SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 21, 2018

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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CA 17-00873

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

MICHAEL VOSS, PLAINTIFF-RESPONDENT,

V ORDER

MONROE COUNTY WATER AUTHORITY,
DEFENDANT-APPELLANT.

RUSSO & TONER, LLP, BUFFALO (TIMOTHY P. WELCH OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAMMHOLZ LAW PLLC, VICTOR (JOSEPH A. ROSSI, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered January 18, 2017. The order granted the motion of plaintiff for partial summary judgment and denied the cross motion of defendant for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on November 20, 2017, and filed in the Monroe County Clerk’s Office on December 19, 2017,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 16-00065

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. HOLZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LANA M. ULRICH OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered November 24, 2015. 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 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]) as charged in count one of a two-count indictment. Count one of the indictment alleged that defendant committed burglary in the second degree by unlawfully entering a dwelling on October 1, 2014; count two of the indictment alleged that defendant committed a separate act of burglary in the second degree by unlawfully entering the same dwelling on October 3, 2014. Defendant's plea to count one was accepted in full satisfaction of both counts of the indictment.

Defendant now challenges Supreme Court's refusal to suppress jewelry recovered from his person during a police stop on October 3. It is undisputed, however, that the aforementioned jewelry relates solely to the October 3 burglary charged in count two, a crime to which defendant did not plead guilty and of which he does not stand convicted (*see generally* CPL 220.30 [2]; *People v Alexander*, 160 AD3d 1370, 1370-1371 [4th Dept 2018], *lv denied* 32 NY3d 1001 [2018]). Indeed, the two burglaries charged in the indictment occurred "on two different dates and were completely separate and distinct acts, notwithstanding the fact that they occurred at the same location" (*People v Suits*, 158 AD3d 949, 951 [3d Dept 2018]). Thus, the court's refusal to suppress physical evidence relevant solely to count two is not reviewable on defendant's appeal from a judgment rendered solely on count one (*see* CPL 710.70 [2]; *People v Dorsey*, 122 AD2d 393, 394

[3d Dept 1986]; *People v Corti*, 88 AD2d 345, 350-351 [2d Dept 1982]; *People v Rivera*, 57 AD2d 811, 811 [1st Dept 1977]; *cf. People v Brown*, 263 AD2d 613, 614 [3d Dept 1999], *lv denied* 94 NY2d 877 [2000]).

Our conclusion is rooted in the limits of our appellate jurisdiction. Put simply, "the judgment of conviction on appeal here did not *ensue* from the denial of the motion to suppress and the latter is, therefore, not reviewable" pursuant to CPL 710.70 (2) (*Rivera*, 57 AD2d at 811 [emphasis added]; *see Corti*, 88 AD2d at 350-351). Unlike the dissent, we agree with a well-established line of cases from the First, Second, and Third Departments that CPL 710.70 (2) "should not be read so broadly so as to entitle a defendant who has pleaded guilty in one [count] to appellate review of the denial of a suppression motion in another [count] in which no judgment was rendered but which was covered by the plea" (*Dorsey*, 122 AD2d at 394; *see Corti*, 88 AD2d at 350-351; *Rivera*, 57 AD2d at 811). Although *Dorsey* and *Rivera* involved separate indictments rather than separate counts of the same indictment, that distinction is inconsequential given the "general rule that 'each count in an indictment is to be treated as if it were a separate indictment' " (*Alexander*, 160 AD3d at 1370, quoting *People v Ardito*, 86 AD2d 144, 163 [1st Dept 1982], *affd for reasons stated* 58 NY2d 842 [1983]).

The dissent conflates reviewability (*see* CPL 710.70 [2]) with harmlessness (*see* CPL 470.05 [1]). In this context, the doctrine of reviewability is concerned with whether the judgment "ensu[ed]" from the suppression determination (CPL 710.70 [2]); the doctrine of harmlessness, on the other hand, is concerned with whether there is any " 'reasonable possibility' " that a reviewable suppression determination " 'contributed to the plea' " (*People v Wells*, 21 NY3d 716, 719 [2013], quoting *People v Grant*, 45 NY2d 366, 379 [1978]). Indeed, the two cases upon which the dissent primarily relies, *People v Kendrick* (128 AD3d 1482 [4th Dept 2015]) and *People v Carpenter* (213 AD2d 747 [3d Dept 1995]), address only the potential harmlessness of an undisputedly reviewable suppression determination. Neither *Kendrick* nor *Carpenter* examine the threshold question of whether the underlying suppression determinations were reviewable in the first instance.

In *Kendrick*, the defendant unsuccessfully moved to suppress various drugs and then pleaded guilty to a lesser-included charge of criminal possession of a controlled substance in the second degree in full satisfaction of a seven-count indictment charging him with, among other crimes, two counts of criminal possession of a controlled substance in the first degree (*id.*, 128 AD3d at 1483). On appeal, the People "concede[d] that the [motion] court erred in determining that defendant lacked standing to contest the search, [but] they nevertheless contend[ed] that the error [was] harmless" because, in the People's view, the defendant would have invariably pleaded guilty to the lesser-included charge given the favorable sentencing promise (*id.* at 1482-1483). We rejected the People's claim of harmless error because "[t]here [was] a reasonable possibility that, had the court granted defendant a suppression hearing and then granted the motion,

defendant would not have pleaded guilty" to the lesser-included charge (*id.* at 1483).

Here, in stark contrast to *Kendrick*, the issue is not whether the suppression ruling is harmless, but rather whether we have jurisdiction to review that ruling at all given that it is unrelated to the "completely separate and distinct" crime to which defendant pleaded guilty (*Suits*, 158 AD3d at 951). *Kendrick* did not consider, much less address, the dispositive jurisdictional issue in this case, namely, whether we can review a suppression ruling that "bore no relation to the charge to which defendant pleaded guilty" (*Dorsey*, 122 AD2d at 394).

Nor was there any reason to have considered that issue in *Kendrick*. After all, the defendant pleaded guilty to a lesser-included drug charge that, as we explicitly noted, was "related to cocaine that was the subject of [his] suppression motion" (*id.*, 128 AD3d at 1483). Here, in contrast, defendant pleaded guilty to one of the two independent and discrete crimes charged in the indictment, and the crime to which he pleaded guilty was wholly unrelated to the suppression motion. Thus, unlike this case, it simply cannot be said that the challenged suppression ruling in *Kendrick* "bore no relation to the charge to which [the] defendant pleaded guilty" (*Dorsey*, 122 AD2d at 394).

The dissent's reliance on *Carpenter* is equally unavailing, and that case does not in any way suggest that the Third Department has "abandoned" the rule of *Dorsey*. In *Carpenter*, the defendant, a drug dealer, pleaded guilty to murder after the motion court refused to suppress drugs recovered from his residence (*id.*, 213 AD2d at 747-748). According to the Third Department, the murder was an "act of reprisal" stemming from the defendant's belief that the victim, a rival dealer, had previously robbed his associates of drugs and money (*People v Carpenter*, 240 AD2d 863, 863 [3d Dept 1997], *lv denied* 90 NY2d 902 [1997]).

Under those circumstances, the drugs at issue in *Carpenter* were not, as the dissent characterizes, "separate" and "unrelated" to the murder charge to which the defendant pleaded guilty. To the contrary, the drugs supplied the context and motive for the murder and, by refusing to suppress those drugs, the court effectively admitted a significant piece of evidence tying the defendant to the murder. The fact that the defendant did not plead guilty to criminally possessing the subject drugs does not mean that such drugs were "separate" and "unrelated" to the drug-related murder to which he did plead guilty. Put simply, the murder plea in *Carpenter* "ensu[ed]" from the motion court's refusal to suppress the very evidence that established his motive to commit the murder, and that suppression determination was therefore reviewable on appeal from the resultant judgment (CPL 710.70 [2]).

By contrast, there is no suggestion in this case that the jewelry recovered by the police on October 3 would or could have been admitted to prove that defendant committed a separate and discrete act of

burglary on October 1 — a point that neither defendant nor the dissent disputes. Thus, under the applicable precedent of *Dorsey*, *Rivera*, and *Corti*, the court's refusal to suppress that jewelry is not reviewable pursuant to CPL 710.70 (2) in connection with this appeal. Without a reviewable determination, the question addressed by the dissent — i.e., the potential harmlessness of that determination — is not properly before us. Indeed, when a defendant pleads guilty, we have no power to review any part of a suppression determination that does not fall within the ambit of CPL 710.70 (2) (*see Corti*, 88 AD2d at 349-351; *see generally People v Howe*, 56 NY2d 622, 624 [1982]). We therefore affirm the judgment on that ground alone.

Finally, we note that the certificate of conviction incorrectly states that count one of the indictment relates to the October 3 burglary, and that count two relates to the October 1 burglary. The certificate must therefore be corrected to indicate that count one relates to the October 1 burglary, and that count two relates to the October 3 burglary (*see generally People v Credell*, 161 AD3d 1563, 1565 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]).

All concur except WHALEN, P.J., who dissents and votes to reverse in accordance with the following memorandum: I must respectfully dissent inasmuch as I cannot agree with the majority that we are precluded from reaching the merits of defendant's appeal. The majority adopts the interpretation of CPL 710.70 (2) stated in *People v Dorsey* (122 AD2d 393, 394 [3d Dept 1986]). Initially, the Third Department has abandoned the restrictive interpretation stated in *Dorsey*. In its subsequent decision in *People v Carpenter* (213 AD2d 747, 747-748 [3d Dept 1995]), for example, a single indictment charged defendant with, inter alia, two counts of murder in the second degree in connection with a 1992 shooting and multiple counts of criminal possession of a controlled substance as a result of cocaine seized during a search of defendant's residence. Following the court's denial of that part of his omnibus motion seeking to suppress the cocaine, the defendant pled guilty to a single count of murder in the second degree in full satisfaction of the indictment. On appeal, the Third Department addressed the merits of defendant's contention that the court improperly refused to suppress the cocaine even though the cocaine related solely to the separate, unrelated crimes of criminal possession of a controlled substance, to which defendant did not plead guilty. In contrast to *Dorsey*, the Third Department held in *Carpenter* that: "Inasmuch as the People did not obtain from defendant a concession that denial of his suppression motion did not influence his decision to plead guilty, nor a waiver of his right to appeal that denial, we are not in a position to determine whether such denial played any part in his decision to plead guilty (*see*, *People v Coles*, 62 NY2d 908, 910 [1984]). We note that a conviction on the third count of the indictment (charging criminal possession of a controlled substance in the second degree) would have subjected defendant to the potential of consecutive sentences and mention was made of that fact by defense counsel during plea discussions. Because it is possible that this factor influenced defendant in his decision to plead guilty, the judgment must be reversed" (*Carpenter*, 213 AD2d at 748-749). If the Third Department were adhering to its prior holding in *Dorsey* that

it is jurisdictionally precluded from reviewing the propriety of a suppression ruling related solely to a count or indictment to which the defendant did not plead guilty, as the majority asserts, then it would have been precluded from even considering whether there was any reasonable possibility that the allegedly erroneous ruling contributed to the defendant's decision to plead guilty.

The Third Department also reached the merits of a suppression motion related to a separate indictment, not just a separate count, that was satisfied as part of a plea agreement in the subsequent case of *People v Pasco* (134 AD3d 1257, 1257-1258 [3d Dept 2015]). Additionally, as defendant argues in his postargument submission on this appeal, contrary to *Dorsey*, this Court has previously addressed the propriety of the denial of a suppression motion that related solely to a count of an indictment to which defendant did not plead guilty, but that was nonetheless resolved by the plea (*see People v Kendrick*, 128 AD3d 1482, 1482-1483 [4th Dept 2015]). Notably, in attempting to distinguish the post-*Dorsey* cases cited herein, the majority conducts a factual analysis whether the challenged suppression ruling bore any relation to the charge to which the defendant pled guilty, an analysis fundamentally indistinguishable from the issue whether there is any " 'reasonable possibility that the error contributed to the plea' " (*People v Wells*, 21 NY3d 716, 719 [2013]; *see People v Grant*, 45 NY2d 366, 379 [1978]). Thus, it is the majority that is conflating the issues of appellate jurisdiction and harmless error.

In my opinion, the Third Department correctly abandoned *Dorsey's* restrictive interpretation of CPL 710.70 (2). That subdivision states, "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty" (CPL 710.70 [2]). To conclude that defendant's conviction did not ensue from, or "follow as a consequence or result" of (American Heritage Dictionary 595 [4th ed 2000]), Supreme Court's refusal to suppress the relevant evidence here ignores both the plain meaning of the statutory language (*see generally People v Andujar*, 30 NY3d 160, 163 [2017]) and the judicial recognition that an improper suppression determination can affect the knowing and voluntary nature of the bargained-for plea agreement with respect to all counts or indictments encompassed therein, not just the counts or indictments to which the determination directly relates (*see People v Clark*, 45 NY2d 432, 440 [1978], *rearg denied* 45 NY2d 839 [1978]; *People v Rosa*, 30 AD3d 905, 908 [3d Dept 2006], *lv denied* 7 NY3d 851 [2006]; *People v Puckett*, 270 AD2d 364, 364-365 [2d Dept 2000]; *see generally Wells*, 21 NY3d at 719; *Grant*, 45 NY2d at 379; *People v Ramos*, 40 NY2d 610, 618-619 [1976]; *Kendrick*, 128 AD3d at 1483; *People v Brinson*, 186 AD2d 1063, 1063 [4th Dept 1992]).

Further, defendant's plea of guilty to burglary in the second degree for the October 1, 2014 incident satisfied the pending charge of burglary in the second degree for the October 3, 2014 incident, as expressly stated in defendant's certificate of conviction. As such, this ensuing judgment has precedential implications with respect to

the separate burglary; it precludes the People from prosecuting defendant again for the October 3, 2014 crime (*see* CPL 40.20 [1]; 40.30 [1] [a]; 220.30 [2]) and, in contrast to a mere arrest or an unproven charge, the People may inquire at trial into the underlying acts of this incident in any future prosecution of defendant because it is not a dismissal on the merits (*see People v Walker*, 66 AD3d 1331, 1332 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]). I therefore reject the narrow interpretation of CPL 710.70 (2) announced in *Dorsey* and adopted by the majority here.

In rejecting *Dorsey*, I am not asserting that the fact that a defendant seeks review of a suppression motion that pertains solely to a count or an indictment to which the defendant did not expressly plead guilty has no relevance. Although an erroneous suppression ruling can influence a defendant's decision whether to plead guilty, "a guilty plea entered after an improper court ruling may be upheld if there is no 'reasonable possibility that the error contributed to the plea' " (*Wells*, 21 NY3d at 719, quoting *Grant*, 45 NY2d at 379). Thus, under certain circumstances, the limited nature of a particular suppression ruling may establish that there was no reasonable possibility that any error with respect thereto contributed to the defendant's decision to plead guilty (*see People v Lloyd*, 66 NY2d 964, 965 [1985]; *People v Clanton*, 151 AD3d 1576, 1579 [4th Dept 2017]; *People v McLaughlin*, 269 AD2d 858, 858-859 [4th Dept 2000], *lv denied* 95 NY2d 800 [2000]). I cannot agree with the majority, however, that "the limits of our appellate jurisdiction" preclude this Court from reviewing the suppression ruling here.

Further, I cannot conclude that there is no reasonable possibility in this case that the denial of defendant's suppression motion contributed to his decision to plead guilty (*see Wells*, 21 NY3d at 719). The parties agree that defendant pled guilty to one count of burglary in the second degree in exchange for a sentencing promise of six years' imprisonment plus five years' postrelease supervision. If defendant had gone to trial on both counts, he would have faced the possibility of consecutive sentences totaling at least 12 years' imprisonment for the separate burglaries (*see* Penal Law §§ 70.06 [3] [c]; 140.25 [2]; *People v Suits*, 158 AD3d 949, 951 [3d Dept 2018]). The transcript of the plea colloquy reveals that neither the court nor the parties were initially clear as to which of the two separate burglaries defendant was to plead guilty, and he allocuted to facts relevant to both counts. Indeed, as the majority notes, even the certificate of conviction confused the two counts. I therefore cannot conclude that defendant understood that, by pleading guilty to count one rather than count two of the indictment, he was waiving his right to seek appellate review of the suppression determination. Further, "the People did not obtain from defendant a concession that denial of his suppression motion did not influence his decision to plead guilty, nor a waiver of his right to appeal that denial" (*Carpenter*, 213 AD2d at 748), although such conditions could have been included as part of the offered plea agreement.

Thus, defendant is entitled to review of the merits of the court's refusal to suppress physical evidence obtained after police

officers allegedly stopped and detained him without the requisite reasonable suspicion to do so. At a suppression hearing, two of the four police officers involved in the stop of defendant testified and their testimony established that, at approximately 4:00 p.m. on October 3, 2014, a police officer was dispatched to an Irondequoit neighborhood in response to a report of "a suspicious person" wearing a gray hooded sweatshirt and brown pants who "could have possibly been involved in a burglary that occurred a day or so ago." Upon the officer's arrival at the reported location, a mail carrier pointed down the road and told the officer that "[h]e's down there," without further elaboration. Although unknown to the officer at the time, the mail carrier was subsequently identified as the person who reported seeing a suspicious person. The officer traveled in the direction indicated by the mail carrier and observed defendant wearing clothing matching the description provided in the dispatch. Upon exiting his patrol car, the officer noticed that defendant was "sweaty and fidgety" and asked defendant to take his hands out of his pockets. When defendant complied, the officer did not "know if [defendant] was trying to conceal something or what but [the officer] did notice that there was something in one of his hands." When the officer asked what it was, defendant "showed [the officer] a plastic bag, and in the plastic bag [there] appeared to be jewelry." The officer took possession of the bag of jewelry.

Three additional officers joined the first officer, one of whom was aware of a burglary in the neighborhood several days prior during which a laptop computer had been stolen. An officer then asked defendant where he obtained the jewelry, and defendant responded that he had purchased it at a nearby yard sale. An officer next asked defendant whether he would accompany them to the yard sale "to confirm with whoever was running the sale that he indeed purchased the jewelry from them." Defendant agreed to do so, and he was placed in the back of a patrol vehicle for approximately 5 to 10 minutes before the officers transported him to the location provided by defendant. At that location, while defendant remained in the back of the patrol car, the officers questioned the woman running the yard sale about the jewelry, and she stated that it had neither been sold by her, nor did she recognize it.

Notably, the People withdrew their CPL 710.30 notice of the intention to offer evidence of defendant's statements during that encounter, and the People offered no further evidence at the hearing to establish if or when the officers obtained sufficient information to conclude that defendant had stolen the jewelry during a second, separate burglary that occurred at the same location as a prior burglary, during which the laptop computer had allegedly been stolen.

I agree with defendant that the court erred in refusing to suppress the jewelry. "It is well established that, in evaluating the legality of police conduct, [a court] 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015]; *see People v De Bour*, 40 NY2d 210, 215 [1976]). "In *De Bour*, the Court of Appeals 'set forth a graduated four-level test for

evaluating street encounters initiated by the police: level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; [and] level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime' " (*Burnett*, 126 AD3d at 1492, quoting *People v Moore*, 6 NY3d 496, 498-499 [2006]).

In refusing to suppress the physical evidence here, the court concluded that "the information provided by the [mail carrier] was deemed to be reliable, coupled with the defendant's physical description and clothing, both of which were previously noted during the earlier dispatch, sufficiently specific and corroborating . . . , [and defendant] was seen in close spatial and temporal proximity to where a crime or crimes had recently occurred." The court therefore concluded that the first responding officer "possessed a suspicion of criminality when approaching and detaining [defendant]." The court further concluded that defendant's detention was appropriately based on that officer's "initial reasonable suspicion that a crime had been committed and that the defendant was the perpetrator, ultimately leading to his legal arrest, based upon requisite probable cause. Further, the subsequent search and seizure of physical property was supported by probable cause."

Here, given the specificity of the clothing description, the anonymous report of a "suspicious person" who "could have possibly been involved in a burglary" is arguably an objectively credible reason for the first officer's initial approach of defendant. According to his own testimony, however, at no point did the officer ask any " 'basic, nonthreatening questions regarding, for instance, identity, address or destination' " appropriate for a first level *De Bour* inquiry (*People v Garcia*, 20 NY3d 317, 322 [2012]; *cf. Burnett*, 126 AD3d at 1492-1493). Instead, the officer directed defendant to remove his hands from his pockets and then began questioning defendant regarding the plastic bag of jewelry in defendant's hand. Even assuming, arguendo, that the officer's observation that defendant might have been "trying to conceal something" warranted the officer's pointed questions regarding the provenance of the jewelry (*cf. People v Bordeaux*, 182 AD2d 1095, 1095-1096 [4th Dept 1992], *appeal dismissed* 80 NY2d 915 [1992]), it is my position that the court erred in concluding that the officers had a reasonable suspicion that defendant was involved in criminal activity warranting the immediate seizure of the jewelry and warranting the subsequent detention of defendant in the back of a patrol car for approximately 30 minutes while they investigated the provenance of the jewelry.

Contrary to the court's conclusion, the information communicated by the dispatcher to the officers was insufficient to provide the

requisite reasonable suspicion for the seizure of the jewelry and defendant's detention. Initially, "whether a person is 'suspicious' is the ultimate determination that is to be reached by the officer on the basis of his or her own observations and experience" (*People v Carney*, 58 NY2d 51, 54 [1982]). In this case, the source of the report of the "suspicious person," although subsequently identified as the mail carrier, was never disclosed to the officers involved prior to defendant's detainment. "An anonymous tip cannot provide reasonable suspicion to justify seizure, except where that tip contains predictive information—such as information suggestive of criminal behavior—so that the police can test the reliability of the tip" (*Moore*, 6 NY3d at 499). The civilian report here contained no such predictive information. Further, although the report accurately identified items of clothing worn by defendant, "reasonable suspicion 'requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person' " (*id.*, quoting *Florida v J.L.*, 529 US 266, 272 [2000]). The hearing testimony also fails to support the court's conclusion that defendant was found "in close spatial and temporal proximity to where a crime or crimes had recently occurred" inasmuch as the civilian report indicated no more than the possible involvement of the suspicious person in an unspecified burglary days prior.

Thus, "to elevate the right of inquiry to the right to forcibly stop and detain, the police [officers were required to] obtain additional information or make additional observations of suspicious conduct sufficient to provide reasonable suspicion of criminal behavior" (*id.* at 500-501). Reasonable suspicion is defined as "the quantum of knowledge sufficient to induce an ordinarily prudent and cautious [person] under the circumstances to believe criminal activity is at hand" (*People v Cantor*, 36 NY2d 106, 112-113 [1975]). "It may not rest on equivocal or 'innocuous behavior' that is susceptible of an innocent as well as a culpable interpretation" (*People v Brannon*, 16 NY3d 596, 602 [2011]). "A stop based on reasonable suspicion will be upheld so long as the intruding officer can point to 'specific and articulable facts which, along with any logical deductions, reasonably prompted th[e] intrusion' " (*id.*, quoting *Cantor*, 36 NY2d at 113).

Here, by his own admission, the officer who initially stopped defendant "did nothing to verify or substantiate the information received over the radio" (*De Bour*, 40 NY2d at 222), and he therefore had no personal knowledge that a burglary had in fact occurred in the neighborhood, of how many days prior that crime might have occurred, or of what, if anything, had been stolen during the commission thereof. Neither testifying officer articulated what facts he observed or logical deductions he made that caused him to find defendant's possession of that particular jewelry suspicious (*see Cantor*, 36 NY2d at 113; *cf. People v Moore*, 47 NY2d 911, 912 [1979], *revg for reasons stated in dissenting opn* 62 AD2d 155 [1st Dept 1978]). The possession of jewelry is not illegal, and the one officer who did have knowledge of a recent burglary in the neighborhood conceded that, at the time defendant was detained, he was unaware of any missing jewelry. Further, although defendant was observed to be "sweaty and fidgety," an individual's nervousness upon being

questioned by police, even when combined with additional factors such as inconsistent statements, provides no indication of criminality that would justify further detention (*see People v Milaski*, 62 NY2d 147, 156 [1984]). Finally, the fact that defendant's assertion that he purchased the jewelry at a nearby yard sale was later established to be false cannot validate a forcible detention that was not justified at its inception (*see Moore*, 6 NY3d at 498).

I would therefore reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress physical evidence seized as a result of the unlawful October 3, 2014 detention, and remit the matter to Supreme Court for further proceedings (*see* CPL 470.55 [2]).

Mark W. Bennett

Entered: December 21, 2018

Clerk of the Court

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

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CA 17-02160

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

PATRICIA PAGE AND JAMES PAGE,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NIAGARA FALLS MEMORIAL MEDICAL CENTER,
DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (KEVIN V. HUTCHESON OF COUNSEL), FOR DEFENDANT-APPELLANT.

HOGANWILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered August 29, 2017. The order, insofar as appealed from, granted that part of the motion of plaintiffs seeking an adverse inference charge against defendant Niagara Falls Memorial Medical Center.

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

Memorandum: Patricia Page (plaintiff) was admitted to Niagara Falls Memorial Medical Center (defendant) for surgery in August 2008. Following surgery, a patient-controlled analgesia infusion pump was connected to plaintiff's intravenous line. The pump allowed plaintiff to self-administer pain medication by pressing a button, subject to a maximum dosage feature that permitted delivery of the next dose only after the expiration of a programmed delay period. While monitored by defendant's nursing staff, plaintiff used the pump for approximately 10 hours without incident. Plaintiff thereafter experienced an adverse medical event, received an emergency opioid-reversing medication, and was transferred to the intensive care unit for further treatment.

Plaintiff and her husband commenced this action in February 2011 to recover damages for injuries allegedly sustained by plaintiff as a result of, inter alia, defendant's alleged medical malpractice and negligence. Following preliminary matters, including the filing of an amended complaint adding the manufacturers of the pump as defendants and document discovery showing that defendant possessed 12 pumps at

the time of the incident and could not identify the specific pump used by plaintiff, the litigation stagnated, and Supreme Court thereafter granted defendants' respective motions pursuant to CPLR 3126 (3) seeking dismissal of the amended complaint against them. On plaintiffs' prior appeal, we substituted our discretion for that of the court and concluded that dismissal of the amended complaint pursuant to CPLR 3126 (3) was not warranted under the circumstances of this case, and we remitted the matter to Supreme Court for further proceedings not inconsistent with our decision (*Page v Niagara Falls Mem. Med. Ctr.*, 141 AD3d 1084, 1085 [4th Dept 2016]). Following further proceedings upon remittal, plaintiffs moved for, among other things, sanctions against defendant for spoliation of the pump. Defendant appeals from an order granting that part of plaintiffs' motion seeking an adverse inference charge at trial as a sanction for spoliation of evidence.

"Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126 . . . Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence . . . It may, under appropriate circumstances, impose a sanction even if the destruction occurred through negligence rather than wilfulness, and even if the evidence was destroyed before the spoliator became a party, provided [the party] was on notice that the evidence might be needed for future litigation" (*Mahiques v County of Niagara*, 137 AD3d 1649, 1650-1651 [4th Dept 2016] [internal quotation marks omitted]; *see Bill's Feed Serv., LLC v Adams*, 132 AD3d 1400, 1401 [4th Dept 2015]). The party seeking sanctions for spoliation of evidence has the burden of showing "that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 547 [2015] [internal quotation marks omitted]; *see Burke v Queen of Heaven R.C. Elementary Sch.*, 151 AD3d 1608, 1608-1609 [4th Dept 2017]).

We agree with defendant that plaintiffs "failed to establish that . . . defendant intentionally or negligently failed to preserve crucial evidence after being placed on notice that the evidence might be needed for future litigation" (*Aponte v Clove Lakes Health Care & Rehabilitation Ctr., Inc.*, 153 AD3d 593, 594 [2d Dept 2017]). Plaintiffs asserted in their motion papers that defendant was on notice that the pump malfunctioned by administering an improper dosage of medication that caused severe injuries to plaintiff and thus that defendant had an obligation to preserve the pump by immediately sequestering it or recording its serial number. That assertion, however, is based on the unsubstantiated claims in the affirmation of plaintiffs' counsel and allegations set forth in their response to interrogatories. In addition, plaintiffs relied on a statement by plaintiff's husband that defendant's nursing staff had been informed that the pump appeared to dispense medication every time the button

was pushed. That statement, which was made in a letter of complaint the husband wrote to a state agency nearly 2½ years after the incident, is belied by the agency's responsive letter, also submitted by plaintiffs, which indicated that an investigation revealed no improprieties, as well as by contemporaneous medical records submitted by plaintiffs demonstrating that, despite numerous attempts by plaintiff to self-administer the medication, the pump did not dispense an excess of medication.

Furthermore, defendant's submissions in opposition to the motion established that the pump was programmed and operating properly, and was administering medication consistent with the prescribed amount after it was first connected to plaintiff. Defendant's nursing staff thereafter assessed plaintiff's condition every two hours and found that the pump was dispensing an appropriate amount of medication. After plaintiff experienced the adverse event that was treated with an emergency opioid-reversing medication, defendant's nursing staff evaluated whether the pump was programmed properly; determined the number of attempted injections, the number of completed injections, and the cumulative dosage administered; and verified that the pump had dispensed an appropriate amount of medication. Contrary to plaintiffs' contention, defendant's submissions established that the nursing staff contemporaneously determined, by reading the screen of the pump and visually inspecting the marked intravenous bag, that plaintiff had received a cumulative dosage that was far less than the maximum dosage prescribed for the period of time during which plaintiff received medication from the pump. Thereafter, pursuant to defendant's normal business practices, the pump was sent to central services for cleaning by biomedical technicians and then returned to service in the hospital among the other pumps in defendant's possession. Defendant did not, in the ordinary course of business, track which of its pumps was assigned to a particular patient, and thus the specific pump used by plaintiff could not be identified.

Based on the foregoing, the record establishes that defendant had no notice that the adverse event experienced by plaintiff related to any malfunction of the pump such that defendant would have an obligation to act beyond its normal business practices by immediately sequestering the pump in anticipation of litigation or by recording its serial number (*see Aponte*, 153 AD3d at 594; *cf. Enstrom v Garden Place Hotel*, 27 AD3d 1084, 1085 [4th Dept 2006]). Where, as here, there is an "absence of pending litigation or notice of a specific claim, a defendant should not be sanctioned for discarding [or failing to preserve] items in good faith and pursuant to its normal business practices" (*Bill's Feed Serv., LLC*, 132 AD3d at 1401). Furthermore, even assuming, arguendo, that the court properly considered certain evidence submitted by plaintiffs for the first time in their reply papers because that evidence was directly responsive to defendant's opposition (*see Studer v Newpointe Estates Condominium*, 152 AD3d 555, 557 [2d Dept 2017]), we conclude that none of that evidence warrants a contrary result.

We also agree with defendant that the court abused its discretion to the extent that it determined that a spoliation sanction was

warranted based on defendant's ostensible failure to comply with an order to show cause signed in April 2011. The order to show cause was jurisdictionally deficient inasmuch as it is undisputed that the record is devoid of any evidence that plaintiffs served defendant in accordance with the provisions of the order to show cause (*see Matter of Flynn v Orsini*, 286 AD2d 568, 568 [4th Dept 2001]). It also was procedurally deficient inasmuch as plaintiffs purportedly sought pre-action preservation of evidence pursuant to CPLR 3102 (c) even though they had already commenced the action against defendant (*see Matter of Johnson v Union Bank of Switzerland, AG*, 150 AD3d 436, 436 [1st Dept 2017]). Even if it was not jurisdictionally and procedurally deficient, the order to show cause was sought and signed over 2½ years after the incident, and the record establishes that it was by then not possible for defendant to sequester or even to identify the specific pump used by plaintiff.

