franza v Olin*, 73 AD3d 44, 45). "Rather, the correct procedural vehicle is an action pursuant to RPAPL 1501," and we exercise our power to convert that part of the action seeking declaratory judgment to such an action (*id.*; *see* CPLR 103 [c]), and we vacate the declarations. Contrary to plaintiffs' contention, we conclude that the court properly determined that they failed to meet their burden of establishing by a preponderance of the evidence that they had acquired title to the portions of the disputed strip of lakeshore abutting their properties (*see Leitch v Jackson*, 243 AD2d 873, 874), and we therefore dismiss the complaint. Finally, we note that plaintiffs have not addressed in their brief any issues concerning their requests for injunctive and other relief, and they have thus abandoned any such issues (*see Village of Gainesville v Hotis*, 39 AD3d 1167, 1168; *Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1077

CA 15-01199

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

IN THE MATTER OF LEONIDES SIERRA,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

LEONIDES SIERRA, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 4, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, made after a tier III hearing, that he violated inmate rule 1.00 (7 NYCRR 270.2 [A]). Petitioner was charged with the rule violation in a misbehavior report alleging that, while confined in a state correctional facility, he was convicted of violating the federal Racketeer Influenced and Corrupt Organizations Act ([RICO] 18 USC § 1961 *et seq*.), specifically, that he conducted an enterprise engaged in a pattern of racketeering activity that affected interstate commerce (*see* 18 USC § 1962 [c], [d]; *Salinas v United States*, 522 US 52, 62). He appeals from a judgment dismissing the petition. We affirm.

Prior to arriving at the correctional facility at issue, petitioner was convicted of the RICO offense, then remanded to the New York State Department of Corrections and Community Supervision to complete his state prison sentence. After arriving at the correctional facility and being placed in administrative quarantine for one day, petitioner was charged with violating inmate rule 1.00 based upon his conviction of the above federal crime. Petitioner initially contends that the hearing was not held within the time limits set forth in 7 NYCRR 251-5.1 (a). Specifically, he contends that he was previously confined for several weeks before the

misbehavior report was written, and that such confinement was based on the same acts that resulted in the misbehavior report because he was administratively segregated during the federal prosecution. "The requirement that a hearing be commenced within seven days of 'the inmate's initial confinement' when he or she is 'confined pending a disciplinary hearing' (*see* 7 NYCRR 251-5.1 [a]) was not breached, for petitioner was placed in administrative segregation before the events upon which the misbehavior report was premised—namely, the entry of his guilty plea and the resulting conviction—occurred" (*Matter of Soto-Rodriguez v Goord*, 252 AD2d 782, 783; *see Matter of Davis v Goord*, 21 AD3d 606, 609).

Petitioner further contends that the hearing was untimely because a handwritten notation of uncertain provenance on his request for employee assistance establishes that he was confined for an additional day before the report was written. Even assuming, arguendo, that he is correct about the authorship of that notation and its meaning, it is well settled that, "[a]bsent a showing that substantial prejudice resulted from the delay, the regulatory time limits are construed to be directory rather than mandatory" (*Matter of Van Gorder v New York State Dept. of Corr. Serv.*, 42 AD3d 834, 835; *see Matter of Al-Matin v Prack*, 131 AD3d 1293, 1293; *Matter of Rosario v Selsky*, 37 AD3d 921, 921-922), and petitioner has identified no prejudice from that single additional day of confinement.

Petitioner also contends that he was unable to establish that he was confined without a timely hearing during the period prior to the filing of the misbehavior report, i.e., while he was administratively confined during the federal prosecution, because he was denied the right to present evidence and call witnesses that would establish such improper prior confinement, and because he received inadequate employee assistance when his employee assistant did not obtain documents or interview the witnesses that would establish such improper prior confinement. We reject those contentions "inasmuch as the evidence petitioner sought to present . . . [and the witnesses he sought to call were] not relevant to the instant charges against petitioner" (*Matter of Jay v Fischer*, 118 AD3d 1364, 1364, *appeal dismissed* 24 NY3d 975; *see Matter of Pujals v Fischer*, 87 AD3d 767, 767; *Matter of Mullen v Superintendent of Southport Corr. Facility*, 29 AD3d 1244, 1244-1245). "Likewise, petitioner's claim that he was denied effective employee assistance—premised as it is on the assistant's failure to obtain the same irrelevant documentation—is without merit" (*Matter of Mullen*, 29 AD3d at 1245; *see Matter of Williams v Selsky*, 257 AD2d 932, 933).

Finally, petitioner contends that the misbehavior report is insufficient because it alleges a violation of inmate rule 1.00 (7 NYCRR 270.2 [A]), which states that "[a]ny Penal Law offense may be referred to law enforcement agencies for prosecution through the courts. In addition, departmental sanctions may be imposed based upon a criminal conviction." Petitioner contends that, because the first sentence of the regulation applies only to violations of the Penal Law, only criminal convictions under the Penal Law will support the imposition of sanctions under the second sentence. Therefore, he

contends, no sanctions may be imposed upon him because he was convicted in United States District Court of a RICO crime. We reject petitioner's contention.

Respondent, through the hearing officer, interpreted the regulation at issue to permit the imposition of sanctions based upon a conviction of any crime, and it is a "recognized principle of administrative law that great weight is to be given to an administrative agency's interpretation of its own regulations" (*People ex rel. Knowles v Smith*, 54 NY2d 259, 267; *see Matter of Brooks v Alexander*, 64 AD3d 1096, 1098). Thus, where "the construction adopted by [the agency] is not irrational, it should be sustained" (*Matter of Hop Wah v Coughlin*, 160 AD2d 1054, 1056; *see Ostrer v Schenck*, 41 NY2d 782, 786). Here, we agree with respondent that the agency's interpretation of the regulation "as authorizing the inmate's [confinement] in these circumstances [is] not irrational" (*Matter of Blake v Mann*, 75 NY2d 742, 743).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1078

CA 16-00075

PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

RAYMOND T. WEBBER AND DUANE WEBBER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LEE WEBBER AND GERALD T. FILIPIAK,
DEFENDANTS-RESPONDENTS.

HARTER SECREST & EMERY LLP, BUFFALO (JOHN G. HORN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered August 18, 2015. The order and judgment awarded money damages to plaintiff Raymond T. Webber upon a nonjury verdict.

It is hereby ORDERED that said appeal insofar as it concerns that part of the order and judgment awarding $50,442 as a principal amount is unanimously dismissed, and the order and judgment is modified on the law by awarding plaintiff Raymond T. Webber interest on that principal amount at a rate of 3.25% from June 3, 2013 to August 18, 2015, and awarding $23,295 to plaintiffs on the conversion cause of action, and as modified the order and judgment is affirmed without costs.

Memorandum: Raymond T. Webber (plaintiff) and defendants, Lee Webber and Gerald T. Filipiak, formed Eagle Crest Manufactured Homes Park, Inc. (Eagle Crest) in order to purchase land and to develop a manufactured home park. Each of them owned one-third of the corporation. When Eagle Crest sold the original manufactured home park in 2001, the three shareholders decided to reinvest the proceeds in other commercial real estate projects. To manage the properties they acquired, they created four separate limited liability companies (LLCs), each of which was wholly owned by Eagle Crest, but managed by the individual shareholders for their own benefit. In 2002, plaintiff and defendants entered into a shareholder agreement which provided, inter alia, that each of the properties would be managed by the shareholder who selected it. Plaintiff and defendants executed an amendment to that agreement in 2004, which was intended to address and rebalance certain tax consequences among the shareholders. In 2007, plaintiff and defendants entered into a new agreement, thereby

cancelling the 2002 agreement with its 2004 amendment. The 2007 agreement provided, inter alia, that Eagle Crest, through its four subsidiary LLCs, would hold title to each of the properties as a nominee for the three Eagle Crest shareholders. It further provided that Eagle Crest's accountant would provide a yearly schedule of the shareholders' income tax liability, and that the shareholders would pay their obligations under that schedule within 10 days of receipt. If a shareholder did not pay his obligation in a timely fashion, Eagle Crest was permitted to pay it out of his distributions. In addition, any shareholder owed an obligation by another shareholder could also commence legal action for the amount of the obligation, plus 12% yearly interest and "costs of collection including reasonable attorney's fees." On June 3, 2013, defendants resigned as officers and directors of Eagle Crest, leaving plaintiff as its sole owner.

Plaintiff and Duane Webber, an assignee of plaintiff's rights and interests in the various agreements, commenced this action. The second amended complaint alleges four causes of action: breach of the 2002 agreement, as amended in 2004; breach of the 2007 agreement; an accounting; and conversion. A nonjury trial was held and, at the close of plaintiffs' proof, defendants moved for a directed verdict on the issues of attorney's fees, interest, and capital expenses, arguing that plaintiffs had failed to meet their burden of proof. Supreme Court reserved decision. Five days after the trial ended, the court granted defendants' motion for a directed verdict. Plaintiffs thereafter filed a motion for leave to reargue the directed verdict determination. Before the court issued the order embodying its decision on the motion for a directed verdict, the court informed the parties by way of an email that it had sua sponte reconsidered its decision in the course of preparing the final written decision and order, and that plaintiffs' motion for leave to reargue the directed verdict determination would be moot as a result. The court subsequently issued a decision and order awarding plaintiff $994,390, which is comprised of the stipulated $943,948 amount due under the 2007 agreement plus $50,442 that the court determined to be owed under the 2002 agreement, as amended in 2004. The court also awarded statutory interest of 9% on the 2007 portion of the award and determined that plaintiffs "shall have no recovery on their remaining claims." Plaintiffs filed the judgment and, after defendants paid the judgment amount, filed the satisfaction of judgment, and they thereafter appealed.

We note at the outset that part of plaintiffs' appeal is barred by plaintiffs' acceptance of payment of the judgment and their issuance of a satisfaction of judgment. "As a general rule, a plaintiff may not appeal after accepting payment of a judgment" (*Kriesel v May Dept. Stores Co.*, 261 AD2d 837, 837). "Where . . . , however, the outcome of the appeal could have no effect on the appellant's right to the benefit he or she accepted, its acceptance should not preclude the appeal" (*id.* at 837-838 [internal quotation marks omitted]). " 'This exception appears to be limited to those instances where the appellant's right to the amount awarded by the original judgment is absolute, making it possible to obtain a more favorable judgment without the risk of a less favorable result upon

retrial' " (*id*. at 838). Here, plaintiffs seek an increase in the judgment amount in several areas where they were denied relief completely, i.e., capital expenditure costs, attorney's fees, consequential damages, contractual interest, and damages associated with defendants' alleged conversion. In our view, however, plaintiffs' contention on appeal that the award of $50,442 as a principal amount pursuant to the 2002 agreement, as amended in 2004, was inadequate is barred by the general rule prohibiting an appeal from a satisfied judgment. Although the other areas of appeal are discrete, severable, and incapable of reduction, plaintiffs' contentions concerning the $50,442 award as a principal amount rely on an assessment of competing expert evidence that lies within the discretion of the factfinder, and could theoretically, based on the evidence in the record, result in a less favorable judgment (*see Williams v Hearburg*, 245 AD2d 794, 794-795, *lv denied* 91 NY2d 810; *Roffey v Roffey*, 217 AD2d 864, 865-866). We therefore dismiss that part of the appeal involving the $50,442 as a principal amount.

Moving to the merits, we note that it is well established that, "[o]n appeal from a judgment entered after a nonjury trial, this Court has the power to set aside the trial court's findings if they are contrary to the weight of the evidence and to render the judgment we deem warranted by the facts . . . That power may be appropriately exercised, however, only after giving due deference to the court's evaluation of the credibility of witnesses and quality of the proof . . . Moreover, [o]n a bench trial, the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence" (*Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525 [internal quotation marks omitted]).

Contrary to plaintiffs' contention, we conclude that a fair interpretation of the evidence supports the court's determination that plaintiffs were not entitled to capital expenditure costs under the 2007 agreement. " '[C]ourts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include' " (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475). Here, there is no reference to capital expenditure costs in the 2007 agreement, and any interpretation of the 2007 agreement that is dependent on language from the 2002 agreement cannot be, as plaintiffs claim, an unambiguous interpretation (*see Kass v Kass*, 91 NY2d 554, 566-567; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162-163).

We agree with plaintiffs that the court's initial decision to grant defendants' motion for a directed verdict was effectively reversed by the court's later decision to deem that application moot and to award, inter alia, statutory interest on the portion of the award concerning the 2007 agreement. We further agree with plaintiffs that the court erred in failing to add interest to the principal of the award made pursuant to the 2002 agreement, as amended in 2004. Although the 2002 agreement did not include any language addressing interest, the 2004 amendment provided that, when Eagle Crest dissolved, the shareholders would be responsible to "settle up the tax

cost or benefit at a rate of 50% of the tax differentials on a cumulative basis from inception," and the funds would be treated as shareholder distributions, paid within five years, and subject to interest "at the prevailing prime rate." Based on that plain language, the court erred in failing to grant interest on the $50,442 principal of the award for breach of the 2002 agreement, as amended in 2004. We therefore modify the order and judgment by adding 3.25% interest on that portion of the award, from the date of Eagle Crest's dissolution, June 3, 2013, until the entry of judgment on August 18, 2015. We reject plaintiffs' related contention, however, that they are entitled to contractual interest of 12% under the 2007 agreement along with attorney's fees. The court's conclusion that the parties, through their actions, either modified or waived the provisions concerning interest and attorney's fees in the 2007 agreement is supported by a fair interpretation of the evidence (*see generally Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104; *Estate of Kingston v Kingston Farms Partnership*, 130 AD3d 1464, 1465). Although "waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection" (*Fundamental Portfolio Advisors, Inc*., 7 NY3d at 104), there was little dispute at trial that plaintiff was fully aware that the relevant provisions of the 2007 agreement were not being followed.

We agree with plaintiffs that there is no fair interpretation of the evidence that would permit the court to deny all relief on their conversion cause of action. Upon our review of the record, we conclude that defendants provided no explanation for an Eagle Crest check drafted by defendant Filipiak, and deposited on October 21, 2013, four months after the resignation of defendants from Eagle Crest. The check was made out to "Hunter Creek Plaza LLC," the LLC jointly controlled by defendants, in the amount of $23,295. We therefore further modify the order and judgment by awarding $23,295 to plaintiffs. We reject plaintiffs' remaining contentions with respect to their claims of conversion inasmuch as the court's determination not to award damages on those claims is supported by a fair interpretation of the evidence (*see Black*, 125 AD3d at 1524-1525).

We reject plaintiffs' further contention that the court abused its discretion in denying their motion to amend the complaint. Plaintiffs sought to amend their complaint for a third time just two months prior to trial and failed to offer any reason why they did not seek to add a new plaintiff when they amended the complaint for the second time just four months earlier (*see generally Jablonski v County of Erie*, 286 AD2d 927, 928). Contrary to plaintiffs' contention, the court did not err in failing to award consequential damages inasmuch as any demand for such damages was absent from the operative pleading at the time of trial and, in any event, plaintiffs offered no proof at trial and made no request in their proposed findings of fact regarding such damages.

Finally, defendants' various requests to this Court for relief are not properly before us inasmuch as they failed to take a cross appeal (*see Baker v Levitin*, 211 AD2d 507, 508; *Monte v DiMarco*, 192

AD2d 1111, 1113, *lv denied* 82 NY2d 653; *see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1081

CA 15-02090

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

JEFFREY RICE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO FIRE DEPARTMENT,
TIMOTHY M. FITZPATRICK, JR.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.
(ACTION NO. 1.)

JAMES FELIX OLIVER, PLAINTIFF-APPELLANT,

V

CITY OF BUFFALO, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(ACTION NO. 2.)

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT JEFFREY RICE.

ROLAND M. CERCONE, PLLC, BUFFALO (ROLAND M. CERCONE OF COUNSEL), FOR PLAINTIFF-APPELLANT JAMES FELIX OLIVER.

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

Appeals from an order of the Supreme Court, Erie County (John M. Curran, J.), entered March 4, 2015. The order, insofar as appealed from, denied the cross motions of plaintiffs for partial summary judgment.

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

Memorandum: In this personal injury action, plaintiffs appeal from an order that, inter alia, denied their respective cross motions for partial summary judgment on the issue of liability. We affirm.

During the afternoon of February 12, 2010, plaintiffs were passengers in a vehicle that was proceeding through a green light at the intersection of Washington Street and Chippewa Street in Buffalo, when their vehicle was struck by a vehicle of defendant Buffalo Fire Department (BFD), which was responding to a call regarding a

suspicious package that possibly contained an explosive device. Rice thereafter commenced an action against defendant City of Buffalo (City), the BFD, and defendant Thomas M. Fitzpatrick, Jr., incorrectly sued herein as Timothy M. Fitzpatrick, Jr., the fireman who had been operating the BFD vehicle (collectively, defendants), among others, seeking damages for injuries he allegedly sustained as a result of the collision. Oliver commenced a separate action against the City, among others, and Oliver's action was subsequently consolidated with Rice's action.

Defendants answered the complaints and thereafter moved for summary judgment dismissing them, contending that the correct standard to determine their potential liability was not ordinary negligence, but reckless disregard for the safety of others, and that their conduct had not risen to the level of reckless disregard as a matter of law. Plaintiffs cross-moved for partial summary judgment on the issue of liability, contending that the ordinary negligence standard applied, and that defendants had violated that standard as a matter of law. In support of their cross motions, plaintiffs submitted the deposition transcript of Fitzpatrick, who testified that he "had lights and sirens on" some of the time, but "would turn the siren on and off" as he "was trying to communicate with the alarm office." Fitzpatrick further testified: "As I approached that intersection with Washington . . . I was turning on and off the siren, [and] as I got to that intersection just before I went in I turned the siren on." The court denied "all motions [and cross motions] on the issues of reckless disregard and ordinary negligence."

The proponent on a summary judgment motion bears the initial burden of establishing entitlement to judgment as a matter of law by submitting evidence sufficient to eliminate any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). We conclude that plaintiffs failed to meet that burden. Although the driver of an emergency vehicle involved in an emergency operation may be privileged to proceed through a steady red traffic signal (*see* Vehicle and Traffic Law §§ 101, 1104 [a], [b] [2]), the injured plaintiff may demonstrate that the driver was unprivileged if he or she "did not, as required by statute, give an audible warning as [the emergency vehicle] approached and entered the intersection against a red signal" (*Abood v Hosp. Ambulance Serv.*, 30 NY2d 295, 300). If unprivileged, an ordinary negligence standard, rather than a reckless disregard standard, applies (*see generally* § 1104 [e]; *Saarinen v Kerr*, 84 NY2d 494, 501). Here, plaintiffs' evidentiary submissions raise issues of fact whether Fitzpatrick sounded his siren "loud enough to be heard and . . . soon enough to be acted upon" (*Abood*, 30 NY2d at 299). We therefore conclude that the court properly denied plaintiffs' cross motions insofar as they sought to apply an ordinary negligence standard (*see generally Campbell v City of Elmira*, 84 NY2d 505, 508).

Contrary to Oliver's further contention, we conclude that Fitzpatrick was engaged in an "[e]mergency operation" inasmuch as the undisputed evidence demonstrated that he was responding to a call regarding a possible explosive device (Vehicle and Traffic Law § 114-

b). In addition, the speed at which the emergency vehicle proceeded into the intersection does not render Fitzpatrick's conduct unprivileged as a matter of law, but rather presents an issue of fact whether he acted with reckless disregard for the safety of others (*see Connelly v City of Syracuse*, 103 AD3d 1242, 1242-1243; *see also* PJI 2:79A).

Finally, the contention raised by Oliver for the first time on appeal that he is entitled to partial summary judgment on the issue of liability on the ground that Fitzpatrick acted with reckless disregard for the safety of others as a matter of law is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1092

KA 15-00490

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD GRUCZA, DEFENDANT-APPELLANT.

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

BERNARD GRUCZA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 24, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We agree with defendant's contention in his main and pro se supplemental briefs that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. "[N]o 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 Pimental*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076, citing *People v Maracle*, 19 NY3d 925, 928; *see People v Gibson*, 134 AD3d 1517, 1518, *lv denied* 27 NY3d 1069). Although defendant executed a written waiver of the right to appeal in which he waived "all aspects of [the] case, including the sentence," we conclude that the written waiver "does not foreclose our review of the severity of the sentence because '[Supreme Court] did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it' " (*People v Donaldson*, 130 AD3d 1486, 1486-1487, quoting *People v Bradshaw*, 18 NY3d 257, 262). We nevertheless reject defendant's contention in his main and pro se supplemental briefs that the bargained-for sentence is unduly harsh

and severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1093

KA 14-02215

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY L. CARR, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE 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 (M. William Boller, A.J.), rendered November 26, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, his waiver of the right to appeal "was not rendered invalid based on [Supreme Court]'s failure to require defendant to articulate the waiver in his own words" (*People v Dozier*, 59 AD3d 987, 987, *lv denied* 12 NY3d 815; *cf. People v Ramos*, 152 AD2d 209, 211-212), and defendant's "responses during the plea colloquy and his execution of a written waiver of the right to appeal establish that he intelligently, knowingly, and voluntarily waived his right to appeal" (*People v Rumsey*, 105 AD3d 1448, 1449, *lv denied* 21 NY3d 1019; *see generally People v Sanders*, 25 NY3d 337, 340-341). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1096

KA 10-00652

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID G. COX, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 19, 2010. The judgment convicted defendant, after a nonjury trial, of criminal sexual act in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [1]). We agree with defendant that the third count of the indictment, charging defendant with engaging in anal sexual contact with the complainant by forcible compulsion, was rendered duplicitous by the complainant's testimony (*see People v Levandowski*, 8 AD3d 898, 899-900; *People v Davila*, 198 AD2d 371, 373). The complainant testified that the acts of anal sexual contact occurred "more than once" over the course of a two-hour incident, and, contrary to the People's contention, such acts did not constitute a continuous offense (*see People v Keindl*, 68 NY2d 410, 420-421, *rearg denied* 69 NY2d 823), but rather were separate and distinct offenses (*see People v Russell*, 116 AD3d 1090, 1091; *see also People v Garcia*, 141 AD3d 861, 865, *lv denied* 28 NY3d 929). We therefore modify the judgment accordingly (*see Keindl*, 68 NY2d at 423).

We reject defendant's contention that Supreme Court erred in refusing to substitute new appointed counsel, inasmuch as defendant's complaints concerning counsel concerned only disagreements over

strategy (*see People v Rupert*, 136 AD3d 1311, 1311, *lv denied* 27 NY3d 1075), or his lack of trust in appointed counsel without a showing of good cause therefor (*see People v Sawyer*, 57 NY2d 12, 19, *rearg dismissed* 57 NY2d 776, *cert denied* 459 US 1178). Viewing the evidence in light of the elements of criminal sexual act in the first degree under the second count of the indictment in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict on that count is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The court was entitled to credit the complainant's testimony that defendant forced her to have sexual contact and to reject defendant's testimony that such contact was consensual (*see People v Cooper*, 72 AD3d 1552, 1552, *lv denied* 15 NY3d 803, *reconsideration denied* 15 NY3d 892). Finally, contrary to defendant's contention, we conclude that the court did not abuse its discretion in refusing to direct production of the complainant's psychiatric records for its in camera review. There was no showing that the complainant's psychiatric history had any bearing on her ability to perceive or recall the incident (*see People v Tirado*, 109 AD3d 688, 689, *lv denied* 22 NY3d 959, *reconsideration denied* 22 NY3d 1091, *cert denied* ___ US ___, 135 S Ct 183; *People v Duran*, 276 AD2d 498, 498), nor was there any other basis for concluding that the confidentiality of her psychiatric records was significantly outweighed by the interests of justice (*see People v Felong*, 283 AD2d 951, 952; *Duran*, 276 AD2d at 498).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1097

KA 16-00767

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KURY S. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LAW OFFICES OF PETER K. SKIVINGTON, PLLC, GENESEO (PETER R. CHANDLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered July 28, 2011. The order directed defendant to pay restitution.

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

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, two counts of assault in the second degree (*People v Spencer*, 108 AD3d 1081, *lv denied* 22 NY3d 1159). After bifurcating the sentencing proceeding and conducting a separate restitution hearing (*see generally People v Connolly*, 100 AD3d 1419, 1419), County Court ordered defendant to pay $74,491.37 (appeal No. 1). The order was mailed by the court to defense counsel and entered with the court clerk on July 28, 2011. Defendant filed a notice of appeal dated August 2, 2011. By order entered August 17, 2015, the court converted the order of restitution to a civil judgment (appeal No. 2). Defendant now appeals from both orders.

We reject the People's contention that appeal No. 1 should be dismissed for failure to perfect the appeal in a timely manner. "[S]ervice by the prevailing party is necessary under CPL 460.10 in order to commence the time period for the other party to take an appeal" (*People v Washington*, 86 NY2d 853, 854). Here, the record establishes that defendant's attorneys received a copy of the order in appeal No. 1 and promptly filed a notice of appeal, but there is no evidence that the People ever served the order as required by CPL 460.10 (1) (a). Inasmuch as "the record fails to establish that [the People] ever served [defendant] with a copy of the order or with notice of entry . . . , [defendant's] 30-day period to appeal County Court's order never began to run" (*People v Aubin*, 245 AD2d 805, 806; *see Washington*, 86 NY2d at 854-855). We agree with the People,

however, that appeal No. 2 should be dismissed inasmuch as no appeal as of right or by permission lies from that order (*see generally* CPL 450.10, 450.15; *People v Fricchione*, 43 AD3d 410, 411).

We reject defendant's contention that the court erred in ordering restitution. "Restitution is 'the sum necessary to compensate the victim for out-of-pocket losses' " (*People v Tzitzikalakis*, 8 NY3d 217, 220; *see* Penal Law § 60.27 [1]). "[R]estitution serves the dual, salutary purposes of easing the victim's financial burden while reinforcing the offender's sense of responsibility for the offense and providing a constructive opportunity for the offender to pay his or her debt to society" (*People v Horne*, 97 NY2d 404, 411). Defendant's conviction stemmed from his conduct in operating a motor vehicle and colliding head-on with another vehicle, causing serious physical injuries to two victims. Contrary to defendant's contention, the People met their burden of establishing the victims' out-of-pocket medical and other costs incurred as a result of defendant's conduct by a preponderance of the evidence (*see People v Tuper*, 125 AD3d 1062, 1062, *lv denied* 25 NY3d 1078; *People v Pugliese*, 113 AD3d 1112, 1112-1113, *lv denied* 23 NY3d 1066; *People v Howell*, 46 AD3d 1464, 1465, *lv denied* 10 NY3d 841).

Contrary to defendant's further contention, the court was not required to offset the amount of restitution by the settlement received by the victims in their lawsuit against defendant and his father, who owned the vehicle that defendant was operating at the time of the accident. An award of restitution must take into account any benefit received by the victim and include appropriate offsets (*see Tzitzikalakis*, 8 NY3d at 220-221). Here, the court credited the testimony of the victims' attorney that the settlement was limited to damages for pain and suffering and did not encompass any out-of-pocket costs incurred by the victims. Indeed, on this record we conclude that to allow an offset, which would effectively eliminate restitution, would result in defendant avoiding "pay[ing] his . . . debt to society" (*Horne*, 97 NY2d at 411).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1098

KA 16-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KURY S. SPENCER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LAW OFFICES OF PETER K. SKIVINGTON, PLLC, GENESEO (PETER R. CHANDLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered August 17, 2015. The order converted an order of restitution to a civil judgment.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Spencer* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1099

KA 14-00192

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON W. BOX, DEFENDANT-APPELLANT.

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

BRANDON W. BOX, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 11, 2013. The judgment convicted defendant, upon a jury verdict, of identity theft in the first degree and falsifying business records 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, following a jury trial, of identity theft in the first degree (Penal Law § 190.80 [1]) and falsifying business records in the first degree (§ 175.10), based on allegations that he applied for a credit card in his grandfather's name and then either he or his accomplice used that credit card to make over $2,000 in cash withdrawals or gift card purchases at two different Wal-Mart stores over the course of one week. To the extent that defendant contends that the evidence is legally insufficient to establish that the multiple uses of the credit card were part of a single, intentional crime as opposed to separate and distinct lesser crimes, we conclude that defendant failed to preserve that contention for our review by a timely motion to dismiss directed at that specific deficiency in the proof (*see People v Gray*, 86 NY2d 10, 19). Were we to reach the merits of that contention, we would conclude that there is sufficient evidence that the repeated use of the credit card "was governed by a single intent and a general illegal design" (*People v Cox*, 286 NY 137, 143, *rearg denied* 286 NY 706).

In his pro se supplemental brief, defendant contends that the evidence is legally insufficient to establish that he assumed his grandfather's identity. That contention is also not preserved for our

review (*see Gray*, 86 NY2d at 19) and, in any event, we conclude that it lacks merit (*see People v Yuson*, 133 AD3d 1221, 1222, *lv denied* 27 NY3d 1157).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to defendant's intent to defraud, an element of both offenses (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the grandfather did not testify, the evidence at trial established that defendant lacked the grandfather's permission to apply for and use the credit card, thereby establishing that defendant acted with an intent to defraud. Defendant filed the application in the predawn hours of January 18, 2013 and, although he testified that he filed the application in the presence of and with the permission of his grandfather, defendant's sister, with whom the grandfather lived, testified that defendant did not visit his grandfather during the entire month of January 2013. Moreover, the accomplice testified that defendant filed the application online at his own residence without the grandfather's knowledge or consent. Defendant and the accomplice admitted at trial that they made over $1,000 in cash withdrawals and that they used that money to buy crack cocaine. From documentary exhibits and the accomplice's testimony, the People established that defendant and the accomplice purchased over $1,000 in gift cards, which they traded for crack cocaine. In a recorded telephone call with his mother, defendant attempted to ensure that the grandfather would not testify at trial, which would be illogical if, in fact, defendant had the grandfather's permission to apply for and use the credit card.

Defendant failed to preserve for our review his contention that Supreme Court improperly limited defense counsel's summation (*see People v Kimmy*, 137 AD3d 1723, 1723-1724, *lv denied* 27 NY3d 1134; *People v Gong*, 30 AD3d 336, 336, *lv denied* 7 NY3d 812), 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]). Moreover, although defendant contends that the prosecutor improperly shifted the burden of proof during summation, we conclude that reversal is not warranted because the prosecutor's "single improper comment was not so egregious that defendant was thereby deprived of a fair trial" (*People v Willson*, 272 AD2d 959, 960, *lv denied* 95 NY2d 873). We note that the court "sustained defendant's objection to the improper comment and instructed the jury to disregard it, and the jury is presumed to have followed the court's instructions" (*People v Smalls*, 100 AD3d 1428, 1430, *lv denied* 21 NY3d 1010).

Defendant contends that the indictment was duplicitous and multiplicitous and, further, that the testimony at trial rendered the indictment duplicitous. The Court of Appeals has unequivocally held that "issues of non-facial duplicity, like those of facial duplicity, must be preserved for appellate review," and defendant failed to do so by either a motion to dismiss the indictment or an objection at trial (*People v Allen*, 24 NY3d 441, 449-450; *see People v Rivera*, 133 AD3d 1255, 1256, *lv denied* 27 NY3d 1154). Defendant likewise failed to

preserve for our review his multiplicity contention "inasmuch as [he] failed to challenge the indictment on that ground" (*People v Fulton*, 133 AD3d 1194, 1194, *lv denied* 26 NY3d 1109, *reconsideration denied* 27 NY3d 997; *see People v Morey*, 224 AD2d 730, 731, *lv denied* 87 NY2d 1022). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

With respect to count two, charging defendant with falsifying business records in the first degree (Penal Law § 175.10), defendant contends that this count impermissibly "double counts" defendant's single criminal intent in violation of *People v Cahill* (2 NY3d 14). We reject that contention. Section 175.10 provides that a person is guilty of falsifying business records in the first degree if he or she commits the crime of falsifying business records in the second degree and "his [or her] intent to defraud includes an intent to commit another crime or to aid or conceal the commission thereof." Defendant thus contends that his intent to defraud in using the credit card was "not meaningfully independent of his intent to defraud through commission (or concealment) of the identity theft associated with gaining the credit card."

Defendant's reliance on *Cahill* in support of that contention is misplaced. In *Cahill*, the defendant was charged with murder in the first degree under Penal Law § 125.27 (1) (a) (vii), based on the aggravating factor that the victim was killed during the commission of a burglary. In that case, the crime the defendant intended to commit for purposes of the underlying burglary was the murder of the victim, and the Court thus held that, "[i]f the burglar intends only murder, that intent cannot be used both to define the burglary and at the same time bootstrap the second degree (intentional) murder to a capital crime" (*id.* at 65). In short, the intent to commit murder could not serve as both the basis for the crime (intentional murder) as well as the basis for the aggravating factor (burglary committed with the intent to commit the crime of murder) for the same murder charge. To do so would "double count" the same criminal intent *in a single charge*. Here, however, defendant's intent to commit a crime, an element of falsifying business records in the first degree, was the intent to commit the separate and distinct crime of identity theft. We thus conclude that, even if defendant's intent to defraud was the same in both charges, the indictment did not impermissibly double-count that intent in a single charge.

Also with respect to count two, defendant contends that the court's instruction on that charge violated the rule of *People v Gaines* (74 NY2d 358) and may have resulted in a lack of unanimity in the verdict in violation of *People v McNab* (167 AD2d 858). Because defendant failed to object to the charge as given, we conclude that those contentions are not preserved for our review (*see Allen*, 24 NY3d at 449; *People v Curella*, 296 AD2d 578, 578; *People v Nelson*, 186 AD2d 1068, 1068, *lv denied* 81 NY2d 764), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Throughout the proceedings in the trial court, defendant requested a substitution of counsel, contending that defense counsel was operating under a conflict of interest because another attorney in the Public Defender's office had previously represented the accomplice on unrelated charges. In both his main and pro se supplemental briefs, defendant contends that the court erred in refusing to substitute counsel and in deferring to defense counsel's conclusion that there was no conflict of interest. We reject defendant's contentions. A review of the record establishes that the court made the requisite minimal inquiry (*see People v Porto*, 16 NY3d 93, 99-101; *People v Sides*, 75 NY2d 822, 824-825), and properly concluded that there was no basis to substitute counsel where, as here, defendant failed to "show that the conduct of his defense was in fact affected by the operation of the conflict of interest" (*People v Bones*, 309 AD2d 1238, 1240, *lv denied* 1 NY3d 568 [internal quotation marks omitted]; *see People v Harris*, 99 NY2d 202, 210; *People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892).

In both his main and pro se supplemental briefs, defendant contends that he was denied effective assistance of counsel based on defense counsel's failure to make various motions or requests. Although defense counsel failed to make certain motions, "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152), and "[d]efendant . . . failed to demonstrate a lack of strategic or other legitimate explanations for defense counsel's alleged ineffectiveness in . . . failing to request" certain jury instructions, including a missing witness charge (*People v Hicks*, 110 AD3d 1488, 1489, *lv denied* 22 NY3d 1156; *see People v Myers*, 87 AD3d 826, 828, *lv denied* 17 NY3d 954; *see generally People v Benevento*, 91 NY2d 708, 712). To the extent that defendant contends in his pro se supplemental brief that defense counsel lost a video containing exculpatory evidence, that contention is based on matters outside the record and must be raised by a motion pursuant to CPL article 440 (*see People v Weaver*, 118 AD3d 1270, 1272, *lv denied* 24 NY3d 965).

Defendant contends in his pro se supplemental brief that he was entitled to dismissal of the indictment based on an alleged *Payton* violation; that defense counsel was ineffective in failing to request a hearing on that alleged violation; and that the court erred in denying his pro se motions seeking such a hearing. Defendant's contentions are wholly lacking in merit. Even assuming, arguendo, that defendant was arrested in his home without a warrant in violation of *Payton*, we recognize that the remedy for such a violation would not be dismissal of the indictment but, rather, suppression of any evidence obtained from defendant following that violation "unless the taint resulting from the violation has been attenuated" (*People v Harris*, 77 NY2d 434, 437). Inasmuch as there was no evidence that could be said to be a " 'product of' the alleged *Payton* violation," there was nothing to suppress and thus no basis to hold a *Payton* hearing (*People v Jones*, 38 AD3d 1272, 1273, *lv denied* 9 NY3d 866, quoting *New York v Harris*, 495 US 14, 19).