Contrary to the dissent's assertion, the court did not defer until trial its disposition of plaintiffs' motion insofar as it sought a spoliation sanction inasmuch as the court, consistent with both the relief requested in the motion and its bench decision determining that defendant spoliated the pump, granted that part of the motion seeking an adverse inference charge at trial as a sanction for spoliation of evidence (*see generally Pegasus Aviation I, Inc.*, 26 NY3d at 554; *Manley v Raspberries Café & Creamery, Inc.*, 126 AD3d 1391, 1392 [4th Dept 2015]; *Anesthesia Assoc. of Mount Kisco, LLP v Northern Westchester Hosp. Ctr.*, 44 AD3d 975, 976 [2d Dept 2007]). Moreover, contrary to the dissent's further assertion, we have not discredited any of the submissions; instead, we have simply evaluated whether plaintiffs, in view of all of the submissions, have adequately shown that defendant was on notice of a pump malfunction such that it had an obligation to preserve the pump in a manner beyond its normal business practices. That showing has not been made here (*see Aponte*, 153 AD3d at 594; *Bill's Feed Serv., LLC*, 132 AD3d at 1401).

All concur except WHALEN, P.J., who dissents and votes to dismiss the appeal in the following memorandum: I respectfully dissent inasmuch as I would dismiss the appeal as premature. A trial court possesses "broad discretion to provide *proportionate* relief to a party deprived of lost or destroyed evidence" (*Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015] [emphasis added]; *see Ortega v City of New York*, 9 NY3d 69, 76 [2007]), which may include an adverse inference charge "appropriately tailored by the trial court" (*Pegasus Aviation I, Inc.*, 26 NY3d at 554). Thus, a court abuses its discretion where it fails to appropriately tailor a sanction for negligence or misconduct to that necessary "to restore balance to the litigation" (*Ortega*, 9 NY3d at 76).

Here, the record is insufficient to allow effective appellate review of whether Supreme Court abused its discretion by imposing a disproportionate sanction for the alleged misconduct of Niagara Falls Memorial Medical Center (defendant). The court failed to make any findings of fact whether defendant had an obligation to preserve either the patient-controlled analgesia infusion pump utilized for the

treatment of Patricia Page (plaintiff) or the electronic data stored on that pump at the time it was "destroyed;" with what culpable state of mind the pump or data was destroyed; or whether the pump or the data was relevant to plaintiffs' action (*see VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). The court further failed to specify the adverse inference instruction warranted by defendant's alleged misconduct, a notable omission given the difference in severity between an instruction permitting the jurors to decide for themselves whether defendant had sufficient notice of impending litigation at the time it destroyed relevant evidence and an instruction that defendant willfully destroyed evidence presumed to be supportive of plaintiffs' claim as a matter of law (*compare* PJI 1:77.1, *with* PJI 1:77.2).

Moreover, counsel for the parties agreed at oral argument on this appeal that the court expressly deferred until trial making any further determination on the specific adverse inference charge that was warranted. Inasmuch as the court failed to make any findings of fact in support of the instant order, the court effectively deferred until trial ruling on every essential element of plaintiffs' motion with respect to the spoliation sanction, including the severity of the sanction itself. I would therefore dismiss the appeal because "[a] party may not appeal as of right from so much of an order as merely defers disposition of a motion until trial" (*Kaplan v Rosiello*, 16 AD3d 626, 626 [2d Dept 2005]).

Further, to the extent that the majority substitutes its own discretion for that of the court and concludes that no adverse inference charge is warranted on this record (*see generally Hawe v Delmar*, 148 AD3d 1788, 1789 [4th Dept 2017]), it places too high an evidentiary burden on plaintiffs to establish their entitlement to have one or more of the elements of their spoliation claim submitted to the jury (*see* PJI 1:77.1). In concluding that defendant lacked notice that the evidence might be needed for future litigation, the majority discredits as unsubstantiated plaintiffs' allegation that the pump malfunctioned by administering an improper dosage of medication. There is no dispute, however, that plaintiff experienced an adverse medical event requiring an emergency opioid-reversing medication while a patient-controlled analgesia infusion pump was connected to plaintiff's intravenous line and that she was transferred to the intensive care unit for further treatment as a result. The relevant evidence that might further substantiate plaintiffs' claim that defendant was on notice of the potential for litigation is the pump and the data maintained therein regarding the dispensation of opioid medication to plaintiff in the hours leading up to that event. The majority therefore faults plaintiffs for the failure to produce the very evidence for which plaintiffs seek a spoliation sanction (*see generally Sage Realty Corp. v Proskauer Rose LLP*, 275 AD2d 11, 17 [1st Dept 2002], *lv denied* 97 NY2d 608 [2002]).

Finally, the majority improperly makes credibility determinations with respect to the evidence submitted on the motion. The majority discounts the unsworn letter written to a state agency by plaintiff's husband alleging that the pump appeared to be malfunctioning on the

day in question while simultaneously crediting the similarly unsworn agency response letter rejecting those allegations. The majority also concludes that the evidence defendant submitted in opposition to the motion establishes "that the pump was programmed and operating properly, and was administering medication consistent with the prescribed amount after it was first connected to plaintiff." That evidence consists of the testimony of defendant's employees, who were engaged in plaintiff's care at the time in question. By crediting the testimony submitted by defendant, the majority ignores the purpose for which plaintiffs sought this evidence: to assess and potentially challenge the credibility of that testimony with contemporaneous documentary evidence, such as the pump data possessed by defendant. In my opinion, the court would have appropriately exercised its discretion by instructing the jury to resolve those issues of fact related to plaintiffs' spoliation claim. Inasmuch as the court failed to make any specific findings, I would dismiss the appeal as premature.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

926

CA 17-02087

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND WINSLOW, JJ.

LECHASE CONSTRUCTION SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

JAG I, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

BREEDLOVE & NOLL, LLP, QUEENSBURY (CARRIE MCLOUGHLIN NOLL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 9, 2017. The order denied defendant's motion to set aside the jury 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, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

927

CA 17-02124

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND WINSLOW, JJ.

LECHASE CONSTRUCTION SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

JAG I, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

BREEDLOVE & NOLL, LLP, QUEENSBURY (CARRIE MCLOUGHLIN NOLL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 14, 2017. The order awarded plaintiff the sum of $2,018,314.44 as against defendant.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

928

CA 17-02149

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND WINSLOW, JJ.

LECHASE CONSTRUCTION SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAG I, LLC, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

BREEDLOVE & NOLL, LLP, QUEENSBURY (CARRIE MCLOUGHLIN NOLL OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (DONALD W. O'BRIEN, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (William K. Taylor, J.), entered February 14, 2017. The judgment awarded plaintiff the sum of $2,018,314.44 as against defendant.

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

Memorandum: Plaintiff, the construction manager on a project to construct a building, entered into a contract with defendant whereby defendant agreed to construct the foundation for the building. The contract included a clause providing for the defense and indemnification of plaintiff by defendant for, inter alia, all costs arising out of, or caused by, or claimed to have been caused in connection with the work performed by defendant under the contract. During construction of the foundation, an employee of defendant was injured, and defendant's employee commenced an action against plaintiff and others alleging, inter alia, a violation of Labor Law § 240 (underlying action). Plaintiff notified defendant of the underlying action and tendered its defense of that action to defendant, which defendant rejected. Plaintiff then commenced the instant action against defendant for contractual indemnification.

Plaintiff ultimately settled in the underlying action with defendant's employee for $1.5 million. Plaintiff's action for contractual indemnification against defendant proceeded to trial on the issue of liability, and the jury determined that plaintiff could have been found liable to defendant's employee under Labor Law § 240; plaintiff's settlement of the underlying action was reasonable and in good faith; and plaintiff was not negligent in the happening of the injury of defendant's employee. Defendant now appeals from a judgment

entered on the basis of the jury's verdict. We affirm.

Defendant contends that Supreme Court applied the "wrong law as to the elements of proof for a contractual indemnification claim arising from a Labor Law § 240 action" because the court did not instruct the jury that plaintiff had the burden of establishing the actual amount of damages sustained by defendant's employee. We reject that contention. It is well settled that, "[w]here a party voluntarily settles a claim, [the party] must demonstrate that [it] was legally liable to the party whom [it] paid and that the amount of [the] settlement was reasonable in order to recover against an indemnitor" (*HSBC Bank USA v Bond, Schoeneck & King, PLLC*, 55 AD3d 1426, 1428 [4th Dept 2008] [internal quotation marks omitted]; *see Caruso v Northeast Emergency Med. Assoc., P.C.*, 85 AD3d 1502, 1507 [3d Dept 2011]; *Jemal v Lucky Ins. Co.*, 260 AD2d 352, 353 [2d Dept 1999]). Here, contrary to defendant's contention, inasmuch as plaintiff notified defendant of the underlying action and tendered the defense thereof, plaintiff was relieved of "the necessity of again litigating and establishing all of the actionable facts" in the underlying action (*Village of Port Jervis v First Natl. Bank of Port Jervis*, 96 NY 550, 556 [1884]).

Contrary to defendant's further contention, the fall of defendant's employee from a foot bridge into an excavation from ground level is the type of elevation-related risk for which Labor Law § 240 (1) provides protection (*see Pitts v Bell Constructors, Inc.*, 81 AD3d 1475, 1476 [4th Dept 2011]; *Wild v Marrano/Marc Equity Corp.*, 75 AD3d 1099, 1099 [4th Dept 2010]; *Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007]). We also reject defendant's contention that plaintiff's status as the project's "construction manager" excluded it from the class of parties potentially liable to defendant's employee under Labor Law § 240 (1) (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1426 [4th Dept 2007]).

We also reject defendant's contention that the court erred in permitting plaintiff's expert and plaintiff's general counsel to testify with respect to the reasonableness of and reasons for plaintiff's settlement with defendant's employee (*see Caruso*, 85 AD3d at 1507). Contrary to defendant's contention, we conclude that the verdict is not against the weight of the evidence (*see id.*).

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

953

CA 18-00371

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

JEFFREY E. ALLINGTON AND STACIE MILLER,
PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, AND PULVER ROOFING CO., INC.,
DEFENDANTS-RESPONDENTS-APPELLANTS.

TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

PULVER ROOFING CO., INC., THIRD-PARTY
DEFENDANT-APPELLANT.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT TEMPLETON FOUNDATION, CARE OF THE MARY IMOGENE BASSETT HOSPITAL, DOING BUSINESS AS BASSETT MEDICAL CENTER AND THIRD-PARTY PLAINTIFF-RESPONDENT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (LINDA LALLI STARK OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT PULVER ROOFING CO., INC. AND THIRD-PARTY DEFENDANT-APPELLANT.

Appeal and cross appeals from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered November 8, 2017. The order denied the motion of plaintiffs and the cross motions of defendants for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiffs' motion in part and granting plaintiffs summary judgment on liability on the Labor Law § 240 (1) cause of action and on the Labor Law § 241 (6) cause of action insofar as it is premised on the violation of 12 NYCRR 23-1.21 (b) (3) (iv); granting the cross motion of defendant Templeton Foundation, care of the Mary Imogene Bassett Hospital, doing business as Bassett Medical Center, in part and dismissing plaintiffs' Labor

Law § 200 cause of action and the Labor Law § 241 (6) cause of action except insofar as it is premised on a violation of 12 NYCRR 23-1.21 (b) (3) (iv) and 12 NYCRR 23-1.21 (b) (4) (ii); granting the cross motion of defendant Pulver Roofing Co., Inc. insofar as it sought summary judgment dismissing the second amended complaint against it; granting the cross motion of third-party defendant insofar as it sought summary judgment dismissing the common-law indemnification cause of action in the third-party complaint; and granting summary judgment to third-party plaintiff on the contractual indemnification cause of action in the third-party complaint; and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking to recover damages under, inter alia, Labor Law §§ 200, 240 (1), and 241 (6) for injuries that Jeffrey E. Allington (plaintiff) sustained when the ladder he had been using to access the roof of a work site "kicked out" from underneath him. Defendant-third-party plaintiff Templeton Foundation, care of the Mary Imogene Bassett Hospital, doing business as Bassett Medical Center (Bassett) subsequently commenced a third-party action against defendant-third-party defendant Pulver Roofing Co., Inc. (Pulver), seeking contractual and common-law indemnification. Plaintiffs moved for, inter alia, partial summary judgment on liability under the Labor Law §§ 240 (1) and 241 (6) causes of action against Bassett. Bassett cross-moved for summary judgment dismissing plaintiffs' second amended complaint and all cross claims against it and, in the alternative, for summary judgment on its cross claim for indemnification against Pulver. Pulver cross-moved for summary judgment dismissing plaintiffs' second amended complaint and all cross claims against it and dismissing the third-party complaint. Plaintiffs appeal and Bassett and Pulver cross-appeal from an order that denied plaintiffs' motion and the cross motions of Bassett and Pulver.

With respect to plaintiffs' appeal, we agree with plaintiffs that Supreme Court erred in denying their motion for partial summary judgment on liability against Bassett, the property owner, under Labor Law § 240 (1). "Plaintiff[s] met [their] initial burden by establishing that [plaintiff's] injury was proximately caused by the failure of a safety device to afford him proper protection from an elevation-related risk" (*Raczka v Nichter Util. Constr. Co.*, 272 AD2d 874, 874 [4th Dept 2000]). In opposition, Bassett did not dispute that the ladder at issue, which consisted of only the top half of an extension ladder and lacked any feet, was defective, and it failed to raise a triable issue of fact whether plaintiff was the sole proximate cause of the accident or a recalcitrant worker. Indeed, the record establishes that plaintiff used this ladder "pursuant to the directions and example of his supervisor" (*Pichardo v Aurora Contrs., Inc.*, 29 AD3d 879, 880-881 [2d Dept 2006]). We therefore modify the order accordingly.

We agree with plaintiffs' further contention that they are entitled to partial summary judgment on their Labor Law § 241 (6) cause of action against Bassett to the extent that this cause of action is based on a violation of 12 NYCRR 23-1.21 (b) (3) (iv), and

we therefore further modify the order accordingly. Evidence of the deterioration or absence of a ladder's feet is sufficient to establish a prima facie violation of this regulation (*see Melchor v Singh*, 90 AD3d 866, 870 [2d Dept 2011]; *De Oliveira v Little John's Moving*, 289 AD2d 108, 109 [1st Dept 2001]), and here plaintiffs established that the ladder lacked any feet and plaintiff was required to use it in an icy environment. In opposition, Bassett relied only on its contention that plaintiff was the sole cause of the accident, but Bassett failed to raise a triable issue of fact with respect to that issue (*see generally Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]). We note that plaintiffs' evidence would also establish a prima facie violation of 12 NYCRR 23-1.21 (b) (4) (ii) (*see Melchor*, 90 AD3d at 870), but plaintiffs failed to move for summary judgment on this ground and the court properly denied Bassett's cross motion for summary judgment with respect to this regulation. We further conclude on Bassett's cross appeal, however, that the court erred in denying those parts of Bassett's cross motion for summary judgment dismissing the Labor Law § 241 (6) cause of action against it with respect to the remaining regulatory violations, and we therefore modify the order accordingly.

We also agree with Bassett on its cross appeal that the court erred in denying that part of its cross motion seeking to dismiss plaintiffs' Labor Law § 200 cause of action against it, and we further modify the order accordingly. Initially, plaintiffs did not oppose that part of Bassett's cross motion and failed to respond to the corresponding contention on Bassett's cross appeal, and plaintiffs have therefore abandoned that cause of action (*see Donna Prince L. v Waters*, 48 AD3d 1137, 1138 [4th Dept 2008]). In any event, Bassett established that it lacked the authority to supervise and control the performance of plaintiff's work and thus it cannot be held liable for a violation of Labor Law § 200 (*see Mayer v Conrad*, 122 AD3d 1366, 1367 [4th Dept 2014]; *see also Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). We note that plaintiffs did not assert Labor Law causes of action against Pulver, the owner of the ladder, in their second amended complaint, and did not move for partial summary judgment on those causes of action against Pulver. We therefore have not considered the parties' contentions regarding Pulver's liability under the Labor Law.

Bassett's further contention on its cross appeal that the court should have dismissed plaintiffs' claim for lost wages subsequent to October 2013 is based on evidence outside the record on appeal. Even assuming, arguendo, that such evidence was submitted to the court in support of Bassett's cross motion, we note that Bassett " 'submitted this appeal on an incomplete record and must suffer the consequences' " (*Resetarits Constr. Corp. v City of Niagara Falls*, 133 AD3d 1229, 1229 [4th Dept 2015]). We have not considered the untimely filed post-argument submissions regarding plaintiffs' claim for lost wages (*see* 22 NYCRR former 1000.11 [g]; *see also* 22 NYCRR 1000.15 [e]).

With respect to Pulver's cross appeal, we agree with Pulver, a subcontractor that was not present on the work site on the day of

plaintiff's accident, that the court erred in denying that part of its cross motion seeking dismissal of plaintiffs' common-law negligence cause of action against it. Inasmuch as the only other cause of action asserted against Pulver is a "derivative cause of action [that] cannot survive the dismissal" of the negligence cause of action (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 711 [2d Dept 2012]), we modify the order by dismissing the second amended complaint against Pulver. A common-law negligence cause of action may be maintained against a subcontractor " 'where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area' " (*Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2d Dept 2011]; *see Tabickman v Batchelder St. Condominium By Bay, LLC*, 52 AD3d 593, 594 [2d Dept 2008]). Here, however, the record establishes that Pulver's employees did not place the ladder in the position from which plaintiff fell. Rather, the ladder was in the control of plaintiff's employer, who is not a party in this action, immediately prior to the accident, and therefore the failure of Pulver to remove the ladder from the work site was not a proximate cause of plaintiff's accident (*cf. Benitez v City of New York*, 160 AD3d 445, 445 [1st Dept 2018]; *see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). In light of our determination, we further agree with Pulver that the court erred in denying it summary judgment dismissing Bassett's cross claim and third-party cause of action against it for common-law indemnification, and we further modify the order accordingly.

Bassett and Pulver each contend on their respective cross appeals that the court erred in denying their respective cross motions for summary judgment on the issue of Pulver's contractual obligation to indemnify Bassett. Unlike common-law indemnification (*see Grove v Cornell Univ.*, 151 AD3d 1813, 1816 [4th Dept 2017]), contractual indemnification is permissible where, as here, there is no finding of negligence on the part of the indemnitor (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *ZRAJ Olean, LLC v Erie Ins. Co. of N.Y.*, 134 AD3d 1557, 1560 [4th Dept 2015], *lv denied* 29 NY3d 915 [2017]); however, "the right to contractual indemnification depends upon the specific language of the contract" (*Lawson v R&L Carriers, Inc.*, 154 AD3d 836, 838 [2d Dept 2017]; *see Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939 [4th Dept 1995]). Here, we agree with Bassett that the operative contractual language is section 8.3 of the October 15, 2012 General Terms of the Subcontract Agreement incorporated into the subcontract between Pulver and plaintiff's employer. That section obligates Pulver to indemnify Bassett "against each and every claim, demand, damage, expense, loss, liability and suit or other action arising out of any injury, including death, to persons . . . *occasioned in any way by* . . . the breakage or malfunctioning of any tools, supplies, scaffolding or other equipment, similar or dissimilar to the foregoing, used by or furnished to SUBCONTRACTOR, its sub-subcontractors, or sub-subcontractors' agents or employees" (emphasis added). An act or omission that "occasion[s]" a claim is an act or omission that is "a direct *or indirect* cause" thereof (Merriam-Webster Dictionary 499 [2016] [emphasis added]; *see*

generally Vigilant Ins. Co. v Bear Stearns Cos., Inc., 10 NY3d 170, 177 [2008]; *Caren EE. v Alan EE.*, 124 AD3d 1102, 1104 [3d Dept 2015]). Thus, while we agree with Pulver that it was not a proximate, or direct, cause of plaintiff's accident, we agree with Bassett that it established as a matter of law that plaintiff's accident was occasioned by, or indirectly caused by, Pulver's failure to remove its defective ladder from the work site.

We note that Bassett cross-moved for summary judgment on only its cross claim for indemnification in the first-party action filed by plaintiffs, without reference to the third-party complaint. Nonetheless, Pulver cross-moved for summary judgment dismissing the cause of action for contractual indemnification in the third-party complaint, and we therefore exercise our authority to search the record and grant summary judgment to Bassett on that third-party cause of action without the necessity of a cross motion in the third-party action (*see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-111 [1984]). We therefore further modify the order accordingly.

Finally, Pulver is not aggrieved by the court's failure to specifically rule on that part of plaintiffs' motion seeking dismissal of several of Pulver's affirmative defenses inasmuch as any such failure is deemed a denial of that part of the motion (*see Millard v City of Ogdensburg*, 274 AD2d 953, 954 [4th Dept 2000]).

Mark W. Bennett

Entered: December 21, 2018

Clerk of the Court

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

956

CA 18-00360

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

ANDREW BALASH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY B. MELROD, DEFENDANT-APPELLANT.

JANINE C. FODOR, OLEAN, FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered August 17, 2017. 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 modified on the law by granting the motion in part and dismissing the complaint insofar as the complaint, as amplified by the bill of particulars, alleges that defendant had actual notice of the dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained while he was inspecting the belt of a running snowblower that was stored in a garage located on rental property owned by defendant, his sister. The engine of the snowblower was exposed because the snowblower lacked an engine compartment cover. Defendant contends that Supreme Court erroneously denied her motion for summary judgment dismissing the complaint. We agree in part and conclude that the court erred in denying the motion with respect to the allegation that defendant had actual notice of the dangerous condition. We therefore modify the order accordingly.

Defendant contends that she is entitled to summary judgment because, as an out-of-possession landlord, she is not liable for plaintiff's injuries. We reject that contention. It is well settled that "an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable . . . for personal injuries caused by an unsafe condition existing on the premises" (*Ferro v Burton*, 45 AD3d 1454, 1454 [4th Dept 2007] [internal quotation marks omitted]; *see Pomeroy v Gelber*, 117 AD3d 1161, 1162 [3d Dept 2014]). In determining whether a landowner has relinquished control, we consider "the parties' course of conduct—including, but not limited to, the

landowner's ability to access the premises—to determine whether the landowner in fact surrendered control over the property such that the landowner's duty is extinguished as a matter of law" (*Gronski v County of Monroe*, 18 NY3d 374, 380-381 [2011], *rearg denied* 19 NY3d 856 [2012]). Here, it is undisputed that defendant asked plaintiff to stay at the property for a period of time in order to perform repairs and maintenance. Indeed, in deposition testimony submitted by defendant, plaintiff testified that defendant had asked him to do so twice in the past. Inasmuch as defendant's own evidentiary submissions create an issue of fact whether she relinquished control of the premises, she failed to meet her burden of establishing entitlement to judgment as a matter of law on the ground that her status as an out-of-possession landlord absolves her of liability (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The court erred, however, in denying the motion with respect to plaintiff's allegation in his bill of particulars that defendant had actual notice of the dangerous condition that caused plaintiff's injury. Defendant established as a matter of law that she had no actual notice of the dangerous condition by submitting an affidavit in which she averred that the parties' sister had provided the snowblower in a used condition, that defendant never saw the snowblower, and that no one informed her about the snowblower's condition or the need to perform maintenance on it. In opposition to the motion, plaintiff failed to submit any evidence establishing that defendant was aware of the condition of the snowblower (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In contrast, defendant failed to establish as a matter of law that she lacked constructive notice of the dangerous condition. In deposition testimony submitted by defendant, one of the parties' brothers, who was a tenant at the premises and had also used the snowblower, testified that the snowblower was missing an engine compartment cover. Defendant failed to submit any evidence establishing how long the snowblower was in the garage in that condition. We therefore conclude that defendant's own submissions create an issue of fact whether the dangerous condition was " 'visible and apparent and . . . exist[ed] for a sufficient length of time prior to the accident to permit [defendant] to discover and remedy it' " (*Rivera v Tops Mkts., LLC*, 125 AD3d 1504, 1505 [4th Dept 2015], quoting *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Finally, defendant failed to establish as a matter of law that plaintiff's conduct was the sole proximate cause of his injuries. In deposition testimony submitted by defendant, plaintiff testified that his hands were at least six inches from the engine compartment when the serpentine belt unexpectedly came loose and pulled his hand into the engine. Defendant thus failed to demonstrate that plaintiff's accident was " 'unrelated to the alleged defect' " (*Grefrath v DeFelice*, 144 AD3d 1652, 1654 [4th Dept 2016]; *cf. Sorrentino v*

Paganica, 18 AD3d 858, 859 [2d Dept 2005]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

960

CA 17-00496

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

ANTHONY C. LAVALLE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COHOLAN FAMILY, LLC, AND DANIEL COHOLAN, AN INDIVIDUAL, JOINTLY AND SEVERALLY, DEFENDANTS-APPELLANTS.

KIRWAN LAW FIRM, P.C., SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANTHONY C. LAVALLE, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered November 21, 2016. The order and judgment granted the motion of plaintiff for summary judgment and awarded money damages to plaintiff.

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

Memorandum: Plaintiff, an attorney, commenced this action for breach of contract, an account stated, and quantum meruit, seeking to recover unpaid attorney's fees and expenses for services he provided to defendants in litigation to enforce a contract to sell real property. Plaintiff moved for, inter alia, summary judgment on the complaint, and Supreme Court granted the motion. Defendants appeal.

We conclude that the court properly granted the motion with respect to the cause of action for an account stated. "An account stated is an agreement, express or implied, between the parties to an account based upon prior transactions between them with respect to the correctness of account items and a specific balance due on them" (*Citibank [S.D.] N.A. v Cutler*, 112 AD3d 573, 573-574 [2d Dept 2013]). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account" (*id.* at 574 [internal quotation marks omitted]). Here, plaintiff submitted evidence showing that he invoiced defendants for charges totaling approximately $50,000 and that defendants made partial payments on the invoices of approximately $19,000 over several months. In light of those partial payments, we conclude that plaintiff satisfied his prima facie burden of establishing the existence of an account stated (*see Holtzman v*

Griffith, 162 AD3d 874, 875-876 [2d Dept 2018]; *Milstein v Montefiore Club of Buffalo*, 47 AD2d 805, 805-806 [4th Dept 1975]). In opposition, defendants failed to raise a triable issue of fact (*see Holtzman*, 162 AD3d at 876).

We have considered defendants' related contentions regarding plaintiff's other causes of action and conclude that they are moot in light of our determination.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

962

CA 17-01501

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

IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A.

MICHELLE A. COLELLO, PETITIONER-RESPONDENT,

V ORDER

EUGENE G. COLELLO, RESPONDENT-APPELLANT.

LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS.
(APPEAL NO. 1.)

STANLEY J. COLLESANO, LLC, BUFFALO (SEAN A. FITZGERALD OF COUNSEL), FOR RESPONDENT STANLEY J. COLLESANO, ESQ.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered January 4, 2016. The order denied respondent Eugene G. Colello's motion seeking, inter alia, to disqualify Lisa J. Allen, Esq., as attorney for petitioner, and to disqualify Stanley J. Collesano, Esq. as guardian ad litem.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

963

CA 17-01502

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

IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A.

MICHELLE A. COLELLO, PETITIONER-RESPONDENT,

V ORDER

EUGENE G. COLELLO, RESPONDENT-APPELLANT.

LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS.
(APPEAL NO. 2.)

STANLEY J. COLLESANO, LLC, BUFFALO (SEAN A. FITZGERALD OF COUNSEL), FOR RESPONDENT STANLEY J. COLLESANO, ESQ.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered August 4, 2016. The order, among other things, reserved decision on respondent Eugene G. Colello's motion for leave to reargue and renew.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Forrestel v Jonkman*, 148 AD3d 1674, 1675 [4th Dept 2017]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

964

CA 17-01503

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

IN THE MATTER OF THE PROCEEDING FOR THE APPOINTMENT OF A GUARDIAN FOR EUGENE DAVID COLELLO, PURSUANT TO SCPA ARTICLE 17-A.

MICHELLE A. COLELLO, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

EUGENE G. COLELLO, RESPONDENT-APPELLANT.

LISA J. ALLEN, ESQ. AND STANLEY J. COLLESANO, ESQ., RESPONDENTS.
(APPEAL NO. 3.)

STANLEY J. COLLESANO, LLC, BUFFALO (SEAN A. FITZGERALD OF COUNSEL), FOR RESPONDENT STANLEY J. COLLESANO, ESQ.

Appeal from an order of the Surrogate's Court, Erie County (Barbara Howe, S.), entered March 21, 2017. The order, among other things, denied that part of respondent Eugene G. Colello's motion seeking leave to reargue, granted that part of the motion seeking leave to renew, and upon renewal, adhered to a prior decision.

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.

Memorandum: Petitioner commenced this proceeding pursuant to article 17-A of the Surrogate's Court Procedure Act seeking to be appointed the guardian of the person of her son, an adult with a developmental disability. Surrogate's Court appointed petitioner to be the temporary guardian of the person of the son, and thereafter Eugene G. Colello (respondent), who is petitioner's ex-husband and the father of her son, filed a cross petition seeking revocation of the temporary letters of guardianship issued to petitioner and appointment of respondent as the guardian of the son's person. The Surrogate then appointed respondent Stanley J. Collesano, Esq. guardian ad litem (GAL) for the son.

After Collesano completed an investigation and submitted a report recommending the appointment of petitioner as sole guardian of the person of the son, respondent moved for, inter alia, an order disqualifying petitioner's attorney, respondent Lisa J. Allen, Esq., from representing petitioner in the guardianship proceeding on the

ground that Allen had a conflict arising from her prior representation of respondent, and disqualifying Collesano as GAL on the grounds of bias against respondent, neglect of duty, and professional misconduct. The Surrogate denied the motion. Respondent then moved for leave to renew and reargue his motion. The Surrogate denied that part of the motion seeking leave to reargue and granted that part seeking leave to renew, but nevertheless adhered to the prior determination. At the outset, we note that no appeal lies from an order denying a motion seeking leave to reargue, and thus that part of respondent's appeal must be dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]).

We conclude that the Surrogate properly denied the renewed motion. Although the Surrogate's discretion to remove a GAL after he or she is appointed is not unfettered, the Surrogate has the inherent power to remove a court-appointed GAL "for just cause or where the interests [of the ward] will otherwise be promoted" (*Matter of Ford*, 79 AD2d 403, 406 [1st Dept 1981]). Where, as here, the GAL has made a thorough and fair report of the information obtained through his or her investigation (*see id.* at 408), has demonstrated an accurate and unbiased understanding of the material facts of the proceeding (*cf. Matter of Lockwood*, 309 AD2d 708, 709 [1st Dept 2003], *lv denied* 2 NY3d 708 [2004]), and has not acted contrary to his or her ward's best interests (*see Dicupe v City of New York*, 124 AD2d 542, 543-544 [2d Dept 1986]), removal is not warranted. Respondent's allegations that Collesano engaged in unethical conduct, bias, and incompetent representation of the son are unsupported and belied by the record. We reject respondent's contention that Collesano knowingly and intentionally misrepresented to the Surrogate the facts concerning a brief encounter between respondent and Collesano that took place in 1996, or that he harbored bias against respondent based on that encounter. Contrary to respondent's contention, Collesano's recommendation that petitioner be appointed the sole guardian of the person of the son is amply supported by his investigative findings and analysis, and also by the son's own expressed preference. Thus, we conclude that the court did not err in denying that part of respondent's motion seeking to disqualify Collesano from his appointment as GAL.