Although defendant correctly contends in both his main and pro se supplemental briefs that the court erred in refusing to instruct the jury on corroboration (*see* CPL 60.22), "in light of the overwhelming corroborating proof of defendant's guilt, the failure to charge the accomplice rule is harmless error" (*People v Kimbrough*, 155 AD2d 935, 935, *lv denied* 75 NY2d 814; *see People v Fortino*, 61 AD3d 1410, 1411, *lv denied* 12 NY3d 925). Finally, we reject defendant's contention that he was not properly sentenced as a second felony offender (*see* CPL 400.21). "The election by defendant to remain silent 'does not negate the opportunity accorded him to controvert [the predicate felony statement]' . . . , and '[u]ncontroverted allegations in the statement shall be deemed to have been admitted by the defendant' " (*People v Neary*, 56 AD3d 1224, 1224, *lv denied* 11 NY3d 928; *see* CPL 400.21 [3]; *People v Woodall*, 145 AD2d 921, 921).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1100

KA 15-00432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FELTON M. OSTEEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered January 7, 2015. 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: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that the gun should have been suppressed as the "fruit of an illegal stop without probable cause." The suppression hearing testimony demonstrates that the officers were patrolling in the vicinity of a particular intersection known to them as a high-crime area when they observed defendant and another man conversing on the corner adjacent to a vacant lot. The officers observed the men looking around them constantly, "their heads on [a] swivel," until the men noticed the patrol car, at which point defendant "fixated" on it. One of the officers, who recognized defendant from "assisting on a couple of his previous arrests," one for narcotics and another for weapon possession, but who had forgotten defendant's name, called out to defendant from the patrol car, asking defendant to provide his name. Defendant gave his first name and immediately started walking toward the patrol car. At that point, the other officer asked the men what they were doing, and defendant said, "Nothing." Defendant walked up to and then past the patrol car until he reached its rear bumper, when he broke out into a run, away from the patrol car. The second officer, who had recognized defendant, got out of the patrol car to see why defendant was running and immediately saw that defendant was holding a handgun in his right hand. That officer drew his weapon and called out for defendant to stop, but defendant did not do so. That

officer gave chase and, right before apprehending defendant in the backyard of a residence, saw defendant throw the handgun over a fence into an adjoining yard. Police subsequently recovered the loaded handgun from the driveway of that adjoining property.

We conclude that, in view of their knowledge and observations, the officers had an " 'articulable basis,' meaning an 'objective, credible reason not necessarily indicative of criminality,' " to support their request for information from defendant, including his name and his purpose for being at that location (*People v Valerio*, 274 AD2d 950, 951, *affd* 95 NY2d 924, *cert denied* 532 US 981, quoting *People v Ocasio*, 85 NY2d 982, 985; *see generally People v Garcia*, 20 NY3d 317, 322; *People v De Bour*, 40 NY2d 210, 223). We further conclude that, when defendant fled from them with a weapon visible in his hand and disregarded their order to stop, the officers acquired probable cause, justifying their pursuit, stop, forcible detention, and arrest of defendant (*see People v Martinez*, 80 NY2d 444, 447-448; *People v Simmons*, 133 AD3d 1275, 1276-1277, *lv denied* 27 NY3d 1006; *see also People v Sierra*, 83 NY2d 928, 929-930). Because defendant abandoned the gun during the chase in response to the lawful conduct of police, he lacks standing to challenge the seizure of the gun from the adjoining property (*see People v Walters*, 140 AD3d 1761, 1762, *lv denied* 28 NY3d 938; *People v Stevenson*, 273 AD2d 826, 827; *see generally People v Ramirez-Portoreal*, 88 NY2d 99, 110).

Finally, we reject defendant's contention that the period of postrelease supervision imposed is unduly harsh and severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1101

KAH 15-00927

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
DEANDRE WILLIAMS, ALSO KNOWN AS DAVID WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered April 21, 2015 in a habeas corpus proceeding. The judgment denied the petition.

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

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus on the grounds that the evidence is legally insufficient to support his conviction of assault in the second degree (Penal Law § 120.05 [2]), he is actually innocent, and certain errors were made at trial. We conclude that Supreme Court properly denied his petition. "Habeas corpus relief is not an appropriate remedy for asserting claims that were or could have been raised on direct appeal or in a CPL article 440 motion" (*People ex rel. Dilbert v Bradt*, 117 AD3d 1498, 1498, *lv denied* 24 NY3d 902 [internal quotation marks omitted]; *see People ex rel. Collins v New York State Dept. of Corr. & Community Supervision*, 132 AD3d 1234, 1235, *lv denied* 26 NY3d 917). Although petitioner contends that he could not raise those grounds on his direct appeal because he was denied effective assistance of appellate counsel, we note that this proceeding for a writ of habeas corpus is not appropriate for raising that contention because his remedy for ineffective assistance of appellate counsel would be a new appeal, not immediate release from custody (*see People ex rel. Rivera v Smith*, 244 AD2d 944, 944, *lv denied* 91 NY2d 808). Rather, that contention is properly the subject of a motion for a writ of error coram nobis (*see id.*).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1102

KAH 15-01200

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
QUINCY NOLLEY, 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 (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (HEATHER MCKAY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 23, 2015 in a habeas corpus proceeding. The judgment denied and dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition seeking a writ of habeas corpus. Petitioner failed to preserve for our review his contention that respondent failed to discharge his responsibility, pursuant to Correction Law § 601-a, to notify the sentencing court of the alleged discrepancy between the sentencing minutes and the sentence and commitment order (*see generally People ex rel. Mitchell v Cully*, 63 AD3d 1679, 1679, *lv denied* 13 NY3d 708). In any event, habeas corpus relief is not available because petitioner would not be entitled to immediate release based upon respondent's alleged failure to comply with the statute (*see People ex rel. Shannon v Khahaifa*, 74 AD3d 1867, 1867, *lv dismissed* 15 NY3d 868). We decline to exercise our power under CPLR 103 (c) to convert this proceeding into a CPLR article 78 proceeding to address that unpreserved contention (*see Matter of Johnson v Fischer*, 104 AD3d 1004, 1005).

We likewise reject petitioner's request that we convert this proceeding to a CPLR article 78 proceeding and direct that he be resentenced to correct the alleged discrepancy between the sentencing minutes and the sentence and commitment order. Although petitioner sought that relief in his petition, he failed to join the sentencing court as a necessary party, and respondent had no authority to alter

the sentence and commitment order (*see Matter of Reed v Annucci*, 133 AD3d 1334, 1335). Because respondent is conclusively bound by that order and his calculation of the sentence is consistent therewith, petitioner's remedy, if any, is an appropriate proceeding before the sentencing court (*see Matter of Jackson v Fischer*, 132 AD3d 1038, 1039; *People ex rel. Davidson v Kelly*, 193 AD2d 1140, 1141).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1103

KAH 16-00167

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
RAYMOND CIMINO, PETITIONER-APPELLANT,

V ORDER

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

RAYMOND CIMINO, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered January 7, 2016 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1105

CA 16-00547

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

M&T BANK, PLAINTIFF-RESPONDENT,

V ORDER

RONALD R. BENJAMIN, ALSO KNOWN AS RONALD BENJAMIN, ALSO KNOWN AS RONALD R. BENJAMIN, ESQ., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICE OF RONALD R. BENJAMIN, BINGHAMTON (MARY JANE MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (JOSEPH S. MONTAGNOLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered December 23, 2015. The order, inter alia, granted the motion of plaintiff for summary judgment.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1106

CA 16-00552

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

M&T BANK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RONALD R. BENJAMIN, ALSO KNOWN AS RONALD BENJAMIN, ALSO KNOWN AS RONALD R. BENJAMIN, ESQ., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LAW OFFICE OF RONALD R. BENJAMIN, BINGHAMTON (MARY JANE MURPHY OF COUNSEL), FOR DEFENDANT-APPELLANT.

GETMAN & BIRYLA, LLP, BUFFALO (JOSEPH S. MONTAGNOLA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered December 28, 2015. The judgment awarded plaintiff money damages.

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

Memorandum: In this action by plaintiff lender to collect debts from defendant borrower, defendant appeals from a statement for judgment entered in favor of plaintiff. Upon our review of the judgment, we conclude that Supreme Court properly granted plaintiff's motion for summary judgment on the complaint and dismissal of defendant's counterclaim, and denied defendant's cross motion for, inter alia, leave to amend his answer and disclosure. We note with respect to the cross motion that defendant failed to support the request for leave to amend the answer with a copy of the "proposed amended . . . pleading clearly showing the changes or additions to be made" (CPLR 3025 [b]; *see Barry v Niagara Frontier Tr. Sys.*, 38 AD2d 878, 878). We further note that, in opposition to the motion and in support of that part of the cross motion seeking disclosure, defendant did not demonstrate that "facts essential to justify opposition" existed but could not then be stated because they were within the exclusive knowledge and possession of plaintiff (CPLR 3212 [f]; *see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308).

With respect to the merits of plaintiff's motion, we agree with the court that the Term Note did not evidence a "home loan" within the meaning of the statute inasmuch as the debt was not "incurred by the borrower primarily for personal, family, or household purposes" (RPAPL

1304 [5] [a] [ii]). In any event, as noted by the court, this is not an action for foreclosure of a mortgage. Thus, the transaction is not subject to the notice and the judicial conference requirements of RPAPL 1304 and CPLR 3408 (a). Finally, we conclude that plaintiff demonstrated its entitlement to judgment as a matter of law with regard to defendant's allegation that he was the victim of predatory and deceptive lending practices by plaintiff, and defendant failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1107

CA 16-00380

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

STAMM LAW FIRM AND GREGORY STAMM, ESQ.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROSEMARY LIGOTTI, DEFENDANT-APPELLANT.

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

LAW OFFICE OF THOMAS C. PARES, BUFFALO, MAGAVERN MAGAVERN GRIMM LLP (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 15, 2015. The order, inter alia, denied that part of defendant's motion seeking to dismiss the complaint.

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

Memorandum: Defendant appeals from an order that, inter alia, denied that part of her motion pursuant to CPLR 3211 to dismiss the complaint. We conclude that Supreme Court properly denied that part of the motion. Contrary to defendant's contention, an attorney's failure to comply with the rules for retainer agreements set forth in 22 NYCRR 1215.1 does not preclude that attorney from recovering under the terms of a " 'fair, understood, and agreed upon' " fee arrangement (*Ferst v Abraham*, 140 AD3d 581, 582; *see Frechtman v Gutterman*, 140 AD3d 538, 538; *Chase v Bowen*, 49 AD3d 1350, 1350-1351).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1108

CA 16-01125

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

COLLEEN M. ZBOCK, AS ADMINISTRATRIX OF THE ESTATE OF JOHN P. ZBOCK, JR., DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL B. GIETZ, RONNIE L. BROWN, PHILLIP C. FOURNIER, FOURNIER ENTERPRISES, INC., AND COPE BESTWAY EXPRESS, INC., DOING BUSINESS AS BESTWAY DISTRIBUTION SERVICE, DEFENDANTS-APPELLANTS.

BURDEN, GULISANO & HANSEN, LLC, BUFFALO (SARAH HANSEN OF COUNSEL), FOR DEFENDANTS-APPELLANTS PHILLIP C. FOURNIER, FOURNIER ENTERPRISES, INC., AND COPE BESTWAY EXPRESS, INC., DOING BUSINESS AS BESTWAY DISTRIBUTION SERVICE.

BROWN & KELLY, LLP, BUFFALO (RENATA KOWALCZUK OF COUNSEL), FOR DEFENDANT-APPELLANT DANIEL B. GIETZ.

CHELUS, HERDZIK, SPEYER & MONTE P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANT-APPELLANT RONNIE L. BROWN.

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

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered February 1, 2016. The order, insofar as appealed from, denied in part the motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant Ronnie L. Brown in its entirety and dismissing the complaint and all cross claims against him and as modified the order is affirmed without costs.

Memorandum: Plaintiff, as administratrix of the estate of John P. Zbock, Jr. (decedent), commenced this action seeking damages for the wrongful death and conscious pain and suffering of decedent allegedly resulting from a motor vehicle accident. The fatal accident occurred on Interstate 190 on the North Grand Island bridge. The sequence of events leading to the accident began when a van operated by defendant Ronnie L. Brown lost power as it approached the crest of

the bridge, and Brown moved the van to the right, but it remained in the travel lane. After activating his four-way hazard lights, Brown exited the van and descended the bridge on foot to obtain assistance. A tractor-trailer operated by defendant Phillip C. Fournier (Fournier) and owned by defendants Fournier Enterprises, Inc. and Cope Bestway Express, Inc., doing business as Bestway Distribution Service (together with Fournier, the Fournier defendants), was proceeding in the right lane when Fournier observed Brown's disabled van. Fournier slowed the tractor-trailer, moved into the left lane and engaged the four-way hazard lights. Defendant Daniel B. Gietz was operating a pickup truck in the right lane, and at some point decedent moved from behind the tractor-trailer in the left lane into the right lane. When Gietz was beside the tractor-trailer, the vehicle directly in front of Gietz moved into the left lane, and he noticed Brown's disabled van for the first time. Gietz slammed on his brakes to avoid a collision and immediately looked at his rearview mirror to see if he would be rear-ended. As soon as he stopped, Gietz observed decedent's motorcycle collide with the rear driver's side corner of his pickup truck. Decedent was propelled over the pickup truck, and both decedent and the motorcycle slid under the Fournier defendants' tractor-trailer, which ran over decedent. Decedent was pronounced dead at the scene.

Supreme Court properly denied those parts of the motions of Gietz and the Fournier defendants seeking summary judgment on the issues of negligence, proximate cause and the applicability of the emergency doctrine. With respect to Gietz, we conclude that he failed to meet his burden on the issues of negligence and proximate cause. The rear-end collision with the stopped pickup truck established a prima facie case of negligence on the part of decedent and, in order to rebut the presumption of negligence, plaintiff was required to "submit a non[]negligent explanation for the collision" (*Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790). Gietz's own account of the accident at his deposition provided a nonnegligent explanation for the collision on decedent's part and thereby rebutted the presumption of negligence. "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle . . . , and such an explanation is sufficient to overcome the inference of negligence and preclude an award of summary judgment" (*Tate v Brown*, 125 AD3d 1397, 1398 [internal quotation marks omitted]). The fact that decedent may have also been negligent does not absolve Gietz of liability inasmuch as an accident may have more than one proximate cause (*see Heal v Liszewski*, 294 AD2d 911, 911). We further conclude that Gietz failed to establish that he is entitled to the benefit of the emergency doctrine as a matter of law, inasmuch as his own submissions raise issues of fact whether he contributed to the emergency by failing to notice the disabled van in his lane or react to the actions of the tractor-trailer beside him (*see Stewart v Ellison*, 28 AD3d 252, 254).

With respect to the Fournier defendants, we conclude that the deposition testimony of one of the nonparty witnesses raised triable issues of fact whether Fournier negligently made an unsafe lane change that contributed to the foreseeable chain of events culminating in the fatal accident (*see Fogel v Rizzo*, 91 AD3d 706, 707; *Aguilar v Alonzo*,

66 AD3d 927, 928). Any inconsistencies in the testimony of that witness raised credibility issues that cannot be resolved on a summary judgment motion (*see Uribe v Merchants Bank of N.Y.*, 239 AD2d 128, 128, *affd* 91 NY2d 336; *Knepka v Tallman*, 278 AD2d 811, 811). Further, the emergency doctrine is inapplicable to the allegedly negligent conduct of Fournier, which consisted of making an abrupt lane change that cut decedent off and contributed to the emergency. Inasmuch as Fournier did not change lanes in response to a perceived emergency, and indeed the emergency did not arise until the lane change was made, the emergency doctrine does not apply (*see Jablonski v Jakaitis*, 85 AD3d 969, 970).

Contrary to the contentions of Gietz and the Fournier defendants, we further conclude that the court properly denied those parts of their motions for summary judgment dismissing plaintiff's claim for damages based upon decedent's preimpact terror. Evidence that decedent was thrown under the tractor-trailer moments following the collision with the pickup truck is sufficient to support that claim (*see Rice v Corasanti*, 122 AD3d 1374, 1375-1376).

The court erred, however, in granting Brown's motion only in part, and should have granted in its entirety Brown's motion for summary judgment dismissing the complaint and cross claims against him. Brown submitted evidence establishing as a matter of law that his efforts to warn approaching motorists of his disabled van were reasonable (*cf. Axelrod v Krupinski*, 302 NY 367, 369-370; *see generally Russo v Sabella Bus Co.*, 275 AD2d 660, 660-661), and the deposition testimony of a witness that she observed his van without its hazard lights flashing more than two hours after the accident did not raise a triable issue of fact. We therefore modify the order accordingly.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1109

CA 16-00017

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

IN THE MATTER OF ARBITRATION BETWEEN COUNTY OF MONROE, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

MONROE COUNTY FEDERATION OF SOCIAL WORKERS, IUE-CWA LOCAL 381, RESPONDENT-APPELLANT.

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

HARRIS BEACH PLLC, PITTSFORD (KYLE W. STURGESS OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered June 2, 2015. The order denied the motion of respondent for leave to reargue its opposition to the petition to vacate an arbitrator's award.

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

Memorandum: We agree with petitioner that respondent's appeal must be dismissed because no appeal lies from an order denying a motion for leave to reargue (*see Miller v Ludwig*, 126 AD3d 1397, 1398; *Empire Ins. Co. v Food City*, 167 AD2d 983, 984).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1110

CA 16-00665

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

IN THE MATTER OF THE APPLICATION FOR A REVIEW
UNDER ARTICLE 7 OF THE REAL PROPERTY TAX LAW
OF A TAX ASSESSMENT BY MAUDE DEVELOPMENT, LLC
C/O WALGREENS, PETITIONER-APPELLANT,

V ORDER

BOARD OF ASSESSMENT REVIEW AND/OR ASSESSOR OF
THE CITY OF CORNING, CITY OF CORNING,
RESPONDENTS-RESPONDENTS,
AND CORNING-PAINTED POST SCHOOL DISTRICT,
INTERVENOR-RESPONDENT.

STAVITSKY & ASSOCIATES LLC, NEW YORK CITY (BRUCE J. STAVITSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

BARCLAY DAMON, LLP, ELMIRA (BRYAN J. MAGGS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

HARRIS BEACH, PLLC, SYRACUSE (TED H. WILLIAMS OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from a judgment of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered June 1, 2015 in proceedings pursuant to RPTL article 7. The judgment, among other things, denied the petitions challenging the real property tax assessment for the 2009 and 2010 tax years.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 24 and 31, 2016,

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1111

CA 16-00588

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

JENNA CLEARY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WALDEN GALLERIA LLC, ET AL., DEFENDANTS,
AT&T MOBILITY LLC, FORMERLY KNOWN AS CINGULAR WIRELESS LLC, AND NEW CINGULAR WIRELESS PCS, LLC, DEFENDANTS-RESPONDENTS.

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

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP, NEW YORK CITY (JARETT L. WARNER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frederick J. Marshall, J.), entered September 25, 2015. The order, insofar as appealed from, granted that part of a motion seeking summary judgment dismissing the complaints and any cross claims against defendants AT&T Mobility LLC, formerly known as Cingular Wireless LLC, and New Cingular Wireless PCS, LLC.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaints and any cross claims are reinstated against defendant AT&T Mobility LLC, formerly known as Cingular Wireless LLC, and defendant New Cingular Wireless PCS, LLC.

Memorandum: In these consolidated actions seeking to recover damages for injuries allegedly sustained by plaintiff in lifting an allegedly dangerous or defective security gate at her place of employment, plaintiff appeals from an order insofar as it granted that part of a motion seeking, inter alia, summary judgment dismissing the complaints and any cross claims against AT&T Mobility LLC, formerly known as Cingular Wireless LLC, and New Cingular Wireless PCS, LLC (defendants) on the ground that such claims are barred by the exclusive remedy provisions of Workers' Compensation Law §§ 11 and 29 (6). We conclude that Supreme Court erred in determining as a matter of law that plaintiff's claims against defendants are barred by those provisions. Defendants failed to establish as a matter of law that they were plaintiff's special employers (*see generally Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351, 357-360; *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-560; *VeRost v Mitsubishi Caterpillar Forklift Am., Inc.*, 124 AD3d 1219, 1221, *lv denied* 25 NY3d 968). Moreover,

although it is well settled that the "protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29 (6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Samuel v Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594-595; *see Wolfe v Wayne-Dalton Corp.*, 133 AD3d 1281, 1284; *Allen v Oberdorfer Foundries*, 192 AD2d 1077, 1078), defendants failed to establish that they functioned as alter egos of plaintiff's employer. "A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (*Batts v IBEX Constr., LLC*, 112 AD3d 765, 766; *see Samuel*, 75 AD3d at 595). However, a mere showing that the entities are related is insufficient where, as here, a defendant cannot demonstrate that one of the entities controls the daily operations of the other (*see Samuel*, 75 AD3d at 595). " '[C]losely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, [their] assets are not commingled, and the principals treat the two entities as separate and distinct' " (*Lee v Arnan Dev. Corp.*, 77 AD3d 1261, 1262).

Turning to the two other grounds for summary judgment raised by defendants in the motion, we note that the court did not address those other grounds, thereby implicitly denying the motion on those other grounds (*see Supensky v State of New York*, 2 AD3d 1436, 1437; *Bald v Westfield Academy & Cent. Sch.*, 298 AD2d 881, 882; *Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864). Although defendants are not aggrieved by the order and thus could not have cross-appealed herein (*see e.g. Matter of Tehan v Tehan's Catalog Showrooms, Inc.* [appeal No. 2], ___ AD3d ___, ___ [Nov. 10, 2016]), they nonetheless properly raise those grounds as alternative bases for affirmance of the order granting their motion (*see Cox v McCormick Farms, Inc.*, ___ AD3d ___, ___ [Nov. 10, 2016]; *see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546). We conclude, however, that those alternative grounds lack merit.

"In seeking summary judgment dismissing the complaint [against them], defendant[s] had the initial burden of establishing that [they] did not create the alleged dangerous condition and did not have actual or constructive notice of it" (*Seferagic v Hannaford Bros. Co.*, 115 AD3d 1230, 1230-1231 [internal quotation marks omitted]). We conclude that defendants did not meet that burden (*see Gabriel v Johnston's L.P. Gas Serv., Inc.*, 143 AD3d 1228, 1230-1231; *Smith v Szpilewski*, 139 AD3d 1342, 1342-1343) and that plaintiff in any event raised a triable issue of fact whether defendants had such actual or constructive notice of the alleged defect (*see Mandzyk v Manor Lanes*, 138 AD3d 1463, 1464-1465). We further conclude that defendants failed to demonstrate that the allegedly dangerous or defective condition of the gate was not a proximate cause of plaintiff's injuries (*see Smith*,

139 AD3d at 1342-1343; *Mercedes v Menella*, 34 AD3d 655, 656).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1113

TP 16-00741

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF MICHAEL ALLEN, PETITIONER,

V ORDER

CAPTAIN R. SHIELDS, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

MICHAEL ALLEN, 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, Seneca County [Dennis F. Bender, A.J.], entered May 2, 2016) to review a determination of respondent. The determination found after a tier II 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: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1114

KA 15-00070

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN FARRARA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 Erie County Court (Thomas P. Franczyk, J.), rendered October 23, 2014. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of rape in the third degree (Penal Law § 130.25 [2]). Contrary to defendant's contention, we conclude that " '[t]he plea colloquy and the written waiver of the right to appeal signed [and acknowledged in court] by defendant demonstrate that [he] knowingly, intelligently and voluntarily waived the right to appeal' " (*People v Kesick*, 119 AD3d 1371, 1372). Defendant's valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 256).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1115

KA 15-00107

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 25, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1117

KA 12-01650

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. HENNIGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Ontario County Court (Craig J. Doran, J.), rendered July 2, 2012. Defendant was resentenced upon his conviction of assault in the second degree, assault on a peace officer, police officer, fireman, or emergency medical services professional and attempted criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and, in appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, burglary in the second degree (§ 140.25 [2]). Although the notice of appeal in appeal No. 1 is taken from the judgment entered May 21, 2012, and not the resentence on July 2, 2012, we exercise our discretion to treat the appeal as taken from the resentence (*see* CPL 460.10 [6]). We reject defendant's contention in appeal Nos. 1 and 2 that the concurrent sentences are unduly harsh and severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1118

KA 14-00225

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID A. HENNIGAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (CARA A. WALDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 2, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree and petit larceny (two counts).

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

Same memorandum as in *People v Hennigan* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1119

KA 14-00873

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELHAJJI ELSHABAZZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 14, 2014. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and burglary in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [3] [felony murder]), and two counts of burglary in the first degree (§ 140.30 [1], [2]), defendant contends that the murder conviction is not supported by legally sufficient evidence with respect to the issue of causation, and that the verdict on that count is contrary to the weight of the evidence for the same reason. Defendant was convicted as an accessory to the criminal conduct of Shaquar Pratcher (codefendant) who, during a home invasion burglary, beat the 96-year-old victim so severely that many of the victim's numerous orbital and jaw fractures had not healed when he died more than four months after the attack. For the reasons stated in codefendant's appeal (*see People v Pratcher*, 134 AD3d 1522, 1524-1525, *lv denied* 27 NY3d 1154), we conclude that the conviction is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that Supreme Court failed to establish that he knowingly, voluntarily, and intelligently waived his right to a jury trial. Defendant failed to challenge the sufficiency of the allocution regarding that waiver, and he therefore failed to preserve

that challenge for our review (*see People v Magnano*, 158 AD2d 979, 979, *affd* 77 NY2d 941, *cert denied* 502 US 864; *People v Hailey*, 128 AD3d 1415, 1415-1416, *lv denied* 26 NY3d 929). In any event, defendant's contention is without merit. It is well settled that "no particular catechism is required to establish the validity of a jury trial waiver. The [court's] inquiry here, though minimal, was sufficient to establish that defendant understood the ramifications of such waiver" (*People v Smith*, 6 NY3d 827, 828, *cert denied* 548 US 905; *see Hailey*, 128 AD3d at 1416).

Finally, defendant contends that he was denied the effective assistance of counsel because his attorney called an alibi witness whose testimony corroborated the testimony of the two codefendants who testified against defendant, which affirmatively hurt the defense. We reject that contention. It is well settled that, where a defendant raises an ineffective assistance of counsel challenge, "[s]o long as the evidence, the law, and the circumstances of [the] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147). Furthermore, the Court of Appeals has clarified that, although "the inquiry focuses on the quality of the representation provided to the accused, the claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" (*People v Benevento*, 91 NY2d 708, 714). Here, counsel filed several pretrial and mid-trial motions and arguments, including one in which he succeeded in suppressing defendant's statement to the police, delivered focused opening and closing statements, and vigorously cross-examined the People's witnesses, including their expert. In addition, we note that there was significant additional evidence, including surveillance video recordings and DNA evidence, which corroborated the testimony of the two codefendants who testified against defendant at trial (*cf. People v Jarvis*, 113 AD3d 1058, 1060-1061, *affd* 25 NY3d 968). Consequently, we conclude that, "[a]lthough the prosecution discredited the alibi testimony, [that] alone did not 'seriously compromise' defendant's right to a fair trial . . . [and, in] view of . . . counsel's competency in all other respects, we conclude that counsel's failed attempt to establish an alibi was at most an unsuccessful tactic that cannot be characterized as ineffective assistance" (*People v Henry*, 95 NY2d 563, 566).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1120

KA 15-02133

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY J. PARIS, III, DEFENDANT-APPELLANT.

ANTHONY J. CERVI, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 12, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the declaration of delinquency is vacated, and the sentence of probation is reinstated.

Memorandum: On appeal from a judgment revoking his sentence of probation imposed upon his conviction of strangulation in the second degree (Penal Law § 121.12) and imposing a sentence of incarceration, defendant contends that the People failed to meet their burden of establishing that he violated a condition of his probation. We agree.

"The People have the burden of establishing by a preponderance of the evidence that defendant violated the terms and conditions of his probation" (*People v Dettelis*, 137 AD3d 1722, 1722; *see* CPL 410.70 [3]). "Although hearsay evidence is admissible in probation violation proceedings . . . , the People must present facts of a probative character, outside of the hearsay statements, to prove the violation" (*People v Pettway*, 286 AD2d 865, 865, *lv dismissed* 97 NY2d 686; *see People v Owens*, 258 AD2d 901, 901, *lv denied* 93 NY2d 975). Contrary to the People's contention, the only evidence adduced at the hearing that defendant had violated the condition that he successfully complete treatment at an out-of-town residential substance abuse program was the hearsay statement of a counselor to defendant's probation officer that defendant was not compliant with his treatment and had been unsuccessfully discharged from the program (*see People v DeMoney*, 55 AD3d 953, 954; *Owens*, 258 AD2d at 901; *cf. People v Michael J.F.*, 15 AD3d 952, 953). We thus conclude that Supreme Court's finding that defendant violated the subject condition of his probation is not supported by a preponderance of the evidence (*see* CPL

410.70 [3]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1121

KA 13-01654

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID STREBER, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON 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 (John R. Schwartz, A.J.), rendered July 9, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of stolen property in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him, upon a plea of guilty, of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]), defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because County Court failed to inform him of a direct consequence of his plea. We agree and therefore reverse the judgment, grant defendant's motion to withdraw his guilty plea, vacate the plea, and remit the matter to County Court for further proceedings on the indictment.

"It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361; *see People v Harnett*, 16 NY3d 200, 205; *People v Hill*, 9 NY3d 189, 191, *cert denied* 553 US 1048). Direct consequences of a plea are those that have "a definite, immediate and largely automatic effect on [a] defendant's punishment" (*People v Ford*, 86 NY2d 397, 403) and include, among other "core components of a defendant's sentence[,]" the term of imprisonment (*Harnett*, 16 NY3d at 205). Here, although the court during defendant's arraignment articulated the terms of a plea offer that included the alternative sentences defendant would receive if he was or was not successful in the Judicial Diversion Program, the court did not state those alternative sentences on the

record during the plea colloquy. Specifically, although the court stated during the plea colloquy that defendant would receive a "cap of felony probation if successful[,]" the court did not articulate the sentence that defendant would receive if he was unsuccessful.

Furthermore, the Judicial Diversion Program Contract (Contract) signed by defendant on the date he pleaded guilty contradicts the terms of the plea agreement set forth in the transcript of defendant's arraignment. Namely, during the arraignment, the court stated, "if unsuccessful, a cap of one and a half to three. If successful, a cap of five years probation." In contrast, the Contract provides that defendant would receive "felony probation" if he was unsuccessful, but it does not reflect that defendant was promised any particular sentence in the event that he was successful with the program. Thus, even though the court ensured during the plea colloquy that no promises had been made to defendant "other than the promises placed on the record and contained in the [C]ontract[,]" the promises made on the record were inconsistent with the promises made in the Contract.

To the extent that the People contend that the court corrected those inconsistencies when the Contract was later amended to reflect the terms of the plea agreement, we reject that contention. The Contract was amended and re-signed by defendant one week after defendant's guilty plea was taken, and the Court of Appeals has made clear that the court must inform the defendant of the direct consequences of a plea "[p]rior to accepting a guilty plea" (*Hill*, 9 NY3d at 191). Moreover, there is no evidence in the record that defendant was afforded an opportunity to withdraw his guilty plea on the date he re-signed the amended Contract. Finally, we reject the People's contention that the court's amendment of the Contract was merely ministerial or clerical in nature (*see People v Howard*, 1 AD3d 1015, 1016; *see also People v Minaya*, 54 NY2d 360, 364, *cert denied* 455 US 1024). The record is insufficient for us to conclude that the court's amendment "fully comported with the expectations of the court, the prosecutor, and the defendant at the time the plea was originally entered" (*Howard*, 1 AD3d at 1016 [internal quotation marks omitted]), and thus the court was not permitted to make the amendment as a ministerial or clerical matter.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1122

CAF 15-01547

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF BRIAN KNIGHT,
PETITIONER-APPELLANT,

V ORDER

NADIA WASHPUN, RESPONDENT-RESPONDENT.

IN THE MATTER OF NADIA WASHPUN,
PETITIONER-RESPONDENT,

V

BRIAN KNIGHT, RESPONDENT-APPELLANT.

TANYA J. CONLEY, ESQ., ATTORNEY FOR
THE CHILD, APPELLANT.

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

TANYA J. CONLEY, ATTORNEY FOR THE CHILD, ROCHESTER, APPELLANT PRO SE.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered August 31, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted primary physical custody of the parties' son to Nadia Washpun.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1123

CAF 15-01520

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF TERIZA SHEHATOU,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EMAD LOUKA, RESPONDENT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR RESPONDENT-APPELLANT.

ALDERMAN AND ALDERMAN, SYRACUSE (EDWARD B. ALDERMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, ATTORNEY FOR THE CHILDREN, MANLIUS.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 26, 2015 in a proceeding pursuant to Family Court Act article 4. The order, among other things, denied respondent's application to, inter alia, vacate an order entered upon his default.

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

Memorandum: Respondent father appeals from an order that, inter alia, denied his application seeking to vacate an order entered upon his default in which Family Court determined that he willfully violated a child support order. The determination whether to vacate an order entered upon a default is left to the sound discretion of the court (*see Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965), and we conclude that the court did not abuse its discretion here. "Pursuant to CPLR 5015 (a) (1), a court may vacate a judgment or order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense" (*id.*). "Although default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously in those cases . . . , that policy does not relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense" (*Matter of Strumpf v Avery*, 134 AD3d 1465, 1465-1466 [internal quotation marks omitted]). Even assuming, arguendo, that the father established a reasonable excuse for his failure to appear for the trial based upon allegedly confusing correspondence from petitioner mother's attorney with respect to

whether the mother had withdrawn her petition, we nevertheless conclude that the father failed to establish a meritorious defense. "In order to support his claim of a meritorious defense, the father was required to set forth sufficient facts [or legal arguments] to demonstrate, on a prima facie basis, that a defense existed . . . , but he failed to do so" (*id.* at 1466 [internal quotation marks omitted]). The father repeated arguments in his affidavit that had been unsuccessful in prior support proceedings, i.e., that he received Social Security benefits and that he was unable to work. We conclude, however, that he failed to establish his inability to work, and his conclusory assertions were not sufficient to establish a meritorious defense (*see Matter of Commissioner of Social Servs. v Turner*, 99 AD3d 1244, 1244-1245).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1124

CAF 15-02024

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

IN THE MATTER OF GERALD SMITH,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TONYA STEWART, RESPONDENT-RESPONDENT.

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

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered May 1, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied petitioner's request for visitation with the subject child at a correctional facility.

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, petitioner father appeals from an order that, inter alia, denied without prejudice his request for in-person visitation with the subject child at the correctional facility in which he is currently incarcerated. Contrary to petitioner's contention, we conclude that "a sound and substantial basis exist[s] in the record for the [Referee]'s determination that the visitation requested by petitioner would not be in the . . . child's best interest[s] under the present circumstances" (*Matter of Ellett v Ellett*, 265 AD2d 747, 748).

It is well settled that "visitation decisions are generally left to Family Court's sound discretion, requiring reversal only where the decision lacks a sound and substantial basis in the record" (*Matter of Helles v Helles*, 87 AD3d 1273, 1273 [internal quotation marks omitted]; *see Matter of Rulinsky v West*, 107 AD3d 1507, 1509). Furthermore, " '[i]t is generally presumed to be in a child's best interest[s] to have visitation with his or her noncustodial parent[,] and the fact that a parent is incarcerated will not, by itself, render visitation inappropriate' " (*Matter of Thomas v Thomas*, 277 AD2d 935, 935; *see Matter of Cierra L.B. v Richard L.R.*, 43 AD3d 1416, 1416-1417). Nevertheless, "where, as here, domestic violence is

alleged, 'the [Referee] must consider the effect of such domestic violence upon the best interests of the child' " (*Matter of Moreno v Cruz*, 24 AD3d 780, 781, *lv denied* 6 NY3d 712, quoting Domestic Relations Law § 240 [1]; *see Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). Furthermore, petitioner presented no plan to accomplish the requested visitation, and the record establishes that none of his friends or family members have offered to facilitate transportation of the child (*cf. Matter of Granger v Misercola*, 96 AD3d 1694, 1695, *affd* 21 NY3d 86). In addition, the record supports the Referee's determination that respondent does not have a driver's license or the financial resources to provide transportation for the child. Consequently, we conclude that a sound and substantial basis in "[t]he record supports the [Referee]'s conclusion that petitioner had no reasonable, feasible plan to facilitate the requested visitation and that compelling [respondent] to undertake the travel arrangements and have contact with petitioner was not reasonable or appropriate. Notably, the denial was not premised merely on an arbitrary opposition to visitation or its cost and inconvenience . . . but, rather, on the unavailability of any appropriate arrangement to accomplish physical visitation under the[] circumstances" (*Matter of Conklin v Hernandez*, 41 AD3d 908, 911; *see Matter of Anthony MM. v Rena LL.*, 34 AD3d 1171, 1172, *lv denied* 8 NY3d 805).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1126

CA 16-00143

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

PETER C. BRADY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARY LOU DOMINO, DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (MAURICE L. SYKES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 4, 2015. The order granted defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he dove into the shallow end of an in-ground residential swimming pool owned by defendant. Plaintiff alleged that defendant was negligent because she failed to have a rope and float assembly across the pool to delineate the shallow end from the deep end. Supreme Court granted defendant's motion for summary judgment dismissing the complaint, concluding that plaintiff's conduct was reckless, unforeseeable to defendant, and the sole proximate cause of his injuries. We affirm.