With respect to that part of the motion seeking to disqualify Allen from representing petitioner, we note that it is of particular concern to the courts that "motions to disqualify are frequently used as an offensive tactic, inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client. Such motions result in a loss of time and money, even if they are eventually denied. [The Court of Appeals] and others have expressed concern that such disqualification motions may be used frivolously as a litigation tactic when there is no real concern that a confidence has been abused" (*Solow v Grace & Co.*, 83 NY2d 303, 310 [1994]; *see Matter of Peters*, 124 AD3d 1266, 1267-1268 [4th Dept 2015]).

Respondent, as the party moving to disqualify petitioner's attorney, had the "burden of making 'a clear showing that

disqualification is warranted' " (*Lake v Kaleida Health*, 60 AD3d 1469, 1470 [4th Dept 2009]; *see Olmoz v Town of Fishkill*, 258 AD2d 447, 447-448 [2d Dept 1999]), by establishing: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse" (*Tekni-Plex, Inc. v Meyner & Landis*, 89 NY2d 123, 131 [1996], *rearg denied* 89 NY2d 917 [1996]; *see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9 [a]; *see also NYAHSA Servs., Inc. v People Care Inc.*, 156 AD3d 1205, 1206 [3d Dept 2017]). Here, there is no dispute that Allen's former law firm represented respondent regarding an application for federal social security benefits for the son and that respondent and petitioner are adversaries in this guardianship proceeding. Thus, to satisfy his burden, respondent "had to establish that the issues in the present litigation are identical to or essentially the same as those in the prior representation or that [Allen] received specific, confidential information substantially related to the present litigation" (*Sgromo v St. Joseph's Hosp. Health Ctr.*, 245 AD2d 1096, 1097 [4th Dept 1997]). We conclude that respondent failed to meet his burden.

A Surrogate's Court Procedure Act article 17-A guardianship proceeding does *not* substantially involve or depend on the financial circumstances of the parties, and the social security benefits application that was the subject of Allen's former law firm's representation of respondent is not implicated in this guardianship proceeding. Furthermore, the information that respondent alleged to have entrusted to Allen in connection with the prior representation was not confidential in nature and, as temporary guardian and mother of the son, petitioner would be entitled to access information concerning the son's benefits. Thus, we conclude that the court did not abuse its discretion in denying that part of respondent's motion seeking to disqualify Allen (*see Bison Plumbing City v Benderson*, 281 AD2d 955, 955 [4th Dept 2001]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

971

KA 13-00794

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNADINE YOUNG, ALSO KNOWN AS BERNADINE ADAMS,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS 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 Supreme Court, Monroe County (Robert B. Wiggins, A.J.), dated April 10, 2013. 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 affirmed.

Memorandum: Defendant was convicted by a jury of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises out of an incident that began when defendant gave her coworker a ride home. Shortly after the coworker left defendant's van, police observed the van, discovered that its registration was suspended, and executed a traffic stop. An inventory search revealed an illegal handgun on the floor between the driver and front passenger seats.

Following her conviction, defendant moved pursuant to CPL 440.10 to vacate the judgment, alleging that defense counsel rendered ineffective assistance by failing to investigate and call various witnesses at trial. After a hearing, Supreme Court denied the motion. A Justice of this Court granted defendant leave to appeal from that order, and we now affirm.

"To prevail on [her] claim that [s]he was denied effective assistance of counsel, defendant must demonstrate that [her] attorney failed to provide meaningful representation" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). "In applying this standard, counsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective" (*Benevento*, 91 NY2d at 712). Indeed, "a reviewing court must avoid

confusing 'true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis' " (*id.*, quoting *Baldi*, 54 NY2d at 146). Instead, " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*Benevento*, 91 NY2d at 712, quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). "A defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses" (*People v Jenkins*, 84 AD3d 1403, 1408 [2d Dept 2011], *lv denied* 19 NY3d 1026 [2012]). Although "the failure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel" (*People v Nau*, 21 AD3d 568, 569 [2d Dept 2005]; *see People v Dombrowski*, 87 AD3d 1267, 1268 [4th Dept 2011]), the governing standard is " 'reasonable competence,' not perfect representation" (*People v Modica*, 64 NY2d 828, 829 [1985]).

Here, the two allegedly exculpatory witnesses would have testified that the coworker possessed the gun shortly before entering defendant's van. One of the witnesses admitted during her hearing testimony that defendant had called her on the night of the arrest, yet defendant apparently did not relay the fact of the call, or the fact of the existence of this witness, to her attorney.

Moreover, defense counsel utilized a reasonable, albeit unsuccessful, strategy at trial. As the court noted in its decision, defense counsel's belief that the true owner of the gun, i.e., the coworker, would testify at least to his presence in the van was a reasonable one, and we conclude that counsel's plan to call the coworker as a witness and allow him to invoke the Fifth Amendment as to his ownership or possession of the gun was a reasonable strategic decision (*see Benevento*, 91 NY2d at 712). Moreover, the witnesses' testimony would not have been exculpatory because it is not necessarily inconsistent with defendant's knowing and unlawful possession of the gun in the vehicle at the time that the police executed the traffic stop (*see People v Tabb*, 12 AD3d 951, 953 [3d Dept 2004], *lv denied* 4 NY3d 768 [2005]).

Thus, "the record establishes that defense counsel sufficiently investigated the facts and searched for potential witnesses, and that there are legitimate explanations for defense counsel's failure to locate the [two] allegedly exculpatory witnesses identified in defendant's motion" (*People v Kurkowski*, 117 AD3d 1442, 1443-1444 [4th Dept 2014]), i.e., defendant's failure to inform her attorney of the existence of the witnesses and defense counsel's reasonable defense strategy of calling the coworker as a witness.

All concur except WHALEN, P.J., and TROUTMAN, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. Defendant was entitled "to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself time for reflection and preparation for trial' " (*People v Bennett*, 29 NY2d 462, 466 [1972]; *see Coles v Peyton*, 389 F2d 224, 226 [4th Cir

1968], *cert denied* 393 US 849 [1968]). The majority disregards this requirement on the ground that defendant "apparently did not" identify exculpatory witnesses to her counsel. However, defense counsel himself conceded that his "fail[ure] to conduct an investigation" constituted ineffective assistance. He stated that, because of his misplaced reliance on the potential testimony of the alleged gun owner, he failed to identify two easily-found and cooperative witnesses, who were other coworkers of defendant, and who were able to place the alleged gun owner in defendant's van, identify the gun found as belonging to him, and testify that he had previously complained to them about the gun falling out of his pocket. After receiving the testimony of the exculpatory witnesses at the CPL article 440 hearing, Supreme Court concluded that, had it been presented with that testimony, the jury would likely have returned a verdict that was more favorable to defendant.

The record does not provide any further information with respect to what defendant told her counsel regarding the exculpatory witnesses or why defense counsel failed to investigate the nightclub where defendant worked. The trial transcript reflects that defense counsel directed his investigator to photograph the exterior of the nightclub, but there was no explanation in the trial transcript why those photos would be relevant to the issues before the jury. Defense counsel's directives to photograph the nightclub, together with his own statements, strongly suggest that defense counsel understood that the nightclub was relevant to the case and should have been investigated fully. Because defense counsel "fail[ed] to pursue the minimal investigation required under the circumstances" (*People v Oliveras*, 21 NY3d 339, 348 [2013]), defendant's right to a fair trial was prejudiced (*see People v Stultz*, 2 NY3d 277, 283-284 [2004], *rearg denied* 3 NY3d 277 [2004]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]), and she was denied meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Moreover, "an attorney should not be deemed effective simply because he or she followed a strategy. Rather, there must be some examination of the reasonableness of the strategy" (*People v Stefanovich*, 136 AD3d 1375, 1377 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]). Defense counsel here believed that the alleged gun owner, a previously convicted felon, would testify against his own interest on defendant's behalf to "do the right thing." During the trial, defense counsel requested that an attorney be assigned to represent the alleged gun owner, knowing, as an experienced defense counsel reasonably should, that the attorney would advise against providing self-incriminating testimony. Ultimately, the trial court precluded the alleged gun owner from testifying because, on the advice of counsel, he asserted his right not to answer questions with respect to his presence in defendant's vehicle or his possession of the gun. Although the majority apparently finds this "strategy" to be "reasonable," it does not require "second-guess[ing] with the clarity of hindsight" to see that it is unreasonable to expect a self-interested felon to incriminate himself against the advice of counsel based purely on his own good nature (*Benevento*, 91 NY2d at 712).

The record, viewed as a whole, establishes that defense counsel failed to provide meaningful representation by neglecting his duty to investigate and by relying on an unreasonable strategy, and that this failure compromised defendant's right to a fair trial (*see Oliveras*, 21 NY3d at 348). We therefore conclude that the order should be reversed, the motion granted, the judgment of conviction vacated, and the matter remitted to Supreme Court for further proceedings on the indictment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

981

CA 18-00253

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

IN THE MATTER OF ARBITRATION BETWEEN TOWN OF GREECE GUARDIANS' CLUB, LOCAL 1170, COMMUNICATION WORKERS OF AMERICA, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

TOWN OF GREECE, RESPONDENT-RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN JOHNSEN OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered April 14, 2017 in a proceeding pursuant to CPLR article 75. The order and judgment denied the petition to confirm an arbitration award and granted respondent's cross petition to vacate the arbitration award.

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

Memorandum: In this proceeding pursuant to CPLR article 75, petitioner seeks a judgment confirming an arbitration award that, inter alia, determined that respondent improperly terminated an employee (grievant) and directed respondent to reinstate the grievant with back pay and benefits. We agree with petitioner that Supreme Court erred in denying its petition and granting respondent's cross petition to vacate the award. We therefore reverse the order and judgment, grant the petition, deny the cross petition, and confirm the award.

The grievant was employed by respondent as a school crossing guard. Petitioner is her union. The collective bargaining agreement (CBA) between petitioner and respondent contains a management rights provision that includes the right "to suspend, dismiss, [or] discharge for cause." In April 2015, respondent's chief of police called the grievant to a meeting in his office and promptly terminated her for misconduct without providing her with prior notice of the charges against her. The chief of police testified at the arbitration hearing

that he made the decision to terminate her before meeting with her. Notably, respondent concedes that the grievant was entitled to notice and a hearing pursuant to Civil Service Law § 75, and that it failed to comply with that statute.

In his opinion and award, the arbitrator noted that the CBA allowed respondent to terminate the grievant "for cause," which is synonymous with the term "just cause," and that just cause encompasses some degree of due process. The arbitrator, however, determined that the grievant's termination fell short of the requirements of due process. First, the termination letter that the chief of police provided to the grievant at their meeting was broadly worded and failed to provide her with notice of the charges against her. Second, the grievant was not given an opportunity to respond to the charges of misconduct before the chief of police made the decision to terminate her. Third, the chief of police did not conduct a full and fair investigation inasmuch as he failed to interview a key witness to the alleged misconduct, the grievant herself. For those reasons, the arbitrator concluded that the grievant "was not provided even rudimentary due process therefore her termination must be found to be without just cause," and sustained petitioner's grievance.

"It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Matter of Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO [City of Lackawanna]*, 156 AD3d 1406, 1407 [4th Dept 2017]). Indeed, "an arbitrator's rulings, unlike a trial court's, are largely unreviewable" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530, 534 [2010]; *see Matter of Professional, Clerical, Tech., Empls. Assn. [Board of Educ. for Buffalo City Sch. Dist.]*, 103 AD3d 1120, 1121 [4th Dept 2013], *lv denied* 21 NY3d 863 [2013]). Such rulings are reviewable only pursuant to CPLR 7511 (b), which states in relevant part: "The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by . . . an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR 7511 [b] [1] [iii]; *see Matter of Kowaleski [New York State Dept. of Correctional Servs.]*, 16 NY3d 85, 90 [2010]). "[A]n arbitrator 'exceed[s] his [or her] power' under the meaning of the statute where his [or her] 'award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power' " (*Kowaleski,* 16 NY3d at 90; *see Matter of Town of Tonawanda [Town of Tonawanda Salaried Workers Assn.]*, 160 AD3d 1477, 1477 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018]).

"Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact' " (*Kowaleski*, 16 NY3d at 91; *see Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003]). "An arbitrator is not bound by principles of substantive law or rules of

evidence, and may do justice and apply his or her own sense of law and equity to the facts as he or she finds them to be" (*Matter of NFB Inv. Servs. Corp. v Fitzgerald*, 49 AD3d 747, 748 [2d Dept 2008]). The court lacks the power to review the legal merits of the award, or to substitute its own judgment for that of the arbitrator, "simply because it believes its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 326 [1999]).

Here, the court erred in vacating the award on the ground that the arbitrator exceeded a limitation on his power when he determined that the grievance was arbitrable. Even if the court is correct that the issue of arbitrability was not before the arbitrator, respondent conceded on appeal that the grievance was arbitrable. Thus, even assuming, arguendo, that the arbitrator exceeded a limitation on his power, we conclude that respondent was not prejudiced by his determination. Absent a showing of prejudice, the court lacks the authority to vacate an arbitration award where, as here, the matter is before the court on the application of a party who participated in the arbitration (*see Matter of Akers v New York City Tr. Auth.*, 172 AD2d 749, 751 [2d Dept 1991], citing CPLR 7511 [b] [1]).

Furthermore, we note that, although petitioner neglected to commence a proceeding pursuant to CPLR article 78 to prosecute any claims based on violations of the grievant's statutory right to due process (*see* Civil Service Law § 75; *see e.g. Matter of Michel v City of Lackawanna*, 159 AD3d 1555, 1555 [4th Dept 2018]), respondent removed any impediment to the arbitrator's review of alleged violations of the grievant's contractual right to due process by conceding that the grievance was arbitrable.

The court also erred insofar as it vacated the award on the ground that the arbitrator exceeded a limitation on his power by adding a substantive provision that was not included in the CBA (*see generally Matter of Buffalo Teachers Fedn., Inc. v Board of Educ. of City Sch. Dist. of City of Buffalo*, 50 AD3d 1503, 1506 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]). The court noted, in particular, "the absence of a stand-alone article [in the CBA] pertaining to employee discipline." It does not necessarily follow, however, that management's right to discipline petitioner's members is entirely unrestrained by the CBA. The "for cause" language contained in the management rights provision expressly circumscribed respondent's right to discipline or discharge the grievant. The arbitrator interpreted that language, consistent with arbitral precedent, as incorporating a just cause standard that encompasses a right to due process. We thus conclude that "the arbitrator merely interpreted and applied the provisions of the CBA, as [he] had the authority to do" (*Lackawanna Professional Fire Fighters Assn., Local 3166, IAFF, AFL-CIO*, 156 AD3d at 1408; *see Matter of Albany County Sheriff's Local 775 of Council 82, AFSCME, AFL-CIO [County of Albany]*, 63 NY2d 654, 656 [1984]).

The court further erred in determining that the award is irrational. "An award is irrational if there is no proof whatever to justify the award" (*Matter of Buffalo Council of Supervisors & Adm'rs,*

Local No. 10, Am. Fedn. of School Adm'rs [Board of Educ. of City School Dist. of Buffalo], 75 AD3d 1067, 1068 [4th Dept 2010] [internal quotation marks omitted]). The court must confirm the award, however, where "the arbitrator 'offer[ed] even a barely colorable justification for the outcome reached' " (*Wien & Malkin LLP*, 6 NY3d at 479; *see Town of Tonawanda Salaried Workers Assn.*, 160 AD3d at 1477). The arbitrator issued a thoughtful, well-reasoned opinion and award, which he based on the hearing testimony of the chief of police and the undisputed evidence in the record. We therefore conclude that the award is not irrational.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

982

CA 17-02161

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

MARILYN BROWN, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF J.L., AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FIRST STUDENT, INC., BUFFALO PUBLIC SCHOOL DISTRICT, ET AL., DEFENDANTS-RESPONDENTS, CATHOLIC DIOCESE OF BUFFALO, OUR LADY OF BLACK ROCK SCHOOL, MARTHA J. EADIE, SISTER CAROL CIMINO, AND DEBBIELYNN DOYLE, DEFENDANTS-APPELLANTS.

CONNORS LLP, BUFFALO (LAWLOR F. QUINLAN, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HOGANWILLIG, PLLC, AMHERST (DIANE TIVERON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

THE LONG FIRM LLP, BUFFALO (WILLIAM A. LONG, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered August 4, 2017. The order denied the motion of defendants Catholic Diocese of Buffalo, Our Lady of Black Rock School, Martha J. Eadie, Sister Carol Cimino and Debbielynn Doyle to dismiss the complaint against them.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion in part and dismissing the seventh, eighth, tenth, and eleventh causes of action, and as modified the order is affirmed without costs.

Memorandum: Defendants-appellants (defendants) appeal from an order denying their pre-answer motion to dismiss the complaint against them (*see* CPLR 3211 [a] [1], [7]). Accepting the factual allegations in the complaint as true and affording plaintiff every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that the sixth, ninth, twelfth, thirteenth, and fourteenth causes of action adequately set forth a cognizable theory of negligence (*see generally Ernest v Red Cr. Cent. Sch. Dist.*, 93 NY2d 664, 670-672 [1999], *rearg denied* 93 NY2d 1042 [1999]). Supreme Court therefore properly refused to dismiss those causes of action (*see generally Villar v Howard*, 28 NY3d 74, 80 [2016]). "Whether [such

causes of action] will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006], citing *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

We agree with defendants, however, that the seventh, eighth, tenth, and eleventh causes of action, which allege various theories of negligent hiring, supervision, and training, do not lie because the subject employees were allegedly "acting within the scope of [their] employment, thereby rendering the employer liable for damages caused by the employee[s' alleged] negligence under the theory of respondeat superior" (*Watson v Strack*, 5 AD3d 1067, 1068 [4th Dept 2004]; *see Malay v City of Syracuse*, 151 AD3d 1624, 1626-1627 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]). The court therefore erred in refusing to dismiss those causes of action, and we modify the order accordingly.

Defendants' remaining contention regarding the sixth cause of action is without merit.

All concur except WHALEN, P.J., and CENTRA, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent in part inasmuch as we disagree with the majority's determination that the sixth, ninth, twelfth, thirteenth, and fourteenth causes of action adequately set forth a cognizable theory of negligence. We would therefore reverse the order, grant the motion, and dismiss the complaint against defendants-appellants (defendants).

Plaintiff's child was a six-year-old special-education student at defendant Our Lady of Black Rock School (School) and, as alleged in the complaint, the child was sexually abused by a fellow student while riding a privately-owned bus home from the School on at least five occasions in November 2015. The company operating the bus was hired by and held a contract with the City of Buffalo (City) and not the School. In her complaint, plaintiff asserted that she informed the School that her child was being bullied, but that the School took no action and thereby allowed the abuse to continue.

"[A] school has a duty of care while children are in its physical custody or orbit of authority" (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 378 [1995]), which generally "does not extend beyond school premises" (*Stephenson v City of New York*, 19 NY3d 1031, 1034 [2012]; *see Harker v Rochester City Sch. Dist.*, 241 AD2d 937, 938 [4th Dept 1997], *lv denied* 90 NY2d 811 [1997], *rearg denied* 91 NY2d 957 [1998]). A school continues to have a duty of care to a child released from its physical custody or orbit of authority only under certain narrow circumstances, specifically, where the school "releases a child without further supervision into a foreseeably hazardous setting it had a hand in creating" (*Ernest v Red Cr. Cent. Sch. Dist.*, 93 NY2d 664, 672 [1999], *rearg denied* 93 NY2d 1042 [1999]; *see Deng v Young*, 163 AD3d 1469, 1469-1470 [4th Dept 2018]).

In determining that the sixth, ninth, twelfth, thirteenth, and fourteenth causes of action adequately set forth a cognizable theory of negligence, the majority effectively ignores the language in *Ernest* limiting a school's duty of care to instances where "it releases a child *without further supervision*" (*id.,* 93 NY2d at 672 [emphasis added]). Those circumstances do not exist here inasmuch as the child was released to the care of the bus company, which was then responsible for the "further supervision" of the child (*id.*). The majority also ignores the precedent set by *Chainani*, which states that a school that has "contracted-out responsibility for transportation" to a private bus company "cannot be held liable on a theory that the children were in [the school's] physical custody at the time of injury" (*id.*, 87 NY2d at 379). Therefore, defendants' duty of care ended when the child was released to the physical custody of the bus company, especially where, as here, the bus company was hired by the City and had no contractual relationship with the School.

Defendants also did not assume a special duty of care as a result of their online training program "Virtus," which was created to combat sexual abuse of children. Such a duty is created where a plaintiff "[knew] of and detrimentally relied upon the defendant's performance, or the defendant's actions . . . increased the risk of harm to the plaintiff" (*Arroyo v We Transp., Inc.*, 118 AD3d 648, 649 [2d Dept 2014]). Here, plaintiff does not allege that she was aware of Virtus and relied on it to her detriment, or that the program increased the risk of sexual abuse on the school bus. We have reviewed plaintiff's remaining alternative ground for affirmance and conclude that it lacks merit.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

984

CA 17-01200

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

MATTHEW SLEIGHT, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 124380.)

RAWLE & HENDERSON LLP, NEW YORK CITY (RICHARD B. POLNER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PULOS & ROSELL, HORNELL (WILLIAM W. PULOS OF COUNSEL), AND LEVENE GOULDIN & THOMPSON, LLP, VESTAL, FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Catherine C. Schaewe, J.), entered September 22, 2016. The order, among other things, granted claimant's motion to amend the claim and for partial summary judgment and denied in part defendant's cross motion for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 19 and 27, 2018,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

998

CA 18-00091

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

MARK BRATGE AND KATRINA BRATGE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JEFFREY SIMONS, INDIVIDUALLY AND AS SUPERINTENDENT OF ROME CITY SCHOOL DISTRICT, FRANK CONESTABILE, INDIVIDUALLY AND AS DIRECTOR OF EMPLOYEE RELATIONS FOR ROME CITY SCHOOL DISTRICT, TRACEY O'ROURKE, INDIVIDUALLY AND AS PRINCIPAL OF STROUGH JUNIOR HIGH SCHOOL, ROME CITY SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

FRANK POLICELLI, UTICA, FOR PLAINTIFFS-APPELLANTS.

FERRARA FIORENZA PC, EAST SYRACUSE (MILES G. LAWLOR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered October 19, 2017. The order granted the motion of defendants Jeffrey Simons, Frank Conestabile, Tracey O'Rourke, in their official and individual capacities, and the Rome City School District to dismiss the complaint against them.

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

Memorandum: This action arises out of an incident that purportedly occurred on November 12, 2015, in which Mark Bratge (plaintiff), a technology teacher at the Strough Junior High School (School), was alleged to have engaged in certain inappropriate conduct toward a student during class at the School. After the incident, the student informed a guidance counselor of plaintiff's conduct. According to plaintiffs, defendants Jeffrey Simons, the Superintendent of defendant Rome City School District (District), Frank Conestabile, the Director of Employee Relations for the District, and Tracey O'Rourke, the Principal of the School, were involved in making the decision to refer the matter to law enforcement authorities. Thereafter, on December 28, 2015, plaintiff was arrested and charged with certain misdemeanors as a result of the incident. The parties agree that, during the ensuing criminal trial, plaintiff moved for a trial order of dismissal concerning the charges but City Court denied the motion, concluding that the People had established a prima facie

case on the crimes charged. After plaintiff was acquitted of the criminal charges, plaintiffs commenced this action against, inter alia, Simons, Conestabile, O'Rourke and the District (collectively, defendants), seeking money damages under several theories, including malicious prosecution, breach of contract, inadequate training and supervision, and a derivative cause of action on behalf of plaintiff Katrina Bratge. Plaintiffs now appeal from an order granting defendants' pre-answer motion to dismiss the complaint against them. We affirm.

Initially, we note that Supreme Court dismissed the fourth, derivative cause of action on the ground that plaintiffs failed to include it in their notice of claim. Plaintiffs do not challenge the dismissal of that cause of action on appeal, and thus have abandoned any contention with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Plaintiffs contend that the court erred in dismissing the complaint on statute of limitations grounds because they timely commenced the action by serving a notice of claim within the relevant limitations periods. We reject that contention. "An action is commenced by filing a summons and complaint or summons with notice in accordance with rule twenty-one hundred two of this chapter" (CPLR 304 [a]). Moreover, "the filing of the notice of claim did not toll the statute of limitations" (*Koehnlein v Jackson*, 12 AD3d 1185, 1186 [4th Dept 2004], *lv denied* 4 NY3d 706 [2005]; *see Matter of Barner v Jeffersonville-Youngsville Cent. Sch. Dist.*, 117 AD2d 162, 166 n 1 [3d Dept 1986]; *see also Hey v Town of Napoli*, 265 AD2d 803, 804 [4th Dept 1999]).

Plaintiffs' contention that the breach of contract claim in the first cause of action did not accrue until after plaintiff was acquitted of the criminal charges because damages were not ascertainable until then is also without merit. A breach of contract accrues at the time of the breach even if " 'no damage occurs until later' " (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Consequently, that claim accrued at the time of the alleged breach, which occurred prior to December 28, 2015, and thus it was time-barred under the one-year statute of limitations in Education Law § 3813 (2-b). Plaintiffs also contend that the additional claim in the first cause of action, alleging a violation of plaintiff's due process rights, is not time-barred due to the application of the continuing wrong doctrine. We reject that contention. The continuing wrong doctrine allows a later accrual date of a cause of action " 'where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed' " (*Capruso v Village of Kings Point*, 23 NY3d 631, 639 [2014]; *see EPK Props., LLC v Pfohl Bros. Landfill Site Steering Comm.*, 159 AD3d 1567, 1569 [4th Dept 2018]). Here, however, plaintiffs alleged that defendants violated plaintiff's due process rights by failing to properly investigate the student's complaint before reporting it to the prosecuting authorities, and all of the alleged damages arise from that failure. Thus, the continuing wrong doctrine is inapplicable.

Contrary to plaintiffs' further contention, the court properly dismissed the second cause of action, for malicious prosecution. "To obtain recovery for malicious prosecution, a plaintiff must establish that a criminal proceeding was commenced, that it was terminated in favor of the accused, that it lacked probable cause, and that the proceeding was brought out of actual malice" (*Martinez v City of Schenectady*, 97 NY2d 78, 84 [2001]; *see Broughton v State of New York*, 37 NY2d 451, 457 [1975], *cert denied* 423 US 929 [1975]). Here, it is undisputed that there was "a judicial determination of probable cause" in the underlying criminal action (*Gullo v Graham*, 255 AD2d 975, 976 [4th Dept 1998]; *see generally Hoffman v Colleluori*, 139 AD3d 900, 902 [2d Dept 2016], *lv denied* 28 NY3d 911 [2016]), which "can be overcome only upon a showing of fraud, perjury or the withholding of evidence" (*Brown v Roland*, 215 AD2d 1000, 1001 [3d Dept 1995], *lv dismissed* 87 NY2d 861 [1995]; *see Gullo*, 255 AD2d at 976), and the complaint fails to allege such conduct. In addition, the documentary evidence establishes that defendants merely "furnished information to law enforcement authorities, who then exercised their own judgment in determining whether they should arrest and file criminal charges against plaintiff. It is well settled that such actions by a civilian complainant . . . do not render the complainant liable for . . . malicious prosecution" (*Quigley v City of Auburn*, 267 AD2d 978, 980 [4th Dept 1999]; *see also Barrett v Watkins*, 82 AD3d 1569, 1572 [3d Dept 2011]). Consequently, the court properly dismissed the second cause of action pursuant to CPLR 3211 (a) (1).

Furthermore, pursuant to Education Law § 1128 (4), defendants are entitled to immunity from liability for their good faith compliance with the mandatory reporting requirements of section 1126. Here, the documentary evidence submitted by defendants established that they acted reasonably and in good faith in transmitting the report of child abuse in an educational setting, and thus the court properly concluded that they are entitled to statutory immunity.

We reject plaintiffs' contention that the court erred in dismissing the third cause of action, alleging negligent training and supervision. We are cognizant of our duty on a motion to dismiss to "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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), and that the issue " '[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' " (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]). Nevertheless, although "it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking factual support . . . Indeed, a cause of action cannot be predicated solely on mere conclusory statements . . . unsupported by factual allegations" (*Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 [4th Dept 2015] [internal quotation marks omitted]; *see McFadden v Schneiderman*, 137 AD3d 1618, 1619 [4th Dept 2016]). Here, the only factual allegations in the third cause of action concern the actions of other defendants not involved in this appeal; therefore, plaintiffs' conclusory

allegations with respect to defendants fail to state a valid cause of action for negligent training and supervision against them (*see Moore v First Fed. Sav. & Loan Assn. of Rochester*, 237 AD2d 956, 957 [4th Dept 1997]; *cf. Kerzhner v G4S Govt. Solutions, Inc.*, 138 AD3d 564, 565 [1st Dept 2016]; *see generally Sclar v Fayetteville-Manlius Sch. Dist.*, 300 AD2d 1115, 1115 [4th Dept 2002], *lv denied* 99 NY2d 510 [2003]).

In addition, the third cause of action is time-barred inasmuch as that cause of action accrued on December 28, 2015, i.e., the date on which plaintiff was arrested, and the summons and complaint was not filed until after the statute of limitations for that cause of action had run (*see* Education Law § 3813 [2]; General Municipal Law § 50-i [1] [c]; *see generally* CPLR 304 [a]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1007

CA 17-02136

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

MICHAEL J. TARSEL AND SUZANNE M. TARSEL,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

JAMES J. TROMBINO, DEFENDANT-APPELLANT-RESPONDENT.

PULLANO & FARROW, ROCHESTER (LANGSTON D. MCFADDEN OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (KAREN G. FELTER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered June 21, 2017. The order and judgment granted in part the motion of defendant for summary judgment dismissing the complaint and declared that plaintiffs may make certain improvements to an easement.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the declaration is vacated, the motion is denied in its entirety and the complaint is reinstated.

Memorandum: Defendant appeals and plaintiffs cross-appeal from an order and judgment, which declared that plaintiffs may repair and improve an easement subject to certain conditions and granted defendant's motion for summary judgment dismissing the complaint except to that extent.

The parties are neighbors. Defendant owns a private access road that extends from the nearest public road, past the entrance to plaintiffs' driveway. Between defendant's private road and the entrance to plaintiffs' driveway is a narrow strip of unpaved land, which defendant also owns. Plaintiffs have an easement over the private road and the strip of land, both of which they need to use in order to access their driveway and property. The strip of land, however, deteriorated over time, resulting in an elevation differential that has caused vehicles entering plaintiffs' property to scrape their undercarriages when they cross from the easement to the driveway. Plaintiffs approached defendant about paving the strip to allow for smooth access to the driveway by vehicles. Defendant raised concerns that paving the strip would cause water to drain onto his property, pool there, and freeze during the winter months, creating a

hazardous condition. Plaintiffs refused to discuss defendant's concerns. Instead, plaintiffs contracted to have the strip paved, and defendant had the asphalt removed the day after it was installed.

Plaintiffs commenced this action seeking money damages in the amount of $1,300, punitive damages, a permanent injunction restraining defendant from interfering with future maintenance and repair of the easement, and costs and attorneys' fees. Defendant moved for summary judgment dismissing the complaint. After searching the record, Supreme Court "adjudged and declared that plaintiffs may make improvements to the easement to correct the impediment to reasonable access to the driveway on their land," subject to conditions: "[T]hey may make improvements to the easement as necessary to correct the impediment to reasonable access to the driveway on their land. Their right is conditioned on the improvements being done in a fashion that will not cause water to pool on the easement or increase the amount of water that has pooled historically. A further condition is that the improvements are to be only as much as necessary to change the grade to allow ordinary vehicles from scraping when entering and exiting the driveway, but in any event, may not exceed the dimensions of the previous improvement." The court otherwise granted the motion and dismissed the complaint except to that extent. We conclude that the court erred, and we therefore reverse the order and judgment, vacate the declaration, deny the motion in its entirety, and reinstate the complaint.

A party's right of passage over an easement carries with it the " 'right to maintain it in a reasonable condition for such use' " (*Ickes v Buist*, 68 AD3d 823, 824 [2d Dept 2009]; *see Schoolman v Mannone*, 226 AD2d 521, 521-522 [2d Dept 1996]). The right to repair and maintain an easement includes "the right to carry out work as necessary to reasonably permit the passage of vehicles and, in so doing, to 'not only remove impediments but supply deficiencies in order to construct [or repair] a suitable road' " (*Lopez v Adams*, 69 AD3d 1162, 1163-1164 [3d Dept 2010], quoting *Missionary Socy. of Salesian Congregation v Evrotas*, 256 NY 86, 90 [1931]; *see Ickes*, 68 AD3d at 823-824; *Bilello v Pacella*, 223 AD2d 522, 522 [2d Dept 1996]). The right to repair and maintain, however, is "limited to those actions 'necessary to effectuate the express purpose of [the] easement' " (*Lopez*, 69 AD3d at 1164; *see Albrechta v Broome County Indus. Dev. Agency*, 274 AD2d 651, 652 [3d Dept 2000]), and thus the work performed must not "materially increase the burden of the servient estate[] or impose new and additional burdens on the servient estate[]" (*Lopez*, 69 AD3d at 1164; *see Shuttle Contr. Corp. v Peikarian*, 108 AD3d 516, 517 [2d Dept 2013]). Relatedly, the servient landowner has a "corresponding right[] 'to have the natural condition of the terrain preserved, as nearly as possible' . . . and 'to insist that the easement enjoyed shall remain substantially as it was at the time it accrued, regardless of whether benefit or damage will result from a proposed change' " (*Lopez*, 69 AD3d at 1164).

Defendant contends on his appeal that the court erred in searching the record and entering a declaratory judgment in plaintiffs' favor. We agree. As an initial matter, although

plaintiffs did not seek declaratory relief, the court has the authority to "grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just" (CPLR 3017 [a]; *see Buttonwood Ltd. Partnership v Blaine*, 37 AD3d 910, 912 [3d Dept 2007]). We conclude, however, that the declaration was not appropriate given the evidence presented here. First, although the declaration refers to an "impediment" in the driveway, plaintiffs do not seek to remove any impediments, and there is no record evidence of impediments. Rather, plaintiffs seek to supply deficiencies by paving over an unpaved strip of land within the easement. Second, although the declaration requires that any improvements be made "so as not to cause water to pool on the easement or increase the amount of water that has pooled historically," that does not speak to defendant's concern. Defendant is concerned with water pooling on portions of his property adjacent to the easement, not with water pooling on the easement itself. There is, moreover, no evidence that water historically pooled on the portions of defendant's property adjacent to the easement, and it is the pooling of water there that defendant seeks to prevent. Third, although the declaration limits the right to make improvements to those "necessary to change the grade to allow ordinary vehicles from scraping when entering and exiting the driveway," the use of the word "ordinary" is problematic. Plaintiff Michael J. Tarsel testified that his truck does not scrape on the driveway, but his wife's Mercedes does, and that a sports car would be unable to enter or exit the driveway. We do not believe that a truck is less "ordinary" than a Mercedes or a sports car. In summary, the declaration contains flaws that the respective parties could exploit in order to assert rights greater than they have with respect to the property at issue. We therefore conclude that the declaration must be vacated.

Defendant's further contention on his appeal that the action is frivolous is not properly before us because it was not raised before the trial court (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, that contention is wholly without merit.

Plaintiffs contend on their cross appeal that the court erred in granting in part defendant's motion for summary judgment dismissing the complaint. We agree. The record establishes that the improvement to the easement was present for less than 24 hours, and there is no evidence of precipitation during that period. Furthermore, defendant conceded in his deposition testimony that it would be impossible to know how the improvement would have affected drainage on his property. Defendant thus failed to establish that he had a right to remove the improvement because the improvement would have imposed a burden on his property in the manner that he described (*see generally Lopez*, 69 AD3d at 1163-1164). Inasmuch as defendant failed to meet his initial burden on summary judgment, the court should have denied his motion in its entirety without regard to the sufficiency of plaintiffs' opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1011

KA 16-00382

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GARY N. MAULL, ALSO KNOWN AS "G",
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered March 7, 2016. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, tampering with physical evidence 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 the sentence imposed on count five of the indictment shall run concurrently with the sentence imposed on count two of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), tampering with physical evidence (§ 215.40 [2]), and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction.

With respect to the conviction of murder in the second degree, the People presented a witness who testified that defendant directed the witness to pick up the victim and drive the victim, defendant, and another witness to a remote location, and that defendant and the victim were outside the vehicle when the victim was shot and killed. Although there was conflicting testimony whether additional persons were present with defendant and the victim at the time of the shooting, at least one witness testified that the only two individuals outside of the vehicle at the time of the shooting were the victim and defendant. That defendant was present at the scene was also supported by DNA evidence. A witness also testified that defendant attempted to conceal the victim's body after the shooting. Thus, contrary to

defendant's contention, the evidence is legally sufficient to establish that defendant fatally shot the victim (*see generally People v Green*, 74 AD3d 1899, 1900 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]), and that defendant did so with an intent to kill (*see generally People v Broadnax*, 52 AD3d 1306, 1307 [4th Dept 2008], *lv denied* 11 NY3d 830 [2008]). Moreover, County Court charged the jury that it could find defendant guilty on a theory of accessorial liability (*see People v Meehan*, 229 AD2d 715, 718 [3d Dept 1996], *lv denied* 89 NY2d 926 [1996]) and, even if the evidence is insufficient to establish that defendant shot and killed the victim, there is sufficient evidence that he at least "shared a 'community of purpose' with" the shooter (*People v Allah*, 71 NY2d 830, 832 [1988]; *see People v Valdez*, 170 AD2d 190, 190 [1st Dept 1991], *lv denied* 77 NY2d 1001 [1991], *reconsideration denied* 78 NY2d 976 [1991]). We therefore conclude that there is sufficient evidence whereby "the jury . . . could fairly find that defendant either shot [the victim] or . . . participated in the planning to kill him and shared the intent of the shooter to do so" (*People v Whatley*, 69 NY2d 784, 785 [1987]).

Defendant contends that the evidence is legally insufficient to establish that he committed tampering with physical evidence inasmuch as the People failed to establish that defendant successfully hid the victim's body. We reject that contention. "Regardless of whether the defendant is successful in suppressing the evidence, once an act of concealment is completed with the requisite mens rea, the offense of tampering has been committed" (*People v Eaglesgrave*, 108 AD3d 434, 434 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *see People v Hafeez*, 100 NY2d 253, 259-260 [2003]). Here, the evidence the People submitted established that defendant directed the codefendant to exit the vehicle to help him dispose of the body and that defendant and the codefendant, after donning gloves, lifted the body over a guardrail and deposited it in a grassy area on the other side. That evidence is sufficient to establish that defendant completed an act of concealment with the requisite mens rea, notwithstanding the fact that, in the light of day, the body remained visible.

We also conclude that the evidence is legally sufficient with respect to defendant's conviction of criminal possession of a weapon in the second degree. The People presented testimony establishing that defendant possessed a loaded firearm and intentionally fired it at the victim (*see e.g. People v Gonzalez*, 193 AD2d 360, 361 [1st Dept 1993]; *People v Ciola*, 136 AD2d 557, 557 [2d Dept 1988], *lv denied* 71 NY2d 893 [1988]).

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 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude " 'that the jury failed to give the evidence the weight it should be accorded' " (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018]; *see generally Bleakley*, 69 NY2d at 495). To the extent that defendant

contends that the People's witnesses were not credible, "the jury was in the best position to assess the credibility of the witnesses" (*People v Chelley*, 121 AD3d 1505, 1506 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015] [internal quotation marks omitted]), and we perceive no reason to reject the jury's credibility determinations.

Defendant's contention that the court erred in denying his motion for a mistrial is without merit, and the court did not abuse its discretion in denying the motion (*see People v Ortiz*, 54 NY2d 288, 292 [1981]; *People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). The court instructed the jury to disregard any nonresponsive answers of the witness (*see People v Johnson*, 118 AD3d 1502, 1503 [4th Dept 2014], *lv denied* 24 NY3d 1120 [2015]), and the court repeatedly admonished the witness to stop giving nonresponsive answers. Contrary to defendant's further contention, the court did not abuse its discretion in sustaining the prosecutor's objection that defense counsel's line of questioning was repetitive and in intervening thereafter to move the cross-examination along (*see People v Riddick*, 251 AD2d 517, 518 [2d Dept 1998], *lv denied* 92 NY2d 951 [1998]; *see also People v Miles*, 157 AD3d 641, 642 [1st Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *see generally Delaware v Van Arsdall*, 475 US 673, 679 [1986]).

Defendant's contentions regarding prosecutorial misconduct are unpreserved for our review (*see People v Machado*, 144 AD3d 1633, 1635 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]; *People v Love*, 134 AD3d 1569, 1570 [4th Dept 2015], *lv denied* 27 NY3d 967 [2016]; *People v Smith*, 32 AD3d 1291, 1292 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]). In any event, we conclude that defendant's contentions are without merit inasmuch as "none of the alleged misconduct by the prosecutor was so egregious as to deprive defendant of a fair trial" (*People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see People v Everson*, 158 AD3d 1119, 1122 [4th Dept 2018], *lv denied* 31 NY3d 1081 [2018], *reconsideration denied* 31 NY3d 1147 [2018]).

The record is insufficient to establish that defendant's trial was affected by an alleged violation of defendant's right to counsel on the ground that law enforcement officers listened to at least three phone calls between defendant and defense counsel, or that defense counsel was ineffective for failing to seek a hearing on that matter. Although the conduct of those law enforcement officers is alarming, the appropriate vehicle for challenging that conduct is a CPL 440.10 motion inasmuch as defendant's contention concerns matters outside the record on appeal (*see People v McLean*, 15 NY3d 117, 121 [2010]).

We agree with defendant, however, that the sentence is illegal insofar as the court directed that the sentence imposed for criminal possession of a weapon in the second degree shall run consecutively to the sentence imposed for murder in the second degree (*see People v Ramsey*, 59 AD3d 1046, 1048 [4th Dept 2009], *lv denied* 12 NY3d 858 [2009]; *People v Fuentes*, 52 AD3d 1297, 1300 [4th Dept 2008], *lv*

denied 11 NY3d 736 [2008]). As the People correctly concede, "the sentence on the murder conviction should run concurrently with the sentence on the weapon possession conviction that requires unlawful intent (Penal Law § 265.03 [1] [b]), because the latter offense was not complete until defendant shot the victim[]" (*People v Service*, 126 AD3d 638, 639 [1st Dept 2015], *lv denied* 27 NY3d 1006 [2016]; *see People v Wright*, 19 NY3d 359, 363 [2012]; *People v Houston*, 142 AD3d 1397, 1399 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]). We therefore modify the judgment accordingly. As modified, the sentence is not unduly harsh or severe.

We have considered defendant's remaining contention, and conclude that it does not warrant reversal or further modification of the judgment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1017

KA 16-01447

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESUS VEGA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (JAMES M. SPECYAL 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 25, 2016. 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]). Defendant contends that he was denied due process of law because the mental competency examination reports prepared by two psychiatric examiners pursuant to an order of County Court failed to comply with the requirements of CPL article 730. We reject that contention. The examination reports submitted to the court pursuant to CPL 730.20 and 730.30 were made by psychiatric examiners as defined by CPL 730.10 (7). Each report includes the opinion of the psychiatric examiner that defendant is not an incapacitated person and that he is able to cooperate with his lawyer and participate in his defense, and each report sufficiently states the nature and extent of the examination (*see* CPL 730.10 [8]). Although one of the reports is typewritten on plain paper rather than on the standardized form, we conclude that where, as here, the report communicates all of the information essential to enable the court to make a full and impartial determination of defendant's mental capacity, the deviation in format is not substantial (*see People v Carkner*, 213 AD2d 735, 739 [3d Dept 1995], *lv denied* 85 NY2d 970 [1995], *lv denied* 86 NY2d 733 [1995]; *cf. People v Meurer*, 184 AD2d 1067, 1068 [4th Dept 1992], *lv dismissed* 80 NY2d 835 [1992], *lv denied* 80 NY2d 907 [1992]; *People v Whysong*, 175 AD2d 576, 577 [4th Dept 1991]; *People v Lowe*, 109 AD2d 300, 303-304 [4th Dept 1985], *lv denied* 67 NY2d 653 [1986]). Furthermore, the alleged factual errors

contained in one of the reports are harmless misstatements that were not relevant to the issue of defendant's mental capacity and competency to stand trial. Inasmuch as the examination reports substantially comply with the requirements set forth in CPL article 730, we conclude that defendant was not denied due process.

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "The resolution of credibility issues by the jury and its determination of the weight to be given to the evidence are accorded great deference" (*People v Wallace*, 306 AD2d 802, 802 [4th Dept 2003]). Contrary to defendant's contention, the jury was entitled to credit the testimony of the correction officer who discovered the shank during a search of defendant's person and to reject the version of the incident set forth by defendant (*see People v Morrison*, 48 AD3d 1044, 1045 [4th Dept 2008], *lv denied* 10 NY3d 867 [2008]).

Defendant's contention that the court abused its discretion in its *Sandoval* ruling is not preserved for our review (*see* CPL 470.05 [2]). In any event, we conclude that the court did not abuse its discretion in permitting the People to cross-examine defendant about the facts underlying a prior conviction for criminal contempt in the first degree. The court "properly balanced the appropriate factors" (*People v Larkins*, 153 AD3d 1584, 1585 [4th Dept 2017], *lv denied* 30 NY3d 1061 [2017]) and determined that the probative value of the evidence to be admitted outweighed the risk of unfair prejudice to defendant (*see generally People v Sandoval*, 34 NY2d 371, 377 [1974]).

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1022

CA 18-00008

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

MICHAEL L. GILKERSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JASON L. BUCK, ET AL., DEFENDANTS,
MATTHEW J. SILE AND JAMES W. SILE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

FANIZZI & BARR, P.C., NIAGARA FALLS (PAUL K. BARR OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered September 29, 2017. The order, insofar as appealed from, granted that part of the motion of defendants Matthew J. Sile and James W. Sile seeking summary judgment dismissing the complaint of plaintiff Michael L. Gilkerson against them.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, that part of the motion of defendants Matthew J. Sile and James W. Sile for summary judgment dismissing the complaint against them is denied, and the complaint against them is reinstated.

Memorandum: Plaintiffs Michael L. Gilkerson and Amber M. Talarico commenced separate negligence actions against the same defendants, seeking to recover damages for injuries that they sustained in a multivehicle accident. Defendant Matthew J. Sile (Matthew) was driving a pick-up truck owned by his father, defendant James W. Sile (collectively, Sile defendants), when the truck was broadsided in an intersection by a vehicle driven by defendant Jason L. Buck. When Buck's vehicle collided with Matthew's truck, the truck flipped over and subsequently collided with Gilkerson's motorcycle, causing injuries to Gilkerson and his passenger, Talarico. Defendant Ashley E. Evans was traveling in a vehicle behind plaintiffs' motorcycle. In each action, the Sile defendants moved for summary judgment dismissing the complaint and cross claims against them on the grounds that Matthew was not negligent in his operation of the truck and that Buck's conduct was the sole proximate cause of the accident. In appeal No. 1, Gilkerson appeals from an order that, inter alia, granted that part of the motion seeking summary judgment dismissing

his complaint against the Sile defendants. In appeal No. 2, Talarico appeals from an order that, inter alia, granted that part of the motion seeking summary judgment dismissing her complaint against the Sile defendants. We reverse the orders in both appeals insofar as appealed from.

We agree with plaintiffs that Supreme Court erred in dismissing their complaints against the Sile defendants. Although plaintiffs do not dispute that Buck was negligent in violating the Vehicle and Traffic Law or that Matthew had the right-of-way as he proceeded straight through the intersection, it is well settled that " 'there may be more than one proximate cause of [a collision]' " (*Harris v Jackson*, 30 AD3d 1027, 1028 [4th Dept 2006]; *see Cooley v Urban,* 1 AD3d 900, 900 [4th Dept 2003]). Thus, in their motions, the Sile defendants had the initial burden of establishing as a matter of law either that Matthew was not negligent or that any negligence on his part was not a proximate cause of the accident (*see Darnley v Randazzo,* 159 AD3d 1578, 1578-1579 [4th Dept 2018]; *see generally Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). We conclude in both appeals that the Sile defendants failed to meet that burden (*see Deering v Deering*, 134 AD3d 1497, 1498-1499 [4th Dept 2015]; *see generally Daniels v Rumsey*, 111 AD3d 1408, 1410 [4th Dept 2013]).

Although "a driver who has the right[-]of[-]way is entitled to anticipate that [the drivers of] other vehicles will obey the traffic laws that require them to yield" (*Rolls v State of New York*, 129 AD3d 1638, 1638 [4th Dept 2015] [internal quotation marks omitted]), that driver nevertheless has a "duty to exercise reasonable care in proceeding through [an] intersection" (*Limardi v McLeod*, 100 AD3d 1375, 1376 [4th Dept 2012]), and "cannot blindly and wantonly enter an intersection" (*Deering*, 134 AD3d at 1499 [internal quotation marks omitted]; *see Dorr v Farnham*, 57 AD3d 1404, 1405-1406 [4th Dept 2008]; *Halbina v Brege*, 41 AD3d 1218, 1219 [4th Dept 2007]). Here, by their own submissions, the Sile defendants raised a triable issue of fact whether Matthew met his "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Deering*, 134 AD3d at 1499 [internal quotation marks omitted]). The deposition testimony of Evans and Gilkerson established that they both saw Buck's vehicle approaching the intersection without slowing down and that Evans anticipated that Buck's vehicle would go through the stop sign and collide with Matthew's vehicle, which raises "a question of fact whether [Matthew] could have avoided or otherwise minimized the accident" (*Margolis v Volkswagen of Am., Inc.*, 77 AD3d 1317, 1320 [4th Dept 2010]; *cf. Liskiewicz v Hameister*, 104 AD3d 1194, 1195 [4th Dept 2013]; *Limardi*, 100 AD3d at 1376; *Lescenski v Williams*, 90 AD3d 1705, 1706 [4th Dept 2011], *lv denied* 18 NY3d 811 [2012]).

Even if, as our dissenting colleagues conclude, the Sile defendants met their prima facie burden on their motions, we further conclude that Matthew's deposition testimony, submitted by each plaintiff in opposition to the motions, raised a question of fact. Matthew testified that he was "[m]aybe a hundred yards" past a construction zone when his vehicle was struck, and that "[l]ess than 30 seconds. Maybe -- probably close to -- less than that. 15

seconds, maybe" *after* he passed under an overpass, Matthew heard his girlfriend, who was a passenger in his truck, scream, and thereafter, his truck was struck on the passenger side. Notably, Matthew's testimony that his girlfriend screamed prior to the collision suggests that she, like both Evans and Gilkerson, saw Buck's vehicle approaching the intersection without slowing down, and that the construction site and overpass did not obscure her vision of Buck's vehicle. Matthew's testimony thus raises questions of fact why, during the 100 yards and at least 15 seconds leading up to the collision, he failed to see Buck's vehicle approaching the intersection (*see Chilinski v Maloney*, 158 AD3d 1174, 1175-1176 [4th Dept 2018]), and whether he could have acted to avoid or minimize the accident (*see Margolis*, 77 AD3d at 1320). We therefore conclude that plaintiffs raised an issue of fact in opposition to the motions.

We thus reverse the orders in both appeals insofar as appealed from, deny those parts of the motions seeking summary judgment dismissing the complaints against the Sile defendants, and reinstate the complaints against them.

All concur except PERADOTTO, J.P., and CARNI, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent in both appeals inasmuch as we conclude that Supreme Court properly granted the motions of defendants Matthew J. Sile (Matthew) and James W. Sile (James) (collectively, Sile defendants) for summary judgment dismissing the complaints and all cross claims against them. We would therefore affirm the order in each appeal.

It is undisputed that the Sile defendants' submissions in support of their motions established that Matthew was driving westbound and passing beneath a split highway overpass in a pick-up truck owned by his father, James, when the truck was broadsided in an intersection on the other side of the overpass by a southbound vehicle driven by defendant Jason L. Buck, who disregarded one or more of his obligations to stop at the stop sign on his intersecting roadway and yield the right-of-way to Matthew's truck (*see* Vehicle and Traffic Law § 1142 [a]). When Buck's vehicle collided with Matthew's truck, the truck flipped over and subsequently collided with an eastbound motorcycle operated by plaintiff Michael L. Gilkerson, causing injuries to Gilkerson and his passenger, plaintiff Amber M. Talarico.

We conclude that the Sile defendants met their initial burden in each motion of establishing as a matter of law that Matthew was not negligent. The fact that Matthew, as the driver with the right-of-way, was entitled to anticipate that Buck would obey the traffic laws that required him to yield to Matthew "d[id] not absolve [Matthew] of the duty to exercise reasonable care in proceeding through the intersection," but "there is no evidence in this case that [Matthew] failed to exercise such care" (*Limardi v McLeod*, 100 AD3d 1375, 1376 [4th Dept 2012]). Matthew was operating the truck in accordance with the rules of the road and at an appropriate speed, and he was paying proper attention to the roadway and everything else that was visible in front of the truck, when Buck's vehicle suddenly and unexpectedly broadsided the truck in the intersection before Matthew

had any time to react (*see id.*). The Sile defendants thus established that Matthew, as " 'a driver with the right-of-way who ha[d] only seconds to react to a vehicle that . . . failed to yield,' " was " 'not . . . negligent for failing to avoid the collision' " (*Penda v Duvall*, 141 AD3d 1156, 1157 [4th Dept 2016]; *see Vazquez v New York City Tr. Auth.*, 94 AD3d 870, 871 [2d Dept 2012]).

In concluding that the Sile defendants' own papers raise an issue of fact whether Matthew could have avoided or otherwise minimized the accident, the majority relies on the deposition testimony of Gilkerson and defendant Ashley E. Evans, who was in a vehicle behind Gilkerson's motorcycle, which established that they both saw Buck's vehicle approaching the intersection without slowing down and that Evans anticipated that Buck's vehicle would go through the stop sign and collide with Matthew's truck. The majority's reliance on that testimony is misplaced. Gilkerson and Evans were driving eastbound with unobstructed views of the southbound roadway upon which Buck was traveling, i.e., on the near side of the highway overpass from the vantage point of Gilkerson and Evans. Matthew, however, was driving in the opposite, westbound direction while passing beneath the overpass with a berm sloping up to the highway on his right before arriving at the intersection with the southbound roadway upon which Buck was traveling, i.e., on the far side of the overpass from Matthew's perspective. Thus, given these vastly different views of the southbound roadway, the majority's assertion that the testimony of Gilkerson and Evans raises an issue of fact whether Matthew too should or could have seen Buck's vehicle approaching the intersection " 'is based on speculation and is insufficient to defeat a motion for summary judgment' " (*Wallace v Kuhn*, 23 AD3d 1042, 1043 [4th Dept 2005]).

We further conclude that plaintiffs failed to meet their burden in opposition to the Sile defendants' prima facie showing. Plaintiffs failed to offer any expert, photographic, or other competent evidence sufficient to raise an issue of fact whether Matthew could have avoided the accident and, therefore, plaintiffs' contentions in that regard are speculative and unsupported by the record (*see Limardi*, 100 AD3d at 1376; *Maloney v Niewender*, 27 AD3d 426, 427 [2d Dept 2006]). Plaintiffs submitted no photographic evidence showing Matthew's view as he approached the intersection; instead, plaintiffs referenced the photographs that were submitted by the Sile defendants in support of their motions, which do not substantiate plaintiffs' assertion that Matthew had an unobstructed view of the southbound roadway upon which Buck was traveling. Further, we disagree with the majority that the deposition testimony of Matthew that was submitted by plaintiffs in opposition to the motions raises an issue of fact whether Matthew could have done something to avoid the accident. Matthew did not testify that he had an unobstructed view of the southbound roadway (*cf. Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]); rather, he estimated that within about 15 seconds or 100 yards of passing beneath the split highway overpass at an appropriate speed of approximately 35 miles per hour, his truck was suddenly struck from the right by Buck's vehicle, which Matthew never saw prior to the collision. Plaintiffs offered no expert affidavit evidence to support

their assertion that Matthew's view, speed, and distance from the intersection was sufficient to observe Buck's vehicle and take evasive action, and the unsubstantiated and speculative assertions in the affirmations of plaintiffs' attorneys in that regard are insufficient (*see Yelder v Walters*, 64 AD3d 762, 765 [2d Dept 2009]; *Jenkins v Alexander*, 9 AD3d 286, 288 [1st Dept 2004]). While the majority asserts that the fact that Matthew's girlfriend, who was a passenger in his truck, screamed prior to the collision suggests that Matthew had a sufficient view and time to observe Buck's vehicle approaching the intersection and to take evasive action, that assertion lacks merit inasmuch as Matthew testified that the collision occurred "immediate[ly]," i.e., "a split second," after his girlfriend's scream. In our view, "[s]peculation regarding evasive action that [Matthew] should have taken to avoid a collision, especially when [Matthew] had, at most, [only] seconds to react, does not raise a triable issue of fact" (*Penda*, 141 AD3d at 1157 [internal quotation marks omitted]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1023

CA 18-00309

PRESENT: CARNI, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

JOSEPH DENNIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

VINCENT CERRONE, AND MARK CERRONE, INC.,
DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT VINCENT CERRONE.

MAGAVERN MAGAVERN GRIMM LLP, NIAGARA FALLS (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT MARK CERRONE, INC.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 10, 2017. The order, insofar as appealed from, denied the motion of plaintiff for partial summary judgment, granted the cross motion of defendant Vincent Cerrone for summary judgment and granted in part the cross motion of defendant Mark Cerrone, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendant Mark Cerrone, Inc.'s cross motion in its entirety and reinstating the first cause of action against it, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained while performing framing work at a residential construction project. At the time of the accident, plaintiff fell through a hole in the ground level subfloor that had been created for the installation of basement stairs. Vincent Cerrone (defendant) owned the property and hired various contractors to complete different portions of the work. Plaintiff was employed by a nonparty contractor that had been hired by defendant to complete the framing portion of the project. Several employees of defendant Mark Cerrone, Inc. (MCI), of which defendant was part owner, general superintendent, and vice president, also completed work on various aspects of the project. Plaintiff asserted causes of action against defendant and MCI for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6). Plaintiff now appeals from an order that denied his motion for summary judgment on defendants' liability

under Labor Law §§ 240 (1) and 241 (6), granted defendant's cross motion for summary judgment dismissing the amended complaint against him, and granted in part MCI's cross motion for summary judgment and dismissed the Labor Law § 240 (1) cause of action against it.

Contrary to plaintiff's contention, we conclude that Supreme Court properly granted defendant's cross motion with respect to the causes of action under Labor Law §§ 240 (1) and 241 (6). "Labor Law §§ 240 (1) and 241 (6) exempt from liability owners of one[-] and two-family dwellings who contract for but do not direct or control the work . . . , i.e., homeowners of such dwellings who do not give specific direction as to how the injured plaintiff was to accomplish the injury-producing work" (*Bausenwein v Allison*, 126 AD3d 1466, 1467 [4th Dept 2015] [internal quotation marks omitted]; *see Ledwin v Auman*, 60 AD3d 1324, 1325 [4th Dept 2009]). Here, defendant met his initial burden of establishing as a matter of law that neither he nor any MCI employee acting as his agent "directed or controlled the methods and means of plaintiff's work" (*Pareja v Davis*, 138 AD3d 615, 615 [1st Dept 2016]). In support of his cross motion, defendant submitted his own deposition, in which he testified that he was in Australia at the time of plaintiff's accident. Furthermore, he submitted other deposition testimony establishing that plaintiff's employer, who is not a party to this action, instructed plaintiff on how to complete the work, and about workplace safety. In response, plaintiff failed to raise an issue of fact.

We reject plaintiff's further contention that defendant's freedom from liability under Labor Law §§ 240 (1) and 241 (6) necessarily implicates MCI's liability thereunder, and therefore reject the contention that the court erred in denying that part of his motion seeking summary judgment with respect to MCI's liability under those sections of the Labor Law. Defendant effectively acted as his own general contractor, and that fact " '[does] not bar application of the single-family homeowner exemption [because he] did not control or direct the method or manner of the work being performed by plaintiff at the time of the injury' " (*McNabb v Oot Bros., Inc.*, 64 AD3d 1237, 1239 [4th Dept 2009]). The issue whether MCI is subject to liability under Labor Law §§ 240 (1) or 241 (6) as a contractor or an agent is an entirely separate question from defendant's personal liability. That defendant did not control plaintiff's work does not automatically require a finding that MCI must have controlled it, and therefore does not require granting plaintiff's motion for partial summary judgment regarding the section 240 (1) and 241 (6) causes of action against MCI.

We agree with plaintiff, as MCI correctly concedes, that the court erred in determining that plaintiff was not engaged in an activity protected under Labor Law § 240 (1) at the time of the accident (*see McKay v Weeden*, 148 AD3d 1718, 1719 [4th Dept 2017]). Further, in light of that determination, and the fact that MCI correctly conceded in its brief and at oral argument that questions of fact exist with respect to whether it had the requisite authority to control or supervise the work, we modify the order by denying MCI's cross motion in its entirety and reinstating the Labor Law § 240 (1)

cause of action against it (*see generally Harris v Hueber-Breuer Constr. Co., Inc*., 67 AD3d 1351, 1352-1353 [4th Dept 2009]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1025

CA 17-01748

PRESENT: CARNI, J.P., LINDLEY, CURRAN, AND WINSLOW, JJ.

DANIEL J. KUBERA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY O. BARTHOLOMEW, M.D., BETH WLODAREK, RPA-C, G. JAY BISHOP, M.D., ANDREW J. LANDIS, M.D., MEDICOR ASSOCIATES, INC., MEDICOR ASSOCIATES OF CHAUTAUQUA, BROOKS MEMORIAL HOSPITAL AND THOMAS BURNS, M.D., DEFENDANTS-RESPONDENTS.