It is well established that "[s]ummary judgment is an appropriate remedy in swimming pool injury cases when from his 'general knowledge of pools, his observations prior to the accident, and plain common sense' . . . , the plaintiff should have known that, if he dove into the pool, the area into which he dove contained shallow water and, thus, posed a danger of injury" (*Sciangula v Mancuso*, 204 AD2d 708, 709). In light of that standard, we conclude that defendant met her burden on the motion, and that plaintiff failed to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562). The record establishes that plaintiff lived on the same street as defendant, swam in the subject pool multiple times prior to the accident, was aware that striking the bottom of a pool was a risk when diving into the shallow end of the pool, and acknowledged that he knew the depth dimensions of defendant's pool, i.e., where the shallow end started and ended. Under those circumstances, we conclude that plaintiff's

reckless conduct was the sole proximate cause of his injuries (*see Howard v Poseidon Pools*, 72 NY2d 972, 974-975; *Smith v Stark*, 67 NY2d 693, 694; *Campbell v Muswim Pools, Inc*., 147 AD2d 977, 978, *lv denied* 74 NY2d 608; *see also Boltax v Joy Day Camp*, 113 AD2d 859, 860-861, *affd* 67 NY2d 617). Furthermore, even assuming, arguendo, that defendant was negligent in failing to provide a "safety float line separating the shallow and deep end of [her] pool, [we conclude that] even the most liberal interpretation of the record eliminates any cause of this accident other than the reckless conduct of plaintiff" (*Magnus v Fawcett*, 224 AD2d 241, 241-242; *see Finguerra v Conn*, 280 AD2d 420, 421, *lv denied* 96 NY2d 714; *Bird v Zelin*, 237 AD2d 107, 108).

In view of our determination, we see no need to address plaintiff's remaining contentions.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1127

CA 16-00707

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

BARBARA J. HINES-BELL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LAURIE M. CRIDEN, DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ROBERT L. VOLTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 22, 2016. The order granted the motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion seeking summary judgment on the issues of serious injury and sole proximate cause of the injuries, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was rear-ended by a vehicle operated by defendant. Plaintiff moved for partial summary judgment contending that, as a result of the accident, she sustained a serious injury under the fracture, permanent consequential limitation of use, and significant limitation of use categories set forth in Insurance Law § 5102 (d), that defendant was negligent, and that defendant's negligence was the sole proximate cause of plaintiff's serious injury. Supreme Court granted the motion. We agree with defendant that plaintiff failed to establish as a matter of law that she sustained a serious injury or that defendant's negligence was the sole proximate cause of any such injury. Supreme Court erred in granting the motion with respect to those issues, and we therefore modify the order accordingly.

In support of her motion, plaintiff submitted medical records, an independent medical examination report, and a physician's affidavit, which established that, as a result of the accident, plaintiff sustained a left wrist scaphoid fracture, which required surgery, and sustained significant losses of range of motion in her lumbar spine, together with a large traumatic annular tear at L4-5 in her lumbar spine, which also required surgery. We thus conclude that plaintiff

met her burden on the motion. In opposition, defendant submitted affidavits from two physicians, one of whom is also an engineer specializing in the analysis of the response of the human body to forces resulting from events such as automobile collisions to determine how injuries are caused. Both of defendant's experts opined that the wrist fracture predated the accident, that the facts of the accident were inconsistent with the force needed to cause such a fracture, and that plaintiff's back injury was degenerative in nature and not caused by the accident. "It is well established that 'conflicting expert opinions may not be resolved on a motion for summary judgment' " (*Crutchfield v Jones*, 132 AD3d 1311, 1311; *see Edwards v Devine*, 111 AD3d 1370, 1372; *Fonseca v Cronk*, 104 AD3d 1154, 1155). Thus, contrary to plaintiff's assertion, defendant raised a triable issue of fact whether there was a causal relationship between plaintiff's alleged injuries and the accident.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1128

CA 16-00402

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

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

V MEMORANDUM AND ORDER

JOSEPH M. ANDERSON, DEFENDANT-APPELLANT.

CONNORS LLP, BUFFALO (CHRISTINA L. SACCOCIO OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (JOSEPH M. FINNERTY OF COUNSEL), AND REBECCA H. BARITOT, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered May 20, 2015. The order denied the motion of defendant seeking restitution of payments made to plaintiff.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the matter is remitted to Supreme Court, Niagara County, to calculate the amount of restitution.

Memorandum: In a prior appeal, we reversed the order that denied defendant's request to terminate his obligation to pay plaintiff consultation fees as provided for in the separation and property settlement agreement (agreement), which was incorporated but not merged into the judgment of divorce. Our rationale for granting that part of defendant's motion seeking termination of the consultation fees was that "plaintiff [had] breached her duty of loyalty to [defendant as] her employer" by operating a business that was in direct competition with defendant's business (*Anderson v Anderson*, 120 AD3d 1559, 1561). Thereafter, defendant sought restitution of the payments he had previously made pursuant to the order that was reversed on appeal (*see* CPLR 5015 [d]; 5523). We conclude that Supreme Court improvidently exercised its discretion in denying defendant's motion seeking such restitution, and we therefore reverse. Because the order directing defendant to reinstate the consultation fees pursuant to the agreement and to pay arrears for unpaid fees was reversed on appeal, defendant was entitled to seek restitution of those amounts that he had paid pursuant to the order (*see Gaisi v Gaisi*, 108 AD3d 687, 688; *see generally Schildkraut v Schildkraut*, 240 AD2d 649, 650). We conclude that the court should have "restore[d] the parties to the position they were in" prior to issuance of the

order (*Gaisi*, 108 AD3d at 688), inasmuch as plaintiff was not entitled to consultation fees after her employment was terminated for competing with defendant's business.

We reject plaintiff's contention that the consultation fees made pursuant to the agreement constituted maintenance. Although the parties agreed that defendant would provide "a substitute source of monetary support for plaintiff after defendant's maintenance obligation terminated, . . . the *reason* defendant agreed to employ plaintiff does not change the fact that the agreement established an employment relationship with corresponding rights and obligations for both parties" (*Anderson*, 120 AD3d at 1560). Even assuming, arguendo, that the payments constituted maintenance for plaintiff, we conclude that recoupment is appropriate under the circumstances presented here (*see Stimmel v Stimmel*, 163 AD2d 381, 383; *see generally Johnson v Chapin*, 12 NY3d 461, 466).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1129

CA 16-00477

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

JEFFREY CIANCHETTI, DC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PHYLLIS BURGIO, DC, DEFENDANT-APPELLANT.

ROSCETTI & DECASTRO, P.C., NIAGARA FALLS (JAMES C. ROSCETTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

TISDALE & COYKENDALL, NIAGARA FALLS (THOMAS J. CASERTA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark Montour, J.), entered June 12, 2015. The order granted plaintiff money damages for breach of contract.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, breach of contract arising out of defendant's sale of a chiropractic practice to plaintiff. After discovery, plaintiff moved for partial summary judgment on the issue of defendant's liability for breach of contract, and defendant cross-moved for summary judgment dismissing the complaint. Each party contended in support of his or her requested relief that the terms of the contract were clear and unequivocal. Supreme Court, inter alia, denied defendant's cross motion based on its conclusion that the contract was ambiguous and, on a prior appeal, this Court affirmed that determination (*Cianchetti v Burgio*, 89 AD3d 1410, 1411). The matter proceeded to a nonjury trial, and defendant now appeals from an order in which the court, among other things, concluded that defendant breached the parties' contract and awarded plaintiff damages for that breach. We affirm.

Initially, we reject defendant's contention that the contract was not ambiguous. We previously affirmed the court's determination that the contract was ambiguous, and "[o]ur prior decision in [a] case is the law of the case until modified or reversed by a higher court" (*Senf v Staubitz*, 11 AD3d 997, 997; *see J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259, 1260). We also reject defendant's contention that the court erred, when interpreting the contract, in using extrinsic evidence to ascertain the intent of the parties. It is well settled that, although "matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face

of the instrument" (*Chimart Assoc. v Paul*, 66 NY2d 570, 572-573), where the contract "on its face is reasonably susceptible of more than one interpretation," it is ambiguous (*General Motors, LLC v B.J. Muirhead Co., Inc.*, 120 AD3d 927, 928 [internal quotation marks omitted]), and "the intent of the contracting parties may properly be determined based on the extrinsic evidence submitted by the parties" (*T.L.C. W., LLC v Fashion Outlets of Niagara, LLC*, 60 AD3d 1422, 1423).

With respect to defendant's contention that the court erred in determining that she breached the contract, we note that, inasmuch as this is a determination after a nonjury trial, "[o]ur scope of review is as broad as that of the trial court" (*Matter of Capizola v Vantage Intl.*, 2 AD3d 843, 844). It is well settled, however, that the decision of a court following a nonjury trial should not be disturbed on appeal "unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially [where, as here,] the findings of fact rest in large measure on considerations relating to the credibility of witnesses" (*Thoreson v Penthouse Intl.*, 80 NY2d 490, 495, *rearg denied* 81 NY2d 835 [internal quotation marks omitted]). Moreover, when conducting such a review, we must view the record "in the light most favorable to sustain the judgment" (*Farace v State of New York*, 266 AD2d 870, 871; *see A&M Global Mgt. Corp. v Northtown Urology Assoc., P.C.*, 115 AD3d 1283, 1286). Upon conducting that review, we conclude that there is a fair interpretation of the evidence supporting the court's determination that defendant breached the contract. We have considered defendant's specific contentions, including those with respect to the unforeseeable nature of her medical condition, the number of patient visits to the chiropractic practice, and plaintiff's alleged lack of due diligence, and we conclude that they do not require a different result.

Finally, contrary to defendant's further contention, the amount of damages is "supported by competent evidence and is within the range of the expert testimony" (*Manlius Ctr. Rd. Corp. v State of New York*, 49 AD2d 685, 685; *cf. S.J. Kula, Inc. v Carrier*, 107 AD3d 1541, 1542; *see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1132

CA 16-00020

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

PEGGYANN HART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. HART, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered March 25, 2015. The order, inter alia, found that defendant willfully failed to obey prior court orders and that plaintiff willfully failed to obey the provisions of Domestic Relations Law § 236 (B) (2) (b).

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

Same memorandum as in *Hart v Hart* ([appeal No. 2] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1133

CA 16-00021

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

PEGGYANN HART, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES R. HART, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MITCHELL LAW OFFICE, OSWEGO (RICHARD C. MITCHELL, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered April 1, 2015. The judgment, inter alia, equitably distributed the marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the decretal paragraphs directing equitable distribution of the marital property, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Oswego County, for further proceedings in accordance with the following memorandum: In appeal No. 1, defendant husband appeals from an order in which Supreme Court determined that he willfully failed to obey two prior orders of the court and that plaintiff wife willfully failed to obey the provisions of Domestic Relations Law § 236 (B) (2) (b). The court also suspended judgment against both parties. In appeal No. 2, defendant appeals from a judgment of divorce that, inter alia, directed equitable distribution of the marital property.

As a preliminary matter, we note that appeal No. 1 must be dismissed. Defendant does not challenge the finding against him of willful failure to obey the court's prior orders (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545), and he is not aggrieved by the finding against plaintiff with respect to her willful failure to obey the provisions of Domestic Relations Law § 236 (B) (2) (b) (*see* CPLR 5511; *see also Stewart v Dunkleman*, 128 AD3d 1338, 1341, *lv denied* 26 NY3d 902).

We agree with defendant in appeal No. 2 that the court erred in classifying as marital property a house he bought prior to the marriage (hereafter, Seneca Hill Property). It was undisputed that the Seneca Hill Property was purchased by defendant prior to the

marriage, and we conclude that it was not transmuted into marital property when the parties used it as the marital residence for approximately two years, or by virtue of defendant having used some of the sale proceeds therefrom to assist in funding the purchase of a new marital residence (*see* Domestic Relations Law § 236 [B] [1] [d] [1]; *Ahearn v Ahearn*, 137 AD3d 719, 720; *Rivera v Rivera*, 126 AD3d 1355, 1356). Defendant was therefore entitled to a credit for his separate property contributions to the marital estate (*see Judson v Judson*, 255 AD2d 656, 657; *see also Maczek v Maczek*, 248 AD2d 835, 836-837). We further conclude, however, that the appreciated value of the Seneca Hill Property that the court determined to be attributable to the contributions of plaintiff should have been classified as marital property (*see Robinson v Robinson*, 133 AD3d 1185, 1187; *Macaluso v Macaluso*, 124 AD3d 959, 961). We thus vacate the decretal paragraphs of the judgment directing equitable distribution of the marital property, and we remit the matter to Supreme Court for a redistribution thereof consistent with our decision.

We have reviewed defendant's other contentions in appeal No. 2 and conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1134

CA 16-00202

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, AND SCUDDER, JJ.

SYLVIA F. BRYANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM M. CARTY, DEFENDANT-APPELLANT.

DEGNAN LAW OFFICE, CANISTEO (ANDREW J. ROBY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER, KELLY WHITE DONOFRIO LLP (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered October 7, 2015. The order declined to set aside the child support provisions of the judgment of divorce.

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

Memorandum: In a prior appeal, we agreed with defendant that Supreme Court erred in denying, without a hearing, that part of his motion seeking to vacate the child support provisions of the judgment of divorce, and we remitted the matter for a hearing (*Bryant v Carty*, 118 AD3d 1459). As we explained in our decision, "the judgment of divorce specifically provided that the child support provisions of the parties' 2009 Property Settlement and Separation Agreement (Agreement) merged with the judgment of divorce" (*id.* at 1459). It is undisputed that, in determining the amount of child support, the Agreement contained income information from 2003, which the parties relied on in a prior agreement entered into in 2005, rather than income information from 2008, as required by Domestic Relations Law § 240 (1-b) (b) (5) (i). Following a hearing, which the record establishes was limited to defendant's allegation that the Agreement was procured by fraud on the part of plaintiff, the court properly determined that defendant failed to meet his burden of establishing fraud (*see Weimer v Weimer*, 281 AD2d 989, 989; *see generally Christian v Christian*, 42 NY2d 63, 71-73). The evidence established that the parties agreed to use the 2003 income information to expedite the divorce and that defendant carefully read the Agreement before he signed it.

Defendant raises for the first time on appeal his contention that the child support provisions of the judgment should be vacated on the ground that those provisions do not comply with the requirements of the Child Support Standards Act (*see* Domestic Relations Law § 240 [1-

b] [b], [h]), and thus that contention is not properly before us (*see Leroy v Leroy*, 298 AD2d 923, 924; *see also Nash v Yablon-Nash*, 61 AD3d 832, 832; *Dudla v Dudla*, 304 AD2d 1009, 1010; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Although plaintiff properly concedes that the court erred in precluding defendant from questioning plaintiff's former attorney regarding certain factual matters (*see Stanwick v A.R.A. Servs.*, 124 AD2d 1041, 1041-1042; *see generally Muriel Siebert & Co., Inc. v Intuit Inc.*, 32 AD3d 284, 286, *affd* 8 NY3d 506), we conclude that the error was harmless inasmuch as follow-up questions would have necessarily involved confidential communications made for the purpose of giving or obtaining legal advice (*see generally Stanwick*, 124 AD2d at 1042). Furthermore, there is no evidence that the communication between plaintiff and her former attorney was "made 'in furtherance of a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct,' " and thus, contrary to defendant's contention, the crime-fraud exception does not apply (*Parnes v Parnes*, 80 AD3d 948, 951).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1135

KA 12-02100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUEL WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 5, 2012. The appeal was held by this Court by order entered December 31, 2015, decision was reserved and the matter was remitted to Supreme Court, Onondaga County, for further proceedings (134 AD3d 1572). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter for Supreme Court to make and state for the record a determination whether defendant is a youthful offender (*People v Williams*, 134 AD3d 1572; *see generally People v Rudolph*, 21 NY3d 497, 503). Upon remittal, the court, after considering the appropriate factors (*see People v Cruickshank*, 105 AD2d 325, 334, *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625), determined that granting defendant youthful offender status would not serve the interest of justice (*see* CPL 720.20 [1] [a]). We conclude that the court did not thereby abuse its discretion (*see People v Agee*, 140 AD3d 1704, 1704-1705, *lv denied* 28 NY3d 925), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see People v Hall*, 130 AD3d 1495, 1496, *lv denied* 26 NY3d 968). We further conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1136

KA 15-00019

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONAS PEACOCK, 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 (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 23, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted strangulation 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 strangulation in the second degree (Penal Law §§ 110.00, 121.12). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see id.* at 255; *People v Lococo*, 92 NY2d 825, 827).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1137

KA 15-00656

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN ALLPORT, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Orleans County Court (James P. Punch, J.), entered March 4, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order classifying him as a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that he was denied effective assistance of counsel at the SORA classification proceeding. We reject that contention. Defendant's contention that his attorney at the classification proceeding should have challenged each of the points assessed is without merit. "It is well established that '[a] defendant is not denied effective assistance of . . . counsel merely because counsel does not make a motion or argument that has little or no chance of success' " (*People v Greenfield*, 126 AD3d 1488, 1489, *lv denied* 26 NY3d 903, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Here, the record establishes that there was no colorable basis for challenging any of the points assessed. With respect to defendant's further contention that counsel was ineffective in failing to seek a downward departure from defendant's presumptive risk level, "we conclude that there are no 'mitigating factors warranting a downward departure from his risk level' " (*id.*). Thus, contrary to defendant's contention, "[c]ounsel could have reasonably concluded that there was nothing to litigate at the hearing" (*People v Reid*, 59 AD3d 158, 159, *lv denied* 12 NY3d 708; *see People v Westfall*, 114 AD3d 1264, 1264; *see also People v Bowles*, 89 AD3d 171, 181, *lv denied* 18 NY3d 807).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1140

KA 15-01408

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE HUNTER, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, 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 (Thomas G. Leone, J.), rendered May 14, 2015. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). Contrary to defendant's contention, County Court properly refused to suppress the hand-made weapon removed from defendant's pocket during a pat frisk without conducting a hearing. Although defense counsel stated that he was unable to determine the reason defendant was searched from the information he had received from defendant, the former attorney and the People (*see generally People v Bryant*, 8 NY3d 530, 533-534), the record establishes that he was aware that a correction officer had observed defendant engage in what he considered to be suspicious behavior when defendant moved his right hand very slowly and put an item in his right front pocket while seated at a table in the dining hall. Defense counsel's assertion that a hearing was required to obtain more information regarding the basis for the search is not sufficient to establish defendant's entitlement to a hearing (*see generally People v Garay*, 25 NY3d 62, 72, *cert denied* ___ US ___, 136 S Ct 501).

We reject defendant's contention that he was denied his constitutional right to attend a sidebar conference during jury selection. The record establishes that the court and counsel discussed a ministerial matter regarding whether some of the venire could be released because 11 jurors had been selected, and thus defendant failed to establish that the conference was a material stage of the trial or that he otherwise had the right to be present because

he would have had " 'something valuable to contribute' " to that discussion (*People v Monroe*, 90 NY2d 982, 984). By failing to object to the use of leg shackles during the trial after the court had reserved its decision on that part of defendant's omnibus motion until trial, defendant failed to preserve for our review his contention that his due process rights were violated by the use of leg shackles without sufficient explanation by the court on the record (*see People v Campbell*, 106 AD3d 1507, 1509, *lv denied* 21 NY3d 1002). In any event, although the court erred in failing to articulate its reasons for requiring the use of leg shackles, the error is harmless (*see People v Clyde*, 18 NY3d 145, 153).

Defendant also failed to preserve for our review his contention that the court committed reversible error in providing a response to the inquiry of a juror during deliberations, out of the presence of the other jurors (*see* CPL 470.05 [2]). In any event, we note that the court thereafter instructed the jury, in response to that question, that there was no evidence regarding what items an inmate was permitted to carry in his or her pocket and that the jury was required to consider only the evidence presented (*see generally People v Torres*, 125 AD3d 1481, 1483, *lv denied* 25 NY3d 1172). Thus, any error is harmless inasmuch as the evidence of guilt is overwhelming, and there is no significant probability that defendant would have been acquitted if the court had responded differently to the juror's inquiry (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant further contends that alleged errors on the part of the court denied him a fair trial. Contrary to defendant's contention, the court did not err in giving an *Allen* charge over his objection under the circumstances presented here. The jury had deliberated for five hours over a two-day period on the single count and, in response to the court's inquiry whether the jury was close to a verdict in an effort to determine what it would do about the jury's lunch break, the jury responded that it was not close to a verdict (*see generally People v Arguinzoni*, 48 AD3d 1239, 1241-1242, *lv denied* 10 NY3d 859). Contrary to defendant's further contention, the court did not coerce a verdict when it advised the jury that it might be required to recess two hours early that day (*see People v Morency*, 93 AD3d 736, 738, *lv denied* 20 NY3d 934). Defendant failed to preserve for our review his remaining two contentions regarding the court's alleged errors because he failed to object to the court's actions (*see* CPL 470.05 [2]) and, in any event, we conclude that those contentions also are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1141

KA 16-00076

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD SCHWARTZ, DEFENDANT-APPELLANT.

JEREMY D. SCHWARTZ, BUFFALO, FOR DEFENDANT-APPELLANT.

NIAGARA COUNTY DISTRICT ATTORNEY'S OFFICE, LOCKPORT (LAURA T. BITTNER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), dated November 10, 2015. 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.*). County Court determined that defendant was a presumptive level three risk by applying the automatic override for a psychological abnormality "that decreases his ability to control impulsive sexual behavior" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]), and then granted him a downward departure to a level two risk. Contrary to defendant's contention, the court's conclusion that the override applies based on his diagnosis of pedophilia is supported by clear and convincing evidence (*see People v Cobb*, 141 AD3d 1174, 1175; *People v Ledbetter*, 82 AD3d 858, 858, *lv denied* 17 NY3d 702; *see generally People v Andrychuk*, 38 AD3d 1242, 1243-1244, *lv denied* 8 NY3d 816). We also reject defendant's contention that the court abused its discretion in declining to grant him a further downward departure to a level one risk (*see People v Busby*, 60 AD3d 1455, 1456; *People v Suarez*, 52 AD3d 423, 423-424, *lv denied* 11 NY3d 710; *see generally People v Gillotti*, 23 NY3d 841, 861). "The departure to level two sufficiently addressed the mitigating factors cited by defendant" (*People v Billups*, 58 AD3d 425, 426, *lv denied* 12 NY3d 707).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1143

KA 14-00803

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 24, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, we conclude that County Court properly exercised its discretion at trial in permitting the responding police officers to identify defendant as one of the perpetrators depicted in the surveillance videos of the crime inasmuch as there was some basis for concluding that the officers were more likely to identify defendant correctly from the videos than was the jury (*see People v Montanez*, 135 AD3d 528, 528, *lv denied* 27 NY3d 1072; *People v Magin*, 1 AD3d 1024, 1025; *see generally People v Rivera*, 259 AD2d 316, 316-317). The officers' testimony thus " 'served to aid the jury in making an independent assessment regarding whether the man in the [video] was indeed the defendant' " (*Montanez*, 135 AD3d at 528). We note that the court properly instructed the jury that the officers merely provided their opinions that defendant was depicted in the videos and that the jurors were the ultimate finders of fact on the issue of the identity of the perpetrators (*see Rivera*, 259 AD2d at 317; *see generally People v Walker*, 96 AD3d 1481, 1482, *lv denied* 20 NY3d 989), and the jury is presumed to have followed the court's instructions (*see Walker*, 96 AD3d at 1482).

We reject defendant's contention that the court erred in denying his request to charge the lesser included offense of attempted robbery in the second degree. Viewing the evidence in the light most

favorable to defendant, we conclude that there is no reasonable view of the evidence to support a finding that he committed the lesser but not the greater offense (*see People v Wells*, 18 AD3d 482, 483, *lv denied* 5 NY3d 811). Indeed, given the evidence adduced at trial, "the jury would have to resort to 'sheer speculation' to determine that defendant and his codefendants attempted to rob the victim but did not take any property" (*People v McCullough*, 278 AD2d 915, 916-917, *lv denied* 96 NY2d 803).

Contrary to defendant's contention, we conclude that the evidence, including the surveillance videos and the police officers' testimony, when viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish defendant's identity, and thus to support the conviction of the crime charged (*see People v Birmingham*, 261 AD2d 942, 942, *lv denied* 93 NY2d 1014; *see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, 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 Bleakley*, 69 NY2d at 495).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1144

KA 15-01405

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL GERMAN, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, 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 (Thomas G. Leone, J.), rendered June 25, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of assault in the second degree (Penal Law § 120.05 [3]). We conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to support the conviction. We note that a "peace officer" is defined to include a "correction officer[] of any state correctional facility" (CPL 2.10 [25]; *see* Penal Law § 120.05 [3]). We further conclude that the evidence demonstrates that the victims each sustained a "physical injury," defined as "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]; *see* § 120.05 [3]; *see also People v Chiddick*, 8 NY3d 445, 447-448). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he was deprived of due process as a result of being shackled within the view of the jurors beginning on the second day of trial (*see People v Goossens*, 92 AD3d 1281, 1282, *lv denied* 19 NY3d 960). Defendant likewise has failed to preserve for our review his contention that County Court erred in failing to give a curative instruction regarding defendant's wearing of shackles (*see* CPL 470.05 [2]; *People v Harris*, 303 AD2d 1026, 1026-1027, *lv denied* 100 NY2d 594). We decline to exercise our power to review those contentions as a matter of our discretion in the interest of justice (*see* CPL 470.15

[6] [a]).

Finally, defendant's contention that he was wrongfully excluded from a material stage of trial, i.e., sidebar conferences among the court and the attorneys at which defendant's presence might have had a substantial effect on his ability to defend against the charges (*see People v Sloan*, 79 NY2d 386, 392-393), "is not reviewable because he failed to provide 'an adequate record for appellate review' " (*People v Lockett*, 1 AD3d 932, 932, *lv denied* 1 NY3d 630, quoting *People v Velasquez*, 1 NY3d 44, 48; *see People v Camacho*, 90 NY2d 558, 560).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1145

KA 14-00997

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHEARARD G. GRIFFIN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered February 25, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts) and robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment entered upon a jury verdict convicting him of two counts each of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]) in connection with the robbery of two individuals in temporal proximity. Contrary to defendant's contention, " '[t]he fact that defendant's photograph has a slightly lighter background than the others does not support the conclusion that the identification procedure was unduly suggestive' " (*People v Evans*, 137 AD3d 1683, 1683, *lv denied* 27 NY3d 1131).

We reject defendant's contention that the evidence is not legally sufficient to establish his accomplice liability for both crimes and thus is not legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). The People presented evidence that one of the two men who approached each victim displayed a silver handgun in his waistband to each of the victims when the two men demanded that the respective victims hand over their property. Defendant was seated in the driver's seat of a vehicle matching the description given by both victims shortly after the offenses were committed, he was identified by one of the victims as the driver of the vehicle entered by the two men after they took his property, and the cellular telephone belonging to the other victim was recovered from the console of the vehicle. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that

defendant was the driver of the vehicle during the relevant times and "that he was a knowing accomplice to the robber[ies] rather than a mere bystander or an accessory after the fact" (*People v Evans*, 142 AD3d 1291, 1292; *see People v Jackson*, 44 NY2d 935, 937). Contrary to defendant's further contention, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that Supreme Court erred in denying his challenge for cause to prospective juror No. 13, and we therefore reverse the judgment and grant a new trial. Defendant exhausted his peremptory challenges, and thus the contention is preserved for our review (*see* CPL 270.20 [2]; *People v Harris*, 19 NY3d 679, 685). In response to the court's question to the panel whether anyone "knows something about themselves or their circumstances that would preclude [them] from being a fair and impartial juror in this case," the prospective juror in question advised the court that her ex-husband served as a police officer for 31 years and her two nephews were police officers. In response to further questioning, she responded that she would "probably go towards the officers." In a subsequent colloquy with that prospective juror, the court asked: "But those relationships are not to the extent that you can say unequivocally that you can't be unfair and impartial, correct?" The prospective juror replied, "I feel I couldn't, no." The court then asked: "Can you be fair and impartial; yes or no?" and she replied, "No." When asked to provide a reason that she could not be fair and impartial, the prospective juror responded, "[B]ecause I'm close to them, you know, the law enforcement." The court noted that "there's a lot of people that are close to police officers," to which she replied, "Right. Well, you know, you hear things and you get together and they tell you things. And so . . ." The court interjected at that point, asking: "If I gave you an instruction, and I will, that says you base this case only upon what you hear in this room and see in this room, can you do that?" and the prospective juror replied, "Yes." When the court concluded its questioning of the prospective jurors, the prospective juror did not raise her hand when asked whether any of the prospective jurors would give more weight or less weight to the testimony of the police officers, and she replied "yes" when the court asked each of them to confirm that they would be "fair and impartial."

It is well established that " 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the juror states unequivocally on the record that he or she can be fair and impartial' " (*Harris*, 19 NY3d at 685, quoting *People v Chambers*, 97 NY2d 417, 419). Although the prospective juror responded affirmatively to the court's question whether she could base her decision in the case on what she heard and saw in the courtroom and the general question whether she could be fair and impartial (*see People v Williams*, 128 AD3d 1522, 1523, *lv denied* 25 NY3d 1209), she did not provide an "unequivocal assurance that . . . [she could] set aside [her] bias" toward police officers

who would testify at the trial (*People v Tapia-DeJesus*, 124 AD3d 1404, 1405 [internal quotation marks omitted]; *see People v Nicholas*, 98 NY2d 749, 751-752; *People v Johnson*, 94 NY2d 600, 614; *cf. People v Wright* [appeal No. 2], 104 AD3d 1327, 1327-1328, *lv denied* 21 NY3d 1012).

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1146

KA 14-01213

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS N. HENDERSON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 20, 2010. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Even assuming, arguendo, that defendant's challenge to the sufficiency of the *Miranda* warnings provided to him prior to his interrogation is preserved for our review (*see People v Smith*, 22 NY3d 462, 465; *cf. People v Louisias*, 29 AD3d 1017, 1018-1019, *lv denied* 7 NY3d 814), we conclude that it is without merit. "[T]he warnings adequately conveyed that defendant had the right not only to have a lawyer present during the entire questioning but to ask for or access that lawyer at any point during the questioning" (*People v Barber-Montemayor*, 138 AD3d 1455, 1455, *lv denied* 28 NY3d 926).

We reject defendant's further contention that Supreme Court abused its discretion in denying his pro se request to withdraw his guilty plea without conducting an evidentiary hearing. The court afforded defendant the requisite opportunity to present his contentions (*see People v Tinsley*, 35 NY2d 926, 927), and defendant's claim that he pleaded guilty because of duress arising from, inter alia, an alleged assault by a jail deputy was belatedly raised (*see People v Nash* [appeal No. 1], 288 AD2d 937, 937, *lv denied* 97 NY2d 686; *People v Hanley*, 255 AD2d 837, 838, *lv denied* 92 NY2d 1050), contradicted by his statements during the plea colloquy (*see People v McKoy*, 60 AD3d 1374, 1374, *lv denied* 12 NY3d 856; *Hanley*, 255 AD2d at 837-838), and entirely uncorroborated (*see Nash*, 288 AD2d at 937;

People v Morris, 107 AD2d 973, 974-975; *cf. People v Flowers*, 30 NY2d 315, 317-319). Under those circumstances, the court was entitled to determine that defendant's allegation was "a belated maneuver that had no foundation in truth," and thus that an evidentiary hearing was not required (*People v Cannon* [appeal No. 1], 78 AD3d 1638, 1638, *lv denied* 16 NY3d 742; *cf. People v Brown*, 14 NY3d 113, 116). In addition, we conclude that the record does not support defendant's contention that defense counsel took a position adverse to him in connection with the plea withdrawal request (*see People v Pimentel*, 108 AD3d 861, 862-863, *lv denied* 21 NY3d 1076; *People v Sylvan*, 108 AD3d 869, 871, *lv denied* 22 NY3d 1091; *cf. People v King*, 129 AD3d 992, 993).

We agree with defendant, however, that the court erred in failing to determine at sentencing whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY3d 497, 501). Contrary to the People's contention, the court's statements during the plea proceeding to the effect that it was not inclined to grant defendant youthful offender status do not obviate the need for remittal (*see People v Eley*, 127 AD3d 583, 584; *see also People v Gutierrez*, 140 AD3d 407, 408; *People v Munoz*, 117 AD3d 1585, 1585). Moreover, inasmuch as a youthful offender determination must be made "in every case where the defendant is eligible" (*Rudolph*, 21 NY3d at 501), we reject the People's contention that remittal "would be futile and pointless" here. We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status. In view of our determination, we do not address defendant's challenge to the severity of the sentence.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1148

CA 15-02117

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

MICHELLE MUNGOVAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID MUNGOVAN, DEFENDANT-RESPONDENT.

LAWRENCE P. BROWN, BRIDGEPORT, FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered October 22, 2015. The order, insofar as appealed from, denied the application of plaintiff for attorney's fees in this post judgment matrimonial proceeding.

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

Memorandum: Plaintiff, as limited by her brief, appeals from that part of an order that denied her request for counsel fees in this postjudgment matrimonial proceeding. Contrary to plaintiff's contention, considering all of the circumstances of this case, including the nature and extent of the services that were required to resolve the dispute and " 'the reasonableness of counsel's performance under the circumstances' " (*McArthur v Bell*, 201 AD2d 974, 974, *lv dismissed* 83 NY2d 906, *lv denied* 85 NY2d 809; *see generally DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881), we conclude that Supreme Court did not abuse its discretion in denying plaintiff's request for counsel fees (*see generally Wilson v Wilson*, 128 AD3d 1326, 1327).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1149

CA 16-00603

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

CLEARVIEW FARMS LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHAWN FANNON, DEFENDANT-RESPONDENT.

ANDREW J. DICK, ROCHESTER, FOR PLAINTIFF-APPELLANT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 25, 2016. The order and judgment denied the motion of plaintiff to set aside in part the verdict.

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

Memorandum: Plaintiff appeals from an order and judgment denying its motion pursuant to CPLR 4404 (b) to set aside in part a verdict rendered following a bench trial on plaintiff's claim for breach of a residential lease. By its verdict, Supreme Court awarded plaintiff landlord the sum of $9,224.41, plus reasonable attorneys' fees, litigation costs and prejudgment interest, "less any amounts Plaintiff collected from re-renting the subject apartment [during the original lease term] as an offset credit to Defendant." In denying the motion, the court declined to delete that offset provision from its verdict. Instead, upon plaintiff's failure to submit a posttrial affidavit "detailing all income/fees it collected from the new tenant as a result of re-renting the subject property," the court determined that plaintiff had "failed to prove its damages and thus [was] not entitled to monetary judgment against Defendant."

We conclude that the court did not err in determining as a matter of law that the accelerated rent clause of the lease constituted an "unenforceable penalty" and in concomitantly determining that plaintiff's recovery was appropriately "limited to actual damages proven" (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [internal quotation marks omitted]), notwithstanding that plaintiff was under no duty to mitigate in the first place (*see Holy Props. v Cole Prods.*, 87 NY2d 130, 134; *see also 172 Van Duzer Realty Corp.*, 24 NY3d at 535). We likewise reject plaintiff's contention that the court had no basis for demanding that plaintiff produce additional proof of actual damages, either at trial or posttrial. The court merely afforded plaintiff a second chance to prove its actual damages by means of a posttrial affidavit quantifying

its relevant receipts from its new tenant and, to the extent that there may have been some procedural irregularity here, that irregularity did not prejudice plaintiff, the recipient of that second chance. Finally, we conclude that the court did not err in ultimately denying plaintiff any recovery of its actual damages in this case based upon plaintiff's failure to quantify and prove such actual damages either at trial or by means of a posttrial affidavit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1150

CA 16-00524

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

PELUSIO CANANDAIGUA, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENESEE REGIONAL BANK, DEFENDANT-APPELLANT.