THE JOY E. MISERENDINO LAW FIRM P.C., ORCHARD PARK, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RICOTTA & VISCO, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ANTHONY O. BARTHOLOMEW, M.D., G. JAY BISHOP, M.D., ANDREW J. LANDIS, M.D. AND BROOKS MEMORIAL HOSPITAL.

NOTARO & LAING, P.C., BUFFALO (LINDA C. LAING OF COUNSEL), FOR DEFENDANT-RESPONDENT BETH WLODAREK, RPA-C.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN, ERIE, PENNSYLVANIA (THOMAS M. LENT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MEDICOR ASSOCIATES, INC. AND MEDICOR ASSOCIATES OF CHAUTAUQUA.

FELDMAN KIEFFER, LLP, BUFFALO (LAUREN A. HEIMER OF COUNSEL), FOR DEFENDANT-RESPONDENT THOMAS BURNS, M.D.

Appeal from a judgment and order (one paper) of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered July 5, 2017. The judgment and order granted defendants' motions and cross motions for summary judgment.

It is hereby ORDERED that the judgment and order so appealed from is unanimously modified on the law by denying in part the motion of defendants Anthony O. Bartholomew, M.D., G. Jay Bishop, M.D., Andrew J. Landis, M.D. and Brooks Memorial Hospital, and denying the cross motions of defendants Beth Wlodarek, RPA-C, Medicor Associates, Inc., and Medicor Associates of Chautauqua, and the motion of defendant Thomas Burns, M.D., and reinstating the amended complaint against defendants Beth Wlodarek, RPA-C, G. Jay Bishop, M.D., Andrew J. Landis, M.D., Medicor Associates, Inc., Medicor Associates of Chautauqua, Brooks Memorial Hospital and Thomas Burns, M.D., and as

modified the judgment and order is affirmed without costs.

Memorandum: In this medical malpractice action, plaintiff appeals from a judgment and order that granted defendants' respective motions and cross motions for summary judgment dismissing the amended complaint against them (*Kubera v Bartholomew*, 56 Misc 3d 1203[A], 2017 NY Slip Op 50845[U] [Sup Ct, Chautauqua County 2017]). We conclude that, with the exception of that part of the motion of defendants Anthony O. Bartholomew, M.D., G. Jay Bishop, M.D., Andrew J. Landis, M.D. and Brooks Memorial Hospital (BMH) seeking dismissal of the amended complaint against Dr. Bartholomew, Supreme Court erred in granting the respective motions and cross motions, and we therefore modify the judgment and order accordingly and reinstate plaintiff's amended complaint against the remaining defendants.

Throughout an 11-day period in March 2008, plaintiff presented to defendant Beth Wlodarek, RPA-C, several times with various complaints. She diagnosed him as suffering from, inter alia, sinusitis and an ear infection and prescribed antibiotics. Wlodarek is a physician assistant employed by defendants Medicor Associates, Inc., and Medicor Associates of Chautauqua (collectively, Medicor). Dr. Bartholomew, Dr. Bishop, and Dr. Landis are physicians employed by Medicor. Also during that time period, plaintiff presented to the emergency room at BMH, where he was treated by BMH staff and defendant Thomas Burns, M.D.

Plaintiff commenced this action seeking damages for injuries that he allegedly sustained as a result of the individual defendants' negligence in failing to diagnose and treat a stroke that plaintiff suffered while he was under their care, and he alleged that Medicor and BMH are vicariously liable for that negligence.

Dr. Bartholomew was plaintiff's personal primary care physician. He was on vacation during the operative 11-day period and, upon his return, he immediately recognized the signs and symptoms of a stroke and treated plaintiff accordingly. Plaintiff's only allegation against Dr. Bartholomew was that he went on vacation without providing plaintiff with adequate medical care in his absence. At oral argument of this appeal, plaintiff's attorney conceded that there were no viable claims against Dr. Bartholomew, and we agree. We thus conclude that the court properly dismissed the amended complaint against him.

With respect to the remaining defendants, we conclude that they failed to meet their initial burden on their respective motions and cross motions for summary judgment and, as a result, the burden never shifted to plaintiff to raise triable issues of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"It is well settled that, on a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273 [4th Dept 2015]; *see Occhino v Fan*, 151

AD3d 1870, 1871 [4th Dept 2017]). Here, the remaining defendants established neither. Wlodarek, Dr. Landis, Dr. Bishop and Dr. Burns failed to establish as a matter of law that they did not deviate from the appropriate standard of care or that their purported malpractice did not cause any of plaintiff's physical injuries. As a result, Medicor and BMH failed to establish as a matter of law that they were not vicariously liable to plaintiff.

In support of their motions and cross motions, defendants submitted plaintiff's records from Medicor and BMH. In her notes from plaintiff's appointments on March 14, 19 and 21, 2008, Wlodarek stated that plaintiff presented with complaints of, inter alia, ear pain, sinus pain and headaches. She diagnosed him with sinusitis and an ear infection and prescribed antibiotics. That diagnosis persisted despite plaintiff's multiple visits, a worsening of his condition and his visit to the emergency room of BMH on the night of March 19 into March 20. There is no mention in any of Wlodarek's notes or the BMH records of any signs or symptoms indicative of a stroke.

Nevertheless, defendants also submitted the deposition testimony of plaintiff, two of his family members who accompanied him to either the March 19 and 21 appointments or the emergency room visit, and the partner of one of those family members. Plaintiff and his family members testified that plaintiff repeatedly complained to Wlodarek, BMH staff and Dr. Burns that he had suffered a stroke and that his head was "killing [him]." Moreover, all four individuals testified that plaintiff was exhibiting the physical manifestations of having suffered a stroke, i.e., facial droop, listing to one side, problems walking, slurring of words and difficulty finding words, when he presented to Wlodarek on March 19 and 21 and when he presented to the emergency room at BMH on March 19.

Dr. Landis was Wlodarek's supervising physician and cosigned her notes from the March 19 and March 21 appointments. Dr. Bishop handled two triage messages regarding plaintiff's treatment on March 20 and 21, and he stated that he would "discuss [the] case with [Wlodarek]." Plaintiff and one relative testified that, during the March 21 appointment, Wlodarek exited the room for a period of time to discuss the case with Dr. Bishop, who thereafter declined to see plaintiff.

There is no dispute that, on March 25, Dr. Bartholomew accurately diagnosed plaintiff as having suffered a stroke. Medical records from plaintiff's subsequent treatment, which were also submitted by defendants in support of their motions and cross motions, establish that, as of March 25, there was "no evidence of an *evolving* infarction . . . Changes within the left cerebral white matter were nonspecific and felt to be representative of *old infarctions*" (emphasis added). Following surgery, during which plaintiff suffered a "subarachnoid hemorrhage," i.e., a known risk of the procedure, plaintiff had significant medical problems, including expressive aphasia, persistent facial droop and an inability to move his right side.

Although defendants submitted affidavits from medical experts opining that the individual defendants did not deviate from the

standard of care and that any alleged deviation was not a proximate cause of the postsurgery medical complications, those experts relied solely on the symptoms as documented in the medical records of Medicor and BMH. As noted above, those symptoms are vastly different from the symptoms allegedly reported to the remaining defendants and demonstrated by plaintiff *before* the surgery. It is well settled that experts may not rely upon disputed facts when rendering an opinion (*see Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]; *Reiss v Sayegh*, 123 AD3d 787, 789 [2d Dept 2014]; *see also Metcalf v O'Halleran*, 137 AD3d 758, 759 [2d Dept 2016]). Moreover, we note that defendants' experts failed to address plaintiff's contention that, had he been timely diagnosed, he would not have been required to undergo the surgery in the first place. Contrary to the contention of several defendants, that theory of causation was raised in the amended complaint, as amplified by the bills of particulars. "By ignoring the [allegation that the remaining defendants' malpractice caused plaintiff to undergo the very surgery that caused the brain bleed], defendant[s'] expert[s] failed to 'tender[ ] sufficient evidence to demonstrate the absence of any material issues of fact' . . . as to proximate causation and, as a result, [the remaining] defendant[s] [were] not entitled to summary judgment" with respect to those parts of their respective motions and cross motions (*Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

With respect to specific contentions of the individual remaining defendants, we reject Dr. Bishop's contention that he cannot be found liable because he was not involved in any treatment of plaintiff. The evidence established that he was involved, to some degree, in plaintiff's treatment and the expert affidavit submitted in support of Dr. Bishop's motion failed to address that evidence. We thus conclude that Dr. Bishop failed to establish that he did not deviate from the standard of care or that his alleged deviations did not proximately cause any injury to plaintiff (*see e.g. James v Wormuth*, 74 AD3d 1895, 1895 [4th Dept 2010]; *S'Doia v Dhabhar*, 261 AD2d 968, 968 [4th Dept 1999]).

Finally, with respect to Dr. Landis, we conclude that he failed to carry his burden of demonstrating as a matter of law that he appropriately supervised Wlodarek (*see* Education Law § 6542 [1]) and was otherwise not "medically responsible" for her alleged malpractice (10 NYCRR 94.2 [f]).

Based on our determination, we do not address plaintiff's remaining contention.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1027

CA 18-00569

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

AMBER M. TALARICO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JASON L. BUCK, ET AL., DEFENDANTS,
MATTHEW J. SILE AND JAMES W. SILE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

STEVE BOYD, P.C., WILLIAMSVILLE (STEPHEN BOYD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered December 7, 2017. The order, insofar as appealed from, granted that part of the motion of defendants Matthew J. Sile and James W. Sile seeking summary judgment dismissing the complaint of plaintiff Amber M. Talarico against them.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law without costs, that part of the motion of defendants Matthew J. Sile and James W. Sile for summary judgment dismissing the complaint against them is denied, and the complaint against them is reinstated.

Same memorandum as in *Gilkerson v Buck* (— AD3d — [Dec. 21, 2018] [4th Dept 2018]).

All concur except PERADOTTO, J.P., and CARNI, J., who dissent and vote to affirm in the same dissenting memorandum as in *Gilkerson v Buck* (— AD3d — [Dec. 21, 2018] [4th Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1072

TP 17-02208

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

IN THE MATTER OF DENNIS BRENNAN, PETITIONER,

V MEMORANDUM AND ORDER

MICHAEL C. GREEN, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DEPUTY COMMISSIONER OF DIVISION OF CRIMINAL JUSTICE SERVICES, AND NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES, RESPONDENTS.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY PHILIP SANDERS OF COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Paul Wojtaszek, J.], entered December 22, 2017) to review a determination of respondent New York State Division of Criminal Justice Services. The determination revoked petitioner's instructor certifications.

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, inter alia, to annul the determination of respondent New York State Division of Criminal Justice Services (Division) revoking his General Topics Instructor Certification and Firearms Instructor Certification (collectively, instructor certifications).

Initially, we note that, inasmuch as this proceeding does not involve a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court (*see Matter of Scherz v New York State Dept. of Health*, 93 AD3d 1302, 1303 [4th Dept 2012]; *see also* CPLR 7803 [4]; 7804 [g]). "A substantial evidence issue arises only where a quasi-judicial hearing has been held and evidence [has been] taken pursuant to law" (*Scherz*, 93 AD3d at 1303 [internal quotation marks omitted]). Here, no hearing was held, nor was one required by law or statute. Although the proceeding was erroneously transferred, we will address the merits of petitioner's contentions.

"Our review of this administrative determination is limited to

whether the determination 'was affected by an error of law or was arbitrary and capricious or an abuse of discretion' " (*Matter of Erie County Sheriff's Police Benevolent Assn., Inc. v Howard*, 159 AD3d 1561, 1562 [4th Dept 2018], quoting CPLR 7803 [3]). A determination is arbitrary and capricious "when it is taken without sound basis in reason or regard to the facts" (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [4th Dept 2014]). "An agency's determination is entitled to great deference . . . and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result" (*id.* [internal quotation marks and citations omitted]).

Petitioner does not contend that the determination is affected by an error of law and, viewing the record as a whole, we conclude that the Division's determination to revoke petitioner's instructor certifications is not arbitrary and capricious or an abuse of discretion. The record supports the Division's determination that each of the six bases for revocation specified in the administrative complaint was substantiated.

We have reviewed petitioner's remaining contentions and conclude that none warrants annulling the determination.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1075

KA 16-00217

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MIDDLEBROOKS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered January 30, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (three counts) and robbery in the second degree.

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

Memorandum: Defendant was convicted upon his plea of guilty of, inter alia, three counts of robbery in the first degree (Penal Law § 160.15 [4]) and, as a condition of the plea, validly waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). On a prior appeal from the judgment, we concluded that County Court did not err in failing to make any youthful offender determination because, having been convicted of an armed felony, defendant was eligible to be adjudicated a youthful offender only if the court determined that one or more of the CPL 720.10 (3) factors were present, and defendant had offered no evidence of the presence of those factors (*People v Middlebrooks*, 117 AD3d 1445, 1446-1447 [4th Dept 2014]). The Court of Appeals reversed our order, holding in pertinent part that, "when a defendant has been convicted of an armed felony . . . pursuant to CPL 720.10 (2) (a) (ii) . . . , and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3)" (*People v Middlebrooks*, 25 NY3d 516, 527 [2015]). Upon remittal, County Court determined on the record that defendant was not an eligible youth because neither of the factors set forth in CPL 720.10 (3) was present in this case and, therefore, that defendant is not eligible for a youthful offender adjudication.

Although the valid waiver of the right to appeal did not foreclose review of the court's initial failure to consider defendant's eligibility for adjudication as a youthful offender, the waiver forecloses defendant's challenge to the court's discretionary determination that defendant is not an eligible youth inasmuch as the court considered the CPL 720.10 (3) factors on the record before continuing the sentence (*see People v Pacherille*, 25 NY3d 1021, 1024 [2015]; *People v Simmons*, 159 AD3d 1270, 1271 [3d Dept 2018]; *People v King*, 151 AD3d 1651, 1652 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]). The valid waiver of the right to appeal also forecloses review of defendant's request that we exercise our interest of justice jurisdiction to determine that the CPL 720.10 (3) factors exist and to adjudicate him a youthful offender (*see People v Torres*, 110 AD3d 1119, 1119 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]; *People v Wilson*, 306 AD2d 212, 212 [1st Dept 2003], *lv denied* 100 NY2d 646 [2003]; *see generally Lopez*, 6 NY3d at 255).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1076

KA 14-01339

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALAN FICK, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO, FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered July 24, 2014. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), grand larceny in the fourth degree (three counts) and unlawful imprisonment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of burglary in the first degree (Penal Law § 140.30 [3], [4]), three counts of grand larceny in the fourth degree (§ 155.30 [4], [7], [8]), and one count of unlawful imprisonment in the first degree (§ 135.10). Contrary to defendant's contention, the evidence, viewed in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further 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 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court erred in refusing to suppress statements that he made to the police after he invoked his right to counsel. We reject that contention. The police officers who questioned defendant testified at the suppression hearing that defendant waived his *Miranda* rights and did not request an attorney. The court did not credit defendant's contrary testimony that he requested counsel before or during the questioning (*see People v Briggs*, 124 AD3d 1320, 1321 [4th Dept 2015], *lv denied* 25 NY3d 1198 [2015]). "We accord great weight to the determination of the suppression court because of its ability to observe and assess the

credibility of the witnesses," and we see no reason to disturb its determination (*id.* [internal quotation marks omitted]; *see People v Andrus*, 77 AD3d 1283, 1283 [4th Dept 2010], *lv denied* 16 NY3d 827 [2011]).

Defendant did not object to any of the alleged instances of prosecutorial misconduct during the prosecutor's opening and closing statements or during cross-examination of a defense witness, and therefore defendant failed to preserve for our review his contention that he was thereby deprived of a fair trial (*see People v Lane*, 106 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *People v Rumph*, 93 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]). In any event, defendant's contention lacks merit. We reject defendant's contention that the prosecutor appealed to the jurors' sympathy by describing the victim as an elderly 71-year-old man during his opening statement (*cf. People v Presha*, 83 AD3d 1406, 1408 [4th Dept 2011]). Additionally, contrary to defendant's contention that the prosecutor vouched for the credibility of a witness during summation, we conclude that the "isolated comment was a fair response to the comments of defense counsel on summation attacking the conduct and credibility of th[at] witness[] . . . and did not deprive defendant of a fair trial" (*People v Smart*, 224 AD2d 999, 999-1000 [4th Dept 1996], *lv denied* 88 NY2d 854 [1996]). Furthermore, we conclude that most of the remaining alleged instances of misconduct during the prosecutor's summation "were fair comment on the evidence and fair response to defense counsel's summation . . . and, to the extent that the prosecutor made inappropriate remarks, . . . they were 'not so pervasive or egregious as to deny defendant a fair trial' " (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *see People v Grady*, 40 AD3d 1368, 1374-1375 [3d Dept 2007], *lv denied* 9 NY3d 923 [2007]).

We agree with defendant, however, that the prosecutor exceeded the bounds of propriety by cross-examining a defense witness regarding an uncharged crime that defendant allegedly committed and by placing his own credibility in issue while doing so. "A prosecutor may not refer to matters not in evidence or call upon the jury to draw conclusions that cannot fairly be inferred from the evidence" (*People v Collins*, 12 AD3d 33, 39-40 [1st Dept 2004]). Indeed, "[i]t is fundamental that the jury must decide the issues on the evidence" (*People v Ashwal*, 39 NY2d 105, 109 [1976]) and, in this case, the prosecutor strayed outside " 'the four corners of the evidence' " when he implied that defendant committed different crimes (*id.*). Nevertheless, reversal is unwarranted where a prosecutor's error has not substantially prejudiced a defendant's trial (*see People v Galloway*, 54 NY2d 396, 401 [1981]) and, although the dissent is correct that we have previously admonished this prosecutor, the instant trial occurred before that admonition. Therefore, although we strongly condemn the prosecutor's conduct during cross-examination, we conclude that it does not warrant reversal here (*see People v Dat Pham*, 283 AD2d 952, 952 [4th Dept 2001], *lv denied* 96 NY2d 900 [2001]; *see generally People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]; *People v Miller*, 104 AD3d 1223, 1223-

1224 [4th Dept 2013], *lv denied* 21 NY3d 1017 [2013]).

Defendant also contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged instances of prosecutorial misconduct. We reject that contention. As noted, although we condemn the prosecutor's actions, we nevertheless conclude that defendant was not deprived of a fair trial by those actions, and we therefore further conclude that "defense counsel's failure to object to the alleged instances of prosecutorial misconduct did not constitute ineffective assistance of counsel" (*Edwards*, 159 AD3d at 1426; *see People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]).

Finally, the sentence is not unduly harsh or severe.

All concur except DEJOSEPH, and TROUTMAN, JJ., who dissent in part and vote to reverse in accordance with the following memorandum: We respectfully dissent in part because we disagree with the majority's conclusion that the prosecutor's actions do not warrant reversal in this case.

Initially, as acknowledged by the majority, this is not the first time that this prosecutor has been admonished by this Court (*see People v Lowery*, 158 AD3d 1179, 1180 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]). In *Lowery*, we noted that "the prosecutor's ill-advised decision to clap sarcastically during summation as he was describing defendant's efforts to report a change of address is entirely inconsistent with the standards of conduct expected of prosecutors, and we therefore admonish the prosecutor for such conduct" (*id.*).

Although the majority is correct that defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct (*see id.* at 1179), we conclude that his contention warrants the exercise of our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]) given "our overriding responsibility to ensure that the cardinal right of a defendant to a fair trial is respected in every instance" (*People v Scheidelman*, 125 AD3d 1426, 1427 [4th Dept 2015] [internal quotation marks omitted]). Based upon that review, we agree with defendant that he was deprived of a fair trial, and we would therefore reverse the judgment and grant a new trial on counts three through eight of the indictment.

We agree with defendant that the prosecutor caused him substantial prejudice during the cross-examination of a defense witness. " 'It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged' " (*People v Cornell*, 110 AD3d 1443, 1445 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]). During his cross-examination of the defense witness, the prosecutor implied that a month before the commission of the instant crimes, defendant broke the

witness's vehicle windows in retaliation for the witness's use of drugs that defendant had intended for sale. When the witness denied knowing who broke his windows, the prosecutor stated, "I would bet my career that person is in the courtroom." We conclude that, in making that statement, the prosecutor "made [himself] an unsworn witness and injected the integrity of the District Attorney's office into the case" (*People v Morgan*, 111 AD3d 1254, 1256 [4th Dept 2013]). Moreover, the prosecutor improperly implied that defendant committed a crime that " 'was irrelevant to any issue in the case and only could have prejudiced defendant by suggesting to the jury that he was an erratic and potentially dangerous person who had the propensity to commit the crime[s] at issue' or some other criminal act" (*Scheidelman*, 125 AD3d at 1428; *see People v Ashwal*, 39 NY2d 105, 110 [1976]; *People v Downing*, 112 AD2d 24, 26 [4th Dept 1985]).

We further agree with defendant that remarks in the prosecutor's summation were inflammatory and prejudicial. The prosecutor referred to defendant's witnesses as "liars," compounding the prejudicial effect of his improper cross-examination (*see People v Fiori*, 262 AD2d 1081, 1081 [4th Dept 1999]; *People v Miller*, 174 AD2d 901, 903 [3d Dept 1991]). More egregiously, the prosecutor referred to defendant as a "monster" four times. Such name-calling was improper and served no purpose other than to suggest to the jurors that defendant was inhuman and dangerous (*see People v Jones*, 134 AD3d 1588, 1589 [4th Dept 2015]; *People v Almethoky*, 9 AD3d 882, 882 [4th Dept 2004]; *People v Connette*, 101 AD2d 699, 700 [4th Dept 1984]).

We recognize, as does the majority, that " '[r]eversal is an ill-suited remedy for prosecutorial misconduct' " (*People v Galloway*, 54 NY2d 396, 401 [1981]). Nevertheless, in light of the severity and frequency of the prosecutor's misconduct, the court's failure to take any action to dilute the effect thereof, and the fact that the evidence of defendant's guilt is less than overwhelming (*see People v Griffin*, 125 AD3d 1509, 1512 [4th Dept 2015]), we cannot conclude that absent such misconduct the same result would undoubtedly have been reached (*see Jones*, 134 AD3d at 1589; *Griffin*, 125 AD3d at 1512; *People v Mott*, 94 AD2d 415, 419 [4th Dept 1983]). We therefore agree with defendant that reversal is required.

Mark W. Bennett

Entered: December 21, 2018

Clerk of the Court

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

1081

KA 17-00483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ZACHARIAH A. MADONNA, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), dated November 4, 2016. 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 modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that the People failed to prove by the requisite clear and convincing evidence that he had a history of alcohol and drug abuse (*see generally* § 168-d [3]). We thus conclude that County Court erred in assessing 15 points on the risk assessment instrument (RAI) for risk factor 11 and that defendant's score on the RAI must be reduced from 85 to 70, rendering him a presumptive level one risk. We therefore modify the order accordingly.

The SORA Risk Assessment Guidelines and Commentary for risk factor 11 state in relevant part that "[a]lcohol and drug abuse are highly associated with sex offending . . . The guidelines reflect this fact by adding 15 points if an offender has a substance abuse history . . . It is not meant to include occasional social drinking. In instances where the offender abused drugs and/or alcohol in the distant past, but his more recent history is one of prolonged abstinence, the . . . court may choose to score zero points in this category" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 15 [2006]). At the SORA hearing, the People presented evidence that defendant drank one can of beer each month.

We agree with defendant that such evidence was insufficient to warrant the assessment of points under risk factor 11 (*see People v Palmer*, 20 NY3d 373, 378-379 [2013]). The People also presented evidence that defendant smoked marihuana in his teenage years and early twenties, but thereafter participated in a drug treatment program and, at the time of the presentence interview, had not smoked marihuana for four years. We agree with defendant that the People's evidence established that his recent history of drug use was one of prolonged abstinence and was also insufficient to warrant the assessment of points under risk factor 11 (*see People v Faul*, 81 AD3d 1246, 1248 [4th Dept 2011]; *People v Wilbert*, 35 AD3d 1220, 1221 [4th Dept 2006]; *People v Abdullah*, 31 AD3d 515, 516 [2d Dept 2006]).

In light of our determination, defendant's remaining contentions are academic.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1085

CA 17-02158

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

LAPORSHA SHAW, PLAINTIFF-APPELLANT,

V ORDER

BARBARA FRIEDLY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, ROCHESTER (KEVIN MATHEWSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered May 22, 2017. The order granted the motion of defendant Barbara Friedly for summary judgment and dismissed the complaint against her.

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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1086

CA 17-02159

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

LAPORSHA SHAW, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BARBARA FRIEDLY, DEFENDANT-RESPONDENT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JOHN TROP, ROCHESTER (KEVIN MATHEWSON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered October 25, 2017. The order denied the motion of plaintiff for leave to reargue or renew.

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.

Memorandum: In this premises liability action, plaintiff moved for leave to reargue and renew her opposition to the motion of Barbara Friedly (defendant) for summary judgment dismissing the complaint against her. We dismiss the appeal from that part of the order denying leave to reargue (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984 [4th Dept 1990]) and affirm that part of the order denying leave to renew for reasons stated in the decision at Supreme Court. We add only that, even assuming, arguendo, that plaintiff submitted new facts that could raise a triable issue of fact whether defendant was an out-of-possession landlord at the time of plaintiff's accident, we conclude that the motion insofar as it sought leave to renew was properly denied. Those new facts, which had not been submitted in opposition to defendant's prior motion, "would [not] change the prior determination" because the court also granted that motion on the ground that defendant neither created the dangerous condition nor had actual or constructive notice of it (CPLR 2221 [e] [2]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1114

CA 18-00294

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

JOHN T. TIMKEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF LOCKPORT, DEFENDANT-APPELLANT.

WEBSTER SZANYI LLP, BUFFALO (RYAN G. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Niagara County (Sara Sheldon, A.J.), entered July 7, 2017. The judgment granted the motion of plaintiff for summary judgment, denied the cross motion of defendant for summary judgment and declared that defendant is obligated to provide certain health insurance benefits to plaintiff.

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

Memorandum: In July 1987, defendant City of Lockport (City) hired plaintiff to a position in its Water Department, where plaintiff was represented by the American Federation of State, County and Municipal Employees (AFSCME). In December 2007, the City promoted plaintiff to a supervisory position, where he was represented by the Civil Service Employees Association (CSEA). In 2008, plaintiff left the City's employ and began working for Niagara County. In 2016, plaintiff requested that the City provide him medical benefits based on the relevant collective bargaining agreements (CBAs) between the City and AFSCME and between the City and CSEA. The City refused, and plaintiff commenced this action for breach of contract and judgment declaring that the City is required to provide plaintiff with medical benefits. Plaintiff moved for summary judgment on his complaint, and the City opposed the motion and cross-moved for summary judgment seeking a declaration that it was not required to provide plaintiff with medical benefits. Supreme Court granted plaintiff's motion, denied the City's cross motion, and declared that the City was obligated to provide plaintiff with medical benefits under the AFSCME CBA. The City appeals, and we affirm.

"As a general rule, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement

. . . However, '[r]ights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement' . . . , and we must look to well established principles of contract interpretation to determine whether the parties intended that the contract give rise to a vested right. '[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms' " (*Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]). Where, however, contract language "is 'reasonably susceptible of more than one interpretation,' . . . extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language" (*Fernandez v Price*, 63 AD3d 672, 675 [2d Dept 2009], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 572-573 [1986]).

Contrary to the City's contention, we conclude that the court properly determined that the plain meaning of the provisions at issue in the AFSCME CBA establishes that plaintiff has a vested right to medical benefits, those rights vested when he completed his 20th year of service, and plaintiff became eligible to receive said benefits when he reached retirement age (*see Kolbe*, 22 NY3d at 353; *Guerrucci v School Dist. of City of Niagara Falls*, 126 AD3d 1498, 1499-1500 [4th Dept 2015], *lv dismissed* 25 NY3d 1194 [2015]). Plaintiff's right to medical benefits vested when he satisfied the criteria in the AFSCME CBA, and there is no language in the AFSCME CBA indicating that employees would forfeit or surrender their vested rights if they transferred jobs or unions prior to reaching retirement age. We thus conclude that the court's interpretation of the AFSCME CBA " 'give[s] fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized . . . [and does] not . . . leave one of its provisions substantially without force or effect' " (*Guerrucci*, 126 AD3d at 1500). We have considered the City's remaining contentions and conclude that they are without merit.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1121

KA 17-00395

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH WARNER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered November 22, 2016. 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: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that his waiver of the right to appeal is invalid. We reject that contention. The plea colloquy and the written waiver of the right to appeal, which defendant indicated that he had reviewed with his attorney and understood, demonstrate that he knowingly, intelligently and voluntarily waived the right to appeal (*see People v Cochran*, 156 AD3d 1474, 1474 [4th Dept 2017], *lv denied* 30 NY3d 1114 [2018]; *People v Farrara*, 145 AD3d 1527, 1527 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]; *see also People v Ramos*, 7 NY3d 737, 738 [2006]). Contrary to defendant's contention, County Court "did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea" (*People v Bentley*, 63 AD3d 1624, 1625 [4th Dept 2009], *lv denied* 13 NY3d 742 [2009]). The valid waiver of the right to appeal forecloses our review of defendant's contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Cochran*, 156 AD3d at 1474), as well as our review of his contention that the sentence constitutes cruel and unusual punishment (*see People v Santilli*, 16 AD3d 1056, 1056-1057 [4th Dept 2005]).

Even assuming, arguendo, that defendant preserved for our review his contention that his plea was not knowing, voluntary and

intelligent (*see People v Thomas* [appeal No. 2], 23 AD3d 1156, 1156 [4th Dept 2005], *lv denied* 6 NY3d 759 [2005]), we conclude that defendant's contention is without merit. Although defendant initially denied committing the crime, upon further inquiry by the court he admitted that he discharged a weapon in another person's direction with the intention of causing serious physical injury to that person (*see People v Campbell*, 256 AD2d 1112, 1112 [4th Dept 1998]; *People v Brow*, 255 AD2d 904, 905 [4th Dept 1998]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1122

KA 16-01366

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN COLLINS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 26, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, endangering the welfare of a child (two counts), theft of services and criminal possession of a weapon in the fourth degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, manslaughter in the second degree (Penal Law § 125.15 [1]) and two counts of endangering the welfare of a child (§ 260.10 [1]). The prosecution arose from defendant's conduct in leaving his son and daughter alone for the night in his single-family house while providing electricity thereto by running a gas-powered generator in the basement. The generator emitted carbon monoxide into the house and caused the son's hospitalization for serious injuries and the daughter's death. In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of scheme to defraud in the first degree (§ 190.65 [1] [b]) arising from allegations that, on two separate occasions in the months following the incident with the children, he agreed to rent the house to a prospective tenant, accepted a security deposit from the prospective tenant, and refused to return the security deposit even though the house was not ready for occupancy as promised when each prospective tenant sought to move in. We affirm in each appeal.

Defendant contends in appeal No. 1 that the evidence is not legally sufficient to support the conviction of manslaughter in the second degree. "A person is guilty of manslaughter in the second degree when," as relevant here, "[h]e recklessly causes the death of another person" (Penal Law § 125.15 [1]). With respect to the

culpable mental state, "[a] person acts recklessly with respect to a result . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur . . . The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation" (§ 15.05 [3]). It is not enough that a person should have known of the substantial and unjustifiable risk; rather, the person "must have actually known of, and consciously disregarded, [that] risk" (*People v Lewie*, 17 NY3d 348, 357 [2011]).