LACY KATZEN LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOLTZBERG LAW FIRM, ROCHESTER (RICHARD H. HOLTZBERG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered November 12, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff leased commercial premises to a tenant that secured a loan from defendant. As a condition of the loan, defendant required the tenant to obtain from plaintiff a "Landlord Waiver" (waiver), which provided, inter alia, that any claims plaintiff may have against the tenant were subordinate to defendant's security interest in the tenant's assets used as collateral to secure the loan. The tenant arranged to liquidate its assets and, during that period, it did not make the payments owed to plaintiff pursuant to the lease agreement. Plaintiff thereafter commenced the instant action alleging in a single cause of action that defendant was unjustly enriched when it took possession of the tenant's assets without paying rent to plaintiff. We agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint.

The record establishes that there are two waivers, which were executed and acknowledged by plaintiff's principal on the same date. Pursuant to the version on which defendant relies in support of its motion, defendant was entitled to the use of the premises for 30 days, rent-free, after it took possession of the premises for the purposes of protecting its security interest. Pursuant to the version of the waiver on which plaintiff relies in opposition to the motion, defendant was entitled to the use of the premises for 60 days, with the obligation to pay rent, after it was given or obtained access to

the premises for the purpose of protecting its security interest. Both versions provided that plaintiff would provide written notice to defendant in the event the tenant defaulted on its lease agreement with plaintiff and provide defendant with an opportunity to cure the default. It is undisputed that plaintiff did not provide such notice, and we thus conclude that defendant established its entitlement to judgment as a matter of law on the cause of action alleging unjust enrichment. "The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement . . . Here, . . . there was no unjust enrichment because the matter is controlled by contract . . . [, and thus] there is no valid claim for unjust enrichment" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572).

To the extent that the parties on appeal treat the complaint as also alleging a claim for breach of contract, we conclude that defendant established its entitlement to judgment with respect to that claim based upon documentary evidence establishing that both versions of the waiver were signed only by plaintiff and thus that the claim is barred by the statute of frauds (*see* General Obligations Law § 5-701 [a] [2]; *American Tower Asset Sub, LLC v Buffalo-Lake Erie Wireless Sys. Co., LLC*, 104 AD3d 1212, 1212). Viewing the submissions of the parties in the light most favorable to the nonmoving party, as we must (*see Victor Temporary Servs. v Slattery*, 105 AD2d 1115, 1117), we conclude that plaintiff failed to raise an issue of fact sufficient to defeat defendant's motion insofar as it sought to dismiss a claim for breach of contract (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1151

CA 16-00032

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

IRENE HILL AND WILLIAM HILL,
PLAINTIFFS-APPELLANTS,

V ORDER

MICHELLE MCGINNES, JANET S. CANTY,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

BRENNA BOYCE, PLLC, ROCHESTER (WILLIAM P. SMITH, JR., OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OSBORN REED & BURKE, LLP, ROCHESTER (MICHAEL A. REDDY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 8, 2015. The order granted the motion of defendants Michelle McGinnes and Janet S. Canty for summary judgment dismissing the complaint against them.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1152

CA 16-00458

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

NICHOLAS KILMER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID MASTROPIETRO, INDIVIDUALLY AND/OR DOING BUSINESS AS FINGER LAKES TRANSPORT, AND DAVID BAKER, DEFENDANTS-RESPONDENTS.

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

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (SHANNON R. BECKER OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID MASTROPIETRO, INDIVIDUALLY AND/OR DOING BUSINESS AS FINGER LAKES TRANSPORT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN J. KROGMAN DAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT DAVID BAKER.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 24, 2015. The order granted defendants' respective motion and cross motion for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he ran behind a rolling car in an attempt to stop it, and then was struck by the car when he slipped and fell. Contrary to plaintiff's contention, Supreme Court properly granted defendants' respective motion and cross motion for summary judgment dismissing the complaint against them. Although "[a]s a general rule, the question of proximate cause is to be decided by the finder of fact" (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312, *rearg denied* 52 NY2d 784), "where[, as here,] a defendant's actions merely 'furnish[ ] the condition or occasion' for the events leading to a plaintiff's injuries, those actions will not be deemed a proximate cause of the injuries" (*Hurlburt v Noble Envtl. Power, LLC*, 128 AD3d 1518, 1519; *see generally Sheehan v City of New York*, 40 NY2d 496, 503). Here, even assuming, arguendo, that defendants' alleged negligence created the opportunity for the vehicle to begin rolling down the incline, we conclude that any such negligence did not cause plaintiff, who was in a safe position, to move behind it and attempt to stop it. "In short, the [alleged] negligence of [defendants]

merely furnished the occasion for an unrelated act to cause injuries not ordinarily anticipated" (*Derdiarian*, 51 NY2d at 316).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1153

CA 16-00602

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

LAURA MACALUSO AND ARTHUR MACALUSO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

WEBSTER H. PILCHER, M.D., PH.D.,
AND UNIVERSITY OF ROCHESTER MEDICAL CENTER
SCHOOL OF MEDICINE AND DENTISTRY,
DEFENDANTS-APPELLANTS.

WARD GREENBERG HELLER & REIDY LLP, ROCHESTER (JESSICA N. CLEMENTE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHARLES A. HALL, ROCHESTER, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 24, 2015. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiffs commenced this medical malpractice action alleging that, during surgery upon Laura Macaluso (plaintiff) to remove a previously-implanted spinal cord stimulator (SCS), Webster H. Pilcher, M.D., Ph.D. (defendant) negligently failed to remove part of a synthetic tubular sleeve that had covered wires connecting components of the SCS. On appeal, defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint. We agree.

In order to meet their initial burden on their motion for summary judgment in this medical malpractice action, defendants were "required to 'present factual proof, generally consisting of affidavits, deposition testimony and medical records, to rebut the claim of malpractice by establishing that [they] complied with the accepted standard of care or did not cause any injury to the patient' " (*Webb v Scanlon*, 133 AD3d 1385, 1386). "A defendant physician may submit his or her own affidavit to meet that burden, but that affidavit must be detailed, specific and factual in nature . . . , and must address each of the specific factual claims of negligence raised in [the] plaintiff[s'] bill of particulars" (*id.* [internal quotation marks omitted]).

Here, defendant submitted his own affidavit, along with an accompanying medical record, in which he described in detail the specific, limited objectives of the surgery, which included removing the battery pack component of the SCS and the electrical leads along plaintiff's spinal cord, as well as removing the connecting wires that ran under plaintiff's skin by pulling them through a surgical opening on her side. Defendant averred—consistent with his deposition testimony that was also submitted with his affidavit—that he was aware of the possibility that sleeves could be under plaintiff's skin from the original surgery, but that the surgical plan discussed with plaintiff did not include expanding the procedure to encompass searching for or removing any such items because to do so would have unnecessarily increased the scope and risk of the surgery beyond any possible benefit. Defendant noted, among other things, that any sleeve previously implanted in plaintiff was inert and sterile, and was designed and intended to remain inside her body. Defendant conducted a routine postoperative visit during which plaintiff had no complaints, and plaintiff never returned for further care after that visit. Defendant explained that, inasmuch as he had completed the surgery and his goal did not include removing every remaining fragment of the SCS components, he would not have subjected plaintiff to an X ray or any other tests unless she had exhibited symptoms such as local inflammation or infection, which she had not shown. Defendant averred that he successfully completed the surgery as planned and that, in his professional medical opinion, the care he provided to plaintiff in planning and conducting the surgery fully conformed with the applicable standard of care. Based on the foregoing, we conclude that defendants established their entitlement to judgment as a matter of law (*see id.*).

To raise an issue of fact to defeat defendants' motion, plaintiffs were required to submit "evidentiary facts or materials to rebut the prima facie showing by the defendant physician" beyond mere "[g]eneral allegations of medical malpractice" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325). Plaintiffs failed to meet their burden here. Without explaining the accepted medical practice from which defendant deviated in performing the surgery, plaintiffs' expert merely averred in general, vague, and conclusory terms that it was his opinion "that the non-removal of the tubing conforms to medical negligence" (*see Keller v Liberatore*, 134 AD3d 1495, 1496). We conclude that the affidavit of plaintiffs' expert is entirely " 'conclusory in nature and lacks any details[,] and thus is insufficient to raise the existence of a triable factual issue concerning medical malpractice' " (*Moticik v Sisters Healthcare*, 19 AD3d 1052, 1053).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1154

CA 16-00489

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

BARBARA KIRBY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DRUMLINS, INC., DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF THERESA J. PULEO, SYRACUSE (MICHELLE M. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 30, 2015. The order, insofar as appealed from, granted that part of defendants' motion for summary judgment dismissing the amended complaint against defendant Drumlins, Inc.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she sustained when she was thrown from her golf cart while playing golf at defendants' golf course. According to plaintiff, she was driving the golf cart down an excessively steep and winding cart path that was littered with wet leaves and other natural debris when she lost control of her cart and was injured.

We conclude that Supreme Court properly granted that part of defendants' motion for summary judgment dismissing the amended complaint against Drumlins, Inc. (defendant) on the ground that plaintiff had assumed the risk of her injuries as a matter of law. The doctrine of primary assumption of the risk acts as a complete bar to recovery where a plaintiff is injured in the course of a sporting or recreational activity through a risk inherent in that activity (*see Turcotte v Fell*, 68 NY2d 432, 438-439). "As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent, or reasonably foreseeable consequences of the participation" (*id.* at 439, citing *Maddox v City of New York*, 66 NY2d 270, 277-278). " 'It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential

for injury of the mechanism from which the injury results' " (*Yargeau v Lasertron*, 128 AD3d 1369, 1371, *lv denied* 26 NY3d 902, quoting *Maddox*, 66 NY2d at 278). "The doctrine of primary assumption of the risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased" (*Ribaudo v LaSalle Inst.*, 45 AD3d 556, 557, *lv denied* 10 NY3d 717).

Here, defendants established on the motion that plaintiff was an experienced golfer who had played that hole and driven that cart path several times previously. Apart from her familiarity with the steep topography of the hole, plaintiff was aware that it had rained the night before and that the course was still wet that morning. She had driven her golf cart on that cart path just moments before her accident, and further had observed the leaves and berries on the cart path as she began down the cart path. It is common knowledge that leaves and other natural litter may be present on a golf course and that such litter may become slick when it is wet (*see generally Maddox*, 66 NY2d at 278). For those reasons, we conclude that plaintiff was aware of the risk posed by the cart path and assumed it (*see Bryant v Town of Brookhaven*, 135 AD3d 801, 802-803; *Mangan v Engineer's Country Club, Inc.*, 79 AD3d 706, 706; *Lombardo v Cedar Brook Golf & Tennis Club, Inc.*, 39 AD3d 818, 819; *Bockelmann v New Paltz Golf Course*, 284 AD2d 783, 784, *lv denied* 97 NY2d 602).

We further conclude that the court did not err in refusing to consider the conclusory affidavit of plaintiff's expert in golf course design in opposition to the motion. The affidavit set forth none of the industry standards to which it alluded (*see Barbato v Hollow Hills Country Club*, 14 AD3d 522, 523), and it provided no specific measurements taken at the scene to which such industry standards might have been compared. The affidavit thus lacked probative value (*see Costanzo v County of Chautauqua*, 108 AD3d 1133, 1133-1134).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1155

CA 16-00630

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

KRISTY MONTANARO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. WEICHERT AND SUSAN M. WEICHERT,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

ROBERT M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

SUSAN M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

CONOR J. KIRCHNER, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), dated November 25, 2014. The order granted the motion of plaintiff for leave to amend the complaint.

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

Memorandum: In appeal No. 1, defendants appeal from an order granting plaintiff's motion for leave to amend her complaint to add Susan M. Weichert as a defendant. We note at the outset that, although the order is dated November 25, 2014 and the notice of appeal is dated July 28, 2015, the record does not contain a notice of entry and therefore the 30-day period in which to file a notice of appeal was not triggered (*see* CPLR 5513 [a]). Although the notice of appeal is premature, we nevertheless treat it as valid (*see* CPLR 5520 [c]). With respect to appeal No. 2, however, defendants purport to appeal from a decision granting plaintiff's motion for a default judgment. Inasmuch as no appeal lies from a decision, that appeal is dismissed (*see* CPLR 5512 [a]; *Gay v Gay*, 118 AD3d 1331, 1332, *lv dismissed* 25 NY3d 1015).

Plaintiff commenced this action alleging, pursuant to Executive Law § 296 (5) (a) (1), that Robert M. Weichert (defendant) engaged in discriminatory practices with respect to rental property he owned. Following his deposition in which he stated that his wife owned the property, plaintiff moved for leave to amend the complaint to add Susan M. Weichert as a defendant. Contrary to defendants' contention, the amended complaint alleged sufficient facts to establish a prima facie case for discrimination inasmuch as plaintiff alleged that she is a member of a protected class and was qualified to rent housing

that was denied her under circumstances that gave rise to an inference of unlawful discrimination (*see generally Matter of New York State Div. of Human Rights v Caprarella*, 82 AD3d 773, 774). Specifically, plaintiff alleged that she was a woman with a minor child who inquired about an apartment advertised in a local newspaper and that, when she went to view the apartment, defendant told her that he did not allow children to live in the rental property. She further alleged that defendant acted with the consent and authority of defendant Susan M. Weichert, the owner, when he refused to rent the premises to plaintiff based on her familial status. We have reviewed defendants' remaining contentions and conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1156

CA 16-00631

PRESENT: WHALEN, P.J., SMITH, PERADOTTO, NEMOYER, AND SCUDDER, JJ.

KRISTY MONTANARO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT M. WEICHERT AND SUSAN M. WEICHERT,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ROBERT M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

SUSAN M. WEICHERT, DEFENDANT-APPELLANT PRO SE.

CONOR J. KIRCHNER, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from a letter decision of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), dated June 18, 2015. The letter decision granted plaintiff's motion for a default judgment against defendants.

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

Same memorandum as in *Montanaro v Weichert* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1158

KA 14-00258

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAKIEME JACKSON, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN HANNAY 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 (Anthony F. Aloi, J.), rendered January 6, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree (four counts).

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of four counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]), defendant contends only that the sentence is unduly harsh and severe. We reject that contention. We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted on January 6, 2013, and it must therefore be amended to reflect that he was convicted on January 6, 2014 (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1159

KA 14-01045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK HAWKINS, ALSO KNOWN AS MARCUS COLEMAN,
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 (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 27, 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 [3]). Defendant failed to preserve for our review his challenge to Supreme Court's alleged enhancement of his sentence at the time of sentencing inasmuch as defendant did not object to the alleged enhanced sentence or move to withdraw his guilty plea (*see People v Viele*, 124 AD3d 1222, 1223). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We reject defendant's contention that his sentence is unduly harsh and severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1160

KA 14-02212

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES HOOD, 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 (MATTHEW S. SZALKOWSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 5, 2014. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband 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 following a jury trial of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. The evidence at trial established that defendant, an inmate in state prison, knowingly possessed the contraband in question, i.e., a razor blade melted into a pen cap that was found in his sock. Thus, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant's contention that Supreme Court erred in allowing the People to introduce testimony that defendant made an inculpatory statement, i.e., that the contraband was his, is unpreserved for our review inasmuch as he failed to move to suppress that evidence (*see generally* CPL 470.05 [2]), and we decline to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1164

KA 14-00821

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA A. GANG, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (TIMOTHY P. MURPHY 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 July 8, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, the 18-month preindictment delay did not deprive him of due process (*see generally People v Singer*, 44 NY2d 241, 253-254). It is well established that "a determination made in good faith to defer commencement of the prosecution for further investigation[,] or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may cause some prejudice to the defense" (*Singer*, 44 NY2d at 254). Here, the "investigative delays were satisfactorily explained and were permissible exercises of prosecutorial discretion" (*People v Nazario*, 85 AD3d 577, 577, *lv denied* 17 NY3d 904). Upon our review of the factors set forth in *People v Taranovich* (37 NY2d 442, 445), we conclude that the delay did not deprive defendant of his right to due process (*see People v Johnson*, 134 AD3d 1388, 1389-1390, *affd* ___ NY3d ___ [Nov. 17, 2016]).

With respect to defendant's remaining contentions, even assuming, arguendo, that defendant's waiver of the right to appeal was knowing, intelligent and voluntary, we agree with defendant that the waiver 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 any issue concerning the severity of the sentence" (*People v Lorenz*, 119 AD3d

1450, 1450, *lv denied* 24 NY3d 962; *see People v Maracle*, 19 NY3d 925, 928). Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1165

KA 14-00059

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY A. CARTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered November 20, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence with respect to the issues of intent to cause physical injury and justification.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence that defendant stabbed the victim in the face and leg is legally sufficient to establish that defendant intended to cause physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495). To the extent that defendant contends that the evidence is legally insufficient to support the conviction because the People failed to disprove the defense of justification beyond a reasonable doubt, we conclude that such contention is unpreserved for our review inasmuch as defendant failed to move for a trial order of dismissal on that ground (*see People v Fafone*, 129 AD3d 1667, 1668, *lv denied* 26 NY3d 1039). In any event, the evidence is legally sufficient to disprove defendant's justification defense (*see generally Bleakley*, 69 NY2d at 495).

We further conclude that, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming,

arguendo, that a different verdict would not have been unreasonable, we note that " '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).

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1166

CAF 14-00965

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

IN THE MATTER OF DANARYEE B.

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

ERICA T., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

NICHOLAS G. LOCICERO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered May 29, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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 10, respondent mother appeals from an order finding that she neglected the subject child. Contrary to the mother's contention, petitioner established by a preponderance of the evidence that the physical, mental, or emotional condition of the child had been or is in imminent danger of becoming impaired as a result of the mother's failure to exercise a minimum degree of care (*see* Family Ct Act §§ 1012 [f] [i]; 1046 [b] [i]; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 368). Specifically, petitioner presented evidence establishing that the child was in imminent danger because she was exposed to unsanitary and deplorable living conditions, including floors covered in animal feces and ankle-deep piles of garbage (*see Matter of Josee Louise L.H. [DeCarla L.]*, 121 AD3d 492, 492-493, *lv denied* 24 NY3d 913; *Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592-1593; *Matter of Raven B. [Melissa K.N.]*, 115 AD3d 1276, 1280-1281). Further, the credible evidence established that the mother's residence did not contain a bed or diapers for the child (*see Matter of China C. [Alexis C.]*, 116 AD3d 953, 954, *lv dismissed* 23 NY3d 1047; *Matter of Commissioner of Social Servs. v Anne F.*, 225 AD2d 620, 620).

Contrary to the mother's further contention, any error in receiving petitioner's exhibits in evidence is harmless "because the

record otherwise contains ample admissible evidence to support [Family Court's] determination" that the mother neglected the child (*Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704; *see Matter of Delehia J. [Tameka J.]*, 93 AD3d 668, 670). Finally, the mother's contention that the court erred in striking the testimony of one of her witnesses is not preserved for our review (*see generally* CPLR 5501 [a] [3]; *Matter of Crystal A.*, 11 AD3d 897, 898).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1169

CAF 14-01333

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

IN THE MATTER OF ZAKIYYAH WOLFFORD,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY STEPHENS, RESPONDENT-RESPONDENT.

IN THE MATTER OF ZAKIYYAH WOLFFORD,
PETITIONER-APPELLANT,

V

GAYLE BRYNETTE, RESPONDENT-RESPONDENT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR PETITIONER-APPELLANT.

BERNADETTE M. HOPPE, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 18, 2014 in proceedings pursuant to Family Court Act article 6. The order, among other things, directed that the subject child shall continue to reside with respondent Gayle Brynette.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petitions are reinstated, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: On appeal from an order directing, inter alia, that her child continue to reside with his paternal grandmother, respondent Gayle Brynette (grandmother), petitioner mother contends that Family Court erred in failing to make a determination of extraordinary circumstances before rendering a decision on the best interests of the child and that the record does not support a finding of extraordinary circumstances. We agree with the mother that the court erred in failing to make a determination whether extraordinary circumstances existed to warrant an inquiry into the best interests of the child. "It is well established that, as between a parent and a nonparent, the parent has a superior right to custody that cannot be denied unless the nonparent establishes that the parent has relinquished that right because of surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances . . . The nonparent has the burden of proving that extraordinary circumstances exist, and until such circumstances are shown, the court does not reach the issue of the

best interests of the child" (*Matter of Gary G. v Roslyn P.*, 248 AD2d 980, 981 [internal quotation marks omitted]; *see Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147-1148). "The foregoing rule applies even if there is an existing order of custody concerning that child unless there is a prior determination that extraordinary circumstances exist" (*Gary G.*, 248 AD2d at 981; *see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351, *lv denied* 7 NY3d 717; *Matter of Vincent A.B. v Karen T.*, 30 AD3d 1100, 1101, *lv denied* 7 NY3d 711).

Here, as in *Howard*, "there is no indication in the record that, in the history of the parties' litigation, the court previously made a determination of extraordinary circumstances divesting the mother of her superior right to custody" (64 AD3d at 1148). Furthermore, because the hearing transcript, which was transcribed from an audio recording, is riddled with "unintelligible" gaps in the testimony, "the record is insufficient to enable us to make our own determination with respect to whether extraordinary circumstances exist" (*id.*). We therefore reverse the order, reinstate the petitions, and remit the matter to Family Court to determine, following a hearing if necessary, whether extraordinary circumstances exist.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1171

CA 16-00522

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

ANITA L. CASTRO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PROFESSIONAL GOLF SERVICES, INC., DOING BUSINESS AS SARATOGA SPA GOLF, DEFENDANT-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL M. CHELUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

SMITH, MINER, O'SHEA & SMITH, LLP, BUFFALO (PHILIP J. O'SHEA, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 14, 2016. The order granted a new trial on damages for past and future pain and suffering and future medical expenses unless the parties stipulate to specified increases in damages.

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

Memorandum: Defendant appeals from an order that granted plaintiff's motion to set aside the jury verdict on damages in this personal injury action. The jury awarded plaintiff, inter alia, the sum of $200,000 for past pain and suffering, $100,000 for future pain and suffering, and $125,000 for future medical expenses. Supreme Court vacated those parts of the award and ordered a new trial on the issue of damages for past and future pain and suffering and future medical expenses unless the parties stipulated to increase the award to $300,000 for past pain and suffering, $600,000 for future pain and suffering and $207,850 for future medical expenses. Contrary to defendant's contention, the court did not abuse its discretion in granting plaintiff's motion. "Although a jury's assessment of damages generally is afforded great deference and will not be overturned unless it deviates materially from what would be reasonable compensation . . . , 'the trial court retains the discretion to set aside a verdict under appropriate circumstances' " (*Carter v Shah*, 31 AD3d 1151, 1151; *see* CPLR 5501 [c]; *Warnke v Warner-Lambert Co.*, 21 AD3d 654, 657). Here, " '[g]iven [the court's] superior opportunity to evaluate the proof and the credibility of the witnesses,' " we conclude that the court did not abuse its discretion in determining that the award of damages should be increased (*Carter*, 31 AD3d at

1151-1152; *see generally Prunty v YMCA of Lockport*, 206 AD2d 911, 912).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1177

CA 16-00010

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

BARBARA TULLY, ALSO KNOWN AS BARBARA BIELLE,
PLAINTIFF,

V MEMORANDUM AND ORDER

TRANSITOWN SOUTH ASSOCIATES, LLC, TRANSITOWN PLAZA ASSOCIATES, LLC, GIAN PROPERTIES, LLC, AND GIAN PROPERTIES LIMITED PARTNERSHIP,
DEFENDANTS.

TRANSITOWN SOUTH ASSOCIATES, LLC, TRANSITOWN PLAZA ASSOCIATES, LLC, GIAN PROPERTIES, LLC, AND GIAN PROPERTIES LIMITED PARTNERSHIP,
THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

TIGER STRIPE, LLC, THIRD-PARTY DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (MICHAEL RIEHLER OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered October 8, 2015. The order, insofar as appealed from, granted that part of the motion of defendants-third-party plaintiffs seeking an order requiring third-party defendant to defend and indemnify them and pay their attorneys' fees.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and that part of the motion of defendants-third-party plaintiffs seeking an order requiring third-party defendant to defend and indemnify them and pay their attorneys' fees is denied.

Memorandum: Third-party defendant, Tiger Stripe, LLC (Tiger Stripe), appeals from an order that, inter alia, granted in part the motion of defendants-third-party plaintiffs (defendants) for summary judgment and ordered Tiger Stripe to defend and indemnify defendants and pay their attorneys' fees. Tiger Stripe contends that defendants failed to establish as a matter of law that they are entitled to contractual indemnification. We agree. The snow-removal services

contract required Tiger Stripe to indemnify defendants against claims "arising out of or resulting from performance of services under [the] Contract," including claims attributable to bodily injury "caused in whole or in part by acts or omissions" of Tiger Stripe. Inasmuch as there are issues of fact concerning the alleged culpability of Tiger Stripe, we conclude that Supreme Court erred in granting that part of the motion (*see Johnson v Wal-Mart*, 125 AD3d 1468, 1469; *Pieri v Forest City Enters.*, 238 AD2d 911, 913).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1178

TP 16-00740

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF EDWARD BROWN, PETITIONER,

V ORDER

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

EDWARD BROWN, 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, Seneca County [Dennis F. Bender, A.J.], entered May 2, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1180

KA 14-01244

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYLER GETMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), entered June 9, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1181

KA 15-00645

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. MCCARTHY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 4, 2014. The judgment convicted defendant, upon his plea of guilty, of aggravated criminal contempt, menacing a police officer or peace officer, and attempted aggravated assault upon a police officer or a peace officer.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of menacing a police officer or peace officer is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of aggravated criminal contempt (Penal Law § 215.52), menacing a police officer or peace officer (§ 120.18), and attempted aggravated assault upon a police officer or a peace officer (§§ 110.00, 120.11) and, in appeal No. 2, he appeals from the resentence imposed on the conviction of menacing a police officer or peace officer. Contrary to defendant's contention in appeal No. 1, 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 and resentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1182

KA 15-01384

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA D. MCCARTHY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Wyoming County Court (Michael M. Mohun, J.), rendered February 11, 2015. Defendant was resentenced upon his conviction of menacing a police officer or peace officer.

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

Same memorandum as in *People v McCarthy* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1183

KA 15-00435

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DECARLO WORTH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP 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 October 23, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 burglary in the first degree (Penal Law §§ 110.00, 140.30 [2]). Contrary to his 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 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: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1184

KA 14-00459

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTOINE GARNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 14, 2013. The judgment convicted defendant, upon a jury verdict, of strangulation in the second degree and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of strangulation in the second degree (Penal Law § 121.12) and assault in the third degree (§ 120.00 [1]). Defendant failed to preserve for our review his contention that the victim's testimony at trial rendered the indictment duplicitous (*see People v Allen*, 24 NY3d 441, 449-450; *People v Symonds*, 140 AD3d 1685, 1686, *lv denied* 28 NY3d 937), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for a mistrial after it was revealed that the prosecutor's brother worked for the same federal agency as the husband of the jury foreperson. "It is well settled that the decision to declare a mistrial rests within the sound discretion of the trial court, which is in the best position to determine if this drastic remedy is truly necessary to protect the defendant's right to a fair trial" (*People v Duell*, 124 AD3d 1225, 1228 [internal quotation marks omitted], *lv denied* 26 NY3d 967). We conclude that, after questioning the juror, the court properly determined that a mistrial was not warranted (*see generally People v Brantley*, 168 AD2d 949, 949, *lv denied* 77 NY2d 904).

We reject defendant's contention that prosecutorial misconduct on summation deprived him of a fair trial. The prosecutor's comments regarding the victim were a fair response to defense counsel's

summation (*see People v Walker*, 117 AD3d 1441, 1441-1442, *lv denied* 23 NY3d 1044). We agree with defendant that the prosecutor made an improper "safe streets" argument (*see People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859). We nevertheless conclude that such argument and any remaining instances of alleged prosecutorial misconduct were not so egregious as to deny defendant a fair trial (*see id.*).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1185

KA 13-01078

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AYIESHA HORTON, ALSO KNOWN AS AYISHA HORTON,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARTER SECREST & EMERY LLP (JOHN P. BRINGEWATT 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 (Victoria M. Argento, J.), rendered April 4, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]), and one count of criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant was convicted primarily upon the testimony of the complainant to the effect that defendant brought a gun to the complainant's apartment and that the gun discharged during a verbal confrontation and subsequent struggle between the two for the weapon. On the other hand, the primary theory of the defense was that the gun belonged to the complainant, who pointed it at defendant during an argument that began over defendant's refusal to engage in an additional illegal transaction with the complainant involving the complainant's "[p]ublic benefit card" (§ 155.00 [7-b]). According to the defense theory, that additional transaction would have generated cash for the complainant's purchase of crack cocaine, and the complainant became angry, hostile, and aggressive as a result of defendant's refusal.

We agree with defendant that County Court abused its discretion in precluding defendant from adducing evidence or cross-examining the

complainant with respect to the complainant's alleged history of engaging in other unlawful transactions involving her public benefit card (*see* Penal Law § 158.30 [1], [3]), and of illegal drug use. "A court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense" (*People v Carroll*, 95 NY2d 375, 385). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations" (*Chambers v Mississippi*, 410 US 284, 294). It is also well settled that in presenting the defense, counsel for the defendant "may establish, during both cross[-]examination and on its direct case, the victim's . . . hostility . . . or motive to lie . . . This is not a collateral inquiry, but is directly probative on the issue of credibility" (*People v Taylor*, 40 AD3d 782, 784, *lv denied* 9 NY3d 927).

Here, we conclude that defendant was improperly precluded from establishing that the complainant was engaged in a criminal enterprise and regularly purchased crack cocaine—therefore having good reason to possess a gun as compared to defendant. More importantly, that evidence, if credited by the jury, would demonstrate that the complainant had every reason to fabricate the story that the gun belonged to defendant and not her (*see People v Nelu*, 157 AD2d 864, 864). In addition, we conclude that the proffered evidence was admissible to complete the narrative of events, i.e., to provide background information as to how and why the complainant allegedly confronted defendant, and to explain the aggressive nature of the confrontation (*see generally People v Morris*, 21 NY3d 588, 595; *People v Tosca*, 98 NY2d 660, 661). Applying those principles here, we conclude that defendant was denied her constitutional right to present a defense (*see People v Bradley*, 99 AD3d 934, 936). We further conclude that, in light of the fact that the evidence of defendant's guilt was not overwhelming, "there is no occasion for consideration of any doctrine of harmless error" (*People v Crimmins*, 36 NY2d 230, 241).

Defendant failed to preserve for our review her contention that she was denied a fair trial by the testimony of prosecution witnesses, the cross-examination of defendant by the prosecutor, and the prosecutor's comments during summation, all of which concerned the alleged failure of defendant to voluntarily turn herself in to the police after the police had prepared a "wanted package" and undertook efforts to locate her. We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the prosecutor's handling of that subject was extremely prejudicial and deprived defendant of a fair trial, thereby requiring reversal (*see People v Pressley*, 93 AD2d 665, 670). It is beyond cavil that a defendant "is under no greater an obligation to incriminate [her]self by voluntarily contacting the police than [s]he is by declining to make statements when confronted by law enforcement officials" (*id.* at 669; *see People v Sandy*, 115 AD2d 27, 30-31). We reject defendant's contention, however, to the extent that it is based upon the alleged violation of her rights under the Fifth or Fourteenth Amendments (*see Jenkins v Anderson*, 447 US 231, 238-241).

Defendant also failed to preserve for our review her contention that the court erred in permitting the prosecutor to elicit testimony from a witness that defendant was a "drug dealer." Nevertheless, we further exercise our power to reach that contention as a matter of discretion in the interest of justice, and we conclude that the testimony caused defendant substantial prejudice and deprived her of a fair trial, thereby requiring reversal (*see People v Clark*, 195 AD2d 988, 990; *People v Burke*, 170 AD2d 1021, 1022, *lv denied* 77 NY2d 959).

Lastly, we agree with defendant that the cumulative effect of the above errors deprived her of a fair trial, thereby requiring reversal (*see generally People v Shanis*, 36 NY2d 697, 699; *People v McCann*, 90 AD2d 554, 555).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1187

KA 13-01452

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. KENNEDY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 19, 2012. The judgment convicted defendant, upon a nonjury verdict, of attempted murder in the second degree and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of criminal possession of stolen property in the fourth degree and dismissing count four of the indictment, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon a nonjury trial, of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and criminal possession of stolen property in the fourth degree (§ 165.45 [4]), defendant contends that the verdict is against the weight of the evidence.

We reject defendant's contention that the verdict is against the weight of the evidence with respect to the attempted murder charge. Defendant's incriminating statements to his friends and family both before and after his arrest manifest a clear intent to kill his victim, and we therefore conclude that the People proved defendant's intent beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 348-349; *People v Bleakley*, 69 NY2d 490, 495). The evidence further established that defendant was lying in wait with a loaded shotgun as his intended victim walked toward his position, and it was only through fortuitous police intervention that the murder was avoided. Inasmuch as the victim was mere seconds from entering the zone of danger when the police foiled the murder plot, we conclude that defendant came "dangerously close" to completing the murder (*People v Bracey*, 41 NY2d 296, 300), and the verdict is not against

the weight of the evidence in that regard (*see People v Naradzay*, 11 NY3d 460, 467-468).

We agree with defendant, however, that the verdict is against the weight of the evidence with respect to the count of criminal possession of stolen property inasmuch as the People failed to prove that defendant knew the shotgun was stolen (Penal Law § 165.45 [4]). Although the People submitted evidence that the shotgun had been stolen approximately 15 months before the attempted murder and that defendant had purchased it shortly before the attempted murder for twenty dollars, those facts, standing alone, do not establish defendant's knowledge that the gun was stolen (*see People v Rolland*, 128 AD2d 650, 651; *People v Hunt*, 112 AD2d 781, 781; *cf. People v Bester*, 163 AD2d 873, 873, *lv denied* 76 NY2d 891; *People v Day*, 132 AD2d 987, 987). We therefore modify the judgment accordingly.

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1188

KA 15-00108

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE HENLEY, DEFENDANT-APPELLANT.

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

WILLIE HENLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 2, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]). In March 2013, defendant stabbed his mother's boyfriend several times with a knife, causing injuries that included a potentially fatal laceration to his heart. The police were dispatched to the home of defendant's grandmother, where the stabbing had occurred, and an officer found defendant hiding in the basement. A show-up identification was conducted, and the victim positively identified defendant as the man who had stabbed him. Defendant was transported to the police station and placed in an interview room. Another officer entered the room, at which time defendant made a spontaneous statement, i.e., that "a guy ran in, stabbed him and ran out." Defendant refused to give a written statement to the police. At trial, the victim testified that defendant had stabbed him twice, said "I am tired of you and my mother talking about me at night," and then continued stabbing him. Defendant testified that he had acted in self-defense, stabbing the victim only after the victim had attacked him with a barbecue fork. Both defendant and the victim gave sharply differing accounts of the fight, to which there were no other witnesses. Nonetheless, 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). The

jury was entitled to resolve issues of credibility in favor of the People, and we see no reason to disturb the jury's resolution of such issues (*see People v Stevens*, 109 AD3d 1204, 1205, *lv denied* 23 NY3d 1043).

Defendant failed to preserve for our review his contention that several instances of prosecutorial misconduct deprived him of a fair trial (*see generally People v Johnson*, 133 AD3d 1309, 1311, *lv denied* 27 NY3d 1000). In any event, that contention lacks merit. In particular, we conclude that defendant opened the door to the People's evidence of his silence by eliciting extensive testimony from the People's witnesses with respect thereto, and arguing in effect that his silence was more consistent with his innocence than his guilt (*see People v Brown*, 135 AD3d 495, 496, *lv denied* 27 NY3d 993; *People v McCall*, 75 AD3d 999, 1001, *lv denied* 15 NY3d 894; *see also People v Nunez*, 253 AD2d 685, 686, *lv denied* 92 NY2d 984; *see generally People v Pavone*, 26 NY3d 629, 640-641; *People v Williams*, 25 NY3d 185, 190-191). In addition, we conclude that the prosecutor's remarks with respect to the relative amounts of blood on the clothing of defendant and the victim were fair comment on the evidence (*see People v Rivera*, 133 AD3d 1255, 1256, *lv denied* 27 NY3d 1154).