Inasmuch as defendant, in moving for a trial order of dismissal, contended only that the evidence was legally insufficient to establish that he consciously disregarded a substantial and unjustifiable risk of death, he preserved his contention only with respect to that component of recklessness (*see People v Gray*, 86 NY2d 10, 19 [1995]; *see generally Lewie*, 17 NY3d at 362).

In any event, defendant's contention is without merit in all respects because the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction of manslaughter in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "Often there is no direct evidence of a defendant's mental state and the jury must infer the *mens rea* circumstantially from the surrounding facts" (*People v Smith*, 79 NY2d 309, 315 [1992]; *see People v Feingold*, 7 NY3d 288, 296 [2006]; *People v Mitchell*, 94 AD3d 1252, 1254 [3d Dept 2012], *lv denied* 19 NY3d 964 [2012]). Here, the People established that defendant was an experienced HVAC professional who installed heating and air conditioning units and new furnaces, and also completed electrical work for such furnaces. After electrical service to the house was disconnected due to nonpayment, defendant initially placed the gas-powered generator outside in the backyard, which indicated that defendant knew that the generator was intended to be used outdoors. Only after a deputy sheriff responded to a noise complaint from defendant's neighbor a few days later did defendant move the generator from the backyard to the basement of the house. Defendant placed the generator in the corner of the basement with a fan on the floor blowing toward a nearby open window. As established by witness testimony and photographic exhibits, the generator included a warning label on the top near the gas cap expressly warning that "to reduce the risk of injury or death . . . [d]o not operate in any building, vehicle or enclosure" and that "[e]xplosion, fire or carbon monoxide poisoning may result" (internal quotation marks omitted). The jury could reasonably infer from defendant's professional HVAC experience and the warning label, along with his decisions with respect to the initial placement of the generator outside and the subsequent attempted "ventilation" of the generator in the basement, that he actually knew that operating the generator inside in any manner posed a substantial and unjustifiable risk of death by the emission of toxic fumes (*see Lewie*, 17 NY3d at 357; *People v Peters*, 126 AD3d 1029, 1031 [3d Dept 2015], *lv denied* 25 NY3d 991 [2015]).

Defendant contends that the evidence is legally insufficient with respect to manslaughter in the second degree because it did not establish that he had actual knowledge that his attempted "ventilation" was inadequate to remediate the risk associated with operating the generator in the basement. We reject that contention. Not only was defendant's attempted "ventilation" indicative of his knowledge of the subject risk of operating the generator inside in any manner, but the evidence also established that defendant knew that his purported remedial efforts were ineffective. The son testified that, during the period when the generator was running in the basement, it sometimes emitted a noticeable smell of fumes. The son also testified that, a couple days prior to the daughter's death, he was in the basement with defendant while the generator was running and told defendant that he did not feel well. Inasmuch as defendant responded to the son's complaint by directing him to go outside, the jury could reasonably infer that defendant was aware that, despite his attempted "ventilation," toxic emissions from the generator were present in the house and were detrimentally affecting the health of his children when they were inside. The jury was also entitled to infer that defendant actually knew that the attempted "ventilation" of the toxic emissions inside the house from the running generator was ineffective because the son called defendant after defendant left the house on the night in question and prior to the daughter's death to report that he and the daughter were not feeling well, which was consistent with his prior complaint of illness made in defendant's presence.

Contrary to defendant's contention, the evidence is also legally sufficient to establish that he consciously disregarded the substantial and unjustifiable risk of death. Defendant deliberately moved the generator from the backyard to the basement despite having actual knowledge that operating the generator inside in any manner posed a substantial and unjustifiable risk of death by the emission of toxic fumes. He disregarded that risk by leaving the children home alone while the generator was running, and in a house with no functional carbon monoxide detectors, to go on a date with a woman. Moreover, defendant received a call from the son on the night in question reporting that he and the daughter were not feeling well, and the woman reiterated that same complaint to defendant after making a follow-up call to the son. The evidence established that defendant dismissed the children's reported condition, "played it off" as though the son was merely bored and wanted defendant home in order to use defendant's cell phone data, declined to return home, and insisted that he and the woman continue to their destination. Based on the foregoing, we conclude that the evidence is legally sufficient to establish that defendant consciously disregarded the substantial and unjustifiable risk of death, of which he was actually aware, posed by operating the generator inside the house (*see Lewie*, 17 NY3d at 357; *Peters*, 126 AD3d at 1031).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime of manslaughter in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on that count is not against the weight of the evidence (*see Peters*, 126 AD3d at 1031; *see generally*

Bleakley, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see generally Bleakley*, 69 NY2d at 495).

Defendant correctly concedes that he failed to preserve for our review his contention in appeal No. 1 that he was deprived of a fair trial by prosecutorial misconduct on summation inasmuch as he did not object to any alleged instances thereof (*see People v Reed*, 163 AD3d 1446, 1447 [4th Dept 2018], *lv denied* — NY3d — [2018]). 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 also contends in appeal No. 1 that he was denied effective assistance of counsel based upon several acts or omissions on the part of defense counsel. We reject defendant's contention that defense counsel was ineffective in failing to object to remarks made by the prosecutor on summation. The prosecutor should have avoided describing as "reckless" additional conduct by defendant relating to the endangering the welfare of a child counts because the only reckless conduct for which defendant was charged related to the operation of the generator inside the house and recklessness is not the relevant mens rea for endangering the welfare of a child (*see* Penal Law § 260.10 [1]). However, the prosecutor's conflation of the elements of the charges "could not have been interpreted by the jury as an instruction on the law, because [County] Court repeatedly advised the jurors that it would instruct them on the law and subsequently gave correct instructions on the law" (*People v Elder*, 152 AD3d 787, 788 [2d Dept 2017], *lv denied* 30 NY3d 979 [2017]). Thus, " '[t]o the extent that a portion of the prosecutor's summation could be viewed as containing a misstatement of law, . . . any prejudice was avoided by the court's instructions, which the jury is presumed to have followed' " (*People v Harper*, 132 AD3d 1230, 1234 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). Further, even assuming, arguendo, that the prosecutor exceeded the broad bounds of permissible rhetorical comment by denigrating the defense and encouraging the jury to do justice for the subject children and society, we conclude that those comments were not so egregious as to deprive defendant of a fair trial (*see People v Clark*, 138 AD3d 1449, 1451 [4th Dept 2016], *lv denied* 27 NY3d 1130 [2016]; *People v Scott*, 60 AD3d 1483, 1484 [4th Dept 2009], *lv denied* 12 NY3d 859 [2009]). Based on the foregoing, we conclude that defense counsel's failure to object to the remarks at issue did not "render[ ] his overall representation constitutionally defective" (*People v Wragg*, 26 NY3d 403, 411 [2015]; *see People v Williams*, 29 NY3d 84, 90 [2017]; *People v Cooper*, 134 AD3d 1583, 1586 [4th Dept 2015]).

We also reject defendant's contention that defense counsel was ineffective in failing to request the lesser included charge of criminally negligent homicide. Although there was a reasonable view of the evidence that defendant committed criminally negligent homicide but not manslaughter in the second degree (*see People v Heide*, 84 NY2d 943, 944 [1994]), "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 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]), and here defendant "has not demonstrated that the failure to request [such a] charge was other than an acceptable all-or-nothing defense strategy" (*People v Rosario*, 157 AD3d 988, 994 [3d Dept 2018], *lv denied* 31 NY3d 1121 [2018] [internal quotation marks omitted]; *see People v McFadden*, 161 AD3d 1570, 1571 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]). "Indeed, it would have been a reasonable strategy for defense counsel to decide not to request criminally negligent homicide as a lesser included offense because, without that charge, the chances of defendant being acquitted outright [with respect to homicide] were increased" (*McFadden*, 161 AD3d at 1571). Defendant nonetheless contends that such a strategy was unreasonable under the circumstances of this case because the jury would have found him culpable in some manner given the evidence against him, and the absence of the lesser included charge deprived the jury of the opportunity to compromise, i.e., caused the jury to convict him of manslaughter in the second degree. We reject that contention, however, because the jury could have acquitted him entirely or compromised by convicting him of only the two counts of endangering the welfare of a child (*see id.*).

Contrary to defendant's contention, defense counsel was not ineffective for failing to move to dismiss the count of criminal impersonation in the second degree "inasmuch as [the court] sua sponte dismissed . . . th[at] count[ ]" (*People v Place*, 152 AD3d 976, 980 [3d Dept 2017], *lv denied* 30 NY3d 1063 [2017]). Defendant's remaining contention that defense counsel was unfamiliar with the applicable law is belied by the record.

We reject defendant's further contention that the sentence in appeal No. 1 is unduly harsh and severe.

In view of our determination affirming the judgment in appeal No. 1, we reject defendant's contention that the judgment in appeal No. 2 must be reversed on the ground that he pleaded guilty in appeal No. 2 based on the promise that the sentence in appeal No. 2 would run concurrently with the sentence in appeal No. 1 (*see People v Roig*, 117 AD3d 1462, 1463 [4th Dept 2014], *lv denied* 23 NY3d 1042 [2014]; *People v Khammonivang*, 68 AD3d 1727, 1727-1728 [4th Dept 2009], *lv denied* 14 NY3d 889 [2010]; *cf. People v Fuggazzatto*, 62 NY2d 862, 863 [1984]). Finally, even assuming, arguendo, that defendant's waiver of the right to appeal in appeal No. 2 is invalid and thus does not preclude our review of his challenge to the severity of the sentence in that appeal (*see People v Pedro*, 134 AD3d 1396, 1397 [4th Dept 2015]; *People v Caufield*, 126 AD3d 1542, 1542 [4th Dept 2015]), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1125

KA 16-00930

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARNELL D. HOWARD, ALSO KNOWN AS DARNELL HOWARD, ALSO KNOWN AS MCKENZIE, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR DEFENDANT-APPELLANT.

DARNELL D. HOWARD, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered December 2, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, reckless endangerment in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [2] [depraved indifference murder]) and reckless endangerment in the first degree (§ 120.25), defendant contends in his main brief that his conviction of those crimes is not supported by legally sufficient evidence that he acted with depraved indifference to human life. We reject that contention.

A person commits depraved indifference murder when, "[u]nder circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person" (Penal Law § 125.25 [2]), and a person commits reckless endangerment in the first degree "when, under circumstances evincing a depraved indifference to human life, he [or she] recklessly engages in conduct which creates a grave risk of death to another person" (§ 120.25). Depraved indifference is a mental state that is " 'best understood as an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not' " (*People v Heidgen*, 22 NY3d 259, 274 [2013], *cert denied* 135 S Ct 873 [2014], quoting *People v*

Feingold, 7 NY3d 288, 296 [2006]; *see People v Archie*, 118 AD3d 1292, 1293 [4th Dept 2014], *lv denied* 26 NY3d 965 [2015]). Thus, "[a]s the drafters of the Penal Law put it, depraved indifference murder is 'extremely dangerous and fatal conduct performed without specific homicidal intent but with a depraved kind of wantonness' " (*People v Payne*, 3 NY3d 266, 272 [2004], *rearg denied* 3 NY3d 767 [2004]). Here, the evidence establishes that defendant repeatedly fired a handgun into a crowd, and "shooting into a crowd is a '[q]uintessential example[]' of depraved indifference" (*People v Ramos*, 19 NY3d 133, 136 [2012]; *see People v Suarez*, 6 NY3d 202, 214 [2005]; *Payne*, 3 NY3d at 272). Thus, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to establish that defendant acted with depraved indifference within the meaning of sections 125.25 (2) and 120.25 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention in his main brief, we conclude that the evidence is also legally sufficient to establish that defendant is the person who fired the shots (*see generally id.*).

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant consented to the annotations on the verdict sheet and thus waived his present contention that the verdict sheet contained improper annotations concerning the alleged incident (*see People v Cipollina*, 94 AD3d 1549, 1550 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]). "Although generally 'the lack of an objection to the annotated verdict sheet by defense counsel cannot be transmuted into consent' (*People v Damiano*, 87 NY2d 477, 484 [1996]), it is well settled that consent to the submission of an annotated verdict sheet may be implied where defense counsel 'fail[s] to object to the verdict sheet after having an opportunity to review it' " (*People v Johnson*, 96 AD3d 1586, 1587 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]; *see People v Bjork*, 105 AD3d 1258, 1264 [3d Dept 2013], *lv denied* 21 NY3d 1040 [2013], *cert denied* 571 US 1213 [2014]; *see also People v O'Kane*, 30 NY3d 669, 672-673 [2018]). Here, the record unequivocally establishes that defense counsel reviewed the annotated verdict sheet and raised no objection to it, thereby implicitly consenting to it.

Defendant failed to object to the People's introduction of evidence concerning prior bad acts and thus failed to preserve for our review his contention in his main brief that such evidence was improperly admitted due to the People's failure to seek a *Ventimiglia* ruling concerning the admissibility of that evidence (*see* CPL 470.05 [2]; *see generally People v Ventimiglia*, 52 NY2d 350, 362 [1981]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). In addition, assuming, arguendo, that defendant preserved for our review his challenge in his main brief to the admissibility of the photographs of the deceased, we conclude that County Court did not

abuse its discretion in admitting such photographs. "The general rule is that photographs of the deceased are admissible [where, as here,] they tend to prove or disprove a disputed or material issue, to illustrate or elucidate other relevant evidence, or to corroborate or disprove some other evidence offered or to be offered" (*People v Pobliner*, 32 NY2d 356, 369 [1973], *rearg denied* 33 NY2d 657 [1973], *cert denied* 416 US 905 [1974]).

Contrary to defendant's additional contention in his main brief, the court properly refused to suppress his statements to the police. The evidence at the suppression hearing supports the court's determination that defendant did not, by stating that he wished to stop talking, make an unequivocal request for an attorney (*see People v Liggins*, 19 AD3d 324, 325 [3d Dept 2005], *lv denied* 5 NY3d 853 [2005]; *cf. People v Porter*, 9 NY3d 966, 967 [2007]). In addition, because questioning ceased when defendant subsequently made such an unequivocal request for an attorney, the court properly determined that the statements defendant made prior to that point were not subject to suppression (*see People v Beasley*, 147 AD3d 1549, 1549 [4th Dept 2017], *lv denied* 29 NY3d 1028 [2017]).

We reject defendant's contentions in his main brief that the sentence imposed constitutes cruel and unusual punishment and is unduly harsh and severe.

Finally, we have reviewed the remaining contention in defendant's pro se supplemental brief, and we conclude that it does not require reversal or modification of the judgment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1128

KA 16-02088

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN COLLINS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered April 21, 2016. The judgment convicted defendant, upon his plea of guilty, of scheme to defraud in the first degree.

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

Same memorandum as in *People v Collins* ([appeal No. 1] — AD3d — [Dec. 21, 2018] [4th Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1149

KA 12-02175

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS N. WALKER, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO (PHIL MODRZYNSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered November 13, 2012. The judgment convicted defendant, upon a nonjury verdict, of robbery in the first degree (three counts) and robbery in the second degree (three counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing those parts convicting defendant of robbery in the first degree under counts one and three of the indictment and robbery in the second degree under counts two and four of the indictment and dismissing those counts of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of three counts of robbery in the first degree (Penal Law § 160.15 [4]) and three counts of robbery in the second degree (§ 160.10 [1]). The charges stem from two separate and distinct robberies that were committed 13 days apart. Counts one through four of the indictment concern the first incident, in which there were two victims, and counts five and six concern the second incident, in which there was only one victim. Before trial, Supreme Court suppressed identification testimony from one of the two victims of the first incident; the other victim of that incident was never able to identify the assailants. The court refused to suppress identification testimony from the victim of the second incident. After the People moved for an independent source hearing with respect to the suppressed identification testimony, defendant applied to the court for an "identification expert." Following the independent source hearing, the court adhered to its determination to suppress identification testimony related to the first incident and, without elaboration, denied defendant's "request for additional funds to procure an [eyewitness] identification expert."

Defendant now contends that the court erred in denying his application for funds to retain an eyewitness identification expert only insofar as it related to the identification testimony from the victim of the second incident. Even assuming, arguendo, that defendant's original application related to the identification testimony from the victim of the second incident and is thus preserved for our review, we conclude that the court "did not abuse or improvidently exercise its discretion" in denying defendant's application (*People v Pike*, 63 AD3d 1692, 1693 [4th Dept 2009], *lv denied* 13 NY3d 838 [2009]; *see People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *People v Mallayev*, 120 AD3d 1358, 1358 [2d Dept 2014], *lv denied* 24 NY3d 1086 [2014]). To prevail on an application to have funds allocated for the retention of an expert witness, defendant "was required to show that he was indigent, that the service was necessary to his defense and, if the compensation he sought exceeded the statutory limit of $1,000, that extraordinary circumstances justified the expenditure" (*People v Clarke*, 110 AD3d 1341, 1342 [3d Dept 2013], *lv denied* 22 NY3d 1197 [2014]; *see* County Law § 722-c). Here, however, defendant failed to establish that the expert was " 'necessary to his defense' " (*Clark*, 142 AD3d at 1340; *see Clarke*, 110 AD3d at 1342; *Pike*, 63 AD3d at 1693), or "that extraordinary circumstances justified [an] expenditure" exceeding the statutory limit (*Clarke*, 110 AD3d at 1342). The eyewitness identification by the victim of the second incident was corroborated by surveillance video from two separate locations (*see People v Abney*, 13 NY3d 251, 269 [2009]; *People v Granger*, 122 AD3d 940, 941 [2d Dept 2014], *lv denied* 25 NY3d 989 [2015]; *cf. People v LeGrand*, 8 NY3d 449, 452 [2007]), and defense counsel conceded at trial that "identity [was] really not an issue" with respect to the second incident.

Defendant further contends that the conviction on each count is not supported by legally sufficient evidence because the People failed to establish that defendant committed the robberies, displayed what appeared to be a firearm, or was aided by another person actually present. With respect to counts one through four of the indictment, the only contention that defendant preserved for our review through a motion specifically directed at the ground advanced on appeal is the contention that the People failed to establish defendant's identity as the perpetrator of the robbery at issue in those counts (*see generally People v Gray*, 86 NY2d 10, 19 [1995]). We reject that contention. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish defendant's identity as one of the two people who committed the robberies underlying counts one through four (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We further conclude, with respect to the unpreserved contentions, that the evidence is legally sufficient to establish that defendant displayed what appeared to be a firearm (*see generally People v Lopez*, 73 NY2d 214, 220 [1989]) and that he was aided by another person actually present (*see generally Bleakley*, 69 NY2d at 495).

With respect to the legal sufficiency challenges to counts five and six, the only contention that defendant preserved for our review is the contention that the People did not establish he displayed what appeared to be a firearm (*see Gray*, 86 NY2d at 19). That contention lacks merit inasmuch as the victim testified that defendant pointed a gun at her before he and his accomplice drove her to various locations to withdraw money from her bank account. Moreover, surveillance video admitted in evidence depicts a firearm protruding from the waistband of defendant's pants. We thus conclude that the evidence is legally sufficient to establish that defendant displayed what appeared to be a firearm during the commission of the robbery (*see generally Lopez*, 73 NY2d at 220; *Bleakley*, 69 NY2d at 495). We further conclude, with respect to the unpreserved contentions, that the evidence is legally sufficient to establish defendant's identity as one of the perpetrators of the robbery and that he was aided by another person who was actually present during the commission of the offense (*see generally Bleakley*, 69 NY2d at 495). The victim identified defendant at trial, and surveillance video established that defendant and one other man were with the victim when she was taken to various places to withdraw money from her bank account and to use her debit card to make purchases for the two men.

Defendant further contends that the verdict on each count is against the weight of the evidence. With respect to counts one through four, we agree. Although the court in this nonjury trial could have considered defendant's commission of the second robbery as probative of his identity as the perpetrator of the first robbery (*see People v Nix*, 192 AD2d 1116, 1116 [4th Dept 1993], *lv denied* 82 NY2d 757 [1993]; *cf. People v Robinson*, 68 NY2d 541, 549-550 [1986]), the court stated that it intended "to consider counts one through four completely separate and distinct from counts [five and] six" and would "not allow one to influence the other" as the court had "promise[d]" in its *Molineux* ruling. The court, in effect, charged itself to consider only evidence directly related to the first incident in determining defendant's guilt of counts one through four. In rendering its verdict, the court reiterated that it had limited its review of the evidence on counts one through four to only that evidence directly related to those counts, eschewing any consideration of evidence related to the second incident as *Molineux* evidence. We are constrained to do likewise.

Viewing the evidence in light of the elements of the crimes and the effective charge that the court gave itself (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict on counts one through four is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The only evidence considered by the court on the issue of defendant's identity as the perpetrator in the first incident was a grainy surveillance video. Although that video might provide legally sufficient evidence of the perpetrator's identity, we conclude that it is simply too grainy to establish the perpetrator's identity beyond a reasonable doubt (*cf. People v Montgomery*, 125 AD3d 1455, 1455-1456 [4th Dept 2015], *lv denied* 25 NY3d 1168 [2015]). Indeed, although the police investigator who was assigned to the case was familiar with defendant from prior

investigations, he was unable to identify defendant in the video. We therefore modify the judgment by reversing those parts convicting defendant of robbery in the first degree under counts one and three of the indictment and robbery in the second degree under counts two and four of the indictment and dismissing those counts of the indictment.

We further conclude, however, that the verdict on counts five and six is not against the weight of the evidence. Contrary to defendant's contention, the victim of that incident was able to identify defendant as the perpetrator of the offense, and that identification was corroborated by clear and precise surveillance video from two separate locations. Even assuming, arguendo, that a different verdict would not have been unreasonable, it cannot be said that the court failed to give the evidence the weight it should have been accorded (*see generally Bleakley*, 69 NY2d at 495; *People v Carter*, 145 AD3d 1567, 1568 [4th Dept 2016]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1150

KA 15-01853

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCENT E. SMITH, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO, HODGSON RUSS LLP (PETER H. WILTENBURG OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, 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 21, 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]).

On July 21, 2014, as two Buffalo police officers were patrolling a high-crime area in a marked police vehicle, they saw several people standing outside on the stoop of an apartment complex. As the patrol vehicle neared the building, one of the officers saw defendant holding the front door of the apartment complex and staring at the patrol vehicle; the officer then saw defendant enter the building and run up an interior set of stairs. The officers entered the building and saw defendant exit an apartment. One of the officers asked defendant "what he was doing in the apartment," and defendant responded, "I wasn't in the apartment." The officer walked toward defendant and again asked him what he was doing in the apartment. Defendant responded that he "was going to get a cup for his drink." Defendant did not have a cup in his hands. Defendant's statements made the officer suspect that defendant was trying to hide something, and the officer asked another officer, who had since arrived at the apartment complex, to take defendant down the stairs so the officer could speak to the apartment's tenant. The tenant consented to a search of the apartment, during which the officers discovered a handgun stashed in a closet that was located within a few feet of the apartment door. The tenant denied having seen the handgun before. Defendant was arrested

and charged with criminal possession of a weapon in the second degree. Defendant subsequently filed an omnibus motion seeking, inter alia, suppression of the handgun and certain statements he made to the police. Following a hearing, Supreme Court refused to suppress the evidence, and defendant thereafter pleaded guilty to the charge. We affirm.

Initially, we note that, although defendant's motion sought suppression of his statements and the handgun, on appeal he seeks suppression only of his statements.

"It is well established that, in evaluating the legality of police conduct, we 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter' " (*People v Burnett*, 126 AD3d 1491, 1492 [4th Dept 2015]). Here, contrary to defendant's contention, we conclude that the officers' presence in a high-crime area, coupled with their observations of defendant, i.e., his evasive behavior of running away, provided them with an "objective, credible reason" for initially approaching defendant (*People v Barksdale*, 26 NY3d 139, 143 [2015]; *see Matter of Demitrus B.*, 89 AD3d 1421, 1421-1422 [4th Dept 2011]).

Although the officers had an objective, credible basis for approaching defendant, we agree with defendant that the ensuing questioning constituted a level two encounter under *People v De Bour* (40 NY2d 210, 223 [1976]; *see generally People v Hollman*, 79 NY2d 181, 191 [1992]). We reject defendant's contention, however, that the officers did not have a "founded suspicion that criminal activity [was] afoot" (*De Bour*, 40 NY2d at 223). In making that determination, we must consider the totality of the circumstances (*see People v Jones*, 155 AD3d 1547, 1550 [4th Dept 2017], *amended on rearg on other grounds* 156 AD3d 1493 [4th Dept 2017]). Here, the subject apartment complex was known to the officers to be in a high-crime area. Defendant's conduct in staring at the patrol vehicle and then running up an interior set of stairs constituted furtive or evasive movements supporting a suspicion of criminal activity. Additionally, one of the officers who followed defendant into the apartment complex smelled marihuana on the stoop of the apartment complex. We conclude, under the totality of the circumstances, that the officers had a founded suspicion that criminality was afoot (*see People v Parker*, 32 NY3d 49, 56 [2018]; *Jones*, 155 AD3d at 1551; *see also People v Hough*, 151 AD3d 1591, 1592 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]).

Contrary to defendant's further contention, although the officer who questioned defendant requested that the other officers take defendant downstairs, "none of the police conduct elevated the encounter to a seizure requiring reasonable suspicion" (*People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]). Finally, we reject defendant's contention that the officers did not have probable cause for the arrest. It is well established that probable cause for an arrest exists where it "appear[s] to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator" (*People v Carrasquillo*, 54 NY2d 248, 254 [1981]; *see People v Colon*, 151 AD3d 1915, 1916-1917 [4th Dept 2017]).

Here, the officers' discovery, in a closet near the apartment door, of a handgun that the tenant denied having seen before gave the officers probable cause to believe that defendant had stashed the gun there during his brief entry (*see People v Wiggins*, 126 AD3d 1369, 1370 [4th Dept 2015]; *People v Binion*, 100 AD3d 1514, 1516 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013]; *People v Dibble*, 43 AD3d 1363, 1365 [4th Dept 2007], *lv denied* 9 NY3d 1032 [2008]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1158

CA 18-00640

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

IN THE MATTER OF MICHAEL SEGOOL, AS PARENT AND NATURAL GUARDIAN OF GABRIELLA MARIE GRYCZKOWSKI, FOR LEAVE TO CHANGE THE NAME OF GABRIELLA MARIE GRYCZKOWSKI TO BRIELLA MARIE SEGOOL, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CARLY MARIE FAZIO, RESPONDENT-RESPONDENT.

DAVID B. COTTER, BUFFALO, FOR PETITIONER-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 31, 2017. The order, among other things, denied the name change sought in the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner father commenced this proceeding seeking an order authorizing a name change for his four-year-old child. At the time of the child's birth, respondent, who is the child's biological mother, and the father were not together. The mother was the custodial parent of the child; her boyfriend at that time signed an acknowledgment of paternity for the child, and the child was given his surname. Thereafter, the father learned of the child's birth, and paternity testing revealed that he was the biological father of the child. The acknowledgment of paternity signed by the mother's boyfriend was vacated. The mother subsequently transferred custody of the child to the father, who was thereafter awarded sole custody of the child. The father filed the instant petition seeking to change the last name of the child to his surname and to alter the child's first name because the father's older daughter has the same name and lives with him and the child. The mother opposed the petition via sworn affidavit and provided a list of alternative names for the child to which she would not object. In its order, Supreme Court authorized the child to assume one of the names proposed by the mother, concluding that "the inclusion of both biological parents' names in a child's last name is reasonable and in the best interests of the child, particularly where, as here, both parents are active participants in the child's life." Thus, the court, in essence, denied the father's petition in its entirety, and the father appeals.

We agree with the father that the court erred in authorizing a change to a name other than that requested in the father's petition and in making its determination without holding a hearing (*see generally Matter of Goodyear v New York State Dept. of Health*, 163 AD3d 1427, 1429 [4th Dept 2018]; *Matter of Kyle Michael M.*, 281 AD2d 954, 954 [4th Dept 2001]). Civil Rights Law § 63 provides that, upon presentation of a petition for a name change, if the court "is satisfied . . . that the petition is true, and that there is no reasonable objection to the change of name proposed, . . . the court shall make an order authorizing the petitioner to assume the name proposed." In the absence of a cross petition filed by the mother proposing a name change for the child, the only name that was properly before the court for consideration was the name change sought by the father in his petition.

Furthermore, "if the petition be to change the name of an infant, . . . the interests of the infant [must] be substantially promoted by the change" (*id.*; *see Matter of Eberhardt*, 83 AD3d 116, 121 [2d Dept 2011]). "With respect to the interests of the infant, the issue is not whether it is in the infant's best interests to have the surname of the mother or father, but whether the interests of the infant will be promoted substantially by changing his [or her] surname" (*Matter of Niethe [McCarthy—DePerno]*, 151 AD3d 1952, 1953 [4th Dept 2017] [internal quotation marks omitted]). "As in any case involving the best interests standard, whether a child's best interests will be substantially promoted by a proposed name change requires a court to consider the totality of the circumstances" (*Eberhardt*, 83 AD3d at 123). Inasmuch as "the record [here] is insufficient to enable us to determine whether the requested change would substantially promote the [child's] interests" (*Niethe*, 151 AD3d at 1953-1954), we reverse the order, reinstate the petition, and remit the matter to Supreme Court for a hearing on the petition.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1162

CA 18-00397

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

IN THE MATTER OF DENISE UFLAND,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
RESPONDENTS-RESPONDENTS.

LAW OFFICE OF LINDY KORN, PLLC, BUFFALO (LINDY KORN OF COUNSEL), FOR PETITIONER-APPELLANT.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (ERIN E. MOLISANI OF COUNSEL), FOR RESPONDENT-RESPONDENT ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered May 16, 2017 in a proceeding pursuant to Executive Law § 298. The order denied the petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR), after an investigation, that there was no probable cause to believe that petitioner's former employer, respondent Erie County Department of Social Services (County), discriminated against petitioner on the basis of her disability. Supreme Court denied the petition, thereby upholding SDHR's determination, and we affirm.

Initially, we note that the County terminated petitioner's employment on May 12, 2015, and petitioner thereafter filed her administrative complaint on May 4, 2016. To the extent that petitioner's claims of disability discrimination are premised on certain adverse employment actions occurring more than one year before the filing of the administrative complaint, i.e., prior to May 4, 2015, those claims are untimely (see Executive Law § 297 [5]; *Kim v New York State Div. of Human Rights*, 107 AD3d 434, 434 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]). In any event, we conclude that "SDHR conducted a proper investigation and afforded petitioner a full and fair opportunity to present evidence on [her] behalf and to rebut the evidence presented by [the County,]" and we further conclude that

the determination " 'is supported by a rational basis and is not arbitrary or capricious' " (*Matter of Szlapak v New York State Div. of Human Rights*, 153 AD3d 1646, 1647 [4th Dept 2017]).

We reject petitioner's contention that SDHR's determination was arbitrary, capricious, and lacking a rational basis because SDHR overlooked the decision of the Unemployment Insurance Appeal Board, which petitioner maintains was "evidence" of discrimination. Findings of fact or law by the Unemployment Insurance Appeal Board have no preclusive effect in subsequent actions or proceedings not related to article 18 of the Labor Law (*see* Labor Law § 623 [2]). Thus, the weight to be accorded to that decision, if any, was a matter within SDHR's " 'broad discretion' " in investigating complaints (*Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747 [4th Dept 2016]).

To the extent that petitioner contends that a hearing was required, it is well settled that SDHR is not required to hold a hearing (*see Matter of McDonald v New York State Div. of Human Rights*, 147 AD3d 1482, 1482 [4th Dept 2017]; *Matter of Smith v New York State Div. of Human Rights*, 142 AD3d 1362, 1363 [4th Dept 2016], *lv denied* 30 NY3d 913 [2018]). Where, as here, "the parties made extensive submissions to [SDHR], petitioner was given an opportunity to present [her] case, and the record shows that the submissions were in fact considered, the determination cannot be arbitrary and capricious merely because no hearing was held" (*McDonald*, 147 AD3d at 1482 [internal quotation marks omitted]).

Finally, we reject petitioner's contention that SDHR improperly credited the County's proffered nondiscriminatory reasons for firing her over her own account that her termination was motivated by discrimination. Although SDHR was required to accept as true petitioner's factual showing, it was free to reject her legal conclusions (*see Matter of Majchrzak v New York State Div. of Human Rights*, 151 AD3d 1856, 1857 [4th Dept 2017]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1164

CA 18-00133

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

HELENA UBILES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TARA L. HALLIWELL-KEMP, AS ADMINISTRATOR OF THE ESTATE OF GARY G. HALLIWELL, DECEASED, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (RICHARD T. SARAF OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered October 11, 2017. The order and judgment, among other things, adjudged that defendant is 100% liable for the damages sustained by plaintiff.

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

Memorandum: Plaintiff commenced this negligence action against her former landlord, decedent Gary G. Halliwell, seeking to recover damages for personal injuries she allegedly sustained when she slipped and fell on ice outside her apartment building. Defendant appeals from an order and judgment entered upon a jury verdict finding that decedent was negligent, that defendant, as administrator of decedent's estate, was 100% liable for plaintiff's injuries, and that plaintiff was not comparatively negligent. We affirm.

We reject defendant's contention that Supreme Court abused its discretion in precluding her from impeaching plaintiff at trial with evidence of a criminal conviction from 2002. "[W]hile a civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness, the nature and extent of cross-examination, including with respect to criminal convictions, remains firmly within the discretion of the trial court" (*Tornatore v Cohen*, 162 AD3d 1503, 1504 [4th Dept 2018]; *see* CPLR 4513; *cf. Morgan v National City Bank*, 32 AD3d 1264, 1265 [4th Dept 2006]; *see generally Bodensteiner v Vannais*, 167 AD2d 954, 954 [4th Dept 1990]), and we conclude that the court did not abuse its discretion in precluding defendant from impeaching plaintiff with evidence of a drug conviction from 15 years earlier (*see Siemucha v*

Garrison, 111 AD3d 1398, 1399-1400 [4th Dept 2013]; *cf. Sansevere v United Parcel Serv.*, 181 AD2d 521, 523 [1st Dept 1992]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1169

KA 16-00657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. JOHNSON, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 4, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree and grand larceny in the fourth 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, the plea is vacated and the matter is remitted to Ontario County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting him, upon his *Alford* plea, of assault in the second degree (Penal Law § 120.05 [6]) and grand larceny in the fourth degree (§ 155.30 [1]). The charges arose when a security officer at a department store observed defendant and his two codefendants fill two shopping carts with $1,100 worth of merchandise and approach the exit of the store with the unpaid merchandise. Defendant and his two codefendants abandoned the merchandise near the exit and left the store. They entered a vehicle that was in the parking lot, and one of the codefendants led police on a high-speed traffic chase from Ontario County to Monroe County. The car chase resulted in two motor vehicle accidents, including one in which a police officer was injured. All three codefendants abandoned the vehicle at the side of the highway and led police on a foot chase through an open field and into a wooded area. Defendant was apprehended by police and transported back to Canandaigua for a showup identification procedure at the department store with the security officer.

Initially, we reject defendant’s contention that the identification procedure was unduly suggestive. The showup, which was conducted approximately two hours after defendant and his codefendants were observed by the security officer with the two carts of unpaid

merchandise, was " 'reasonable under the circumstances' " presented in this case (*People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* — US —, 137 S Ct 205 [2016]; *see People v Brisco*, 99 NY2d 596, 597 [2003]; *People v Duuvon*, 77 NY2d 541, 543 [1991]). There is no bright-line rule for determining whether a showup identification procedure is per se unacceptable based on the lapse of time between the commission of the crime and the identification procedure (*see People v Howard*, 22 NY3d 388, 402 [2013]) and, in this case, the showup was part of a continuous, ongoing police investigation (*see Brisco*, 99 NY2d at 597; *People v Thomas*, 164 AD3d 619, 620 [2d Dept 2018], *lv denied* 32 NY3d 1068 [2018]; *People v Capers*, 94 AD3d 1475, 1476 [4th Dept 2012], *lv denied* 19 NY3d 971 [2012]; *see also Howard*, 22 NY3d at 402), which spanned two counties and involved multiple law enforcement agencies, due in large part to the flight of defendant and his codefendants. We further conclude that the showup was not rendered unduly suggestive by the fact that defendant was standing between two uniformed officers and the security officer could see the parking lot where the police cars were parked (*see People v Owens*, 161 AD3d 1567, 1568 [4th Dept 2018]; *People v Thompson*, 132 AD3d 1364, 1365 [4th Dept 2015], *lv denied* 27 NY3d 1156 [2016]), or by the fact that defendant's showup was conducted in sequence with the showups of his codefendants (*see generally People v Ball*, 57 AD3d 1444, 1445 [4th Dept 2008], *lv denied* 12 NY3d 755 [2009]).

We agree with defendant, however, that County Court erred in accepting his *Alford* plea because the record lacks the requisite strong evidence of his actual guilt (*see generally Matter of Silmon v Travis*, 95 NY2d 470, 475 [2000]; *People v Richardson*, 132 AD3d 1313, 1316 [4th Dept 2015], *lv denied* 26 NY3d 1145 [2016]). Although defendant failed to preserve that contention for our review by moving to withdraw his plea or to vacate the judgment of conviction (*see People v Steinmetz*, 159 AD3d 1577, 1577 [4th Dept 2018], *lv denied* 31 NY3d 1122 [2018]; *People v Dixon*, 147 AD3d 1518, 1518-1519 [4th Dept 2017], *lv denied* 29 NY3d 1078 [2017]), and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]; *see People v Farnsworth*, 32 AD3d 1176, 1177 [4th Dept 2006], *lv denied* 7 NY3d 867 [2006]), we exercise our power to review defendant's unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Richardson*, 72 AD3d 1578, 1579 [4th Dept 2010]).

The record, which includes sworn grand jury testimony, sufficiently establishes that defendant "exercised dominion and control over the property for a period of time, however temporary, in a manner wholly inconsistent with the owner's continued rights" (*People v Pallagi*, 91 AD3d 1266, 1269 [4th Dept 2012] [internal quotation marks omitted]; *see People v LaRock*, 21 AD3d 1367, 1368 [4th Dept 2005], *lv denied* 5 NY3d 883 [2005]), and that the value of such property exceeded one thousand dollars (*see* Penal Law § 155.30 [1]). We conclude, however, that the record lacks strong evidence that defendant acted with the intent to deprive the owner of the property or to appropriate the property to himself or to a third person (*see id.*; § 155.05 [1]). Thus, inasmuch as the record lacks strong

evidence that defendant acted with the intent to commit grand larceny in the fourth degree, the record also lacks strong evidence that defendant caused injury to a person in the course of and in furtherance of the commission or attempted commission of that crime or during the immediate flight therefrom (*see* § 120.05 [6]).

Although defendant made a knowing and voluntary choice to enter an *Alford* plea, we conclude that the court erred in accepting his plea because the record does not contain the requisite "strong evidence of actual guilt" (*Silmon*, 95 NY2d at 475; *see Richardson*, 72 AD3d at 1580; *People v Oberdorf*, 5 AD3d 1000, 1001 [4th Dept 2004]). We therefore reverse the judgment, vacate defendant's plea of guilty, and remit the matter to County Court for further proceedings on the indictment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1171

KA 12-01874

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAKUANN B. STEELE, DEFENDANT-APPELLANT.

DIANNE C. RUSSELL, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 11, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review his challenge to the factual sufficiency of the plea allocution inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Oswold*, 151 AD3d 1756, 1756 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]). We conclude that this case does not fall within the "narrow exception" to the preservation rule (*People v Lopez*, 71 NY2d 662, 666 [1988]). Defendant's plea allocution neither negated an essential element of the offense nor otherwise cast doubt on the voluntariness of the plea (*see People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]; *People v Brown*, 115 AD3d 1204, 1205-1206 [4th Dept 2014], *lv denied* 23 NY3d 1060 [2014]). In any event, the factual sufficiency contention lacks merit.

To the extent that it is preserved for our review, we reject defendant's contention that County Court erred in denying his oral request at sentencing to withdraw his guilty plea based on his claims of innocence. Although defendant claimed innocence in his statement in the presentence report and at sentencing, defendant "admitted each element of the offense during his plea allocution and did not claim either that he was innocent or that he had been coerced by defense counsel at that time. The court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion, and it did not abuse its

discretion in discrediting those claims" (*People v Sparcino*, 78 AD3d 1508, 1509 [4th Dept 2010], *lv denied* 16 NY3d 746 [2011]; *see People v Newsome*, 140 AD3d 1695, 1695-1696 [4th Dept 2016], *lv denied* 28 NY3d 973 [2016]). Indeed, aside from his plea allocution, defendant provided at least three inconsistent statements regarding his conduct at the time of the alleged crime. Defendant voluntarily signed a statement shortly after he was taken into custody in which he admitted to using the clip end of a pellet pistol to intentionally break the window of the home that he was later charged with burglarizing because he wanted to "get back at" the homeowner. At a suppression hearing, defendant testified that he did not break the window at all, but that it was broken by defendant's friend, although defendant could not recall the friend's name or address. In the presentence report, defendant claimed that he was "horsing around" when the pellet pistol's clip was accidentally thrown through the window. Under these circumstances, the court did not abuse its discretion in denying defendant's request to withdraw his plea, particularly where defendant's "assertions at sentencing that he was innocent, under duress, and coerced into taking the plea were belied by the statements he made during the plea colloquy" (*People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]; *see generally People v Barrett*, 153 AD3d 1600, 1601 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]). Further, we reject defendant's contention that he did not admit the element of entry during the factual allocution. Defense counsel explicitly stated during the allocution that defendant was not contesting entry, defendant did not object to this statement by counsel, and defendant himself then admitted that "when [he] entered into that building, it was [his] intention to commit a crime therein."

We also reject defendant's contention that his statements made at sentencing regarding defense counsel required the court to conduct an inquiry into defendant's issues with his counsel. Defendant's general remarks at sentencing were not "specific factual allegations of 'serious complaints about counsel,' " and thus were insufficient to require the court to conduct further inquiry (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Chess*, 162 AD3d 1577, 1579 [4th Dept 2018]; *People v Jones*, 149 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1173

KA 15-00756

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. MORROW, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM 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 (Marianne Furfure, A.J.), rendered November 6, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree, criminal possession of a weapon in the fourth degree and tampering with physical evidence (five counts).

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, murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court erred in refusing to suppress statements that he made to police investigators as involuntarily made. We reject that contention. " 'The voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession' " (*People v Deitz*, 148 AD3d 1653, 1653 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]; *see People v Buchanan*, 136 AD3d 1293, 1293 [4th Dept 2016], *lv denied* 27 NY3d 1129 [2016]). Here, the police investigators testified at the suppression hearing that defendant agreed to accompany them to the police station and was advised of his *Miranda* rights during the ride to the station. Thereafter, defendant agreed to speak to the investigators (*see Deitz*, 148 AD3d at 1653-1654), and was not threatened or coerced to waive his *Miranda* rights (*see Buchanan*, 136 AD3d at 1293-1294). The court credited the police investigators' testimony, and we afford deference to the court's resolution of issues of credibility (*see People v Dogan*, 154 AD3d 1314, 1315 [4th Dept 2017], *lv denied* 30 NY3d 1115 [2018]; *Buchanan*, 136 AD3d at 1294). Moreover, we note that the video recordings of defendant's conversations with the police investigators, which were received in evidence at the hearing, are consistent with their testimony. Contrary to defendant's contention, his statements were not rendered

involuntary by police deception because the deception "did not create a substantial risk that defendant might falsely incriminate himself" (*Deitz*, 148 AD3d at 1654 [internal quotation marks omitted]; *see People v Clyburn-Dawson*, 128 AD3d 1350, 1351 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]). In light of the totality of the circumstances, the People proved beyond a reasonable doubt that the challenged statements "were not products of coercion but rather were the result of a free and unconstrained choice by defendant" (*Buchanan*, 136 AD3d at 1294 [internal quotation marks omitted]; *see People v Thomas*, 22 NY3d 629, 641 [2014]).

Defendant failed to preserve for our review his contention that his plea was not knowingly, intelligently, or voluntarily entered inasmuch as he did not move to withdraw his guilty plea or vacate the judgment of conviction (*see People v Sheppard*, 149 AD3d 1569, 1569 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]; *People v Jones*, 118 AD3d 1354, 1354 [4th Dept 2014], *lv denied* 24 NY3d 961 [2014]). Contrary to his contention, this case does not fall into the rare exception to the preservation doctrine inasmuch as nothing in the plea colloquy "casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see Sheppard*, 149 AD3d at 1569).

Defendant also failed to preserve for our review his challenge to the adequacy of the presentence report (*see People v Jones*, 114 AD3d 1239, 1242 [4th Dept 2014], *lv denied* 23 NY3d 1038 [2014], *lv denied* 25 NY3d 1166 [2015]; *People v Hayhurst*, 108 AD3d 1233, 1234 [4th Dept 2013]). 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]).

The sentence is not unduly harsh or severe. We note, however, that the certificate of conviction and uniform sentence and commitment sheet incorrectly reflect that, under count two of the indictment, defendant was convicted of tampering with physical evidence under Penal Law § 215.40 (1). Therefore, those documents must be amended to reflect that defendant was convicted under Penal Law § 215.40 (2) (*see People v Gathers*, 106 AD3d 1333, 1334 [3d Dept 2013], *lv denied* 21 NY3d 1073 [2013]; *see also People v Green*, 132 AD3d 1268, 1269 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016], *reconsideration denied* 28 NY3d 930 [2016]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1177

CA 18-00842

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

KAREN R. PECK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DONALD E. PECK, DEFENDANT-RESPONDENT.

FINOCCHIO, ENGLISH & DORN, SYRACUSE (MARK ENGLISH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (SARA E. LOWENGARD OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Kevin G. Young, J.), entered August 3, 2017 in a divorce action. The judgment, among other things, equitably distributed the marital property, awarded durational maintenance to plaintiff and awarded plaintiff attorney's fees.

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

Memorandum: Plaintiff appeals from a judgment of divorce that, inter alia, distributed the marital property between the parties and awarded her maintenance and attorney's fees. We affirm.

Contrary to plaintiff's contention, we conclude that Supreme Court did not err in setting the amount and duration of the maintenance award. "Although the authority of this Court in determining issues of maintenance is as broad as that of the trial court" (*D'Amato v D'Amato*, 132 AD3d 1424, 1425 [4th Dept 2015]), "[a]s a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court" (*Gately v Gately*, 113 AD3d 1093, 1093 [4th Dept 2014], *lv dismissed* 23 NY3d 1048 [2014] [internal quotation marks omitted]). We perceive no abuse of discretion here. The court "properly considered plaintiff's 'reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors' set forth in the statute" (*Wilkins v Wilkins*, 129 AD3d 1617, 1618 [4th Dept 2015], quoting *Hartog v Hartog*, 85 NY2d 36, 52 [1995]; *see* Domestic Relations Law § 236 [B] [former (6) (a)]), including the payor spouse's present and future earning capacity (*see Morrissey v Morrissey*, 259 AD2d 472, 473 [2d Dept 1999]), and the equitable distribution of marital property (*see Zufall v Zufall*, 109 AD3d 1135, 1136 [4th Dept 2013], *lv denied* 22 NY3d 859 [2014]). We decline to substitute our discretion for that

of the court.

Contrary to plaintiff's further contention, the court did not abuse its discretion in ordering defendant to transfer funds from his retirement accounts to plaintiff's retirement accounts in order to equalize the value of the parties' respective retirement accounts (*see Schiffmacher v Schiffmacher*, 21 AD3d 1386, 1386-1387 [4th Dept 2005]). While it is well established that equitable distribution does not require equal distribution (*see Arvantides v Arvantides*, 64 NY2d 1033, 1034 [1985]; *Schiffmacher*, 21 AD3d at 1386), we conclude that, here, equal distribution of the funds in the parties' retirement accounts is appropriate based on consideration of the pertinent statutory factors, as well as the substantial maintenance award and the equitable distribution of the other marital assets to plaintiff (*see Robbins-Johnson v Johnson*, 20 AD3d 723, 725 [3d Dept 2005]).

Finally, we reject plaintiff's contention that the court abused its discretion in awarding her only a portion of the requested amount of attorney's fees. In making its award of attorney's fees, the court took note of the substantial distribution of assets to plaintiff, as well as defendant's payment of plaintiff's living expenses and plaintiff's receipt of an unearned salary from defendant's business since the commencement of this action (*see Shine v Shine*, 148 AD3d 1665, 1666 [4th Dept 2017]; *Gifford v Gifford*, 132 AD3d 1123, 1126 [3d Dept 2015]). Thus, "the court's award of counsel fees was a proper exercise of discretion that is supported by 'the equities of the case and the financial circumstances of the parties' " (*Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1683 [4th Dept 2015]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1189

KA 14-02128

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRELL L. THOMAS, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (LISA GRAY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered September 2, 2014. 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]). Defendant contends that Supreme Court erred in finding that the police officer's stop of him was lawful and that the officer had reasonable suspicion to frisk him, and thus should have suppressed the gun found during the frisk as well as statements defendant made after his arrest. We reject that contention. The officer lawfully ordered defendant to stop riding his bicycle after the officer observed defendant violating various provisions of the Vehicle and Traffic Law (*see People v Freeman*, 144 AD3d 1650, 1651 [4th Dept 2016]; *People v Johnson*, 138 AD3d 1454, 1454 [4th Dept 2016], *lv denied* 28 NY3d 931 [2016]). Additionally, the officer had the requisite reasonable suspicion to frisk defendant (*see generally People v De Bour*, 40 NY2d 210, 223 [1976]). In particular, defendant matched the general description of suspects in a stabbing incident that had occurred nearby just minutes earlier (*see People v Lopez*, 71 AD3d 1518, 1519 [4th Dept 2010], *lv denied* 15 NY3d 753 [2010]; *People v Hethington*, 258 AD2d 919, 919-920 [4th Dept 1999], *lv denied* 93 NY2d 971 [1999]). Moreover, defendant was traveling away from the incident, tried to obscure his face when passing the officer, and was evasive and inconsistent when answering the officer's questions. The gun that was seized from defendant and the statements he made following his arrest are therefore not subject to suppression as fruit of the poisonous tree (*see People v Walker*, 149 AD3d 1537,

1538-1539 [4th Dept 2017], *lv denied* 30 NY3d 954 [2017]).

Defendant's contention that defense counsel was ineffective for failing to afford him an opportunity to testify before the grand jury " 'does not survive his guilty plea . . . because there was no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance' " (*People v Halsey*, 108 AD3d 1123, 1124 [4th Dept 2013]). Finally, the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1211.1

CAF 18-00028

PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF DESIREE N. DEAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARTY SHERRON, RESPONDENT-RESPONDENT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR PETITIONER-APPELLANT.

RORY GILHOOLEY, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered September 27, 2017 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Onondaga County, for further proceedings in accordance with the following memorandum: Petitioner mother appeals from an order that dismissed for lack of jurisdiction her petition for custody of the subject child. Domestic Relations Law § 76 (1) (a) provides in relevant part that a New York court has jurisdiction to make an initial custody determination if New York "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state . . . ." " 'Home state' means the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of a child custody proceeding" (§ 75-a [7]). A period of temporary absence during the six-month time frame is considered part of the time period to establish home-state residency (*see id.*; *Matter of Felty v Felty*, 66 AD3d 64, 70 [2d Dept 2009]). Moreover, if "a parent wrongfully removes a child from a state, the time following the removal is considered a temporary absence" (*Felty*, 66 AD3d at 71).

We conclude that Family Court erred in dismissing the petition based on lack of jurisdiction without holding a hearing. Here, there are disputed issues of fact whether the child's four- or five-month stay in North Carolina constituted a temporary absence from New York State in light of allegations that respondent father withheld the

child from the mother for purposes of establishing a "home state" in North Carolina (*see generally Matter of Joy v Kutzuk*, 99 AD3d 1049, 1050 [3d Dept 2012], *lv denied* 20 NY3d 856 [2013]) and whether the mother's absence from New York State interrupted the child's six-month pre-petition residency period required by Domestic Relations Law § 76 (1) (a) (*see generally Arnold v Harari*, 4 AD3d 644, 646-647 [3d Dept 2004]). Thus, we reverse the order, reinstate the petition, and remit the matter to Family Court for a determination, following a hearing, on the issue of jurisdiction (*see Matter of Stylianos T. v Tarah B.*, 161 AD3d 1175, 1176-1177 [2d Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1218

KA 15-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY BENTON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 19, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, we conclude that County Court did not abuse its discretion in denying his request for an adjournment to afford defense counsel additional time to prepare for trial. " '[T]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*People v Diggins*, 11 NY3d 518, 524 [2008]), and "[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice" (*People v Arroyo*, 161 AD2d 1127, 1127 [4th Dept 1990], *lv denied* 76 NY2d 852 [1990]). Defendant did not make that showing here.

Upon our review of the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, we reject defendant's further contention that he received ineffective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Additionally, defendant correctly concedes that he failed to preserve for our review his contention with respect to alleged prosecutorial misconduct (*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, we conclude that "the record reflects that the court properly exercised its discretion in sentencing defendant 'after careful consideration of all facts available' " (*People v Brudecki*, 32 AD3d 1255, 1255 [4th Dept 2006], *lv denied* 7 NY3d 924 [2006], *reconsideration denied* 8 NY3d 920 [2007], quoting *People v Farrar*, 52 NY2d 302, 305 [1981]; *see People v Jones*, 43 AD3d 1296, 1299 [4th Dept 2007], *lv denied* 9 NY3d 991 [2007], *reconsideration denied* 10 NY3d 812 [2008]). Finally, the sentence is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1222

CAF 17-00388

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

IN THE MATTER OF AVIANNA M.-G.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHEN G., III, RESPONDENT-APPELLANT.

YORIMAR K.-M., INTERVENOR-RESPONDENT.

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

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered January 27, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Stephen G., III, had neglected and abused the subject child.

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

Memorandum: Respondent Stephen G., III (father) and intervenor Yorimar K.-M. (mother) are the parents of the subject child. Petitioner commenced this proceeding pursuant to Family Court Act article 10 against the parents after it was discovered that the child, who was then four months old, had multiple fractured ribs in various stages of healing. Following a fact-finding hearing, Family Court found that petitioner had established a prima facie case of abuse against both parents (*see* Family Ct Act § 1046 [a] [ii]). The court further found that the mother had satisfactorily rebutted petitioner's prima facie case of abuse, but that the father had not. The court therefore dismissed the petition against the mother and entered a final order determining, inter alia, that the father abused the child. The father appeals, and we now affirm.

Petitioner established a prima facie case of abuse by submitting

"proof of injuries sustained by [the] child . . . of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent," i.e., multiple fractured ribs in various stages of healing (Family Ct Act § 1046 [a] [ii]; *see Matter of Wyquanza J. [Lisa J.]*, 93 AD3d 1360, 1361 [4th Dept 2012]; *Matter of Keara MM. [Naomi MM.]*, 84 AD3d 1442, 1443 [3d Dept 2011]; *Matter of Keone J.*, 309 AD2d 684, 686 [1st Dept 2003]). Contrary to the father's contention, petitioner's "inability . . . to pinpoint the time and date of each injury and link it to [a particular parent is not] fatal to the establishment of a prima facie case" of abuse (*Matter of Matthew O. [Kenneth O.]*, 103 AD3d 67, 73 [1st Dept 2012]). The "presumption of culpability [created by section 1046 (a) (ii)] extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case" (*id.* at 74), and we agree with the court that the father failed to rebut the presumption that he, as one of the child's parents, was responsible for her injuries (*see Wyquanza J.*, 93 AD3d at 1361; *Keone J.*, 309 AD2d at 686-687).

The father next contends that he was deprived of his right to counsel at a temporary removal hearing conducted immediately after the petition was filed. The entry of a final order following a fact-finding hearing in a Family Court Act article 10 proceeding, however, renders moot any challenge to the procedures employed at an antecedent temporary removal hearing where, as here, the final order is "predicated solely on evidence introduced at the fact-finding hearing" (*Matter of Mitchell WW. [Andrew WW.]*, 74 AD3d 1409, 1411-1412 [3d Dept 2010]; *see Matter of Elijah ZZ. [Freddie ZZ.]*, 118 AD3d 1172, 1174 [3d Dept 2014]; *Matter of Frank Y.*, 11 AD3d 740, 743 [3d Dept 2004]). Thus, given the final order in this case, the father's complaint about his lack of representation at the temporary removal hearing is now moot.

Contrary to the father's further contention, he is not aggrieved by—and thus cannot challenge—the court's dismissal of the petition against the mother (*see Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1775-1776 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *Matter of Unique R.*, 43 AD3d 446, 446-447 [2d Dept 2007]; *see generally* CPLR 5511). We have considered and rejected the father's remaining contentions.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1228

CA 18-00015

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

IN THE MATTER OF MATTHEW NIX,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF CRIMINAL JUSTICE
SERVICES, RESPONDENT-RESPONDENT.

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered October 27, 2017 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 that dismissed his CPLR article 78 petition seeking, inter alia, disclosure of certain documents pursuant to the Freedom of Information Law ([FOIL] Public Officers Law article 6). Petitioner, who was convicted in March 2017 in federal court on various offenses, sought the criminal history reports of certain prospective jurors at his criminal trial and records relating to any repository inquiry searches for those jurors. Respondent denied the FOIL request, and that determination was affirmed on administrative appeal. Supreme Court properly dismissed the petition. FOIL "requires government agencies to 'make available for public inspection and copying all records' subject to a number of exemptions" (*Matter of Harbatkin v New York City Dept. of Records & Info. Servs.*, 19 NY3d 373, 379 [2012], quoting Public Officers Law § 87 [2]). Public agencies "must articulate 'particularized and specific justification' for not disclosing requested documents" (*Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]).

To the extent that petitioner sought the criminal history reports, it is well settled that such reports are exempt from disclosure under FOIL (*see* Public Officers Law § 87 [2] [a]; Executive Law § 837 [6], [8]; *Matter of Gerace v Mandel*, 267 AD2d 386, 386 [2d Dept 1999]; *Matter of Williams v Erie County Dist. Attorney,* 255 AD2d 863, 864 [4th Dept 1998]). We agree with respondent that the records

of the repository inquiry searches are also exempt from disclosure under FOIL inasmuch as they would constitute unwarranted invasions of personal privacy (*see* Public Officers Law § 87 [2] [a], [b]; Executive Law § 837 [8]). We further agree with respondent that the repository inquiry searches are also exempt from disclosure under Public Officers Law § 87 (2) (e) (i). The court thus properly dismissed the petition inasmuch as respondent's denial of petitioner's FOIL request was not affected by an error of law.

Petitioner's constitutional contentions were not raised in the petition and are thus not properly before us (*see Matter of Krossber v Jackson*, 263 AD2d 960, 961 [4th Dept 1999], *lv denied* 94 NY2d 756 [1999]). Contrary to petitioner's contention, the court properly dismissed his notice to admit. While a notice to admit may be used in a special proceeding (*see* CPLR 408), "it is generally used only where there are issues of fact requiring a trial" (*Matter of Moody's Corp. & Subsidiaries v New York State Dept. of Taxation & Fin.*, 141 AD3d 997, 1004 [3d Dept 2016]). Here, the notice to admit was properly dismissed because "no trial was pending or warranted" (*id.*). We further conclude that the court did not abuse its discretion in dismissing the demand for interrogatories (*see Matter of Bramble v New York City Dept. of Educ.*, 125 AD3d 856, 857 [2d Dept 2015]). Petitioner failed to establish that the requested discovery was necessary to determine the merits of his FOIL request (*see Matter of Hanlon v New York State Police*, 133 AD3d 1265, 1266 [4th Dept 2015]; *Bramble*, 125 AD3d at 857). Finally, inasmuch as petitioner has not "substantially prevailed" in this proceeding to review the denial of his FOIL request, he is not entitled to attorney's fees (Public Officers Law § 89 [4] [former (c) (i)]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1231

CA 17-00443

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

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

V MEMORANDUM AND ORDER

JAMAAL A., RESPONDENT-APPELLANT.

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Sara Sheldon, A.J.), entered February 2, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: On appeal from an order revoking his prior regimen of strict and intensive supervision and treatment (SIST), determining that he is a dangerous sex offender requiring confinement and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*), respondent contends that Supreme Court erred in determining that he has a mental abnormality that predisposes him to commit sex offenses. That contention is not properly before us. "In a SIST revocation hearing, like in a dispositional hearing following trial on the issue of mental abnormality, the statute gives the court only two dispositional choices–to order civil confinement or to continue a regimen of SIST . . . , both of which assume that respondent has a mental abnormality. The only issue before the court, therefore, is whether the mental abnormality is such that respondent requires confinement . . . In light of that statutory structure, we see no need to address respondent's contention[] that the evidence of mental abnormality was insufficient" (*Matter of State of New York v Breeden*, 140 AD3d 1649, 1649 [4th Dept 2016]; *see Matter of State of New York v David HH.*, 147 AD3d 1230, 1233 [3d Dept 2017], *lv denied* 29 NY3d 913 [2017]).

Contrary to respondent's further contention, petitioner established by clear and convincing evidence (*see* Mental Hygiene Law § 10.11 [d] [4]) that respondent was a dangerous sex offender requiring confinement, i.e., a person "suffering from a mental

abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *see Matter of State of New York v George N.*, 160 AD3d 28, 30 [4th Dept 2018]). Although respondent's SIST violations did not involve sexual conduct, they demonstrated an "increased sexual preoccupation, [as well as] ongoing deceptive, manipulative, and victim-grooming behaviors." Moreover, respondent had resisted supervision and seemed unable to refrain from his "impulsive, high-risk behaviors in total disregard of the known potential negative consequences of such behaviors." We thus conclude that the SIST violations "[bore] a close causative relationship to sex offending" (*George N.*, 160 AD3d at 33), and " 'remain 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 Jason H.*, 82 AD3d 778, 780 [2d Dept 2011]; *see Matter of State of New York v William J.* [appeal No. 2], 151 AD3d 1890, 1891-1892 [4th Dept 2017]; *cf. George N.*, 160 AD3d at 33-34; *Matter of State of New York v Husted*, 145 AD3d 1637, 1638 [4th Dept 2016]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1242

CAF 17-00202

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

IN THE MATTER OF JESTEN J.F., ALSO KNOWN AS JESTEN S.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RUTH P.S., RESPONDENT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered December 20, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order that terminated her parental rights with respect to her son on the ground of permanent neglect (*see* Social Services Law § 384-b [4] [d]). The mother's sole contention on appeal is that Family Court erred in failing to appoint a guardian ad litem for her when it became apparent that she was incapable of assisting in her defense (*see* CPLR 1201). We agree and conclude that reversal is required.