We reject defendant's further contention that he was denied effective assistance of counsel. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152; *see People v Faison*, 113 AD3d 1135, 1136, *lv denied* 23 NY3d 1036). With respect to the alleged instances of prosecutorial misconduct, inasmuch as they did not deprive defendant of a fair trial, defense counsel was not ineffective for failing to object thereto (*see People v Lewis*, 140 AD3d 1593, 1595). Furthermore, counsel was not ineffective for failing to request a lesser included charge of assault in the second degree, based on recklessness (Penal Law § 120.05 [4]). In light of defendant's testimony that he intentionally stabbed the victim in self-defense, there was no reasonable view of the evidence that would support a finding that defendant acted recklessly in stabbing the victim (*see People v Horn*, 152 AD2d 925, 925, *lv denied* 74 NY2d 897), and thus an application to charge the jury with reckless assault as a lesser included offense would have had " 'little or no chance of success' " (*Caban*, 5 NY3d at 152).

We agree with defendant that he was denied his right to counsel when County Court permitted him to decide, himself, whether to request the lesser included charge. "It is well established that a defendant, 'having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case' such as 'whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal' " (*People v Colon*, 90 NY2d 824, 825-826; *see People v McKenzie*, 142 AD3d 1279, 1280). On the other hand, defense counsel has ultimate decision making authority over matters of strategy and trial tactics, such as whether to seek a jury charge on a lesser included offense (*see People v Colville*, 20 NY3d 20, 23; *People v Gottsche*, 118 AD3d 1303, 1303, *lv denied* 24 NY3d 1084). Here, the

court "made plain that [it] would be guided solely by defendant's choice in the matter, despite the defense attorney's clearly stated views and advice to the contrary," and thus the court "denied [defendant] the expert judgment of counsel to which the Sixth Amendment entitles him" (*Colville*, 20 NY3d at 32). We nonetheless conclude that the error is harmless in light of the testimony of defendant that he intentionally stabbed the victim (*see People v Butler*, 140 AD3d 472, 473).

In his pro se supplemental brief, defendant contends that the court erred in permitting the prosecutor to exercise a peremptory challenge to exclude a prospective juror based on race. We reject that contention "inasmuch as the prosecutor clearly provided a race-neutral basis for the challenge" (*People v Morris*, 138 AD3d 1408, 1409, *lv denied* 27 NY3d 1136), i.e., a police officer wrongfully had accused the prospective juror of an assault in the past, and she was tried on that charge, which ultimately was dismissed.

Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1189

CAF 15-01025

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF JENNIFER L.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

GERALD S., JR., RESPONDENT-APPELLANT.

IN THE MATTER OF GERALD S., JR.,
PETITIONER-APPELLANT,

V

JENNIFER L., RESPONDENT-RESPONDENT.

IN THE MATTER OF MELINDA L.-B.,
PETITIONER-RESPONDENT,

V

GERALD S., JR., RESPONDENT-APPELLANT,
AND JENNIFER L., RESPONDENT-RESPONDENT.

IN THE MATTER OF JENNIFER L., PETITIONER,

V

SHANE C., RESPONDENT.

KIMBERLY J. CZAPRANSKI, INTERIM CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR PETITIONER-RESPONDENT JENNIFER L. AND RESPONDENT-RESPONDENT.

NATHAN A. VANLOON, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered April 29, 2015 in proceedings pursuant to Family Court Act article 5 and article 6. The order, among other things, vacated the acknowledgment of paternity signed by Gerald S., Jr., and Jennifer L.

It is hereby ORDERED that the order so appealed from is

unanimously reversed on the law without costs, the acknowledgment of paternity, custody order, and petition for modification of custody are reinstated, the second and fifth through eighth ordering paragraphs are vacated and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner mother in the first proceeding is the biological mother of a child born in October 2012. A week after the child's birth, the mother and respondent in the first proceeding, Gerald S., Jr. (Gerald), signed an acknowledgment of paternity. The mother was unable to care for the child because of her own mental health issues, and custody was granted to Gerald. Approximately one year later, Family Court issued a consent order granting the mother and Gerald joint custody with Gerald having primary physical residency. Less than two months later, however, in December 2013, the mother filed the petition in the first proceeding to vacate the acknowledgment of paternity. Gerald then filed the petition in the second proceeding to modify custody by seeking sole custody of the child. In the third proceeding, the child's maternal grandmother filed a petition seeking custody of the child. In the fourth proceeding, the mother filed a paternity petition against Shane C. (Shane) in March 2014.

The mother and Shane appeared before the court on the paternity petition, and Shane, who had no involvement in the child's life to that point, expressed in no uncertain terms that he wanted nothing to do with the child. Nevertheless, the court, without notification to Gerald, ordered a genetic marker test, which indicated a 99.99% probability that Shane was the child's father. At the next court appearance, on the mother's petition to vacate the acknowledgment of paternity, Gerald raised the defense of equitable estoppel, and the court reluctantly ordered a hearing. At the conclusion of the hearing, the court, inter alia, granted the mother's petition to vacate the acknowledgment of paternity, dismissed Gerald's modification petition with prejudice, vacated the custody order, implicitly granted the mother's paternity petition with respect to Shane by declaring Shane the father of the child, and removed Gerald as a party in the grandmother's proceeding. According to the parties, the child is currently in the custody of the maternal grandmother.

"New York courts have long applied the doctrine of estoppel in paternity and support proceedings" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326). The Legislature has specifically incorporated the estoppel doctrine in statutes. Specifically, the pertinent statutes provide that no genetic marker test "shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of . . . equitable estoppel" (Family Ct Act §§ 418 [a]; 532 [a]). Estoppel may be used "in the offensive posture to enforce rights or the defensive posture to prevent rights from being enforced" (*Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1, 6). Whether estoppel should be applied depends entirely on the best interests of the child and not the equities between the adults (*see Shondel J.*, 7 NY3d at 330; *Matter of Isaiah A.C. v Faith T.*, 43 AD3d 1048, 1048).

"Family Court should consider paternity by estoppel before it

decides whether to test for biological paternity" (*Shondel J.*, 7 NY3d at 330; *see Isaiah A.C.*, 43 AD3d at 1048). That did not occur here because Gerald was not a named party in the paternity proceeding and did not otherwise appear when the court ordered Shane to submit to a genetic marker test, so he did not have the opportunity to raise the doctrine of estoppel. The court should have joined Gerald in that proceeding or otherwise notified him before it ordered the test (*see Isaiah A.C.*, 43 AD3d at 1048-1049). After all, Gerald was not only the acknowledged father of the child, but was the custodial parent of the child, and the court was well aware of those facts inasmuch as it had issued the custody orders. The court made it clear in its decision, however, that even if Gerald had made a timely objection and raised the defense earlier, the court nevertheless would have ordered the test because the child was young and "the truth is important." That is contrary to both the plain language of the statute and statements of law by the Court of Appeals.

Even though the genetic marker test had already been conducted, the court was still authorized to consider the estoppel issue (*see Shondel J.*, 7 NY3d at 330). We conclude that, although the court held a hearing on that issue, its decision shows that it has little regard for the doctrine of estoppel, despite the fact that it "is now secured by statute in New York" (*id.*). The court stated in its decision that it routinely allows genetic marker tests involving babies and toddlers even when the child has an acknowledged father. The court remarked that the statute "was obviously designed to prevent everyone from learning in a proper case that the legal father was indeed not the biological father. In decades and centuries past this intended protection could have worked. The reality now however is that there is no way to protect a child from a genetic marker test when someone is determined to have one." Although a child has an interest in finding out the identity of his or her biological father, "in many instances a child also has an interest—no less powerful—in maintaining [his or] her relationship with the man who led [him or] her to believe that he is [his or] her father" (*id.* at 329). We conclude that Gerald was denied a fair hearing on the issue of equitable estoppel, and we therefore reverse the order, reinstate the acknowledgment of paternity, custody order, and petition for modification of custody, and vacate the second and fifth through eighth ordering paragraphs. We remit the matter to Family Court for further proceedings on the petitions before a different judge. Owing to the passage of time since the entry of the order on appeal, which directed Gerald to immediately turn the child over to the mother, we conclude that, pending a new determination, the maternal grandmother shall retain physical custody of the child.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1195

CA 15-01942

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

IN THE MATTER OF LAUREN L. SHEIVE,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOLLEY VOLUNTEER FIRE COMPANY,
RESPONDENT-DEFENDANT-RESPONDENT.

WINSTON & STRAWN LLP, NEW YORK CITY (ANUP K. MISRA OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 19, 2015 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment denied and dismissed the petition-complaint.

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

Memorandum: In this hybrid CPLR article 78 and declaratory judgment action, petitioner-plaintiff (petitioner) appeals from a judgment denying and dismissing the petition-complaint (petition). We agree with petitioner that Supreme Court improvidently exercised its discretion in sua sponte dismissing the petition. " '[U]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances,' " and no such extraordinary circumstances are present in this case (*CitiMortgage, Inc. v Carter*, 140 AD3d 1663, 1663; *see Oak Hollow Nursing Ctr. v Stumbo*, 117 AD3d 698, 699; *Hurd v Hurd*, 66 AD3d 1492, 1493; *cf. Wehringer v Brannigan*, 232 AD2d 206, 207, *appeal dismissed* 89 NY2d 980, *reconsideration denied* 89 NY2d 1087). In sua sponte dismissing the petition, "the court deprived [petitioner] of notice of what was effectively the court's own motion for summary judgment . . . , thereby depriving [her] of [her] opportunity to lay bare [her] proof . . . and rendering meaningful appellate review of the propriety of the court's determination on the merits impossible" (*Sena v Nationwide Mut. Fire Ins. Co.*, 198 AD2d 345, 346; *see Hurd*, 66 AD3d at 1493; *Abinanti v Pascale*, 41 AD3d 395, 396; *Jacobs v Mostow*, 23 AD3d 623, 623-624). We therefore reverse the judgment and reinstate the petition.

In light of our determination, we do not address petitioner's

remaining contention.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1197

CA 16-00708

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

JAMES J. MORAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JRM CONTRACTING, INC., DEFENDANT-APPELLANT.

ROBERT J. LUNN, ROCHESTER, AND FRANK A. ALOI, FOR DEFENDANT-APPELLANT.

KEITH R. LORD, PHELPS, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered July 22, 2015. The order, insofar as appealed from, denied in part defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In April 2004, plaintiff and defendant entered into a contract for the construction of a single-family residence pursuant to which plaintiff agreed to pay defendant a certain amount per week until the project was completed. Plaintiff terminated the contract in 2005 and commenced an action in 2010 against "James Madalena, d/b/a JRM Construction," alleging that the parties agreed that Madalena would complete the construction in nine months but failed to do so. Madalena answered and asserted as an affirmative defense that plaintiff had named the wrong party and that the contract was with defendant, not Madalena. In February 2014, Supreme Court granted Madalena's cross motion for summary judgment dismissing the complaint on the ground that he was not a proper party defendant. Three months later, plaintiff commenced this action against defendant, making the same allegations as in the prior action and asserting, inter alia, a breach of contract cause of action. The court granted defendant's motion for summary judgment dismissing the complaint in part by dismissing the breach of warranty cause of action, but otherwise denied the motion. We agree with defendant that the court should have granted the motion in its entirety.

Defendant established that the action was commenced more than six years after the breach of contract cause of action accrued and was therefore time-barred (*see* CPLR 213 [2]; *Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1150). Contrary to plaintiff's contention, the relation back doctrine does not apply herein (*see* CPLR 203 [b]).

"[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for [s]tatute of [l]imitations purposes where the two defendants are 'united in interest' " (*Buran v Coupal*, 87 NY2d 173, 177, quoting CPLR 203 [b]). Here, inasmuch as the prior action was dismissed, there was no amended pleading (*see Walls v Prestige Mgt., Inc.*, 73 AD3d 636, 637; *Alharezi v Sharma*, 304 AD2d 414, 414-415) and, moreover, Madalena was not a codefendant (*see Nevling v Chrysler Corp.*, 206 AD2d 221, 224-226; *Shepard v St. Agnes Hosp.*, 86 AD2d 628, 630). Contrary to plaintiff's further contention, CPLR 205 (a) also does not apply herein inasmuch as the prior action was dismissed on the merits (*see Hausch v Clarke*, 8 AD3d 436, 437; *see generally Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380). Contrary to the determination of the court, the relation back doctrine cannot be "bootstrapped onto CPLR 205 (a)."

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1198

CA 16-00394

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

DENNIS H. KINDRED, PLAINTIFF-APPELLANT,

V ORDER

SARAH COLBY AND MONROE COUNTY FAIR & RECREATION ASSOCIATION, DEFENDANTS-RESPONDENTS.

NASH CONNORS, P.C., BUFFALO (MATTHEW LOUISOS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (MARK T. WHITFORD, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered May 19, 2015. The order granted defendants' motion to dismiss plaintiff's complaint.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1200

CA 16-00718

PRESENT: CENTRA, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ.

DEWOLFF PARTNERSHIP ARCHITECTS, LLP,
PLAINTIFF-RESPONDENT,

V ORDER

ESCROW AGENT FOR A CERTAIN ESCROW ACCOUNT TO
WHICH PLAINTIFF IS A BENEFICIARY, WILLIAM R.
NOJAY, ESCROWEE, DEFENDANT,
AND KING HUSSEIN INSTITUTE FOR BIOTECHNOLOGY
AND CANCER, DEFENDANT-APPELLANT.

WHITE & CASE, WASHINGTON, DC (CLAIRE A. DELELLE OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERNSTROM & DRESTE, LLP, ROCHESTER (JOHN W. DRESTE OF COUNSEL), AND DEHM LAW FIRM, P.C., PITTSFORD, FOR PLAINTIFF-RESPONDENT.

SHULTS & SHULTS, HORNELL (DAVID A. SHULTS OF COUNSEL), FOR DEFENDANT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 22, 2016. The order, inter alia, granted the cross motion of plaintiff for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 9 and 10, 2016, and filed in the Monroe County Clerk’s Office on August 11, 2016,

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1201

CA 16-00423

PRESENT: CENTRA, J.P., CARNI, NEMOYER, AND CURRAN, JJ.

TRAVIS BUTCHELLO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. HERBERGER, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered December 22, 2015. The order denied the motion of defendant Michael J. Herberger for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint is dismissed against defendant Michael J. Herberger.

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained while playing in an intercollegiate junior varsity football game. In his complaint, plaintiff alleged, inter alia, negligent and/or reckless conduct on the part of the college that fielded the opposing team, that team's coach, and Michael J. Herberger (defendant), the opposition player who allegedly injured plaintiff. Defendant moved for summary judgment dismissing the complaint against him on the ground that plaintiff assumed the risk of his injury as a matter of law. Supreme Court denied the motion, and we now reverse.

"As a general rule, participants properly may be held to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*Turcotte v Fell*, 68 NY2d 432, 439, citing *Maddox v City of New York*, 66 NY2d 270, 277-278). Whether a plaintiff should be deemed to have made an informed estimate of the risks involved in an activity before deciding to participate depends upon the openness and obviousness of the risk, the plaintiff's background, skill and experience, the plaintiff's own conduct under the circumstances, and the nature of the defendant's conduct (*see Morgan v State of New York*, 90 NY2d 471, 485-486). To establish a plaintiff's assumption of the

risk, a defendant must show that the plaintiff was generally aware of the risk that befell him, but it is not necessary to demonstrate that the plaintiff foresaw the exact manner in which his injury occurred (*see Maddox*, 66 NY2d at 278; *Lamey v Foley*, 188 AD2d 157, 164).

We agree with defendant that plaintiff's action is barred by the doctrine of primary assumption of the risk and that the court thus erred in denying the motion. Defendant sustained his burden on the motion of demonstrating that plaintiff, an experienced football player, voluntarily assumed the risk of the injury by participating in the game (*see Benitez v New York City Bd. of Educ.*, 73 NY2d 650, 657-659; *Serrell v Connetquot Cent. Sch. Dist. of Islip*, 19 AD3d 683, 683-684; *see also Hagon v Northport-East Northport Union Free Sch. Dist. No. 4*, 273 AD2d 441, 441). In opposition to the motion, plaintiff failed to raise a triable issue of fact concerning whether he was subjected to a concealed or unseasonably increased risk (*see Serrell*, 19 AD3d at 683-684; *Hagon*, 273 AD2d at 441-442), or one that was otherwise not inherent in the sport (*see Cole v New York Racing Assn.*, 24 AD2d 993, 994, *affd* 17 NY2d 761; *see generally Benitez*, 73 NY2d at 659). Moreover, plaintiff failed to raise a triable issue of fact on his claim that defendant's conduct was a "flagrant infraction[of the rules of the sport] unrelated to the normal method of playing the game and . . . without any competitive purpose" (*Turcotte*, 68 NY2d at 441; *see Barton v Hapeman*, 251 AD2d 1052, 1052; *cf. Kramer v Arbore*, 309 AD2d 1208, 1209; *Keicher v Town of Hamburg*, 291 AD2d 920, 920-921).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1202

TP 16-00742

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

IN THE MATTER OF SHANNON V. CAMPBELL, PETITIONER,

V ORDER

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

SHANNON CAMPBELL, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER 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, Seneca County [Dennis F. Bender, A.J.], entered May 2, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1203

TP 16-00501

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

IN THE MATTER OF THE ESTATE OF EMILIE S. BURKE, DECEASED, BY SANDRA DIMARCO, EXECUTOR, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

KARPINSKI, STAPLETON & TEHAN, PC, AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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 March 23, 2016) to review a determination of respondent. The determination imposed a penalty of 17.3 months on the Medicaid application of petitioner's decedent.

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 that Emilie S. Burke (decedent) was not Medicaid-eligible for nursing facility services for a period of 17.3 months on the ground that she had made uncompensated transfers during the look-back period (*see* Social Services Law § 366 [5] [a], [e] [1] [vi]). The determination of the Cayuga County Department of Health and Human Services that decedent was not eligible for those services was affirmed by respondent, and we now confirm the determination.

"When reviewing a Medicaid eligibility determination made after a fair hearing, we must determine whether the agency's decision is supported by substantial evidence and [is] not affected by an error of law, bearing in mind that the petitioner bears the burden of demonstrating eligibility" (*Matter of Flannery v Zucker*, 136 AD3d 1385, 1385 [internal quotation marks omitted]). "We will uphold the agency's determination when it is 'premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute' " (*id.*, quoting

Matter of Golf v New York State Dept. of Social Servs., 91 NY2d 656, 658).

Here, there is no dispute that decedent transferred approximately $150,000 to her children and grandchildren in June 2010, and she submitted her application for Medicaid in November 2014. The look-back period for transfers made after February 8, 2006 is 60 months (*see* Social Services Law § 366 [5] [e] [1] [vi]). Where, as here, an applicant "has transferred assets for less than fair market value, he or she must 'rebut the presumption that the transfer of funds was motivated, in part if not in whole, by . . . anticipation of a future need to qualify for medical assistance' " (*Matter of Corcoran v Shah*, 118 AD3d 1473, 1473; *see Matter of Donvito v Shah*, 108 AD3d 1196, 1197-1198). In other words, the applicant must establish that "the assets were transferred exclusively for a purpose other than to qualify for [Medicaid]" (§ 366 [5] [e] [4] [iii] [B]).

Contrary to petitioner's contention, there is substantial evidence to support the determination of the Administrative Law Judge (ALJ) that decedent failed to rebut that presumption. First, decedent "failed to establish that the transfers were 'part of a long-standing pattern,' inasmuch as she presented no evidence that substantial gifts such as the uncompensated transfers at issue were made in prior years" (*Corcoran*, 118 AD3d at 1474; *see Donvito*, 108 AD3d at 1198; *Matter of Capri v Daines*, 90 AD3d 1530, 1531). Second, although decedent was relatively independent at the time of the transfer, she was 86 years old, had her own medical issues to consider, including diabetes, had minimal savings apart from the money transferred to relatives, and had needed financial assistance in the past. It thus cannot be said that her entry into a nursing home facility and concomitant need for those funds were "unanticipated events" (*Matter of Albino v Shah*, 111 AD3d 1352, 1355). We thus conclude that, given decedent's "advanced age and [questionable] health," there is evidence to support the ALJ's determination that the transfers may have been made in part to qualify for medical assistance (*Capri*, 90 AD3d at 1531).

Although we recognize that there is evidence that would have supported a contrary determination, we cannot say that the determination is not supported by substantial evidence. We further note that, although decedent's daughter, who had power of attorney, testified at the hearing that they never received any documentation notifying them that the look-back period was 60 months instead of 36 months, we need not address the effect that contention would have had on the ultimate determination inasmuch as the ALJ weighed the conflicting evidence on that issue and concluded that the daughter received the requisite notice before the application was filed. Inasmuch as " '[i]t is for the administrative tribunal, not the courts, to weigh conflicting evidence, assess the credibility of witnesses, and determine which [evidence] to accept and which to reject,' " the ALJ's determination on this issue should not be rejected (*Faber v Merrifield*, 11 AD3d 1009, 1010; *see Matter of Hall v Shah*, 100 AD3d 1357, 1360).

Finally, petitioner contends that the ALJ erred in refusing to

consider whether decedent was eligible for benefits under the "undue hardship" provisions (*see* Social Services Law § 366 [5] [e] [4] [iv]). We do not review that contention inasmuch as it is well settled that " '[t]he scope of a CPLR article 78 proceeding, following an administrative hearing, is limited to review of the issues raised and addressed in that hearing' " (*Matter of De Santis v Wing*, 289 AD2d 953, 954; *see Matter of Myles v Doar*, 24 AD3d 677, 678). At no time during the hearing did decedent's representatives raise the issue of a statutory undue hardship exemption (*cf. Matter of Tarrytown Hall Care Ctr. v McGuire*, 116 AD3d 871, 872), or offer any proof on the relevant factors for that determination (*see Matter of Weiss v Suffolk County Dept. of Social Servs.*, 121 AD3d 703, 705).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1204

TP 16-00613

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

IN THE MATTER OF RYAN BRADWAY, PETITIONER,

V MEMORANDUM AND ORDER

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

RYAN BRADWAY, 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, Oneida County [Bernadette T. Clark, J.], entered March 29, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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 inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [using drugs]). At the outset, we note that, " '[b]ecause the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court' " (*Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362). Nevertheless, we review the two issues raised by petitioner in the interest of judicial economy (*see id.*), i.e., that his employee assistant was inadequate and his hearing was not timely. Petitioner failed to raise those contentions during his tier III hearing and thus failed to preserve them for our review (*see Matter of Reeves v Goord*, 248 AD2d 994, 995, *lv denied* 92 NY2d 804).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1205

KA 15-00110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GENE D. RIVERS, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 26, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated criminal contempt, unlawfully fleeing a police officer in a motor vehicle in the third degree and resisting arrest.

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 aggravated criminal contempt (Penal Law §§ 110.00, 215.52 [1]), unlawful fleeing a police officer in a motor vehicle in the third degree (§ 270.25), and resisting arrest (§ 205.30). We note at the outset that, as conceded by the People, the uniform sentence and commitment form incorrectly reflects that a post-incarceration period of conditional discharge was imposed, and it therefore must be amended to correct that clerical error (*see generally People v Pitcher*, 126 AD3d 1471, 1473-1474, *lv denied* 25 NY3d 1169).

Defendant failed to preserve for our review his contentions that his conventional plea of guilty to a lesser charge under the first count of the indictment and his *Alford* pleas to crimes charged in the sixth and seventh counts of the indictment were not knowingly and voluntarily entered, inasmuch as defendant did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see generally People v Conceicao*, 26 NY3d 375, 381; *People v Jones*, 114 AD3d 1239, 1242, *lv denied* 23 NY3d 1038, 25 NY3d 1166). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *Jones*, 114 AD3d at 1242).

In any event, defendant’s challenges to County Court’s acceptance

of his pleas are without merit. With respect to defendant's conviction under the first count of the indictment, we conclude that the record affirmatively demonstrates that defendant understood the nature and consequences of his plea (*see Conceicao*, 26 NY3d at 382-384). We further note that "no factual colloquy was required inasmuch as defendant pleaded guilty to a crime lesser than that charged" (*People v Richards*, 93 AD3d 1240, 1240, *lv denied* 20 NY3d 1014; *see People v Harris*, 125 AD3d 1506, 1507, *lv denied* 26 NY3d 929).

Similarly, "the record establishes that defendant's *Alford* plea was 'the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt' " (*People v Smith*, 26 AD3d 746, 747, *lv denied* 7 NY3d 763). Beyond that, the record "shows that defendant was advised of his rights and that his *Alford* plea . . . was knowingly, intelligently and voluntarily entered with a full understanding of its consequences" (*People v Alfieri*, 201 AD2d 935, 935, *lv denied* 83 NY2d 908; *see People v Clacks*, 298 AD2d 846, 847, *lv denied* 99 NY2d 534). We note that the court specifically advised defendant of the existence of a possible defense of intoxication and elicited defendant's knowing waiver of that defense (*see People v Petix*, 234 AD2d 994, 995, *lv denied* 89 NY2d 1098).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1206

KA 14-00754

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HORACE BETTS, III, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered March 6, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1208

KA 13-01360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. PILATO, DEFENDANT-APPELLANT.

LAW OFFICES OF MATTHEW J. RICH, P.C., ROCHESTER (MATTHEW J. RICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LEAH R. MERVINE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 24, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (six counts), attempted murder in the second degree (two counts) and arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts each of intentional murder in the second degree (Penal Law § 125.25 [1]) and felony murder in the second degree (§ 125.25 [3]), two counts of attempted murder in the second degree (§§ 110.00, 125.25 [1]) and one count of arson in the second degree (§ 150.15) based on allegations that he intentionally set fire to his family's residence in the middle of the night, killing three of the five family members who were inside the residence at the time.

When the matter proceeded to trial, defense counsel relied heavily on the affirmative defense of extreme emotional disturbance (EED defense) (*see* Penal Law § 125.25 [1] [a]), but it is well settled that "[o]nly subdivision (1) [of section 125.25], dealing with intentional murder, contains a provision for mitigation of the charge by the affirmative defense of extreme emotional disturbance" (*People v Fardan*, 82 NY2d 638, 642; *see People v Royster*, 43 AD3d 758, 759, *lv denied* 9 NY3d 1009). Defendant thus contends that he was denied effective assistance of counsel on the ground that, by pursuing the EED defense, counsel effectively conceded defendant's guilt to the entire indictment, resulting in the functional equivalent of a guilty plea. We reject that contention.

Here, there was no real issue at trial concerning who had started

the fire at defendant's residence. Defendant admitted to a friend and his sister's boyfriend that he had started the fire, revealing particulars that no one but the perpetrator could have known, and he reeked of gasoline when he was taken into custody within hours after the fire erupted. In addition, defendant confessed his guilt to the police. Although County Court suppressed the confession, it ruled that defendant's statements to the police could be used by the People for impeachment purposes at trial if defendant testified that he did not start the fire. Defense counsel thus had "limited options for advancing a viable defense" (*People v Green*, 187 AD2d 259, 259, *lv denied* 81 NY2d 762). Inasmuch as "[t]he evidence of defendant's guilt was overwhelming, and '[c]ounsel may not be expected to create a defense when it does not exist' " (*People v Taussi-Casucci*, 57 AD3d 209, 210, *lv denied* 12 NY3d 788), we conclude under the circumstances of this case that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Although defendant contends that defense counsel was unaware that the EED defense did not apply to felony murder, the record does not support that contention. Defendant, who was 15 years old at the time of the offenses, was charged as a juvenile offender (*see* CPL 1.20 [42] [2]). As opposed to adults charged with both intentional and felony murder, juvenile offenders face different sentencing minimums for the two offenses (*compare* Penal Law § 70.00 [2] [a]; [3] [a] [i] *with* § 70.05 [3] [a]). That disparity in the sentencing minimums establishes that it was reasonable for defense counsel to pursue a strategy focused on obtaining an acquittal on the intentional murder counts, even at the expense of exposing defendant to an all but certain felony murder conviction. Had defense counsel's "strategy been successful, defendant would have been eligible for a considerably lower sentence" (*People v Frascone*, 271 AD2d 333, 333). We thus conclude that, contrary to defendant's contentions, defense counsel's strategy did not amount to the functional equivalent of a guilty plea (*see People v Washington* [appeal No. 2], 19 AD3d 1180, 1180-1181, *lv denied* 5 NY3d 833; *People v Barnes*, 249 AD2d 227, 228, *lv denied* 92 NY2d 893; *cf. People v Barbot*, 133 AD2d 274, 275-276), and the court did not err in failing to conduct a colloquy with defendant to determine whether he expressly consented to that strategy (*see Washington*, 19 AD3d at 1180-1181; *People v Chaney*, 284 AD2d 998, 998, *lv denied* 96 NY2d 917). Defendant's heavy reliance on *Washington* (5 Misc 3d 957, 957, *revd* 19 AD3d 1180) is misplaced inasmuch as there is no evidence on this record that defense counsel pursued such a strategy "without defendant's consent" (19 AD3d at 1180). We have reviewed defendant's remaining challenges to the effectiveness of counsel and conclude that they lack merit (*see generally People v Caban*, 5 NY3d 143, 152).

Contrary to the contention of defendant, the court did not err in denying defense counsel's requests to dismiss the felony murder counts under the merger doctrine (*see People v Steen*, 107 AD3d 1608, 1609, *lv denied* 22 NY3d 959; *People v Couser*, 12 AD3d 1040, 1041, *lv denied* 4 NY3d 762), or to charge the jury on the EED defense with respect to those counts (*see Fardan*, 82 NY2d at 642; *Royster*, 43 AD3d at 759).

Defendant further contends that he was denied his right to testify in his own defense at trial. Even assuming, arguendo, that defendant was not required to preserve that contention for our review, we conclude that it lacks merit. Although there is a "fundamental precept that a criminal defendant has the right to testify in his or her own defense guaranteed by the Federal and State Constitutions" (*People v Robles*, 115 AD3d 30, 33-34, *lv denied* 22 NY3d 1202, *reconsideration denied* 23 NY3d 1042), it is well settled that, ordinarily, "the 'trial court does not have a general obligation to sua sponte ascertain if the defendant's failure to testify was a voluntary and intelligent waiver of his [or her] right' " (*id.* at 34; *see generally People v Fratta*, 83 NY2d 771, 772). Contrary to defendant's contention, this case does not present any of the " 'exceptional, narrowly defined circumstances' " in which " 'judicial interjection through a direct colloquy with the defendant [would] be required to ensure that the defendant's right to testify is protected' " (*Robles*, 115 AD3d at 34; *see Brown v Artuz*, 124 F3d 73, 79 n 2, *cert denied* 522 US 1128).

Although defendant contends that he was denied a fair trial by prosecutorial misconduct on summation, he concedes that his contention is not preserved for our review inasmuch as defense counsel made no objection to any of the challenged comments (*see People v Glenn*, 72 AD3d 1567, 1568, *lv denied* 15 NY3d 805). 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]).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence inasmuch as he failed to make a sufficiently specific motion to dismiss (*see People v Gray*, 86 NY2d 10, 19) and, moreover, he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we reject defendant's contention that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495) and, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Finally, we address defendant's contentions concerning the sentence. We conclude that New York's sentencing statutes, which provide for indeterminate life sentences for juvenile offenders convicted of the crimes of murder of which defendant was convicted, do not violate the state or federal prohibitions against cruel and unusual punishment (*see People v Taylor*, 136 AD3d 1331, 1332-1333, *lv denied* 27 NY3d 1075; *cf. Miller v Alabama*, ___ US ___, ___, 132 S Ct 2455, 2460), and we further conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1209

KA 14-01826

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN MYERS, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 (James H. Cecile, A.J.), rendered March 25, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the third degree (Penal Law § 140.20). Preliminarily, we agree with defendant that he did not validly waive his right to appeal because, although defendant signed two written waivers of the right to appeal, there was no colloquy between County Court and defendant concerning the waiver (*see People v Bradshaw*, 18 NY3d 257, 264-265; *People v Callahan*, 80 NY2d 273, 283; *People v Terry*, 138 AD3d 1484, 1484, *lv denied* 27 NY3d 1156). "[A] written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his right to appeal" (*Terry*, 138 AD3d at 1484 [internal quotation marks omitted]). Defendant's challenge to the voluntariness of his plea is unpreserved for our review because he failed to move to withdraw the plea or to vacate the judgment of conviction (*see e.g. People v Reinard*, 134 AD3d 1407, 1408, *lv denied* 27 NY3d 1074, *cert denied* ___ US ___ [Oct. 31, 2016]).

Although defendant was not required to preserve for our review his challenge to the validity of his waiver of indictment (*see People v Boston*, 75 NY2d 585, 589 n; *People v Lugg*, 108 AD3d 1074, 1074), we reject defendant's contentions that his waiver of indictment is invalid because there was no colloquy on that subject and no evidence in the record that his waiver was executed in "open court" (CPL 195.20). A colloquy is not required in connection with a waiver of indictment (*see generally People v Pierce*, 14 NY3d 564, 567-568) and,

"even [when] the plea minutes are silent," the "open court" execution requirement of CPL 195.20 is satisfied where, as here, the court's order approving the indictment waiver "expressly found that defendant had executed the waiver in open court" (*People v Davis*, 84 AD3d 1645, 1646, *lv denied* 17 NY3d 815; *see People v Finster*, 136 AD3d 1279, 1280, *lv denied* 27 NY3d 1132).

We reject defendant's contention that the court abused its discretion in terminating his participation in a drug treatment program. Pursuant to the terms of the plea agreement, defendant was placed in a drug treatment program and, following his successful completion of the program, the charge would be reduced to an unspecified misdemeanor, from which he would be conditionally discharged. If defendant did not complete the program, however, defendant could receive any lawful sentence on the burglary conviction, including the maximum term of imprisonment. When defendant did not successfully complete the program, the court sentenced him to the maximum term allowed. Trial courts have "broad discretion when supervising a defendant subject to [a drug treatment program], and deciding whether the conditions of a [drug treatment program] plea agreement have been met" (*People v Fiammegta*, 14 NY3d 90, 96; *see generally* CPL 216.05 [9] [c]). Here, despite doing well in the first year of the program, defendant ultimately relapsed multiple times and missed several court dates. Defendant nevertheless was twice given new treatment programs after relapsing. Under these circumstances, we cannot conclude that the court abused its broad discretion in terminating defendant's participation in the drug treatment program (*see e.g. People v Shipp*, 138 AD3d 1416, 1417, *lv denied* 28 NY3d 936; *People v Peck*, 100 AD3d 1520, 1521, *lv denied* 20 NY3d 1102).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1210

CAF 15-01837

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

IN THE MATTER OF LARRY D. STEVENSON, II,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TRICIA A. SMITH, RESPONDENT-APPELLANT.

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

LARRY D. STEVENSON, II, PETITIONER-RESPONDENT PRO SE.

ARDETH L. HOUDE, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Caroline E. Morrison, A.J.), entered August 25, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, directed that the parties shall have joint custody of the subject child, and that the child's primary residence shall be with petitioner.

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

Memorandum: In this child custody matter, respondent mother appeals from an order that continued joint parental custody of the parties' daughter but, in connection with Family Court's implementation of a previously agreed-upon change of schools and school district, changed the child's primary residential parent from the mother to petitioner father. Nevertheless, by the terms of the order, the father's status as primary residential parent is subject to "periods of temporary physical residency" that have the child spending 12 or 13 out of every 28 overnights, and up to equal time each week, at the mother's home, depending on whether school is in session.

The court's determination in a custody matter "is entitled to great deference and will not be disturbed where," as here, it is based on a careful weighing of appropriate factors (*Matter of Pinkerton v Pensyl*, 305 AD2d 1113, 1113-1114; *see Matter of Triplett v Scott*, 94 AD3d 1421, 1422; *Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). The touchstone of any such determination is " 'what is for the best interest[s] of the child, and what will best promote [his or her] welfare and happiness' " (*Eschbach v Eschbach*, 56 NY2d 167, 171, quoting Domestic Relations Law § 70). "It is well settled that, in seeking to modify an existing order of custody, '[t]he petitioner must

make a sufficient evidentiary showing of a change in circumstances to require a hearing on the issue whether the existing custody order should be modified' " (*Matter of Hughes v Davis*, 68 AD3d 1674, 1675; *see Matter of Jones v Laird*, 119 AD3d 1434, 1434, *lv denied* 24 NY3d 908). Where, as here, the parties' existing custody arrangement is based on a consent order, which is "entitled to less weight than a disposition after a plenary trial" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [internal quotation marks omitted]), a court "cannot modify that order unless a sufficient change in circumstances—since the time of the stipulation—has been established, and then only where a modification would be in the best interests of the children" (*Matter of Hight v Hight*, 19 AD3d 1159, 1160 [internal quotation marks omitted]; *see Jones*, 119 AD3d at 1434).

Contrary to the mother's contention, we conclude that a change of circumstances was shown to have occurred since the entry of the prior order, namely, the mother's refusal to live up to what the court found was in fact her prior agreement with the father that the child would, beginning with the seventh grade, attend school in the district in which the father resides (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1323; *see generally Sequeira v Sequeira*, 105 AD3d 504, 505, *lv denied* 21 NY3d 1052). We further conclude that there is a sound and substantial basis in the record for the determination that it is in the child's best interests to change her primary physical residence from the mother's house to the father's house in connection with that long-anticipated change of schools (*see generally Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1726; *Matter of Westfall v Westfall*, 28 AD3d 1229, 1230, *lv denied* 7 NY3d 706).

We have considered the mother's contention that the court deprived her of her right to a fair hearing in its questioning of the parties and conclude that it is without merit (*cf. Matter of Yadiel Roque C.*, 17 AD3d 1168, 1169).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1211

CAF 16-00605

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

IN THE MATTER OF STACEY WYNN MOREY,
PETITIONER-APPELLANT,

V ORDER

SONJA ANKE FRANKLIN, RESPONDENT-RESPONDENT.

IN THE MATTER OF SONJA ANKE FRANKLIN,
PETITIONER-RESPONDENT,

V

STACEY WYNN MOREY, RESPONDENT-APPELLANT.

BURGETT & ROBBINS, LLP, JAMESTOWN (LYDIA ALLEN CAYLOR OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

DAVID M. CVILETTE, P.C., DUNKIRK (DAVID M. CIVILETTE OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

JOHN JAMES WESTMAN, ATTORNEY FOR THE CHILD, JAMESTOWN.

Appeal from an order of the Family Court, Chautauqua County (Michael F. Griffith, J.), entered September 2, 2015 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint custody of the subject child.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1212

CAF 15-01119

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

IN THE MATTER OF LISA M. HOLECK,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

SEAN D. BEYEL, RESPONDENT-PETITIONER-APPELLANT.

SEAN D. BEYEL, RESPONDENT-PETITIONER-APPELLANT PRO SE.

LISA M. HOLECK, PETITIONER-RESPONDENT-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered April 23, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent-petitioner to an order of a Support Magistrate.

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-petitioner father appeals pro se from an order that, inter alia, denied his objections to a Support Magistrate's order that, among other things, denied his request for a reduction of his child support obligation. Contrary to the father's contention, the Support Magistrate did not err in directing him to apply to the Social Security Administration for a change in the representative payee of the subject children's social security disability (SSD) benefits from the father to petitioner-respondent mother. The court in a child support matter has discretion to consider " 'everything available to support the child' " (*Matter of Webb v Rugg*, 197 AD2d 777, 778; *see Matter of Graby v Graby*, 87 NY2d 605, 611, *rearg denied* 88 NY2d 875). The evidence in the record before us establishes that the mother had primary physical custody of the subject children, and that their needs were best served by having their SSD benefits paid to her.

We further conclude that, because those payments are to be used for the benefit of the children and the father failed to establish that he had done so, the Support Magistrate did not err in directing that he pay to the mother the amount of those benefits that he received after the mother filed the petition seeking those payments for the benefit of the children (*see* Family Ct Act § 449 [2]; *McDonald v McDonald*, 262 AD2d 1028, 1028-1029; *see generally Matter of Kummer*, 93 AD2d 135, 185-186). Contrary to the father's contention, the

Support Magistrate did not award those funds to the mother as support arrears. Instead, the Support Magistrate directed the father to provide the mother, the children's primary custodian, with funds that were "for the children's social security payment that [the father] received and did not give to" the mother and that he failed to establish that he used for the children's benefit.

Family Court also properly denied the father's objection to that part of the Support Magistrate's order that rejected his request for a reduction of his child support obligation. The father requested that reduction after the mother became the payee for the children's SSD benefits, and the father contended that he received less income due to the change in payee. It is well settled that, "although a dependent child's Social Security benefits are derived from the disabled parent's past employment, they are designed to supplement existing resources, and are not intended to displace the obligation of the parent to support his or her children" (*Graby*, 87 NY2d at 611; *see Matter of Hollister v Whalen*, 244 AD2d 650, 650). Therefore, the fact that the Support Magistrate directed the father to request that the Social Security Administration designate the mother as the children's representative payee, together with the father's resulting loss of the use of that money, does not provide a basis for a downward modification of the father's child support obligation (*see Matter of McDonald v McDonald*, 112 AD3d 1105, 1107-1108; *see generally Graby*, 87 NY2d at 611).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1214

CA 16-00538

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

JEFFREY MALKAN, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.

RICHARD E. CASAGRANDE, LATHAM (ANTHONY J. BROCK OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 19, 2015. The order denied the motion of claimant for leave to file and serve a late claim.

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

Memorandum: We reject claimant's contention that the Court of Claims erred in denying his motion seeking permission to file a late claim against defendant based upon its alleged breach of contract. " 'A determination by the Court of Claims to grant or deny a motion for permission to file a late . . . claim lies within the broad discretion of that court and should not be disturbed absent a clear abuse of that discretion' " (*Ledet v State of New York*, 207 AD2d 965, 965-966). Here, the court considered the requisite statutory factors and concluded that three of them favored claimant, i.e., notice, opportunity to investigate, and lack of substantial prejudice to defendant (*see* Court of Claims Act § 10 [6]; *see also Ledet*, 207 AD2d at 966). We nonetheless decline to disturb the court's exercise of discretion inasmuch as we agree with the court's conclusions that claimant failed to demonstrate an adequate excuse for the delay, that the proposed claim lacks merit, and that claimant had and/or has alternative remedies (*see Lange v State of New York*, 133 AD3d 1250, 1250; *Matter of Magee v State of New York*, 54 AD3d 1117, 1118; *Olsen v State of New York*, 45 AD3d 824, 824-825).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1215

CA 16-00496

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

JAMIE LEE RODRIGUEZ AND ERIC RODRIGUEZ, JR., INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF ERIC RODRIGUEZ, III, INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DYNASTY MAINTENANCE CREW, LLC, ET AL., DEFENDANTS, AND JOVINO PROPERTY AND FINANCIAL MANAGEMENT, DEFENDANT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (LUISA JOHNSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered October 19, 2015. The order denied the motion of defendant Jovino Property and Financial Management for summary judgment and for sanctions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking summary judgment dismissing the complaint against defendant Jovino Property and Financial Management, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for burn injuries sustained by their son, who was involved in an accident near a fire pit at a family gathering. Jovino Property and Financial Management (defendant) appeals from an order denying its motion for summary judgment dismissing the complaint against it and for the imposition of sanctions and costs against plaintiffs and/or their counsel for their failure to discontinue the action against it. We conclude that Supreme Court erred insofar as it denied that part of the motion seeking summary judgment dismissing the complaint against defendant, and we modify the order accordingly.

We conclude that defendant met its burden on the motion of establishing as a matter of law that it did not employ the individual who allegedly caused the accident, defendant DeParis R. Vives, and that plaintiffs failed to raise a triable issue of fact (*see Kats-Kagan v City of New York*, 117 AD3d 686, 687; *Berger v Dykstra*, 203 AD2d 754, 755, *lv dismissed* 84 NY2d 965; *see generally Kavanaugh v Nussbaum*, 71 NY2d 535, 546). Defendant further established as a

matter of law that it did not manage the property on which the accident occurred, and plaintiffs failed to raise a triable issue of fact on that point as well (*see Reynolds v Avon Grove Props.*, 129 AD3d 932, 933). Finally, we see no basis in the record for the imposition of liability against defendant as the alleged owner of the vehicle from which Vives allegedly unloaded a certain gas can prior to the incident (*see generally* Vehicle and Traffic Law § 388 [1]). The record establishes as a matter of law that the van and the gas can were owned by Vives or his company, defendant Dynasty Maintenance Crew, LLC, and not by defendant. We thus agree with defendant that it cannot be held liable to plaintiffs because, as a matter of law, it had nothing to do with the property, the van, the gasoline, or the fire, and because it did not employ Vives.

We nevertheless further conclude that the court did not abuse its discretion in denying defendant's request for the imposition of sanctions against plaintiffs and/or their counsel (*see* 22 NYCRR 130-1.1 [a]; *Kern v City of Rochester* [appeal No. 1], 267 AD2d 1026, 1026; *Scaccia v MacCurdy*, 239 AD2d 942, 942; *see also* CPLR 8303-a [a]; *Leonard v Reinhardt*, 20 AD3d 510, 511; *Lavin & Kleiman v J.M. Heinike Assocs.*, 221 AD2d 919, 919).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1218

CA 16-00544

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

IN THE MATTER OF JAYSON BULMAHN,
PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE OFFICE OF MEDICAID INSPECTOR GENERAL AND NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENTS-RESPONDENTS.

STAMM LAW FIRM, WILLIAMSVILLE (GREGORY STAMM OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 26, 2015 in a proceeding pursuant to CPLR article 78. The judgment denied the amended petition.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1219

CA 15-01355

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

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

V MEMORANDUM AND ORDER

JOSEPH SCHOLTISEK, RESPONDENT-APPELLANT.

NEIL T. CAMPBELL, ROCHESTER, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered June 26, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed that respondent be committed to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a jury trial, that he is a detained sex offender who has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and determining, following a nonjury dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility. We affirm.

To the extent that respondent contends that the evidence is legally insufficient to establish that he has a mental abnormality, we reject that contention. Petitioner's expert witnesses testified that respondent suffers from "pedophilic disorder"; had four victims spanning ten years; re-offended after going to prison and while under parole supervision; and has not progressed or completed any sex offender treatment. In addition, one of petitioner's experts testified that, despite the fact that respondent has ready accessibility to age-appropriate sexual partners, he continues to pursue children, which, according to petitioner's expert witness, is an indication "of the strength of that interest and urge, that sex with people his own age isn't enough." We therefore conclude that petitioner sustained its burden of establishing by clear and convincing evidence that respondent suffers from "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that

predisposes him . . . to the commission of conduct constituting a sex offense and that results in [him] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03 [i]; *see Matter of State of New York v Stein*, 85 AD3d 1646, 1647, *affd* 20 NY3d 99, *cert denied* ___ US ___, 133 S Ct 1500; *Matter of State of New York v Bushey*, 142 AD3d 1375, 1376; *Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473-1474, *lv denied* 17 NY3d 702). We reject respondent's further contention that the verdict is against the weight of the evidence. "The jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony" (*Matter of State of New York v Chrisman*, 75 AD3d 1057, 1058), and it should be set aside only if the evidence preponderates so greatly in respondent's favor that the jury's determination is not supported by any fair interpretation of the evidence (*see Matter of State of New York v Nervina,* 120 AD3d 941, 943, *affd* 27 NY3d 718). Here, we conclude that the jury's determination is supported by a fair interpretation of the evidence.

Contrary to respondent's further contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.03 [e]; 10.07 [f]). " 'Supreme Court, as the trier of fact, was in the best position to evaluate the weight and credibility of the conflicting [psychological] testimony presented . . . , and we see no basis to disturb its decision to credit the testimony of petitioner's expert over that of respondent's expert' " (*Matter of State of New York v Connor*, 134 AD3d 1577, 1578, *lv denied* 27 NY3d 903; *see Matter of State of New York v Adkison*, 108 AD3d 1050, 1052; *see also Bushey*, 142 AD3d at 1376-1377). Finally, contrary to respondent's contention, the court was under no obligation to "consider the possibility of a 'least restrictive alternative' in rendering its disposition" (*Matter of State of New York v Bass*, 119 AD3d 1356, 1357, *lv denied* 24 NY3d 908; *see Matter of State of New York v Michael M.*, 24 NY3d 649, 657-658; *Matter of State of New York v Parrott*, 125 AD3d 1438, 1439-1440, *lv denied* 25 NY3d 911).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1226

KA 15-00736

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAMUEL RIVALDO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Douglas A. Randall, J.), entered March 28, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1227

TP 16-00762

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

IN THE MATTER OF TERRY DAUM, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 May 4, 2016) 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: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1228

TP 16-00691

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

IN THE MATTER OF MICHAEL FREDERICK, PETITIONER,

V ORDER

DONALD E. VENETOZZI, DIRECTOR, SPECIAL HOUSING UNIT, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

MICHAEL FREDERICK, 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 [Thomas G. Leone, A.J.], entered April 22, 2016) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1229

KA 15-00902

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK J. ELLIOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered November 8, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of rape in the second degree (Penal Law § 130.30 [1]) and endangering the welfare of a child (§ 260.10 [1]). Contrary to his sole contention on appeal, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The 14-year-old victim testified that defendant had sex with her, and the forensic evidence, although inconclusive, was not inconsistent with her testimony.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1230

KA 14-00230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALQUAN R. JUNIOUS, ALSO KNOWN AS PIG,
DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE ABBATOY LAW FIRM, PLLC (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

MALQUAN R. JUNIOUS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 19, 2013. The judgment convicted defendant, upon a jury verdict, of attempted assault in the first degree, criminal possession of a weapon in the third degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), criminal possession of a weapon in the third degree (§ 265.02 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [4]). Defendant is convicted of firing a shotgun toward a woman, who was living with his uncle in a house owned by defendant's grandmother, after defendant and his uncle had engaged in a physical altercation. We reject defendant's contention in his main and pro se supplemental briefs that the verdict on the attempted assault count is against the weight of the evidence. Viewing the evidence in light of the elements of the crime of attempted assault in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the evidence established that defendant intended to cause serious physical injury to the woman by means of a deadly weapon (*see* § 120.10 [1]), and that he engaged in conduct that tended to effect the commission of the crime (*see* § 110.00), by firing the shotgun toward her. Even assuming, arguendo, that an acquittal would not have been unreasonable on the ground that defendant's intended victim was his uncle and not the woman, as he contends, we nevertheless conclude that the jury did not fail to give

the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495). We therefore conclude that "the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348).

We also reject defendant's contention in his main and pro se supplemental briefs that County Court erred in refusing to suppress the gun. The court credited the testimony of the police witnesses that, upon responding to a call of shots fired in a residence, several people were outside the residence, some of the people directed the police to the rear of the house where the man with the gun had gone, one officer observed a man enter a garage and, when the police demanded that any occupants exit the garage, an unarmed man exited. The man who exited was defendant but had not yet been identified as the shooter. One of the police witnesses testified that they entered the garage to see if there was anyone else inside who might be armed or injured. While walking in the loft of the garage, that officer saw a portion of the gun protruding from the eaves.

It is axiomatic that "a warrantless search of an individual's home is per se unreasonable and hence unconstitutional" in the absence of exceptional circumstances (*People v Knapp*, 52 NY2d 689, 694). We conclude that the People established the requisite elements of the emergency doctrine (*see People v Dallas*, 8 NY3d 890, 891, citing *People v Mitchell*, 39 NY2d 173, 177-178, *cert denied* 426 US 953). First, the police had reasonable grounds to believe that there was an emergency at hand and that there was an immediate need for their assistance for the protection of life (*see Dallas*, 8 NY3d at 891). " '[T]he requirement of reasonable grounds to believe that an emergency existed must be applied by reference to the circumstances then confronting the officer[s], including the need for a prompt assessment of sometimes ambiguous information concerning potentially serious consequences' " (*People v Gibson*, 117 AD3d 1317, 1319, *affd* 24 NY3d 1125). Based upon the information available to the police, they were aware that there was a suspect, not yet identified, who could be armed and was willing to use a gun (*see People v Stevens*, 57 AD3d 1515, 1515-1516, *lv denied* 12 NY3d 822). Second, the People established through the testimony of a police witness that they entered the garage to determine whether there were any armed or injured occupants and thus established that the search was not primarily motivated by an intent to arrest and seize evidence (*see Dallas*, 8 NY3d at 891; *Stevens*, 57 AD3d at 1516; *cf. People v Doll*, 21 NY3d 665, 671 n, *rearg denied* 22 NY3d 1053, *cert denied* ___ US ___, 134 S Ct 1552). Third, based upon the information that the armed suspect had fled to the rear of the house, a police witness had observed a man enter the garage, and the man who exited the garage was not armed, there was a reasonable basis to associate the emergency with the garage (*see Dallas*, 8 NY3d at 891; *Stevens*, 57 AD3d at 1515-1516). Thus, under the facts presented here, the police were not "constitutionally precluded from conducting a protective sweep to ascertain whether any armed [or injured] persons were inside" (*Gibson*, 117 AD3d at 1319-1320). The court therefore properly refused to suppress the gun, which was in plain view (*see generally People v Brown*, 96 NY2d 80, 88-89).

By failing to seek a ruling on that part of his omnibus motion seeking to suppress the gun as the fruit of an illegal detention, defendant abandoned the contention in his pro se supplemental brief that the gun should be suppressed on that ground (*see People v Adams,* 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954). We reject defendant's further contention in his pro se supplemental brief that he was denied his right to appear before the grand jury and thus that the court erred in denying his motion to dismiss the indictment. The record establishes that the People complied with their obligation pursuant to CPL 190.50 (5) (a) to give notice to defendant and his attorney of their intention to present the matter to the grand jury, and defendant did not exercise his right to give the District Attorney notice of his request to testify prior to the filing of the indictment (*see id.*).

We have reviewed defendant's remaining contention in the main and pro se supplemental briefs and conclude that it is without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1231

KA 14-00666

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARYL HILKERT, JR., DEFENDANT-APPELLANT.

TYSON BLUE, MACEDON, FOR DEFENDANT-APPELLANT.

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (LORA J. TRYON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered February 18, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree and petit larceny.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, burglary in the third degree (Penal Law § 140.20), defendant contends that the testimony of his accomplice was not sufficiently corroborated to support the conviction, as required by CPL 60.22 (1). We reject that contention. The photographs of the crime from the property owner's security camera, as well as the testimony of one of the investigating police officers, " 'tend[ed] to connect the defendant with the commission of the crime in such a way as [could] reasonably satisfy the jury that the accomplice [was] telling the truth' " (*People v Reome*, 15 NY3d 188, 192; *see* CPL 60.22 [1]; *People v Pratcher*, 134 AD3d 1522, 1523-1524, *lv denied* 27 NY3d 1154; *People v Robinson*, 111 AD3d 1358, 1358, *lv denied* 22 NY3d 1141).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1232

KA 14-00834

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN L. RICKS, JR., DEFENDANT-APPELLANT.

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

ALLEN L. RICKS, JR., DEFENDANT-APPELLANT PRO SE.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 16, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree and attempted criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]) and attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). We agree with defendant that the waiver of the right to appeal was not valid inasmuch as the "inquiry made by [County] Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Sanford*, 138 AD3d 1435, 1436 [internal quotation marks omitted]), and because " '[t]he court [also] did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it' " (*id.*, quoting *People v Bradshaw*, 18 NY3d 257, 262). However, defendant failed to preserve for our review his contention that his plea was not knowing, intelligent and voluntary because he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Laney*, 117 AD3d 1481, 1482), and this case does not fall within the rare exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666; *Sanford*, 138 AD3d at 1436).

Defendant further contends in his main and pro se supplemental briefs that the court erred in refusing to suppress the evidence seized from defendant and the trunk of his vehicle because the police did not have probable cause to search defendant or his vehicle. We reject that contention. The record establishes, and defendant does not dispute, that the arresting officer was entitled to stop defendant's vehicle based on a violation of the Vehicle and Traffic Law (*see People v Raghnal*, 135 AD3d 1168, 1168-1169, *lv denied* 27 NY3d 1137; *see also* § 375 [31]; *see generally People v Cuffie*, 109 AD3d 1200, 1201, *lv denied* 22 NY3d 1087). We also conclude that, following the traffic stop, the officer had probable cause to search defendant and the vehicle. Contrary to defendant's contention, it is well established that "[t]he odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*Cuffie*, 109 AD3d at 1201 [internal quotation marks omitted]; *see People v Chestnut*, 43 AD2d 260, 261-262, *affd* 36 NY2d 971; *see also People v Mack*, 114 AD3d 1282, 1282, *lv denied* 22 NY3d 1200). The remaining contentions of defendant, including those raised in his pro se supplemental brief and reply brief, are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1233

CAF 15-00712

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

IN THE MATTER OF TRISTYN R. AND ADDASYN R.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, JENNA W. AND TREVOR W., PETITIONERS-RESPONDENTS;

JOSHUA R., RESPONDENT-APPELLANT, AND JACQUELINE Z., RESPONDENT.

MEMORANDUM AND ORDER

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

MICHAEL D. BURKE, ATTORNEY FOR THE CHILDREN, OLEAN.

Appeal from an amended order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered March 24, 2015 in a proceeding pursuant to Family Court Act article 10. The amended order, inter alia, determined that respondent Joshua R. violated a temporary order of protection.

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

Memorandum: Respondent father appeals from an amended custody and dispositional order that, inter alia, determined that he violated a temporary order of protection issued in favor of his children. Family Court credited the testimony at the hearing that the father had contact with his children on numerous occasions. " 'According deference to that credibility determination, as we must, we conclude that petitioner established by clear and convincing evidence that [the father] willfully violated the relevant order of protection' " (*Matter of Schoenl v Schoenl*, 136 AD3d 1361, 1362; *see Matter of Da'Shunna M.H. [Delbert W.H.]*, 133 AD3d 1381, 1382).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1234

CAF 15-01871

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

IN THE MATTER OF KENNETH C., JR., MAKAYLEE C., NICHOLAS C. AND ZACHARY C.

---------- MEMORANDUM AND ORDER

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

TERRI C., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Onondaga County (Michele Pirro Bailey, J.), entered September 8, 2015 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject children.

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

Memorandum: Respondent mother appeals from an order that, inter alia, adjudicated her four children to be neglected and awarded custody of them to the nonparty father. Contrary to the mother's contention, we conclude that petitioner met its burden of establishing neglect by a preponderance of the evidence.

With respect to the issue of educational neglect, " '[p]roof that a minor child is not attending a public or parochial school in the district where the parent[] reside[s] makes out a prima facie case of educational neglect pursuant to section 3212 (2) (d) of the Education Law' " (*Matter of Matthew B.*, 24 AD3d 1183, 1184). " 'Unrebutted evidence of excessive school absences [is] sufficient to establish . . . educational neglect' " (*id.*). Here, the testimony of the caseworker established that two of the children had a combined number of approximately 150 unexcused absences during the most recent school year, and the mother failed to rebut that evidence (*see Matter of Airionna C. [Shernell E.]*, 118 AD3d 1430, 1431, *lv denied* 24 NY3d 905, *lv dismissed* 24 NY3d 951; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). To the extent that the mother challenges the admission in evidence of certain documents, we

conclude that any error is harmless because the record otherwise contains ample evidence supporting Family Court's determination (*see Matter of Delehia J. [Tameka J.]*, 93 AD3d 668, 669-670; *Matter of Matthews v Matthews*, 72 AD3d 1631, 1632, *lv denied* 15 NY3d 704).

With respect to the issue of the mother's drug use, " 'neglect may in some circumstances be presumed if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs his or her judgment while [the] child is entrusted to his or her care' " (*Matter of Samaj B. [Towanda H.-B.–Wade B.]*, 98 AD3d 1312, 1313; *see* Family Ct Act § 1046 [a] [iii]). That presumption "operates to eliminate a requirement of specific parental conduct vis-à-vis the child and neither actual impairment nor specific risk of impairment need be established" (*Samaj B.*, 98 AD3d at 1313 [internal quotation marks omitted]). Here, petitioner established the presumption of neglect by presenting the testimony and notes of the caseworker, who testified that the mother admitted to using heroin and failed to take meaningful action to treat her addiction, and that the mother's drug use impaired her ability to function (*see Matter of Chassidy CC. [Andrew CC.]*, 84 AD3d 1448, 1449-1450; *Matter of Paolo W.*, 56 AD3d 966, 967, *lv dismissed* 12 NY3d 747), and the mother presented no evidence to rebut that presumption of neglect (*see Samaj B.*, 98 AD3d at 1313).

Contrary to the mother's final contention, the court did not err in conducting fact-finding and dispositional hearings in her absence. It is well settled that a parent's right to be present at every stage of a Family Court Act article 10 proceeding "is not absolute" (*Matter of Elizabeth T. [Leonard T.]*, 3 AD3d 751, 753; *see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315, *lv denied* 25 NY3d 909). " 'Thus, when faced with the unavoidable absence of a parent, a court must balance the respective rights and interests of both the parent and the child in determining whether to proceed' " (*Dakota H.*, 126 AD3d at 1315). Here, the court alerted the mother to the date of the fact-finding hearing and warned her that the hearing would proceed in her absence, yet she failed to appear on the scheduled date. Moreover, her attorney fully represented her at the fact-finding and dispositional hearings, and thus the mother has not demonstrated that she suffered any prejudice arising from her absence (*see id.*; *Matter of Sean P.H. [Rosemarie H.]*, 122 AD3d 850, 851, *lv denied* 24 NY3d 914).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1235

CAF 15-01118

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

IN THE MATTER OF JOSEPH L. KING,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANY A. KING, DEFENDANT-APPELLANT.

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

GERALD J. VELLA, SPRINGVILLE, FOR PLAINTIFF-RESPONDENT.

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

Appeal from a judgment of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered October 14, 2015. The judgment, insofar as appealed from, incorporated an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.) entered June 3, 2015, which granted sole custody of the parties' children to plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as defendant challenges the custody determination, the judgment insofar as appealed from is reversed on the law without costs, the second decretal paragraph is vacated, the order entered June 3, 2015 is reversed, and the matter is remitted to Supreme Court, Cattaraugus County, for further proceedings in accordance with the following memorandum: Defendant mother appeals from an order of Family Court that granted plaintiff father's petition seeking sole custody of the parties' two children. Because that order was incorporated but not merged in Supreme Court's subsequent judgment of divorce, we exercise our discretion to treat the appeal as having been taken from the final judgment of divorce (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988). Although the judgment was entered upon the mother's default and no appeal lies from a judgment entered on default, the appeal nevertheless "brings up for our review 'matters which were the subject of contest' before the court," i.e., the father's custody petition (*Rottenberg v Clarke*, ___ AD3d ___, ___ [Nov. 18, 2016], quoting *James v Powell*, 19 NY2d 249, 256 n 3, *rearg denied* 19 NY2d 862; *see Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196).

We agree with the mother that Family Court erred in granting the father sole custody of the children in the absence of a hearing to

determine the best interests of the children without "articulat[ing] which factors were—or were not—material to its determination and the evidence supporting its decision" (*S.L. v J.R.*, 27 NY3d 558, 564). It is axiomatic that "custody determinations should '[g]enerally' be made 'only after a full and plenary hearing and inquiry' . . . This general rule furthers the substantial interest, shared by the State, the children, and the parents, in ensuring that custody proceedings generate a just and enduring result that, above all else, serves the best interest[s] of the child[ren]" (*id.* at 563). "[A] court opting to forgo a plenary hearing must take care to clearly articulate" the material factors and the supporting evidence upon which it relied (*id.* at 564), and Family Court failed to do so here. We therefore dismiss the appeal except insofar as it concerns the contested custody matter, reverse the judgment insofar as appealed from, vacate the second decretal paragraph, reverse Family Court's custody order, and remit the matter to Supreme Court for further proceedings on the issue of custody. In light of our determination, we need not reach the mother's remaining contention.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1236

CAF 16-00369

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

IN THE MATTER OF ANDREW R. SABOL AND VICKI J. SABOL, PETITIONERS-RESPONDENTS,

V ORDER

PAULA G. IANNELLO, RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT.

WILLIAM H. GETMAN, WATERVILLE, FOR PETITIONERS-RESPONDENTS.

JOSEPH M. CIRILLO, ATTORNEY FOR THE CHILDREN, MOHAWK.

Appeal from an order of the Family Court, Herkimer County (Anthony J. Garramone, J.H.O.), entered September 22, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioners visitation with the subject children.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1237

CAF 14-02252

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

IN THE MATTER OF CHARITY M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

WARREN M., RESPONDENT-APPELLANT,
AND CHRISTINA M., RESPONDENT.

IN THE MATTER OF KORDELL S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

WARREN M., RESPONDENT-APPELLANT,
AND CHRISTINA M., RESPONDENT.

IN THE MATTER OF TEMPERANCE M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

WARREN M., RESPONDENT-APPELLANT,
AND CHRISTINA M., RESPONDENT.

IN THE MATTER OF KYRA T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

WARREN M., RESPONDENT-APPELLANT,
AND CHRISTINA M., RESPONDENT.
(APPEAL NO. 1.)

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

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 17, 2014 in proceedings pursuant to Family Court Act article 10. The order, among other things, adjudged that Kordell S. is an abused child and Charity M., Temperance M., and

Kyra T. are derivatively abused children.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1238

CAF 15-00407

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

IN THE MATTER OF CHARITY M., KORDELL S., TEMPERANCE M. AND KYRA T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WARREN M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered February 20, 2015 in proceedings pursuant to Family Court Act article 10. The order, among other things, placed the subject children in the custody of petitioner and directed respondent Warren M. to comply with the terms and conditions specified in orders of protection.

It is hereby ORDERED that said appeal from the order insofar as it concerns the disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent father appeals from an order in these proceedings pursuant to Family Court Act article 10 in which Family Court found, inter alia, that he abused Kordell S., one of the subject children, and derivatively abused the remaining subject children. We conclude that the evidence is sufficient to sustain a finding of abuse with respect to Kordell. Medical testimony of a child abuse physician established that Kordell sustained second-degree burns on his back, left lateral side and left upper arm, in a pattern that did not fit any of the histories that were given and was inconsistent with Kordell inflicting the burns on himself. The physician repeatedly testified that she believed that the burns were intentionally inflicted. It is undisputed on appeal that the father was the sole caregiver for Kordell at the time he sustained those burns. Thus, we conclude that "petitioner established a prima facie case of child abuse with respect to [Kordell,] and [the father] failed to rebut the presumption that [he] was culpable" (*Matter of Alyssa C.M.*, 17 AD3d 1023, 1024, *lv denied* 5 NY3d 706).

Moreover, contrary to the father's contention, Kordell's statements that the father burned him were sufficiently corroborated by both the medical testimony and the child protective caseworker's observation of his injuries (*see Matter of Ishanellys O. [Luis A.O.]*, 129 AD3d 1450, 1451-1452; *Matter of Nicholas L.*, 50 AD3d 1141, 1142). To the extent that the father contends that Kordell's statements were consistent with his own description of the incident, we note that the court specifically found that the father's statements appeared to be internally inconsistent and were not corroborated by the medical testimony. We conclude that "[t]here is no basis to disturb the court's credibility determinations with respect to the [father's] varying accounts of the occurrence, [or] the court's decision to credit petitioner's expert over [the father]. It is well settled that 'the court's determination regarding credibility of the witnesses is entitled to great weight on appeal' " (*Matter of Amire B. [Selika B.]*, 95 AD3d 632, 632, *lv denied* 20 NY3d 855; *see generally Matter of Isobella A. [Anna W.]*, 136 AD3d 1317, 1319).

The court properly determined that the father's abuse of Kordell established his derivative abuse of the other subject children (*see Matter of Michael U. [Marcus U.]*, 110 AD3d 821, 822). We conclude both that petitioner established that the father had "a fundamental defect in [his] understanding of the duties of parenthood, and [a] lack of self-control [that] created a substantial risk of harm to any child in his care" (*id.*), and that "the abuse . . . of [Kordell] 'is so closely connected with the care of [the other children] as to indicate that [they are] equally at risk' " (*Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361).

Lastly, we agree with petitioner and the Attorney for the Children that the father's challenges to the dispositional provisions of the order are not properly before this Court because no appeal lies from that part of an order entered on consent (*see Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1240

CA 16-00653

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

SYDNEY H. RAIT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MATTHEW D. SHEEHAN AND SMITH & NEPHEW, INC.,
DEFENDANTS-RESPONDENTS.

LEWIS & LEWIS, P.C., BUFFALO (DAVID M. BLOCK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (LEO T. FABRIZI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered June 30, 2015. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained in a motor vehicle accident in the Town of Amherst. The accident occurred when a vehicle driven by Matthew D. Sheehan (defendant) struck the driver's side of plaintiff's vehicle while plaintiff was attempting to make a left turn from a parking lot onto Sheridan Drive.

We conclude that Supreme Court properly granted defendants' motion for summary judgment dismissing the amended complaint. Defendants met their initial burden " 'by establishing that [defendant] was driving within the speed limit, that he did not have time to avoid the collision, and that plaintiff was entering the roadway from a parking lot' " (*Johnson v Time Warner Entertainment*, 115 AD3d 1295, 1295; *see generally* Vehicle and Traffic Law § 1143), and in response plaintiff failed to raise an issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In particular, plaintiff failed to raise an issue of fact whether defendant was traveling in excess of a reasonable speed under the circumstances by her submission of a witness statement that defendant's "speed was at least" that of the posted speed limit (*see generally* § 1180 [a]). Contrary to plaintiff's contention, the fact that defendant may have been traveling at such a speed "is inconsequential inasmuch as there is no indication that [he] could have avoided the accident even if [he] had been traveling at a speed

. . . below the posted speed limit" (*Daniels v Rumsey*, 111 AD3d 1408, 1410; *see Heltz v Barratt*, 115 AD3d 1298, 1299, *affd* 24 NY3d 1185).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1241

CA 16-00467

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

CARRIE MARX, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF JUDITH B. MARX, DECEASED, AND
PATRIC A. MARX, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

LYNN M. KESSLER, DEFENDANT,
AND BERNARD M. SHEVLIN, DEFENDANT-RESPONDENT.
(ACTION NO. 1.)

KEITH MARX, PLAINTIFF,

V

LYNN M. KESSLER AND BERNARD M. SHEVLIN,
DEFENDANTS.
(ACTION NO. 2.)

GELBER & O'CONNELL, LLC, BUFFALO (HERSCHEL GELBER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 2, 2015. The order, insofar as appealed from, upon reargument, granted the motion of defendant Bernard M. Shevlin for summary judgment dismissing the complaint against him in action No. 1.

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

Memorandum: The plaintiffs in action No. 1, Carrie Marx (plaintiff) and Patric A. Marx (Marx) (collectively, plaintiffs), commenced this negligence action seeking damages for injuries sustained by Marx and injuries resulting in the death of plaintiff's decedent when the vehicle operated by the plaintiff in action No. 2, in which Marx and decedent were passengers, was rear-ended while it was stopped in the northbound lane of Route 16 in the Town of Aurora waiting to make a left turn into the driveway of a business establishment. The force of the impact propelled the vehicle into the southbound lane, where it was then struck by the vehicle operated by Bernard M. Shevlin (defendant). Supreme Court granted that part of

defendant's motion seeking summary judgment dismissing the complaint in action No. 1 against him and, upon granting plaintiffs' motion for leave to reargue, adhered to its decision. We affirm.

Contrary to plaintiffs' contention, defendant established as a matter of law in action No. 1 that the emergency doctrine applies (*see Albert v Machols*, 129 AD3d 1481, 1482), i.e., that he "was operating [his] vehicle in a lawful and prudent manner when plaintiff[s'] vehicle suddenly and without warning [was propelled] into [his] lane of travel, and there was nothing [he] could have done to avoid the collision" (*id.*). Indeed, defendant established that less than two seconds transpired between the first collision and the second collision. "Although 'it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether [defendant's] response was reasonable' . . . , we conclude that summary judgment is appropriate here because defendant[] presented 'sufficient evidence to establish the reasonableness of [his] actions [in an emergency situation] and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact' " (*Shanahan v Mackowiak*, 111 AD3d 1328, 1329-1330; *cf. Oscier v Musty*, 138 AD3d 1402, 1404). The opinion of plaintiffs' expert that defendant's speed was excessive, i.e., 57 miles per hour in a speed zone of 55 miles per hour, and that he should have anticipated that plaintiffs' vehicle would be rear-ended and thus would have had sufficient time to react when plaintiffs' vehicle entered his lane is speculative and therefore insufficient to raise an issue of fact to defeat the motion (*see Stewart v Kier*, 100 AD3d 1389, 1390).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1242

CA 16-00328

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

HOGAN WILLIG, PLLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARRIE W. KAHN, ALSO KNOWN AS CARRIE H. KAHN, INDIVIDUALLY, DEFENDANT-RESPONDENT, ET AL., DEFENDANTS.

HOGAN WILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PERSONIUS MELBER LLP, BUFFALO (BRIAN M. MELBER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 18, 2015. The order granted the motion of defendant Carrie W. Kahn, also known as Carrie H. Kahn, in her individual capacity, for summary judgment dismissing plaintiff's amended complaint against her in her individual capacity.

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

Memorandum: Dennis Alan Kahn (Kahn), the late husband of Carrie W. Kahn, also known as Carrie H. Kahn (defendant), was the owner of the law firm Siegel, Kelleher & Kahn (SKK). After being diagnosed with a serious health condition, Kahn approached a representative of plaintiff, a law firm, seeking to facilitate discussions about the possible acquisition of SKK by plaintiff. It is undisputed that discussions subsequently occurred that eventually led to plaintiff's acquisition of SKK's business, but the nature and extent of defendant's involvement in those discussions is in dispute. According to plaintiff, there were various misrepresentations and omissions regarding, among other things, SKK's financial state and liabilities, the quantity and value of SKK's client files, and the status of claims by creditors. Subsequent to Kahn's death, plaintiff commenced this action against SKK, and against defendant in her individual capacity and as the executrix of Kahn's estate, alleging various causes of action and seeking damages for losses it allegedly incurred in resolving the issues associated with the misrepresentations and omissions. As limited by its brief on appeal, plaintiff contends that Supreme Court erred in granting the motion of defendant, in her individual capacity, seeking summary judgment dismissing the amended complaint against her to the extent that it asserted causes of action

for fraudulent inducement, fraudulent concealment, and unjust enrichment. We affirm.

As an initial matter, we reject plaintiff's contention that summary judgment was premature because it had not conducted depositions (*see generally* CPLR 3212 [f]). Plaintiff failed to establish that facts essential to oppose the motion were in defendant's exclusive knowledge and possession, and its mere hope that conducting depositions would disclose evidence to prove its case is insufficient to support denial of the motion (*see Boyle v Caledonia-Mumford Cent. Sch.*, 140 AD3d 1619, 1621-1622; *Kremer v Sinopia LLC*, 104 AD3d 479, 481; *Denby v Pace Univ.*, 294 AD2d 156, 156-157).

Contrary to plaintiff's further contention, the court properly granted those parts of defendant's motion for summary judgment dismissing the fraudulent inducement and fraudulent concealment causes of action against her in her individual capacity. "The elements of a fraud cause of action consist of a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827, *rearg denied* 28 NY3d 956 [internal quotation marks omitted]; *see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178). In addition to the elements for fraudulent inducement, a cause of action for fraudulent concealment also requires a duty on the part of the defendant to disclose material information and the failure to do so (*see Mandarin Trading Ltd.*, 16 NY3d at 179). It is undisputed that defendant established her entitlement to summary judgment as a matter of law by submitting proof in admissible form, including her affidavit, that demonstrated the absence of any triable issues of fact on the fraud causes of action (*see Estate of Giffune v Kavanagh*, 302 AD2d 878, 879; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

In opposition, plaintiff submitted, among other things, the affidavits of three of its attorneys who were involved in the acquisition discussions and who, for the first time, attributed to Kahn and defendant, collectively, specific misrepresentations and omissions that had been attributed solely to Kahn in the amended complaint. Even assuming, arguendo, that there is a factual issue regarding whether defendant too made such misrepresentations and omitted material facts, we conclude that plaintiff's submissions in opposition to the motion failed to raise triable issues of fact regarding defendant's knowledge that the misrepresentations and omissions attributed to her and Kahn were false and her intent to induce plaintiff's reliance (*see Estate of Giffune*, 302 AD2d at 879). The record establishes that defendant was not an attorney and had no involvement with operating SKK's legal practice. Other than general assertions of defendant's presence and involvement in the acquisition discussions, plaintiff's submissions establish only that the extent of defendant's alleged knowledge and the reason for her involvement were based upon her position as the spouse of Kahn—the individual with

specific knowledge of SKK's business—following his diagnosis and decision to divest SKK (*see generally MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 291). Plaintiff also failed to raise a triable issue of fact whether its attorneys, who were experienced legal practitioners with managerial positions at an established law firm, justifiably relied on the misrepresentations and omissions to the extent that they were made by defendant (*see Evans v Lawrence Arms Assoc.*, 215 AD2d 717, 717-718). Based on the foregoing, we conclude that the court properly granted those parts of defendant's motion for summary judgment dismissing the fraud causes of action against her in her individual capacity.

We also conclude that the court properly granted summary judgment dismissing the fraudulent concealment cause of action for the additional reason that defendant had no duty to disclose. Plaintiff does not contend that defendant had a duty to disclose based upon a fiduciary or confidential relationship, and plaintiff's submissions fail to raise a triable issue of fact whether defendant had superior knowledge of essential facts rendering nondisclosure inherently unfair (*see Barrett v Freifeld*, 77 AD3d 600, 601-602).

Plaintiff also contends that the court erred in granting that part of defendant's motion for summary judgment dismissing the unjust enrichment cause of action, alleging that defendant in her individual capacity was enriched at plaintiff's expense based upon a presentation that it gave to defendant's creditors. We reject that contention. " 'A cause of action for unjust enrichment requires a showing that (1) the defendant was enriched, (2) at the expense of the plaintiff, and (3) that it would be inequitable to permit the defendant to retain that which is claimed by the plaintiff . . . The essence of such a cause of action is that one party is in possession of money or property that rightly belongs to another' " (*Hayward Baker, Inc. v C.O. Falter Constr. Corp.*, 104 AD3d 1253, 1255). Here, defendant met her initial burden by submitting her affidavit in which she averred that she negotiated resolutions with the subject creditors through counsel and paid the debts by agreement without any contribution from plaintiff. Plaintiff failed to raise a triable issue of fact inasmuch as its submissions in opposition to the motion provide only conclusory and vague statements that defendant benefitted from plaintiff's involvement with the creditors, and plaintiff has asserted no facts suggesting that defendant was in possession of money belonging to it (*see id.*; *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 987-988).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1243

CA 15-02079

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

WILLIAM E. HAMILTON, PLAINTIFF-APPELLANT,

V ORDER

BOARD OF EDUCATION OF JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, MARY L. ALLEY, DIANA M. FOOTE, JEANNE E. PIEKLIK, PENNY L. FEENEY, CONSTANCE E. DRAKE, SUSAN A. GORTON, PAULA L. VANMINOS, LAWRENCE J. ZACHER, JAMES R. FROIO, DANNY L. MEVEC, ALICIA A. MATTIE AND MARY MADONNA, DEFENDANTS-RESPONDENTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BOARD OF EDUCATION OF JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT, MARY L. ALLEY, DIANA M. FOOTE, JEANNE E. PIEKLIK, PENNY L. FEENEY, CONSTANCE E. DRAKE, SUSAN A. GORTON, PAULA L. VANMINOS, LAWRENCE J. ZACHER, JAMES R. FROIO, ALICIA A. MATTIE AND MARY MADONNA.

DANNY L. MEVEC, SYRACUSE, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 7, 2015. The order and judgment, among other things, denied plaintiff's motion for partial summary judgment and granted defendants' motions for summary judgment.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1245

CA 16-00497

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

MARCIA WENTLAND, PLAINTIFF-APPELLANT,

V ORDER

E.A. GRANCHELLI DEVELOPERS, INC., AND K.M. TREATS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

BROWN CHIARI LLP, BUFFALO (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (LISA DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-RESPONDENT E.A. GRANCHELLI DEVELOPERS, INC.

HAGELIN SPENCER LLC, BUFFALO (WILLIAM SWIFT OF COUNSEL), FOR DEFENDANT-RESPONDENT K.M. TREATS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 22, 2016. The order denied the motion of plaintiff to set aside a verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1246

CA 16-00500

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

MARCIA WENTLAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

E.A. GRANCHELLI DEVELOPERS, INC., AND K.M. TREATS, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

BROWN CHIARI LLP, BUFFALO (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (LISA DIAZ-ORDAZ OF COUNSEL), FOR DEFENDANT-RESPONDENT E.A. GRANCHELLI DEVELOPERS, INC.

HAGELIN SPENCER LLC, BUFFALO (WILLIAM SWIFT OF COUNSEL), FOR DEFENDANT-RESPONDENT K.M. TREATS.

Appeal from a judgment of the Supreme Court, Niagara County (Frank Caruso, J.), entered January 22, 2016. The judgment granted judgment in favor of defendants upon a jury verdict.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained when she slipped and fell outside the storefront of defendant K.M. Treats, a tenant in a plaza owned by defendant E.A. Granchelli Developers, Inc. (Granchelli). At trial, plaintiff's theory was that she slipped on ice that formed when melting snow dripped from Granchelli's metal canopy and froze on the sidewalk below, and thus Granchelli was negligent in creating the dangerous condition on its sidewalk. The jury returned a verdict finding that defendants were not negligent. Plaintiff thereafter moved to set aside the verdict as against the weight of the evidence and on the ground of juror misconduct, and Supreme Court denied that motion.

"It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*McMillian v Burden*, 136 AD3d 1342, 1343 [internal quotation marks omitted]; *see Krieger v McDonald's Rest. of N.Y., Inc.*, 79 AD3d 1827, 1828, *lv dismissed* 17 NY3d 734).

That determination is within the court's sound discretion and, "if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*McMillian*, 136 AD3d at 1343 [internal quotation marks omitted]; *see Parr v Mongarella*, 77 AD3d 1429, 1429-1430). Where there is conflicting testimony, it is the jury's function to make credibility determinations, which are entitled to deference based on the jury's opportunity to see and hear the witnesses (*see McMillian*, 136 AD3d at 1343-1344). Moreover, the jury is entitled to reject the opinion of an expert witness, particularly where such testimony is contrary to the testimony of another expert witness whom the jury finds more credible (*see Sanchez v Dawson*, 120 AD3d 933, 935; *see also McMillian*, 136 AD3d at 1344).

Contrary to plaintiff's contention, we conclude that the verdict is not against the weight of the evidence. On cross-examination, plaintiff testified that the ice patch on which she slipped was 15 to 16 inches wide and, although she felt "a couple drops" of water from the canopy, she could not say that dripping water caused the condition on which she fell. Granchelli's maintenance supervisor, upon whose testimony plaintiff heavily relies, testified that the alleged defect in the canopy consistently created an ice patch that was four inches wide, and could not have created an icy condition as large as the one on which plaintiff allegedly slipped. Their testimony comports with the testimony of Granchelli's expert, who opined that, although an "extremely small" amount of water likely dripped off the canopy, the icy condition on the sidewalk was more likely ice created by precipitation. Moreover, Granchelli's office personnel testified that they never received a complaint about icy conditions or about the metal canopy prior to plaintiff's accident. Although the maintenance supervisor testified otherwise, he was married to the owner of the other defendant herein, whose interests were adverse to Granchelli's interests. We therefore conclude that the evidence did not so preponderate in favor of plaintiff that the verdict could not have been reached upon a fair interpretation of the evidence (*see Krieger*, 79 AD3d at 1828-1829).

We reject plaintiff's further contention that the court abused its discretion in denying her motion to set aside the verdict insofar as it was based on juror misconduct. The court held a hearing on that part of the motion and took testimony from one juror who discussed with the jury his observations about canopies. We conclude that the evidence presented at the hearing supports the court's conclusion that the subject juror did not hold himself out to the jury as an expert, but properly based his opinions on his day-to-day life experience (*see generally Campopiano v Volcko*, 82 AD3d 1587, 1588-1589).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1247

CA 15-01472

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

IN THE MATTER OF GREG WILLIAMS,
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 (ADAM W. KOCH OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered July 14, 2015 in a CPLR article 78 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 pursuant to CPLR article 78 seeking to annul the determination denying him parole release. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole in May of 2016 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Sanchez v Evans*, 111 AD3d 1315, 1315). Contrary to petitioner's contention, this matter does not fall within the exception to the mootness doctrine (*see id.*).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1248

KA 15-00948

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD A. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered November 6, 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 reversed on the law without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following 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 did not err in assessing 20 points against defendant under the risk factor for a continuing course of sexual misconduct. "[T]he court was not limited to considering only the crime of which defendant was convicted in making its determination" (*People v Feeney*, 58 AD3d 614, 615; *see People v Glanowski*, 140 AD3d 1625, 1625-1626, *lv denied* 28 NY3d 902). The People proved by clear and convincing evidence that defendant engaged in "two or more acts of sexual contact, at least one of which is an act of sexual intercourse, oral sexual conduct, anal sexual conduct, or aggravated sexual contact, which acts are separated in time by at least 24 hours" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; *see Glanowski*, 140 AD3d at 1625-1626; *People v Scott*, 71 AD3d 1417, 1418, *lv denied* 14 NY3d 714).

We agree with defendant, however, that the court failed to consider his request for a downward departure. We therefore reverse the order and remit the matter to Supreme Court for a determination of defendant's request for a downward departure (*see People v Cobb*, 141

AD3d 1174, 1175; *People v Lewis*, 140 AD3d 1697, 1697).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1250

KA 13-01951

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIS KNIGHT, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Monroe County Court (John Lewis DeMarco, J.), rendered September 6, 2013. Defendant was resentenced following his conviction, upon a plea of guilty, of burglary in the second degree.

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

Memorandum: On appeal from a resentence following his conviction upon a plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]), defendant contends that County Court erred in resentencing him as a second violent felony offender and that the resentence is unduly harsh and severe. We reject those contentions. We note at the outset that the posthearing loss of the exhibits that were submitted at the predicate felony hearing, including the certificate of conviction from the predicate felony offense, does not deprive defendant of his right to appellate review of these issues. At the hearing, defense counsel did not object to the admission in evidence of the certificate of conviction, and there is no dispute that the certificate of conviction bore defendant's name and date of birth and was therefore "sufficient to establish that defendant was previously convicted of [the predicate] crime" (*People v Switzer*, 55 AD3d 1394, 1395, *lv denied* 11 NY3d 858; *see People v Rattelade*, 226 AD2d 1107, 1107-1108, *lv denied* 88 NY2d 992). Inasmuch as "the information in the missing [certificate of conviction] can be gleaned from the record and there is no dispute with respect to the accuracy of that information," we conclude that there is sufficient information to allow for effective appellate review of defendant's contention (*People v Jackson*, 11 AD3d 928, 930, *lv denied* 3 NY3d 757; *see generally People v Yavru-Sakuk*, 98 NY2d 56, 60). Based on the record, we conclude that the People established beyond a reasonable doubt that defendant was a second violent felony offender (*see People v Kinnear*,

78 AD3d 1593, 1594). We further conclude that the resentence is not unduly harsh or severe.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1251

KA 15-00814

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN M. REBER, DEFENDANT-APPELLANT.

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 an order of the Monroe County Court (Victoria M. Argento, J.), entered March 30, 2015. 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 designating him a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, County Court did not abuse its discretion in denying defendant's request for a downward departure from the presumptive risk level (*see People v Ricks*, 124 AD3d 1352, 1352; *see generally People v Howard,* 27 NY3d 337, 341; *People v Gillotti*, 23 NY3d 841, 861). Defendant preserved his contention for our review with respect to only three of the multiple alleged mitigating factors or circumstances now asserted by him (*see People v Uphael*, 140 AD3d 1143, 1144-1145, *lv denied* ___ NY3d ___ [Nov. 21, 2016]; *People v Fullen*, 93 AD3d 1340, 1340, *lv denied* 19 NY3d 805), and two of those factors are adequately taken into account by the guidelines and thus improperly asserted as mitigating factors (*see generally Gillotti*, 23 NY3d at 861; *People v Finocchario*, 140 AD3d 1676, 1676-1677, *lv denied* 28 NY3d 906). We conclude with respect to the remaining factor that "defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of [that] mitigating factor[] by the requisite preponderance of the evidence" (*People v Smith*, 140 AD3d 1705, 1706, *lv denied* 28 NY3d 904; *see generally Gillotti*, 23 NY3d at 861).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1253

KA 15-00420

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE D. SMITH, III, DEFENDANT-APPELLANT.

THE LAW OFFICE OF GUY A. TALIA, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (SEAN R. STERLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 12, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree, assault in the second degree, reckless endangerment in the first degree and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of reckless endangerment in the first degree and dismissing count three of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [3]), assault in the second degree (§ 120.05 [9]), reckless endangerment in the first degree (§ 120.25), and endangering the welfare of a child (§ 260.10 [1]). As the People correctly concede, "[r]eckless endangerment in the first degree . . . is a lesser included offense of assault in the first degree" (*People v Cotton*, 214 AD2d 994, 994, *lv denied* 86 NY2d 733; *see People v Glanda*, 18 AD3d 956, 959, *lv denied* 6 NY3d 754, *reconsideration denied* 6 NY3d 848). We therefore modify the judgment by reversing that part convicting defendant of reckless endangerment in the first degree and by dismissing count three of the indictment.

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his contention that the evidence is legally insufficient (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, that contention is without merit. The evidence is legally sufficient to establish that defendant was the perpetrator (*see People v McLain*, 80 AD3d 992, 996, *lv denied* 16 NY3d 897). The evidence established that

defendant's two-month-old child sustained broken arms, legs, and ribs that were in various stages of healing, and a fracture of the skull that had been recently inflicted. The child's mother testified that she observed defendant strike the child in the head three times with a closed fist the night before the child was treated at the hospital. The evidence further established that, with the exception of one evening approximately two weeks prior to the child being treated at the hospital, defendant and the child's mother were the only caretakers of the child. Contrary to defendant's contention, the mother's testimony was not incredible as a matter of law. "Testimony will be deemed incredible as a matter of law only where it is 'manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Smith*, 73 AD3d 1469, 1470, *lv denied* 15 NY3d 778), and that is not the case here. With respect to the conviction of assault in the first degree, the evidence is legally sufficient to establish that there was a grave risk of death to the child as a result of defendant's conduct and that the child sustained a serious physical injury (*see* Penal Law § 120.10 [3]; *see generally People v Borst*, 256 AD2d 1168, 1168, *lv denied* 93 NY2d 871). A radiologist testified that the child sustained a diffuse axial injury to the brain, which carried a high risk for coma and death. Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "[I]ssues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942), and we see no basis for disturbing the jury's credibility determinations in this case.

Defendant failed to preserve for our review his contention that the indictment was facially duplicitous (*People v Becoats*, 17 NY3d 643, 650-651, *cert denied* ___ US ___, 132 S Ct 1970), or rendered duplicitous by the trial testimony (*see People v Allen*, 24 NY3d 441, 449-450), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that County Court erred in admitting evidence of prior acts of abuse by defendant against the child's mother. The testimony of the child's mother was admissible to show the mother's state of mind, i.e., to explain why she did not call the police sooner when she noticed injuries on the child (*see People v Justice*, 99 AD3d 1213, 1215, *lv denied* 20 NY3d 1012; *see also People v Bradford*, 118 AD3d 1254, 1256, *lv denied* 24 NY3d 1082; *People v Long*, 96 AD3d 1492, 1493, *lv denied* 19 NY3d 1027). We conclude that the probative value of that testimony outweighed any prejudice to defendant, and that any prejudice to defendant was also minimized by the court's limiting instructions (*see generally People v Carson*, 4 AD3d 805, 806, *lv denied* 2 NY3d 797).

We reject defendant's contention that he was denied effective assistance of counsel. Inasmuch as we have concluded that the evidence is legally sufficient, defense counsel's failure to renew the

motion for a trial order of dismissal does not constitute ineffective assistance (*see People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922). Defense counsel's failure to move to dismiss count one of the indictment as rendered duplicitous by the trial testimony also does not constitute ineffective assistance. "A single error may qualify as ineffective assistance, but only when the error is sufficiently egregious and prejudicial as to compromise a defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152). Here, had defense counsel objected during the trial, "[a]ny uncertainty could have easily been remedied" through a jury charge (*Allen*, 24 NY3d at 449), and defense counsel may have chosen to remain silent because defendant may have "prefer[red] to face one count (and thus one conviction) rather than several" (*Becoats*, 17 NY3d at 651). Defendant's challenges to defense counsel's cross-examination of the medical witnesses and failure to make certain objections during the prosecutor's direct examination of the child's mother constitute mere disagreements with matters of strategy that do not rise to the level of ineffective assistance (*see People v Ocasio*, 81 AD3d 1469, 1469-1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318). To the extent that defendant contends that counsel was ineffective in failing to call a particular witness, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440 (*see id.* at 1470). Defense counsel was not ineffective for failing to request a circumstantial evidence charge because such a charge is required only where the evidence against defendant is wholly circumstantial (*see People v Slade*, 133 AD3d 1203, 1207, *lv denied* 26 NY3d 1150), which is not the case here (*see People v Geddes*, 49 AD3d 1255, 1256-1257, *lv denied* 10 NY3d 863). We conclude, with respect to all of defendant's claims concerning the alleged ineffective assistance of counsel, that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant's contention that the grand jury proceeding was defective because the prosecutor engaged in misconduct by eliciting false testimony is without merit. "Upon our review of the grand jury proceeding, we conclude that [t]here is no indication that the People knowingly or deliberately presented false testimony before the [g]rand [j]ury, and thus there is no basis for finding that the integrity of the [g]rand [j]ury proceeding was impaired . . . by the alleged false testimony" (*People v Bean*, 66 AD3d 1386, 1386, *lv denied* 14 NY3d 769 [internal quotation marks omitted]). Defendant's further contention that the grand jury proceeding was defective because he appeared before the grand jury in shackles and jail attire is not preserved for our review (*see People v Griggs*, 27 NY3d 602, 605-606, *rearg denied* 28 NY3d 957), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant also failed to preserve for our review his contention that the court increased the sentence because he chose to assert his right to a trial rather than to accept a plea bargain (*see People v Flinn*, 98 AD3d 1262, 1263-1264, *affd* 22 NY3d 599, *rearg denied* 23 NY3d 940). In any event, that contention is without merit (*see id.*). " '[T]he mere fact that a sentence imposed after trial is greater than

that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to trial' " (*People v Chappelle*, 14 AD3d 728, 729, *lv denied* 5 NY3d 786). Further, the record does not disclose any vindictiveness on the part of the court (*see People v Jackson*, 94 AD3d 1559, 1561, *lv denied* 19 NY3d 1026).

The certificate of conviction incorrectly reflects that defendant was sentenced as a second felony offender, and it must therefore be amended to reflect that he was sentenced as a second violent felony offender (*see People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959). We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1254

KA 14-00505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENNIE SMITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 (Thomas J. Miller, J.), rendered January 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). Defendant contends that County Court erred in refusing to suppress evidence and dismiss the indictment because the evidence was obtained pursuant to a search warrant that was based, in part, upon communications intercepted under improperly issued eavesdropping warrants (*see* CPL 700.15), and the People failed to provide copies of the eavesdropping warrants and accompanying applications within 15 days after arraignment (*see* CPL 700.70). Inasmuch as defendant failed to seek suppression of the evidence on those grounds, his contention is not preserved for our review (*see People v Romero*, 120 AD3d 947, 949, *lv denied* 24 NY3d 1004; *People v DePonceau*, 96 AD3d 1345, 1346, *lv denied* 19 NY3d 1025; *People v Espiritusanto*, 4 AD3d 826, 826, *lv denied* 2 NY3d 799). We decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

We reject defendant's further contention that defense counsel was ineffective for failing to seek suppression by challenging the eavesdropping warrants. With respect to challenging the warrants as improperly issued, we conclude that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion . . . that has little or no chance of success' "

(*People v Caban*, 5 NY3d 143, 152). Even assuming, arguendo, that defendant has a colorable claim that the People violated the notice requirements of CPL 700.70, we reject defendant's claim that defense counsel was ineffective for failing to seek suppression of the evidence on that ground inasmuch as defendant made no showing that such failure " 'was not premised on strategy' " (*People v Carver*, 27 NY3d 418, 421).

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1255

KA 12-00910

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW DEAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered February 23, 2012. The judgment convicted defendant, upon a jury verdict, of two counts of driving while intoxicated, as class E felonies, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]) and one count of aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), defendant contends that County Court erred in refusing to suppress statements he made to law enforcement officers following his arrest for the instant offenses. Even assuming, arguendo, that those statements should have been suppressed, we conclude that any error in failing to suppress them is harmless beyond a reasonable doubt (*see generally People v Crimmins*, 36 NY2d 230, 237). The evidence at trial established that, less than two hours before his arrest for the instant offenses, two police officers observed defendant urinating in public while holding an open container of beer. At that time, defendant admitted to the officers that he had been drinking beer, and it appeared to the officers that defendant was intoxicated. The officers, who had knowledge that defendant's license was suspended, informed defendant of the suspension and advised him not to drive. Immediately before his arrest for the instant offenses, one of the same officers observed defendant operating a motor vehicle. When stopped by the officer, defendant attempted to flee but was apprehended. At that time, defendant failed all field sobriety tests, had slurred speech and smelled of alcohol. According to the breathalyzer test, defendant had a blood alcohol content of .16%,

which is twice the legal limit for driving while intoxicated (*see* § 1192 [2]). We thus conclude that "the evidence against defendant is overwhelming, and there is no reasonable possibility that defendant would have been acquitted if the statements had not been admitted in evidence" (*People v Rupert*, 136 AD3d 1311, 1312, *lv denied* 27 NY3d 1075).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1257

KA 15-01581

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN A. MULCAHEY, DEFENDANT-APPELLANT.

SALVATORE F. LANZA, FULTON, FOR DEFENDANT-APPELLANT.

GREGORY S. OAKES, DISTRICT ATTORNEY, OSWEGO (ALLISON O'NEILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered June 22, 2015. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the second degree (Penal Law § 130.80 [1] [b]). Contrary to defendant's contention, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's contention that County Court erred in allowing the People to present evidence of certain behavior by defendant while he committed the charged crime. That evidence was relevant to establish that defendant acted for the purpose of gratifying his sexual desire, which is an element of course of sexual conduct against a child in the second degree (*see* Penal Law §§ 130.00 [3], [10]; 130.80 [1] [b]), and the prosecutor was "not required to include in the bill of particulars matters of evidence relating to how the [P]eople intend to prove the elements of the offense charged" (CPL 200.95 [1] [a]).

We also reject defendant's contention that the court abused its discretion in limiting defense counsel's questioning of prospective jurors concerning prior criminal defense matters in which he was involved, inasmuch as the court "must preclude repetitive or irrelevant questioning" during voir dire (*People v Jean*, 75 NY2d 744, 745; *see People v Steward*, 17 NY3d 104, 110). Defendant failed to preserve for our review his contention that he was prejudiced by the

court's facial expression during cross-examination of a prosecution witness. Defendant made no further objection after the court granted his request for a curative instruction, and the curative instruction is therefore "deemed to have corrected the [alleged] error to . . . defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1259

CAF 16-00476

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

IN THE MATTER OF CELINA D., A PERSON ALLEGED
TO BE A JUVENILE DELINQUENT,
RESPONDENT-APPELLANT. MEMORANDUM AND ORDER

COUNTY OF MONROE, PETITIONER-RESPONDENT.
(APPEAL NO. 1.)

BARBARA E. FARRELL, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (BRETT C. GRANVILLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered May 26, 2015 in a proceeding pursuant to Family Court Act article 3. The order placed respondent in the custody of the Office of Children and Family Services for a period of one year.

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

Memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, respondent appeals in appeal No. 1 from an order of disposition that placed her in the custody of the Office of Children and Family Services for a period of one year. In appeal No. 2, respondent appeals from an order adjudicating her a juvenile delinquent based on the finding that she committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree (Penal Law § 145.00 [1]). Preliminarily, inasmuch as the appeal from the order of disposition brings up for our review the underlying fact-finding order adjudicating her a juvenile delinquent (*see Matter of Benjamin S.A.*, 302 AD2d 979, 979, *lv denied* 100 NY2d 505), the appeal from the fact-finding order in appeal No. 2 must be dismissed (*see Matter of Robert M.*, 71 AD3d 896, 896-897).

With respect to appeal No. 1, respondent contends that her admission to the underlying act was defective because Family Court failed to comply with Family Court Act § 321.3 (1). We note at the outset that, although respondent's period of placement has expired, her challenge to the admission is not moot " 'because there may be collateral consequences resulting from the adjudication of delinquency' " (*Matter of Sysamouth D.*, 98 AD3d 1314, 1314; *see Matter of Gabriela A.*, 23 NY3d 155, 161 n 2). We further note that respondent was not required to preserve her contention for our review

inasmuch as "the requirements of Family Court Act § 321.3 are mandatory and nonwaivable" (*Matter of Dakota L.K.*, 70 AD3d 1334, 1335 [internal quotation marks omitted]). We nonetheless conclude that respondent's contention lacks merit. The record establishes that, in its allocution with respondent and her mother, the court properly advised them of respondent's right to a fact-finding hearing, and the court ascertained that respondent committed the act to which she was entering the admission, that she was voluntarily waiving her right to a fact-finding hearing, that her mother did not object to the admission and waiver, and that they were aware of the possible specific dispositional orders (*see* § 321.3 [1]; *Matter of William VV.*, 42 AD3d 710, 712; *cf. Dakota L.K.*, 70 AD3d at 1334-1335).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1260

CAF 16-00479

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

IN THE MATTER OF CELINA D., A PERSON ALLEGED
TO BE A JUVENILE DELINQUENT,
RESPONDENT-APPELLANT. MEMORANDUM AND ORDER

COUNTY OF MONROE, PETITIONER-RESPONDENT.
(APPEAL NO. 2.)

BARBARA E. FARRELL, ATTORNEY FOR THE CHILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (BRETT C. GRANVILLE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered May 26, 2015 in a proceeding pursuant to Family Court Act article 3. The order adjudicated respondent a juvenile delinquent.

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

Same memorandum as in *Matter of Celina D.* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1262

CA 16-00526

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

IN THE MATTER OF J. THOMAS BASSETT AND SILVIA DE LA GARZA BASSETT, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF MANLIUS, RESPONDENT-RESPONDENT.

J. THOMAS BASSETT, PETITIONER-APPELLANT PRO SE.

SILVIA DE LA GARZA BASSETT, PETITIONER-APPELLANT PRO SE.

FRATESCHI LAW FIRM, PLLC, SYRACUSE (TIMOTHY A. FRATESCHI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered January 15, 2016 in a CPLR article 78 proceeding. The judgment denied the petition.

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

Memorandum: In this CPLR article 78 proceeding challenging a determination made by a hearing officer in a small claims assessment review (SCAR) proceeding (*see* RPTL 736 [2]), we conclude that Supreme Court properly denied the petition. Judicial review of the determination of a hearing officer in a SCAR proceeding is limited to ascertaining whether the determination has a rational basis (*see Matter of Dodge v Krul*, 99 AD3d 1218, 1218; *Matter of Garth v Assessors of Town of Perinton*, 87 AD3d 1306, 1307). Here, the evidence presented at the SCAR hearing, including the evidence of comparable sales and assessments, provided a rational basis for the Hearing Officer's determination that petitioners had failed to meet their burden of demonstrating that respondent's assessment of their property was unequal or excessive (*see Garth*, 87 AD3d at 1307; *Matter of Montgomery v Board of Assessment Review of Town of Union*, 30 AD3d 747, 749).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1263

CA 16-01079

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

SUZANNE BARNER, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF JOHN M. BARNER, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

CHRISTOPHER R. DEPNER, M.D., ET AL., DEFENDANTS, THE UNIVERSITY OF ROCHESTER AND BARBARA J. KIRCHER, M.D., DEFENDANTS-RESPONDENTS.

PORTER NORDBY HOWE LLP, SYRACUSE (ERIC C. NORDBY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN REED & BURKE, LLP, ROCHESTER (CHRISTIAN C. CASINI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), dated July 31, 2015. The order, insofar as appealed from, granted the motion of defendants The University of Rochester and Barbara J. Kircher, M.D., for summary judgment dismissing the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at Supreme Court.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1264

CA 16-00286

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

WILLIAM ANDRE AND LINDA ANDRE,
PLAINTIFFS-RESPONDENTS,

V ORDER

FRED L. SANFILIPO, D.C., AND CHIROPRACTIC
ORTHOPEDICS & REHABILITATION, LLP,
DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KEVIN E. HULSLANDER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

PHETERSON SPATORICO LLP, ROCHESTER (DERRICK A. SPATORICO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Monroe County (Richard A. Dollinger, A.J.), entered November 30, 2015. The amended order, inter alia, denied the motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 31 and November 2, 2016,

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1268

CA 15-01438

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

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

V MEMORANDUM AND ORDER

JEDEDIAH HUSTED, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (LISA L. PAINE OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered July 22, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, granted the petition and determined that respondent violated the conditions of strict and intensive supervision and that he is a dangerous sex offender requiring confinement.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is denied, and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Respondent appeals from an order that, inter alia, granted the petition and determined that he violated the conditions of strict and intensive supervision (SIST) imposed on May 31, 2011 and that he is a dangerous sex offender requiring confinement. We agree with respondent that the evidence is not legally sufficient to establish, by clear and convincing evidence (*see* Mental Hygiene Law § 10.07 [f]), that he required confinement pursuant to Mental Hygiene Law article 10.

The evidence at the hearing established that respondent violated the terms and conditions of SIST by using alcohol in November 2013 and marihuana in December 2014 and February 2015, and by being discharged from sex offender treatment. We note, however, that respondent's treatment provider testified that his discharge from treatment was based solely on his substance abuse violations, that he was otherwise appropriately engaged in treatment, and that she was willing to accept him in treatment again. The evidence also established that respondent had been diagnosed with antisocial personality disorder, alcohol use disorder and cannabis use disorder.

As the Court of Appeals made clear in *Matter of State of New York*

v Michael M. (24 NY3d 649, 658-659), the statutory definitions of a dangerous sex offender requiring confinement (*see* Mental Hygiene Law § 10.03 [e]) and a sex offender requiring strict and intensive supervision (*see* § 10.03 [r]) "clearly envisage[] a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and only the latter may be confined" (*Michael M.*, 24 NY3d at 659). Here, viewing the evidence in the light most favorable to petitioner, we conclude that the evidence was "insufficient to support the trial court's finding that respondent had such an inability to control his behavior that he was likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (*id.* at 660). Indeed, it is undisputed that the alleged violations of respondent's SIST conditions related solely to his use of alcohol and marihuana, and not to any alleged sexual conduct (*see id.* at 659). We therefore reverse the order, deny the petition, and remit the matter to Supreme Court for further proceedings. Respondent failed to preserve for our review his contention that he was denied due process based on the lack of legally sufficient evidence that he is a dangerous sex offender requiring confinement and, in light of our determination, we decline to reach that contention.

We reject respondent's contention that the court erred in failing to consider a less restrictive alternative to confinement inasmuch as there is no requirement that the court do so (*see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439-1440, *lv denied* 25 NY3d 911; *see generally Michael M.*, 24 NY3d at 657-658). Respondent's contention that he should be permitted to appear anonymously in this proceeding is not properly before us inasmuch as we previously denied such an application from respondent, and he failed to move for leave to renew or reargue that determination (*see Matter of State of New York v Smith* [appeal No. 1], ___ AD3d ___, ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1269

KA 15-01395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRETT E. COPES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered July 7, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]) and criminally using drug paraphernalia in the second degree (§ 220.50 [3]). Defendant does not challenge the validity of his waiver of the right to appeal, and his valid waiver encompasses his contention that the sentence is unduly harsh and severe (*see People v Ruffin*, 101 AD3d 1793, 1793, *lv denied* 21 NY3d 1019; *People v Foster*, 281 AD2d 902, 902, *lv denied* 96 NY2d 862; *see generally People v Lopez*, 6 NY3d 248, 256).

Defendant further contends that the court violated the terms of the plea agreement by failing to impose a sentence of parole supervision pursuant to CPL 410.91. Although that contention implicates the voluntariness of defendant's guilty plea and therefore survives his waiver of the right to appeal (*see People v Brady*, 122 AD3d 1009, 1010, *lv denied* 25 NY3d 1160), we conclude that it is without merit. The record establishes that the court did not promise defendant a sentence of parole supervision, but merely stated that it was willing to impose such a sentence if defendant was eligible for it (*see People v Hernandez*, 62 AD3d 1095, 1097, *lv denied* 13 NY3d 745; *People v Carlton*, 2 AD3d 1353, 1354, *lv denied* 1 NY3d 625; *see also People v Hardy*, 32 AD3d 1317, 1318, *lv denied* 7 NY3d 925). Inasmuch as defendant's prior violent felony conviction rendered him ineligible

for a sentence of parole supervision (*see* CPL 410.91 [2]), "there was no . . . unfulfilled sentencing promise" (*Carlton*, 2 AD3d at 1354; *see People v Tallman*, 92 AD3d 1082, 1083, *lv denied* 20 NY3d 1065). To the extent that defendant contends that the attorneys and the court assured him that he would be eligible for a parole supervision sentence, that contention is belied by his acknowledgment during the plea colloquy that no off-the-record promises had been made to induce him to plead guilty (*see People v Sanchez*, 184 AD2d 537, 538, *lv denied* 80 NY2d 909; *see also Brady*, 122 AD3d at 1010-1011).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1270

KA 14-01607

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YADIEL CORREA, DEFENDANT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered March 27, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, criminal sale of a controlled substance in the third degree (two counts), and conspiracy in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and conspiracy in the fourth degree (§ 105.10 [1]), defendant contends that County Court erred in denying his request for a substitution of counsel. It is well settled that "[t]he decision to allow a defendant to substitute counsel is largely within the discretion of the court to which the application is made" (*People v Jackson*, 85 AD3d 1697, 1699, *lv denied* 17 NY3d 817 [internal quotation marks omitted]; *see People v Stevenson*, 36 AD3d 634, 634, *lv denied* 8 NY3d 927), and here, we conclude that the court did not abuse its discretion in denying defendant's request.

Contrary to defendant's contention, the court did not err in denying the request for substitution without making further inquiry into the reasons for the request. A "court's duty to consider such a motion is invoked only where a defendant makes a 'seemingly serious request[ ]' . . . Therefore, it is incumbent upon a defendant to make specific factual allegations of 'serious complaints about counsel' " in support of his or her motion (*People v Porto*, 16 NY3d 93, 99-100). Here, to the contrary, "[f]urther inquiry was not required because [defendant']s conclusory assertions did not suggest the serious possibility of a genuine conflict of interest" (*Stevenson*, 36 AD3d at

635; *see People v Lewicki*, 118 AD3d 1328, 1329, *lv denied* 23 NY3d 1064; *People v Boswell*, 117 AD3d 1493, 1494, *lv denied* 23 NY3d 1060). In any event, defendant abandoned his request when he " 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004; *see Boswell*, 117 AD3d at 1494; *see also People v Ocasio*, 81 AD3d 1469, 1470, *lv denied* 16 NY3d 898, *cert denied* ___ US ___, 132 S Ct 318).

Finally, we note that the certificate of conviction contains a typographical error inasmuch as it incorrectly reflects that defendant was sentenced to an indeterminate term of imprisonment of 1 to 3 years on the conspiracy count, whereas the parties agree, and the sentencing minutes reflect, that he was sentenced to 1½ to 3 years on that count. The certificate of conviction therefore must be amended to correct that error (*see generally People v Kemp*, 112 AD3d 1376, 1377; *People v Smoke*, 43 AD3d 1332, 1333, *lv denied* 9 NY3d 1039).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1271

TP 16-00649

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

IN THE MATTER OF BRIAN HUNT, 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 (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, Wyoming County [Michael M. Mohun, A.J.], entered April 19, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1272

KA 15-00811

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROOSEVELT R. COLEMAN, JR., DEFENDANT-APPELLANT.

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

ROOSEVELT R. COLEMAN, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered February 18, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by amending the order of protection, and as modified the judgment is affirmed, and the matter is remitted to Cayuga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty to two counts of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that his guilty plea was jurisdictionally defective because that crime was neither charged in the indictment nor constitutes a lesser included offense of a crime charged in the indictment. We reject that contention inasmuch as first-degree criminal contempt under Penal Law § 215.51 (c) constitutes a lesser included offense of aggravated criminal contempt under Penal Law § 215.52 (3), two counts of which were charged in the indictment (*see generally* CPL 1.20 [37]; *People v Green*, 56 NY2d 427, 431, *rearg denied* 57 NY2d 775). Indeed, as charged in the indictment, the commission of first-degree criminal contempt under section 215.51 (c) is itself the criminal act required under the aggravated criminal contempt counts under section 215.52 (3).

Defendant contends that the expiration date on the order of protection, i.e., February 18, 2027, is illegal because it fails to account for his jail time credit under Penal Law § 70.30 (3) (*see* CPL 530.12 [5]; *People v Hopper*, 123 AD3d 1234, 1235; *People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21 NY3d 1015; *People v Nugent*, 31 AD3d 976, 978, *lv denied* 8 NY3d 925). That contention is not preserved for

our review (*see People v Nieves*, 2 NY3d 310, 315-317), but we nevertheless exercise our power to review it as a matter of discretion in the interests of justice. We agree with defendant that County Court failed to account for the jail time credit to which he is entitled and, consequently, erred in its determination of the expiration date of the order of protection. We therefore modify the judgment by amending the order of protection, and we remit the matter to County Court to determine the jail time credit to which defendant is entitled and to specify an expiration date for the order of protection in accordance with CPL 530.12 (5) (*see People v Richardson*, 143 AD3d 1252, 1255; *DeFazio*, 105 AD3d at 1439).

We conclude that the sentence is not unduly harsh or severe. Finally, we have considered defendant's remaining contentions in his main and pro se supplemental briefs, and we conclude that they are without merit.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1276

CAF 15-01895

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

IN THE MATTER OF KELLY NEUPERT,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. NEUPERT, RESPONDENT-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

KELLY L. BALL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered October 16, 2015 in a proceeding pursuant to Family Court Act article 6. The order denied respondent's motion to vacate an order entered upon his default.

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

Memorandum: Respondent father appeals from an order denying his motion to vacate an order, entered upon his default, that awarded petitioner mother sole custody of the parties' children and ended the father's visitation with the children.

We reject the father's contention that he did not receive notice of the default hearing. To the contrary, the record establishes that the notice Family Court mailed to the father was not returned, and that the father had actual knowledge of the hearing (*see Matter of Strumpf v Avery*, 134 AD3d 1465, 1466; *see also Matter of Geoffrey Colin D. v Janelle Latoya A.*, 132 AD3d 438, 438). We further conclude that the court did not abuse its discretion in denying the father's motion inasmuch as he failed to offer either a reasonable excuse for his default or a meritorious defense (*see Strumpf*, 134 AD3d at 1466; *see also Matter of Roshia v Thiel*, 110 AD3d 1490, 1491, *lv dismissed in part and denied in part* 22 NY3d 1037).

The father's remaining contentions are not properly before this Court. "[I]t is well settled that no appeal lies from an order entered on default" (*Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98

AD3d 1257, 1258; *see generally Hines v Hines*, 125 AD2d 946, 946).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1279

CAF 15-01600

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

IN THE MATTER OF MIRIAM M. OWENS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD G. POUND, JR., RESPONDENT-RESPONDENT.

IN THE MATTER OF RICHARD G. POUND, JR.,
PETITIONER-RESPONDENT,

V

MIRIAM M. OWENS, RESPONDENT-APPELLANT.

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

CHAFFEE & LINDER, PLLC, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-REPSONDENT.

PATRICIO JIMENEZ, ATTORNEY FOR THE CHILD, HAMMONDSPORT.

Appeal from an order of the Family Court, Steuben County (Gerard J. Alonzo, J.H.O.), entered September 9, 2015 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint custody of the subject child with primary physical placement with Richard G. Pound, Jr.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order, entered after a hearing, awarding the parties joint custody of the subject child, who was born in 2010, with primary physical placement to respondent-petitioner father and visitation to the mother. Contrary to the mother's contention, there is a sound and substantial basis in the record for Family Court's determination that primary physical placement with the father is in the child's best interests (*see Matter of Baxter v Borden*, 122 AD3d 1417, 1418, *lv denied* 24 NY3d 915; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Matter of Chilbert v Soler*, 77 AD3d 1405, 1406, *lv denied* 16 NY3d 701). The fact that the mother was the child's primary caretaker prior to the parties' separation is not determinative, and the record establishes

that "the child is comfortable in both homes" and has strong relationships with members of her extended family who live with the father, i.e., her paternal grandparents and a cousin also born in 2010 (*Matter of Howell v Lovell*, 103 AD3d 1229, 1232; *see Matter of Ray v Eastman*, 117 AD3d 1114, 1114-1115; *Matter of Oravec v Oravec*, 89 AD3d 1475, 1475-1476). In addition, the hearing evidence, including evidence that the mother moved more than an hour away from the father's home with the child when the parties separated and denied the father access to the child for over a month, supports the court's finding that the father is the more willing of the parties to foster the other parent's relationship with the child (*see Matter of Saunders v Stull*, 133 AD3d 1383, 1384; *see generally Hill v Dean*, 135 AD3d 990, 993-994).

We reject the mother's contention that the award of primary physical placement to the father is in effect an award of custody to the paternal grandmother (*see Matter of Francisco v Francisco*, 298 AD2d 925, 926, *lv denied* 99 NY2d 504). Although the father works as a truck driver and has a demanding schedule, the record establishes that he returns home each day, usually by 5:30 p.m., and that he takes care of the child himself whenever he is at home, thereby demonstrating that he is an active and capable parent notwithstanding his work schedule (*see Matter of Moreau v Sirles*, 268 AD2d 811, 812-813; *see also Matter of Chyreck v Swift*, ___ AD3d ___, ___ [Nov. 10, 2016]; *Francisco*, 298 AD2d at 926).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1280

CAF 15-01064

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

IN THE MATTER OF STACI L. CASPER,
PETITIONER-RESPONDENT,

V ORDER

JAMES R. SOCCIO, RESPONDENT-APPELLANT.

IN THE MATTER OF JAMES R. SOCCIO,
PETITIONER-APPELLANT,

V

STACI L. CASPER, RESPONDENT-RESPONDENT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

BRIAN P. DEGNAN, ATTORNEY FOR THE CHILD, BATAVIA.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered June 4, 2015 in proceedings pursuant to Family Court Act article 6. The order adjudged that if James R. Soccio failed to complete his substance abuse evaluation within 45 days of the court's decision of May 7, 2015, his visitation shall be suspended until an evaluation is completed.

It is hereby ORDERED that said appeal insofar as it concerns visitation is unanimously dismissed (*see Matter of Green v Green*, 139 AD3d 1384, 1385), and the order is otherwise affirmed without costs for reasons stated in the decision at Family Court.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1282

CA 16-00413

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

COUNTY OF ERIE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRANCIS B. VOLANTE, DEFENDANT-RESPONDENT.

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

SMITH, MURPHY & SCHOEPPERLE, LLP, BUFFALO (STEPHEN P. BROOKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), dated August 17, 2015. The order granted in part the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action pursuant to General Municipal Law § 207-c (6) seeking to enforce its right to be reimbursed for the salary and medical expenses paid on behalf of a police officer who was injured when his patrol car collided with a motor vehicle owned and operated by defendant. Supreme Court granted defendant's motion for summary judgment in part, concluding that plaintiff's "claim is . . . limited to those amounts it has paid in excess of basic economic loss." We affirm.

Contrary to plaintiff's contention, its "potential recovery pursuant to General Municipal Law § 207-c (6) of payments made to a police officer injured by the alleged negligence of the defendant in her ownership and operation of an automobile is limited by Insurance Law article 51" (*Village of Suffern v Baels*, 215 AD2d 751, 751). Thus, the court properly determined that plaintiff can recover only those amounts paid to its employee pursuant to section 207-c that are in excess of basic economic loss as that term is defined by article 51 of the Insurance Law (*see Incorporated Vil. of Freeport v Sanders*, 101 AD2d 808, 809; *City of Buffalo v Murry*, 79 AD2d 1096, 1096, *lv denied* 53 NY2d 601).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1286

CA 16-00664

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

NAKITA HARRIS, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF MYRA HARRIS, PLAINTIFF-APPELLANT,

V ORDER

CITY OF BUFFALO, BUFFALO BOARD OF EDUCATION, BUFFALO PUBLIC SCHOOL #53, THE AFTER SCHOOL PROGRAM AND THE DIRECTOR OF THE AFTER SCHOOL PROGRAM (JOINTLY AND SEVERALLY), DEFENDANTS-RESPONDENTS.

JAMES P. DAVIS, BUFFALO, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered May 5, 2015. The order granted the motion of defendants for summary judgment and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs for reasons stated at Supreme Court (*see Brandy B. v Eden Cent. Sch. Dist.*, 15 NY3d 297, 301-303).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1291

KA 15-00846

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. CARLBERG, 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 an order of the Steuben County Court (Marianne Furfure, A.J.), entered May 4, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in failing to grant a downward departure from his presumptive risk level. We reject that contention. "A departure from the presumptive risk level is warranted if there is 'an aggravating or mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines' " (*People v Smith*, 122 AD3d 1325, 1325, quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 4 [2006]). Defendant failed to identify or establish the existence of any such mitigating factor (*see People v Lowery*, 140 AD3d 1141, 1142, *lv denied* 28 NY3d 903; *see generally People v Gillotti*, 23 NY3d 841, 861). Contrary to defendant's further contention, the court properly assessed 15 points under risk factor 11 for history of drug or alcohol abuse. Defendant's criminal history includes two prior alcohol-related convictions (*see People v Green*, 104 AD3d 1222, 1222, *lv denied* 21 NY3d 860), and his purported abstinence while incarcerated and limited consumption of alcohol during the brief period following his release is not necessarily predictive of his future behavior (*see People v Jackson*, 134 AD3d 1580, 1580-1581; *Green*, 104 AD3d at 1223). The court also properly assessed 10 points under risk factor 13 for unsatisfactory conduct while supervised because the People established that defendant violated the terms of his supervision by engaging in

criminal conduct (*see People v Young*, 108 AD3d 1232, 1233, *lv denied* 22 NY3d 853, *rearg denied* 22 NY3d 1036; *People v Lowery*, 93 AD3d 1269, 1270, *lv denied* 19 NY3d 807). Contrary to defendant's contention, the assessment of points under risk factor 11 and risk factor 13 did not constitute impermissible double counting, notwithstanding the fact that the unsatisfactory conduct while supervised was alcohol-related.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1298

KA 14-01065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL DIPALMA, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 15, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony.

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

Same memorandum as in *People v DiPalma* ([appeal No. 2] ___ AD3d ___ [Dec. 23, 2016]).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1299

KA 14-01072

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL DIPALMA, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered October 15, 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: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The People correctly concede that the waiver of the right to appeal his conviction did not encompass defendant's contention in appeal No. 2 that the period of postrelease supervision is unduly harsh and severe and thus does not foreclose our review of that contention (*see People v Maracle*, 19 NY3d 925, 927-928; *People v Diaz*, 142 AD3d 1332, 1333). We nevertheless reject that contention.

Contrary to defendant's contention in appeal No. 1, Supreme Court did not impose a fee of $350, rather than the proper fee of $50, for the DNA databank fee (*see* Penal Law § 60.35 [1] [a] [v]). Although the sentencing transcript reflects the imposition of a DNA databank fee of $350, the transcript further reflects that the court correctly stated the total amount due from defendant for fees and surcharges, which establishes that the court properly imposed a fee of $50. Moreover, the certificate of conviction correctly states that $50 was assessed for the DNA databank fee. We therefore conclude that no corrective action is necessary inasmuch as the record establishes

either that the court misspoke or that there is a transcription error (*see People v Kaetzel*, 117 AD3d 1187, 1190, *lv denied* 24 NY3d 962).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1300

KA 16-00383

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA B. KLOSSNER, DEFENDANT-APPELLANT.

LEONARD, CURLEY & LONGERETTA, PLLC, ROME (JOHN LEONARD 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 (John S. Balzano, A.J.), rendered July 1, 2014. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, as a class E felony, failure to stay in lane and consumption or possession of an alcoholic beverage in a motor vehicle.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that County Court erred in refusing to suppress evidence obtained as the result of the warrantless search of his vehicle. We reject that contention. The evidence at the suppression hearing established that, shortly before 3:00 a.m., the arresting officer was driving east on Gifford Hill Road when he noticed a vehicle on the side of the road. The driver's side of the vehicle was on the paved portion of the road, the passenger side was in the ditch, and the position of the vehicle made it impossible to maneuver the vehicle out of the ditch and back onto the road. The officer exited his patrol car, approached the vehicle to investigate the accident and observed that no one was inside the vehicle, although the engine was still warm and he could smell exhaust. The officer testified that he was concerned with determining the cause of the accident and whether anyone was injured and needed assistance. The officer opened the unlocked driver's side door, leaned inside the vehicle, and looked for blood or other signs of injury. In one of the cupholders in the console, he saw a tall drinking glass containing a dark liquid that smelled of alcohol, and he saw an open 12-pack of beer in the backseat. There was an open can of chili in another cupholder in the console, and the officer noticed that chili was splattered on the

dashboard. He returned to his vehicle and resumed traveling east on Gifford Hill Road for approximately two-thirds of a mile, where he encountered defendant. Defendant acknowledged that he was the owner of the vehicle that was partially in the ditch, and he identified the dark liquid in the tall drinking glass as rum and Coke.

At the outset, we agree with defendant that the officer's act of opening the door of the vehicle and leaning inside constituted a search (*see People v Vidal*, 71 AD2d 962, 963). Contrary to defendant's contention, however, we conclude that the search of the vehicle was lawful. Under the circumstances, defendant had no reasonable expectation of privacy in the abandoned vehicle, and the officer was justified in conducting the limited search (*see People v Sparks*, 13 AD3d 813, 814-815, *lv denied* 4 NY3d 836). In addition, we agree with the People that the warrantless search of the vehicle in these circumstances was lawful because the search came within the emergency exception to the warrant requirement (*see People v Mitchell*, 39 NY2d 173, 177-178, *cert denied* 426 US 953; *People v Griffiths*, 112 AD2d 798, 798, *lv denied* 67 NY2d 943).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1301

CAF 14-01739

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

IN THE MATTER OF CINIA E. BILES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL S. BILES, RESPONDENT-APPELLANT.

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

KRISTINE A. KIPERS, NEW HARTFORD, FOR PETITIONER-RESPONDENT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered August 26, 2014 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the children to petitioner and supervised visitation to respondent.

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

Memorandum: Respondent father appeals from an order that, inter alia, awarded sole custody of the subject children to petitioner mother. We reject the father's contention that Family Court abused its discretion in denying his request to adjourn the evidentiary hearing. It is well settled that "[t]he grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889, quoting *Matter of Anthony M.*, 63 NY2d 270, 283). Here, the father had not appeared at the pretrial conference or the date scheduled for a hearing, and the medical excuse that the father sent to the court was vague and failed to show why he was unable to attend the hearing (*see Matter of Sanaia L. [Corey W.]*, 75 AD3d 554, 554-555; *Matter of Holmes v Glover*, 68 AD3d 868, 869). We therefore conclude that the court did not abuse its discretion in denying the father's request for an adjournment and proceeding with the hearing in his absence (*see Matter of La'Derrick J.W. [Ashley W.]*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1302

CA 16-00737

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

IN THE MATTER OF NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC., AND CURTIS SAVAGE, PETITIONERS-APPELLANTS,

V ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH AND CENTRAL NEW YORK PSYCHIATRIC CENTER, RESPONDENTS-RESPONDENTS.

LIPPES, MATHIAS, WEXLER & FRIEDMAN, LLP, ALBANY (EMILY G. HANNIGAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered July 8, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1304

CA 16-00695

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

BRADFORD PETTIT, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF ROSE V. PETTIT, DECEASED, AND LONNIE KAPFER, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF LEWIS AND BOARD OF LEGISLATORS FOR COUNTY OF LEWIS, DEFENDANTS-RESPONDENTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, CANTON (SCOTT B. GOLDIE OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (ANDREW J. LEJA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Lewis County (Peter A. Schwerzmann, A.J.), entered July 1, 2015. The order, inter alia, denied the motion of plaintiffs for summary judgment.

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

Memorandum: In this hybrid CPLR article 78 proceeding and declaratory judgment action, plaintiffs appeal from an order that, inter alia, denied their motion for summary judgment seeking a declaration that two local laws that permitted all-terrain vehicles to access county roads were null and void because they violate Vehicle and Traffic Law § 2405 (1). We affirm. We note at the outset that, inasmuch as the sole challenge is to the validity of the legislative enactments, "this is properly only a declaratory judgment action" (*Parker v Town of Alexandria*, 138 AD3d 1467, 1467). We further note that plaintiffs have abandoned any contention that Supreme Court erred in granting that part of defendants' cross motion for summary judgment dismissing the complaint as asserted by plaintiff Bradford Pettit, individually and as executor of the estate of Rose V. Pettit, on the ground that he lacks standing, inasmuch as they have not raised that contention on appeal (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). The contention of Lonnie Kapfer (plaintiff) that he is entitled to summary judgment based upon the doctrine of law of the case is not preserved for our review (*see Matter of Piccillo*, 43 AD3d 1344, 1344). In any event, we conclude that plaintiff's contention lacks merit because the doctrine "applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Town of Angelica v Smith*, 89 AD3d 1547, 1550 [internal quotation marks

omitted]), and here the prior legal determinations relied upon by plaintiff were not resolved on the merits. Furthermore, even assuming, arguendo, that plaintiff met his initial burden of establishing his entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), viewing the evidence in the light most favorable to defendants, as we must (*see Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089, *lv dismissed* 5 NY3d 746), we conclude that defendants raised triable issues of fact whether their legislative actions violate Vehicle and Traffic Law § 2405 (1).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1306

CA 16-00038

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

IN THE MATTER OF THE ESTATE OF SHIRLEY A. KEHOE, DECEASED.

---------- ORDER

JEFFREY KEHOE, PETITIONER-RESPONDENT;

ROBERT L. EDICK, JR., BRITTNEY L. EDICK AND AMBER M. EDICK, OBJECTANTS-APPELLANTS.

BALDWIN & SUTPHEN, LLP, SYRACUSE (ROBERT F. BALDWIN, JR., OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (STEPHEN W. GEBO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered October 5, 2015. The decree dismissed the objections to probate and admitted the last will and testament of Shirley A. Kehoe to probate.

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

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1307

CA 16-00251

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

IN THE MATTER OF THE GERRY HOMES,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF ELLICOTT, ASSESSOR FOR TOWN OF
ELLICOTT AND BOARD OF ASSESSMENT REVIEW
FOR TOWN OF ELLICOTT,
RESPONDENTS-APPELLANTS-RESPONDENTS.

FERRARA FIORENZA, PC, EAST SYRACUSE (KATHERINE E. GAVETT OF COUNSEL), FOR RESPONDENTS-APPELLANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PETITIONER-RESPONDENT-APPELLANT.

TIMOTHY G. KREMER, EXECUTIVE DIRECTOR, LATHAM (JAY WORONA OF COUNSEL), FOR NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC., AMICUS CURIAE.

HINMAN STRAUB P.C., ALBANY (MATTHEW J. LEONARDO OF COUNSEL), FOR LEADINGAGE NEW YORK, INC., AMICUS CURIAE.

Appeal and cross appeal from a judgment (denominated order) of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered June 11, 2015 in proceedings pursuant to CPLR article 78 and RPTL article 7. The judgment granted in part and denied in part the respective motions of the parties for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying petitioner's motion in its entirety and as modified the judgment is affirmed without costs.

Memorandum: Petitioner is a not-for-profit corporation that operates numerous facilities for elderly residents at varying levels of care. Following construction of two facilities, The Woodlands and Orchard Grove Residences (Orchard Grove), on a single tax parcel, petitioner applied for a real property tax exemption pursuant to RPTL 420-a. Respondent Assessor for the Town of Ellicott denied both the 2013 and the 2014 applications, and that denial was upheld by respondent Board of Assessment Review for the Town of Ellicott. Petitioner commenced these CPLR article 78/RPTL article 7 proceedings seeking, inter alia, to challenge those determinations, and both petitioner and respondents moved for summary judgment seeking a summary determination on the petitions. Supreme Court awarded partial

summary judgment to petitioner, concluding that the portion of property upon which Orchard Grove is situated is entitled to a real property tax exemption, but the court also awarded partial summary judgment to respondents, concluding that the portion of property upon which The Woodlands is situated is not entitled to a real property tax exemption (*see generally* RPTL 420-a [2]). We conclude that, although the court properly awarded respondents summary judgment with respect to The Woodlands, the court erred in awarding summary judgment to petitioner with respect to Orchard Grove, and we therefore modify the judgment accordingly.

Real Property Tax Law § 420-a (1) (a) provides, in pertinent part, that "[r]eal property owned by a corporation or association organized or conducted exclusively for . . . charitable [or] hospital . . . purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section." It is well established that "to qualify for the exemption, (1) [the petitioner] must be organized exclusively for [the] purposes enumerated in the statute, (2) the property in question must be used primarily for the furtherance of such purposes, . . . (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees, and (4) [the petitioner] may not be simply used as a guise for profit-making operations" (*Matter of Maetreum of Cybele, Magna Mater, Inc. v McCoy*, 111 AD3d 1098, 1100, *affd* 24 NY3d 1023 [internal quotation marks omitted]; *see Matter of Eternal Flame of Hope Ministries, Inc. v King*, 76 AD3d 775, 777, *affd* 16 NY3d 778). The Court of Appeals has "defined the term 'exclusively' as used in this context to connote 'principal' or 'primary' such that purposes and uses merely auxiliary or incidental to the main and exempt purpose and use will not defeat the exemption" (*Maetreum of Cybele, Magna Mater, Inc.*, 24 NY3d at 1024 [internal quotation marks omitted]; *see Matter of Greater Jamaica Dev. Corp. v New York City Tax Commn.*, 25 NY3d 614, 623; *Matter of Association of Bar of City of N.Y. v Lewisohn*, 34 NY2d 143, 153).

Generally, the question "whether property is used 'exclusively' for purposes of [Real Property Tax Law] section 420-a is dependent upon whether the 'primary use' of the property is in furtherance of permitted purposes" (*Greater Jamaica Dev. Corp.*, 25 NY3d at 623). We note, however, that RPTL 420-a (2) also provides that, "[i]f any portion of such real property is not so used exclusively to carry out thereupon one or more of such purposes but is leased or otherwise used for other purposes, such portion shall be subject to taxation and the remaining portion only shall be exempt." Courts and assessors may thus parse up a single tax parcel for purposes of determining whether any portion thereof is exempt from taxation (*see Matter of ViaHealth of Wayne v VanPatten*, 90 AD3d 1700, 1701-1702; *Matter of Miriam Osborn Mem. Home Assn. v Assessor of City of Rye*, 80 AD3d 118, 138-139).

It is well settled that " '[t]ax exclusions are never presumed or preferred and before [a] petitioner may have the benefit of them, the burden rests on it to establish that the item comes within the language of the exclusion' " (*Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582; *see Matter of 677 New Loudon Corp. v*

State of N.Y. Tax Appeals Trib., 19 NY3d 1058, 1060, *rearg denied* 20 NY3d 1024, *cert denied* ___ US ___, 134 S Ct 422; *Eternal Flame of Hope Ministries, Inc.*, 76 AD3d at 777). The tax exemption statute will be " 'construed against the taxpayer unless the taxpayer identifies a provision of law plainly creating the exemption' . . . [, and] the taxpayer's interpretation of the statute must not simply be plausible, it must be 'the only reasonable construction' " (*Charter Dev. Co.*, 6 NY3d at 582; *see Matter of Al-Ber, Inc. v New York City Dept. of Fin.*, 80 AD3d 760, 761, *lv denied* 16 NY3d 712). Moreover, a determination "that a taxpayer does not qualify for a tax exemption should not be disturbed 'unless shown to be erroneous, arbitrary or capricious' " (*677 New Loudon Corp.*, 19 NY3d at 1060). Contrary to respondents' contention, on a motion for summary judgment, the court is "not limited to the record adduced before 'the agency' " and may thus consider affidavits and other evidence submitted on the motion (*Eternal Flame of Hope Ministries, Inc.*, 76 AD3d at 777).

Contrary to petitioner's contention, the court properly concluded that petitioner failed to establish that respondents' determination with respect to The Woodlands was erroneous, arbitrary, or capricious, and that respondents were entitled to summary judgment dismissing the petitions insofar as they challenged their determination with respect to that portion of the property. The Woodlands provides independent living to seniors and operates at a profit. It is well settled that "renting homes to elderly people who are not poor is not a 'charitable' activity" (*Matter of Adult Home at Erie Sta., Inc. v Assessor & Bd. of Assessment Review of City of Middletown*, 10 NY3d 205, 214), and petitioner's provision of housing to middle-income seniors at The Woodlands does not constitute "a charitable activity" (*id.* at 215; *see Matter of Greer Woodycrest Children's Servs. v Fountain*, 74 NY2d 749, 751; *Matter of Pine Harbour, Inc. v Dowling*, 89 AD3d 1192, 1194; *Matter of Quail Summit, Inc. v Town of Canandaigua*, 55 AD3d 1295, 1296-1297, *lv denied* 11 NY3d 716). Moreover, petitioner's use of the property to operate The Woodlands is not " 'merely auxiliary or incidental' " to the use of the property to operate Orchard Grove (*Maetreum of Cybele, Magna Mater, Inc.*, 111 AD3d at 1100; *see Greater Jamaica Dev. Corp.*, 25 NY3d at 630-631; *but see Matter of Merry-Go-Round Playhouse, Inc. v Assessor of City of Auburn*, 24 NY3d 362, 368-369). We thus conclude that the portion of the property upon which The Woodlands is situated is not entitled to a tax exemption, regardless of whether an exemption is granted for the portion of property upon which Orchard Grove is situated.

We agree with respondents, however, that the court erred in awarding summary judgment to petitioner with respect to that portion of the property upon which Orchard Grove is situated. There are triable issues of fact whether Orchard Grove, an assisted living program facility, was used primarily for the furtherance of hospital purposes (*compare* Public Health Law § 2801 [1] *with* § 4651 [1]), or charitable purposes (*see Matter of Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc. v Town of Malta Assessor*, 125 AD3d 1218, 1219).

"The provision of housing to low-income persons may constitute a charitable activity . . . , and the critical factor is whether the provider subsidizes the rentals or charges less than fair market rental rates" (*Matter of TAP, Inc. v Dimitriadis*, 49 AD3d 947, 948; *see Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, 125 AD3d at 1219*; Pine Harbour, Inc.*, 89 AD3d at 1194-1195; *Matter of Lake Forest Senior Living Community, Inc. v Assessor of the City of Plattsburgh*, 72 AD3d 1302, 1305). Here, petitioner established that it subsidized 60%-70% of its "days of service," but it did not establish either the "number of residents who are dependent on government benefits" (*Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, 125 AD3d at 1219), or the market rates for similar housing (*see Pine Harbour, Inc.*, 89 AD3d at 1195). Moreover, all of petitioner's applications provide for termination of the resident for nonpayment (*see Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, 125 AD3d at 1219; *Pine Harbour, Inc.*, 89 AD3d at 1195). Contrary to respondents' contention, however, the mere fact that petitioner received some economic benefit "does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable" (*Adult Home at Erie Sta., Inc.*, 10 NY3d at 216). "The fact that government subsidies [may] raise the amount received for low-income housing to an equivalent of market rates does not necessarily defeat the exemption" (*Matter of Association for Neighborhood Rehabilitation, Inc. v Board of Assessors of the City of Ogdensburg*, 81 AD3d 1214, 1216; *see Matter of United Church Residences of Fredonia, N.Y., Inc. v Newell*, 10 NY3d 922, 923). Inasmuch as there are "issues of fact with respect to the relevant criteria for determining whether [Orchard Grove] qualifies as 'charitable' " or as a hospital, neither party is entitled to summary judgment with respect to that portion of petitioner's property (*Church Aid of the Prot. Episcopal Church in the Town of Saratoga Springs, Inc.*, 125 AD3d at 1219; *see TAP, Inc.*, 49 AD3d at 949).

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

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

1311

CA 15-01984

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

IN THE MATTER OF THOMAS KRUPA,
PETITIONER-APPELLANT.

V MEMORANDUM AND ORDER

TINA M. STANFORD, CHAIRWOMAN, NEW YORK STATE
DIVISION OF PAROLE, RESPONDENT-RESPONDENT.

THOMAS KRUPA, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered October 20, 2015 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition seeking to vacate the determination of the New York State Board of Parole (Board) denying his release to parole supervision. As a preliminary matter, we note that petitioner's contention that the Board failed to consider his transition accountability plan was not raised in his administrative appeal or in the petition, and thus that contention is not properly before us (*see Matter of Secore v Mantello*, 176 AD2d 1244, 1244).

"It is well settled that parole release decisions are discretionary and will not be disturbed so long as the Board complied with the statutory requirements enumerated in Executive Law § 259-i . . . Judicial intervention is warranted only when there is a showing of irrationality bordering on impropriety" (*Matter of Fischer v Graziano*, 130 AD3d 1470, 1470 [internal quotation marks omitted]). Here, the record establishes that the Board properly considered the requisite factors and adequately set forth its reasons to deny petitioner's application for release (*see id.*). We conclude "that there was no showing of irrationality bordering on impropriety" (*id.* [internal quotation marks omitted]; *see Matter of Silmon v Travis*, 95 NY2d 470, 476). We have reviewed petitioner's remaining contentions and

conclude that none requires reversal or modification of the judgment.

Entered: December 23, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (1409/95) KA 06-01024. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH ALBERT, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (1242/96) KA 16-01685. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JALAAL PEOPLES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (905/02) KA 01-01982. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHONDELL J. PAUL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (264/08) KA 06-00775. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRANDON JACKSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY,

AND DEJOSEPH, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (951/11) KA 07-02656. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (249/14) KA 08-00334. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHRISTOPHER D. HUNTER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Dec. 23, 2016.)

MOTION NOS. (1159/15 AND 534-535/11) KA 12-01818. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS B. WORTH, DEFENDANT-APPELLANT. KA 06-00414. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. KA 09-01449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. -- Motion for reargument and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NOS. (1251-1252/15) KA 14-00785. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 15-00527. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V

DONALD W. REINARD, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (48/16) KA 14-00110. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DYLAN SCHUMAKER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (468/16) KA 14-00233. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SALVATORE LETIZIA, DEFENDANT-APPELLANT. -- Motion insofar as it can be construed as one seeking leave to reargue the appeal decided by this Court on July 8, 2016 (141 AD3d 1129) is granted and, upon reargument, the memorandum and order is amended by adding the following paragraph to the end of the memorandum: "We have reviewed the contentions raised in defendant's pro se supplemental brief and pro se addendum and conclude that none warrant reversal or modification of the order." The motion is otherwise denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (470/16) CA 15-00769. -- ELLIOTT B. PATER, AS ADMINISTRATOR OF THE ESTATE OF JOYCE PECKY, DECEASED, PLAINTIFF-APPELLANT, V CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND GREGG O'SHEI, DEFENDANTS-RESPONDENTS. (ACTION NO. 1.) SUSAN PHISTER,

PLAINTIFF-APPELLANT, V CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT AND GREGG O'SHEI, DEFENDANTS-RESPONDENTS. (ACTION NO. 2.) ERICA SNYDER, PLAINTIFF-APPELLANT, V CITY OF BUFFALO AND GREGG O'SHEI, DEFENDANTS-RESPONDENTS. (ACTION NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (698/16) CA 15-01977. -- GASPER A. TIRONE AND ELAINE E. TIRONE, CO-TRUSTEES OF GASPER A. TIRONE AND ELAINE E. TIRONE TRUST, PLAINTIFFS-RESPONDENTS, V DEBORAH A. BUCZEK, DEFENDANT-APPELLANT, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (700/16) CA 15-01923. -- IN THE MATTER OF NANCY ALTIC, ET AL., PETITIONERS-RESPONDENTS, V BOARD OF EDUCATION, ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, J. FRANCIS MANNING, IN HIS CAPACITY AS SUPERINTENDENT OF ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, AND ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, CURRAN, TROUTMAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (742/16) CAF 15-00345. -- IN THE MATTER OF JOYCE S., PETITIONER-APPELLANT, V ROBERT W.S., RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (754/16) CA 15-02074. -- RICCELLI ENTERPRISES, INC., ET AL., PETITIONERS-PLAINTIFFS-RESPONDENTS, V STATE OF NEW YORK WORKERS' COMPENSATION BOARD, ROBERT E. BELOTEN, CHAIRMAN OF WORKERS' COMPENSATION BOARD AND SAFE LLC, RESPONDENTS-DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, TROUTMAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (766/16) CA 15-01978. -- MARGUERITE MITCHELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN K. MITCHELL, DECEASED, PLAINTIFF, V NRG ENERGY, INC. AND DUNKIRK POWER, LLC, DEFENDANTS. NRG ENERGY, INC. AND DUNKIRK POWER, LLC, THIRD-PARTY-PLAINTIFFS-APPELLANTS, V INTERNATIONAL CHIMNEY CORP., THIRD-PARTY-DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (769.1/16) CAF 16-00175. -- IN THE MATTER OF JAMIE J. WAYNE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; MICHELLE E.C.,

RESPONDENT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied (*see* CPLR 5601 [a]; 5602 [a] [1] [i]). PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (790/16) CA 15-02099. -- IN THE MATTER OF ARBITRATION BETWEEN ALLSTATE INSURANCE COMPANY, PETITIONER-RESPONDENT, AND MICHAEL J. CAPPADONIA, RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 23, 2016.)

MOTION NO. (809/16) CA 15-02157. -- CRANE-HOGAN STRUCTURAL SYSTEMS, INC., AND DANIEL C. HOGAN, PLAINTIFFS-RESPONDENTS, V MARY ELLEN BELDING, DEFENDANT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Dec. 23, 2016.)