It is well settled that courts cannot "shut their eyes to the special need of protection of a litigant actually incompetent but not yet judicially declared such. There is a duty on the courts to protect such litigants" (*Sengstack v Sengstack*, 4 NY2d 502, 509 [1958]). Indeed, "[t]he public policy of this State . . . is one of rigorous protection of the rights of the mentally infirm" (*Vinokur v Balzaretti*, 62 AD2d 990, 990 [2d Dept 1978]). Thus, " 'where there is a question of fact . . . whether a guardian ad litem should be appointed, a hearing *must* be conducted' " (*Resmae Mtge. Corp. v Jenkins*, 115 AD3d 926, 927 [2d Dept 2014] [emphasis added]; *see Matter of Mary H. [Sanders-Spencer]*, 126 AD3d 794, 795 [2d Dept 2015]), and

the failure to make such an inquiry once a meritorious question of a litigant's competence has been raised requires remittal (*see Matter of Foreclosure of Tax Liens by the City of Ithaca*, 283 AD2d 703, 705 [3d Dept 2001]).

Contrary to the contention of petitioner and the Attorney for the Child (AFC), we conclude that a meritorious question of the mother's competence was raised. It is of no moment that the mother's attorney did not move for the appointment of a guardian ad litem inasmuch as the court may make such an appointment on its own initiative (*see* CPLR 1202 [a]; *Brewster v John Hancock Mut. Life Ins. Co.*, 280 AD2d 300, 300 [1st Dept 2001]; *Rakiecki v Ferenc*, 21 AD2d 741, 741 [4th Dept 1964]). In any event, although the mother's attorney did not specifically request the appointment of a guardian ad litem, she informed the court that the mother was unable to assist in her own defense when she moved to strike the mother's incoherent testimony. Notably, the court granted that motion, which was not opposed by petitioner or the AFC. In our view, that was sufficient to alert the court to the issue of the mother's competence.

We further conclude that the issue was meritorious inasmuch as the record demonstrates significant questions concerning the mother's ability to understand the nature of the proceedings, defend her rights and assist in her own defense (*cf. Matter of Marie ZZ. [Jeanne A.]*, 140 AD3d 1216, 1217 [3d Dept 2016]; *Matter of Justice T.*, 19 AD3d 1079, 1080 [4th Dept 2005], *lv denied* 5 NY3d 707 [2005]; *Matter of Casey J.*, 251 AD2d 1002, 1002 [4th Dept 1998]). There is no dispute that the mother, who had been diagnosed with, inter alia, schizophrenia, had been in and out of psychiatric hospitals throughout her life. Indeed, at the time of the subject child's birth, which was two years before this termination proceeding, the mother had been committed to a psychiatric unit after being found incompetent to stand trial in a criminal court. During the course of the hearing in this proceeding, the mother was involuntarily committed to a psychiatric unit, and the matter had to be adjourned until her release. Additionally, during the mother's brief testimony upon resumption of the hearing, the court and the AFC had to interrupt her repeatedly inasmuch as her answers to questions were nonresponsive and, at times, completely nonsensical.

Given "the magnitude of the rights at stake [in a termination proceeding], as well as the allegations of mental illness" (*Matter of Daniel Aaron D.*, 49 NY2d 788, 790 [1980]), we conclude that the court erred in failing to hold a hearing on whether a guardian ad litem should have been appointed for the mother. We therefore reverse the order and remit the matter to Family Court for a hearing to determine whether a guardian ad litem should be appointed for the mother and for a new determination on the petition, if warranted.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1243

CAF 16-02236

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

IN THE MATTER OF JENNIFER RICE,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL WIGHTMAN,
RESPONDENT-PETITIONER-APPELLANT.

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

M. KATHLEEN CURRAN, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Ontario County (James E. Walsh, Jr., A.J.), entered October 3, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner-respondent sole legal and residential custody of the subject child.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the sixth, seventh, and eighth ordering paragraphs, and as modified the order is affirmed without costs and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this Family Court Act article 6 proceeding, respondent-petitioner father appeals from an order that, inter alia, modified a prior custody and visitation order by awarding petitioner-respondent mother sole legal and residential custody of the subject child and limiting the father's visitation with the child to family therapy sessions. The father contends that Family Court abused its discretion in denying his motion to change venue from Ontario County to Seneca County. We reject that contention. At the time the mother commenced this proceeding in Ontario County, the father resided in that jurisdiction, and the prior order that the mother sought to modify was entered in Ontario County. Thus, venue was proper in Ontario County (*see* Family Ct Act § 171), and the father failed to demonstrate "good cause" for transferring this proceeding to Seneca County (§ 174; *see Matter of Bonnell v Rodgers*, 106 AD3d 1515, 1515 [4th Dept 2013], *lv denied* 21 NY3d 864 [2013]).

We further conclude that the father waived his contention that the mother failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the child inasmuch as he also alleged in his cross petition that there had been such a

change in circumstances (*see Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). In any event, we agree with the mother that she established the requisite change in circumstances inasmuch as the father's relationship with the subject child has deteriorated since the prior order (*see id.*; *Cook v Cook*, 142 AD3d 530, 533 [2d Dept 2016]; *Matter of Filippelli v Chant*, 40 AD3d 1221, 1222 [3d Dept 2007]). Contrary to the father's related contention, we conclude that the court did not err in modifying the prior order inasmuch as "there is a sound and substantial basis in the record to support the court's determination that it was in the child's best interests to award [sole custody] to the [mother]" and to reduce the father's visitation (*Matter of Brewer v Soles*, 111 AD3d 1403, 1404 [4th Dept 2013]; *see Matter of Noble v Gigon*, 165 AD3d 1640, 1640-1641 [4th Dept 2018]).

We agree with the father, however, that the court erred in conditioning the father's visitation upon his participation in therapeutic counseling. "Although a court may include a directive to obtain counseling as a *component* of a custody or visitation order, the court does not have the authority to order such counseling as a prerequisite to custody or visitation" (*Matter of Avdic v Avdic*, 125 AD3d 1534, 1535 [4th Dept 2015]). Here, the court erred in making participation in counseling the "triggering event" in determining visitation (*id.*). We further conclude that the court impermissibly delegated the decision to hold family therapy sessions to the father's and the child's therapists and therefore improperly gave the therapists the authority to determine if and when visitation would occur (*see Matter of Christina KK. v Kathleen LL.*, 119 AD3d 1000, 1004 [3d Dept 2014]; *Matter of Roskwitalski v Fleming*, 105 AD3d 1432, 1433 [4th Dept 2013]). We therefore modify the order by vacating the sixth, seventh, and eighth ordering paragraphs, and we remit the matter to Family Court to fashion a specific and definitive schedule for visitation between the father and the subject child.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1255

CA 18-00256

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

IN THE MATTER OF DARRELL WALKER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 2, 2017 in a proceeding pursuant to CPLR article 78. The judgment, among other things, ordered that a new hearing be held regarding the misbehavior report dated November 21, 2016.

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 a determination, after a tier III disciplinary hearing, that he violated various inmate rules. In his answer, respondent requested that the matter be remitted for a new hearing because the recording of the original hearing was inaudible and could not be transcribed, thereby precluding meaningful review of the determination. Supreme Court, inter alia, annulled the determination; deleted from petitioner's record all testimony, decisions, and documents prepared or produced solely as a result of that hearing; and remitted the matter for a de novo hearing to be conducted by a different hearing officer on only those charges of which petitioner was found guilty at the original hearing. Petitioner appeals, contending that the court erred in annulling the determination and remitting the matter to respondent for a new hearing and that, instead, the court should have annulled the determination and expunged from his institutional record all references to the inmate rule violations. We affirm.

Contrary to petitioner's contention, the court properly annulled the determination and remitted the matter for a new hearing under the

circumstances presented in this case (*cf. Matter of Tolliver v Fischer*, 125 AD3d 1023, 1023-1024 [3d Dept 2015], *lv denied* 25 NY3d 908 [2015]). "[T]he failure to produce a transcript [does] not involve a substantial evidence issue or implicate any fundamental due process rights," and there are no equitable considerations here that warrant expungement of petitioner's institutional record (*Matter of Auricchio v Goord*, 273 AD2d 571, 572 [3d Dept 2000]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1259

KA 18-00021

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAYLOR J. CLAUSE, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN E. MCCAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered December 15, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence and by continuing the sentence of probation originally imposed with additional conditions as set forth in the memorandum and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon her conviction, following her plea of guilty, of vehicular manslaughter in the first degree (Penal Law § 125.13 [1]) and driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [b] [i]), and sentencing her to an indeterminate term of 1 to 3 years of incarceration. We reject defendant's contention that Supreme Court failed to exercise its discretion in revoking the sentence of probation based upon defendant's admission that she violated a term of her probation. Although the court made several ill-advised statements improperly suggesting that it was bound to revoke defendant's probation and impose a sentence of incarceration based on the terms of the negotiated plea and the court's comments at the original sentencing proceeding (*cf. People v Farrar*, 52 NY2d 302, 305 [1981]; *People v Dupont*, 164 AD3d 1649, 1650 [4th Dept 2018]), we conclude upon our review of the entire sentencing transcript that the court understood that it had the authority to continue or modify the sentence of probation (*see* CPL 410.70 [5]) and exercised its discretion in imposing a sentence of incarceration after considering the severity of the underlying crimes, the favorable plea, defendant's admission that

she violated a term of probation by failing to report to her probation officer on four occasions following the death of her grandfather, the updated presentence report, and defendant's awareness that she faced the possibility of incarceration for violating a term of probation (*see People v Brudecki*, 32 AD3d 1255, 1255 [4th Dept 2006], *lv denied* 7 NY3d 924 [2006], *reconsideration denied* 8 NY3d 920 [2007]; *see generally Farrar*, 52 NY2d at 305).

We agree with defendant, however, that the sentence is unduly harsh and severe. "The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime[s] charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*Farrar*, 52 NY2d at 305). Although we conclude that the court did not abuse its discretion in revoking defendant's probation and sentencing her to an indeterminate term of incarceration, "we can [nevertheless] substitute our own discretion for that of a trial court [that] has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86 [2d Dept 1982]; *see People v Rapone*, 71 AD3d 1563, 1564 [4th Dept 2010]; *People v Patel*, 64 AD3d 1246, 1247 [4th Dept 2009]).

Here, defendant, who was 18 years old and had no criminal history at the time of the underlying crimes, completed substance abuse counseling and was fully compliant with the reporting requirement during the nearly 2½ years between her release to probation from an initial period of incarceration and the death of her grandfather (*see Rapone*, 71 AD3d at 1565; *Patel*, 64 AD3d at 1247; *cf. People v Handley*, 134 AD3d 1509, 1510 [4th Dept 2015], *lv denied* 27 NY3d 1151 [2016]). A clinical psychologist who treated defendant in the years following the underlying crimes and during the probation period noted that, despite the effects that her grandfather's death had on defendant, she did not revert to previous unhealthy coping mechanisms, i.e., using alcohol and drugs, and she thereafter re-engaged in her treatment program. The psychologist also opined that incarceration would impede defendant's progress and create a setback in her recovery, and that continuation of probation and her treatment program would best facilitate defendant's commitment to a sober, productive lifestyle. Significantly, in consideration of all the circumstances, including a single "low positive reading" for marihuana approximately one year prior to her grandfather's death that did not result in a violation petition against defendant, the probation officer recommended against incarceration given that defendant was otherwise compliant with the terms of probation until her failure to report on four occasions. Further, the record establishes that defendant was employed on a full-time basis, intended to re-enroll in college classes, and committed no crimes after the underlying conviction. Based on the foregoing, we conclude that the imposition of an indeterminate term of incarceration is not warranted under the circumstances of this case, and we therefore modify the judgment as a matter of discretion in the interest of justice by vacating that part revoking the sentence of probation and imposing sentence.

With respect to the appropriate sentence, we agree with defendant that, as recommended by the probation officer and sought by defendant on appeal, the sentence of probation originally imposed should be continued with the additional conditions that defendant perform 100 hours of community service at a public or not-for-profit agency approved by the probation department (*see* Penal Law § 65.10 [2] [h]) and submit to the use and pay the costs of an electronic monitoring device for a period of 12 months (*see* § 65.10 [4]; *People v Hakes*, — NY3d —, —, 2018 NY Slip Op 08538, *1-4 [2018]). We therefore further modify the judgment accordingly.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1260

KA 17-00960

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALFONSO C. CUTAIA, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered January 31, 2017. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of predatory sexual assault against a child (Penal Law § 130.96). Defendant was acquitted of another count of predatory sexual assault against a child involving a different complainant. We affirm.

Defendant challenges County Court's admission of certain *Molineux* evidence. That evidence, however, pertained only to the count of which defendant was acquitted, and the court gave extensive limiting instructions forbidding the jury from considering the *Molineux* evidence in connection with the count of which he was convicted. As such, defendant was not prejudiced by the *Molineux* evidence at issue, and we therefore reject his assertion that he was denied a fair trial as a result of its admission (*see People v Reynoso-Fabian*, 134 AD3d 1141, 1146-1147 [3d Dept 2015]; *see generally People v Young*, 255 AD2d 907, 907 [4th Dept 1998], *affd* 94 NY2d 171 [1999]). Defendant's related claim that the admission of the *Molineux* evidence chilled his right to testify about the charge of which he was convicted necessarily assumes that the jury would have disregarded the court's clear instructions forbidding any consideration of the *Molineux* evidence in connection with that charge, and the law does not permit such an assumption (*see generally People v Baker*, 14 NY3d 266, 274 [2010]; *People v Alexander*, 160 AD3d 1370, 1371 [4th Dept 2018], *lv denied* 32 NY3d 1001 [2018]).

Contrary to defendant's further contention, the court properly denied his motion to sever the two counts for trial (*see People v Rios*, 107 AD3d 1379, 1380-1381 [4th Dept 2013], *lv denied* 22 NY3d 1158 [2014]; *see also People v Molyneaux*, 49 AD3d 1220, 1221 [4th Dept 2008], *lv denied* 10 NY3d 937 [2008]).

We reject defendant's contention that he was deprived of due process by four instances of alleged prosecutorial misconduct on summation. As defendant correctly concedes, the court effectively sustained his objections to all four challenged comments. Because defendant did not seek any further relief in connection with three of the four challenged comments, any prejudice from those three comments was presumptively corrected to his satisfaction (*see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Carson*, 122 AD3d 1391, 1393 [4th Dept 2014], *lv denied* 25 NY3d 1161 [2015]). Defendant's mistrial motion with respect to the remaining challenged comment was properly denied because the prosecutor did not actually comment on defendant's failure to testify (*see People v Elliott*, 288 AD2d 907, 907 [4th Dept 2001], *lv denied* 97 NY2d 704 [2002]; *see generally People v Thomas*, 96 AD3d 1670, 1673 [4th Dept 2012], *lv denied* 19 NY3d 1002 [2012]).

The sentence is not unduly harsh or severe. We are nevertheless compelled to emphasize once again that, "[c]ontrary to the People's contention, and as we have previously noted, it is well settled that this Court's sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court . . . , and that we may substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v White*, 153 AD3d 1565, 1568 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017] [internal quotation marks omitted]).

Finally, we note that the "certificate of disposition" contains multiple errors that must be corrected (*see generally People v Saxton*, 32 AD3d 1286, 1286 [4th Dept 2006]). First, the certificate lists an incorrect date for the underlying offense, and it must be amended to reflect the correct date range specified in count one of the indictment. Second, the certificate incorrectly states that count one of the indictment was "reduced" at some point during the proceedings, and this notation must be stricken. Third, the certificate does not clearly specify the jury's verdict on each count, and it must be amended to clearly indicate that defendant was convicted of count one and acquitted of count two. Fourth, the certificate incorrectly states that the court assessed only a $325 "surcharge" at sentencing; rather, the court assessed a $300 mandatory surcharge, a $50 DNA databank fee, a $25 crime victim assistance fee, and a $50 sex offender registration fee, and the certificate must be amended to correctly delineate the various fees and surcharges assessed.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1261

KA 16-01597

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ABIMAEL AYALA-GONZALEZ, ALSO KNOWN AS JAVI, ALSO KNOWN AS RABITO, ALSO KNOWN AS MIJO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered August 17, 2016. 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]), arising from the fatal shooting of the victim outside a residence on Herkimer Street in Buffalo. Defendant contends that the conviction is not supported by legally sufficient evidence primarily because there is no direct evidence that he fired the shot that killed the victim. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 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 Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007] [internal quotation marks omitted]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Here, prosecution witnesses testified that defendant was observed arguing with the victim about poor quality drugs earlier on the day of the shooting and that, later in the day, gunshots were heard and a man with a blond ponytail, i.e., a distinguishing feature of defendant's appearance, was observed with a gun in his hands running toward West Delavan Avenue, near Herkimer Street. Prosecution witnesses also testified that, around the same

time, defendant ran to a yellow pickup truck on West Delavan Avenue with a gun in his hand. We therefore conclude that there is ample evidence in the record from which the jury could have reasonably concluded that defendant possessed a weapon and fired the shot that killed the victim. Additionally, 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 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, Supreme Court did not err in denying defense counsel's request for a racial identification charge (*cf. People v Boone*, 30 NY3d 521, 526 [2017]). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). We further conclude that the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contention and conclude that it does not warrant modification or reversal of the judgment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1263

KA 17-00095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDERSON ARROYO, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, 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 September 13, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of two counts of robbery in the first degree (Penal Law § 160.15 [2], [4]) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). We reject defendant's contention that Supreme Court erred in refusing to suppress physical evidence seized following a traffic stop of his vehicle. The evidence at the suppression hearing established that the police officer who initiated the stop had probable cause to stop defendant's vehicle for a violation of Vehicle and Traffic Law § 1111 (d) (1). We further conclude that the officer had a founded suspicion that criminal activity was afoot and he was therefore justified in asking for defendant's consent to search the vehicle (*see People v McGinnis*, 83 AD3d 1594, 1595 [4th Dept 2011], *lv denied* 18 NY3d 926 [2012]; *People v Tejeda*, 217 AD2d 932, 933 [4th Dept 1995], *lv denied* 87 NY2d 908 [1995]). At the time the officer asked defendant for his consent, the officer was aware that an armed robbery had occurred in physical and temporal proximity to the stop and that the robbery had involved two suspects whose clothing partially matched items either worn by defendant and the other occupant of the car or found in the backseat. Further, the officer testified that the occupants were not wearing coats despite the freezing weather and gave illogical and contradictory responses to his questions (*see McGinnis*, 83 AD3d at 1595; *cf. People v Hightower*, 136 AD3d 1396, 1396-1397 [4th Dept 2016]). Defendant abandoned his contention that the People failed to

establish through clear and convincing evidence that he consented to the search of his vehicle (*see People v Carrasquillo*, 142 AD3d 1359, 1360 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]) and, in any event, that contention lacks merit. Finally, in light of our determination, defendant's remaining contentions are moot.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1268

CAF 18-00022

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

IN THE MATTER OF NICKOLAS B., NEVAEH J.L.,
AND ZACHERY C.

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

KATHERINE F.L., RESPONDENT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR RESPONDENT-APPELLANT.

ANTHONY L. RESTAINO, LOCKPORT, FOR PETITIONER-RESPONDENT.

LAURA A. MISKELL, LOCKPORT, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered December 8, 2017 in a proceeding pursuant to Family Court Act article 10. The order denied respondent's application seeking the return of the subject children.

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

Memorandum: Respondent mother appeals from an order that denied her Family Court Act § 1028 application seeking the return of her children to her care and custody following their temporary removal pursuant to a prior order. We dismiss the appeal as moot because a final order of disposition was entered during the pendency of the appeal, finding that the children are neglected and placing them in petitioner's custody. "[A]n appeal from a denial of an application for return of a child removed as a result of the initiation of a proceeding pursuant to Family [Court] Act article 10 becomes moot at the point a decision is made on the charges of neglect or abuse" (*Matter of Corine G. [William G.]*, 135 AD3d 443, 444 [1st Dept 2016]; *see Matter of Bruce P.*, 138 AD3d 864, 865 [2d Dept 2016]; *Matter of Angel C. [Lynn H.]*, 103 AD3d 1246, 1247 [4th Dept 2013]; *cf. Matter of C. Children*, 249 AD2d 540, 540 [2d Dept 1998]) and, " '[i]nasmuch as a temporary order [of removal] is not a finding of wrongdoing, the exception to the mootness doctrine does not apply' " (*Matter of Faith B. [Rochelle C.]*, 158 AD3d 1282, 1282-1283 [4th Dept 2018], *lv denied* 31 NY3d 910 [2018]; *see Matter of Karrie-Ann ZZ. [Tammy ZZ.]*, 132 AD3d

1180, 1181 [3d Dept 2015]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1274

CA 18-00638

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

IN THE MATTER OF THOMAS JOHNSON, JANE JOHNSON,
JOE CLAUS AND MICHELLE CLAUS,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF HAMBURG, GREEN ACRES, INC., RESPONDENTS,
AND GLENN WETZL, RESPONDENT-APPELLANT.

HOPKINS SORGI & ROMANOWSKI PLLC, WILLIAMSVILLE (SEAN W. HOPKINS OF COUNSEL), FOR RESPONDENT-APPELLANT.

LIPPES & LIPPES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), dated June 16, 2017 in a proceeding pursuant to CPLR article 78. The judgment annulled a determination of the Town Board of respondent Town of Hamburg rezoning a parcel of land.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination of the Town Board of respondent Town of Hamburg (Town) granting the application of respondent Glenn Wetzl to rezone a parcel of land to allow the construction of a clustered patio-home project (project). In his answer, Wetzl raised an affirmative defense and objection in point of law that petitioners failed to state a claim upon which relief could be granted, and sought dismissal of the petition. We agree with Wetzl that Supreme Court erred in annulling the rezoning determination based on the purported failure of the Town Board to comply with Town Law § 264, as asserted in petitioners' fourth cause of action. That section provides that no amendment to any zoning regulation "shall become effective until after a public hearing in relation thereto, at which the public shall have an opportunity to be heard," and that "[a]t least ten days' notice of the time and place of such hearing shall be published in a paper of general circulation in such town" (§ 264 [1]). "The sufficiency of the notice is tested by whether it fairly apprises the public of the fundamental character of the proposed zoning change. It should not mislead interested parties into

foregoing attendance at the public hearing" (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 678 [1996]). Here, the notice relating to the rezoning application announced a public hearing on the adoption of an amendment to the Town's Zoning Code with respect to a specified "29.29 acres of vacant land" rather than the 24.24 acres actually under consideration. We conclude, however, that the notice was sufficient and that the court therefore erred in failing to dismiss the fourth cause of action. There is nothing in the record supporting the court's conclusion that a member of the public could reasonably have been misled by the erroneous description of the acreage and thereby caused to forego attending the public hearing.

We further agree with Wetzl that, although the court did not address petitioners' remaining three causes of action, we may consider them in the interest of judicial economy inasmuch as the record is adequate to permit review and the issues relating to them have been briefed by the parties on appeal (*see Matter of Munroe v Ponte*, 148 AD3d 1025, 1027 [2d Dept 2017]; *see also LM Bus. Assoc., Inc. v State of New York*, 124 AD3d 1215, 1218 [4th Dept 2015], *lv denied* 25 NY3d 905 [2015]; *Matter of Melber v New York State Educ. Dept.*, 71 AD3d 1216, 1217 [3d Dept 2010]). Upon our review of the record, we agree with Wetzl that the remaining causes of action must also be dismissed.

Contrary to the allegations in petitioners' first cause of action, the Town Board did not violate article 8 of the Environmental Conservation Law (State Environmental Quality Review Act [SEQRA]). We agree with Wetzl that the Town Board properly classified the project as an unlisted action, which, unlike a Type I action, does not carry a "presumption that it is likely to have a significant adverse impact on the environment" (6 NYCRR 617.4 [a] [1]; *see Matter of Village of Chestnut Ridge v Town of Ramapo*, 99 AD3d 918, 925 [2d Dept 2012], *lv dismissed and denied* 20 NY3d 1034 [2013]; *see also* 6 NYCRR 617.6 [a] [2], [3]). Further, the Town Board provided a reasoned elaboration of the basis for its determination to issue a negative declaration that allowed for effective judicial review (*see* 6 NYCRR 617.7 [b] [4]; *cf. Matter of Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571 [4th Dept 2015]), and we reject petitioners' contention that the Town Board failed to take the requisite hard look at the relevant areas of environmental concern, including, among other things, the effect of the project on preexistent flooding in the area to be rezoned (*see Matter of Pilot Travel Ctrs., LLC v Town Bd. of Town of Bath*, 163 AD3d 1409, 1412 [4th Dept 2018]).

Contrary to the allegations in petitioners' second cause of action, the record establishes that, before taking final action on the proposed rezoning, the Town Board did refer the matter to the Erie County Department of Environment and Planning (ECDEP) for review in compliance with General Municipal Law § 239-m, and the ECDEP's failure to issue a recommendation within 30 days of "receipt of a full statement of such proposed action" permitted the Town Board to make a final determination on the rezoning application (General Municipal Law § 239-m [4] [b]). In addition, the affidavit of the Town Board's planning consultant establishes that the submission to the ECDEP included, among other things, the SEQRA-related materials that

petitioners contend on appeal were omitted (*see* General Municipal Law § 239-m [1] [c]).

Finally, we agree with Wetzl that petitioners' third cause of action must also be dismissed because petitioners failed to demonstrate that a "clear conflict" exists between the Town's comprehensive plan and the rezoning determination (*Matter of Ferraro v Town Bd. of Town of Amherst*, 79 AD3d 1691, 1694 [4th Dept 2010], *lv denied* 16 NY3d 711 [2011] [internal quotation marks omitted]; *see Bergstol v Town of Monroe*, 15 AD3d 324, 325 [2d Dept 2005], *lv denied* 5 NY3d 701 [2005]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1276

CA 18-00587

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

JENNIFER R. SIMS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AYLA C. CICCONE-BURTON AND CHRISTA M. CICCONE,
DEFENDANTS-RESPONDENTS.

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

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered November 15, 2017. The order, insofar as appealed from, granted in part the motion of defendants for summary judgment and denied the cross 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 those parts of the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury within the meaning of Insurance Law § 5102 (d) and reinstating the complaint, as amplified by the bill of particulars, to that extent, and granting the cross motion in part with respect to the issue of negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this negligence action to recover damages for the injuries she allegedly sustained when her vehicle was rear-ended by a vehicle owned by defendant Christa M. Ciccone and operated by defendant Ayla C. Ciccone-Burton (driver). Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within, inter alia, the significant limitation of use, permanent consequential limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]), and plaintiff cross-moved for partial summary judgment on the issues of negligence and serious injury. Supreme Court denied plaintiff's cross motion and granted defendants' motion except with respect to the 90/180-day claim. Plaintiff now appeals.

On the issue of serious injury, we reject plaintiff's contention that the court erred in denying her cross motion with respect to the 90/180-day claim. We agree with plaintiff, however, that defendants

failed to meet the initial burden on their motion insofar as it sought summary judgment dismissing the significant limitation of use and permanent consequential limitation of use claims (*see Crane v Glover*, 151 AD3d 1841, 1841-1842 [4th Dept 2017]). We therefore modify the order accordingly.

Finally, the court erred in denying plaintiff's cross motion with respect to the issue of negligence, and we therefore further modify the order accordingly. "It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle . . . In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision . . . One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (*Macri v Kotrys*, 164 AD3d 1642, 1643 [4th Dept 2018] [internal quotation marks omitted]). Here, contrary to defendants' misconstruction of the record, the driver did not testify at her deposition that plaintiff suddenly stopped her vehicle and thereby precipitated the crash. Instead, the driver testified that she "remember[ed] being stopped and [that she] thought the car in front of [her] began to move, so [she] went on [her] acceleration [sic]. And next thing [she] knew there was a crack on [her windshield]." Far from constituting a nonnegligent explanation for the crash, the driver's deposition testimony conclusively establishes her own negligence, i.e., that she breached her " 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Cupp v McGaffick*, 104 AD3d 1283, 1284 [4th Dept 2013]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1278.1

CAF 18-00903

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

IN THE MATTER OF LINDA M. JONES,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SHANE LAUBACKER AND JOANNE LAUBACKER,
RESPONDENTS-APPELLANTS.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (BRIAN J. HUTCHISON OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

RYBAK, METZLER & GRASSO, PLLC, BATAVIA (JACQUELINE M. GRASSO OF COUNSEL), FOR PETITIONER-RESPONDENT.

JAKE M. WHITING, LEROY, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Genesee County (Sanford A. Church, A.J.), entered May 3, 2018, in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner visitation with the subject children.

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

Memorandum: Petitioner, the paternal grandmother of the subject children (grandmother), commenced this Family Court Act article 6 proceeding seeking visitation with the children. Following a hearing, Family Court determined, inter alia, that visitation with the grandmother was in the children's best interests. Even assuming, arguendo, that the grandmother established standing by demonstrating "circumstances in which equity would see fit to intervene" (*Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 181 [1991]; *see* Domestic Relations Law § 72 [1]), we agree with respondent father and respondent mother that the court's best interests determination lacks a sound and substantial basis in the record (*see Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1434 [4th Dept 2012]). We therefore reverse the order and dismiss the petitions.

On Sunday, June 25, 2017, the grandmother hosted brunch at her home. Almost every weekend prior to that date, the older of the two subject children (child) had at least one overnight visit at the grandmother's home, and then the parents would come to the grandmother's home for Sunday dinner. Present for brunch on June 25

were the parents, the child, and her uncle. Following brunch, the father and the uncle, who are brothers, engaged in a heated argument, which involved yelling. Before leaving, the father told the grandmother, "[N]o more weekends."

That same day, a report of child abuse or maltreatment was made to the Office of Children and Family Services (OCFS). The reporter's identity is confidential, per the normal protocol. We note, however, that the grandmother is an attorney, a longtime practitioner in Family Court, and an administrative law judge in OCFS. The report was investigated by Child Protective Services (CPS) and determined to be unfounded.

On Tuesday, June 27, the grandmother sent the father a text message, asking whether he would bring the child to her home the next weekend or whether she had to file a petition in Family Court. The father did not respond. The grandmother sent a similar text message to the mother, who responded that, per the advice of CPS, there would be no visitation until the investigation concluded. The mother advised the grandmother to contact the parents' attorney with any questions. On Wednesday, June 28, the grandmother filed a petition seeking visitation with the child every weekend from Friday at 10:00 a.m. to Sunday at noon. The petition accused the father of committing "an incident of domestic violence" on June 25, and noted that a CPS investigation of the incident "has commenced."

The first court appearance was July 14. The court asked the parents whether they were willing to allow temporary visitation with the grandmother. They were not. The next day, the uncle filed a police report accusing the father of assaulting him at the grandmother's home on June 25. According to the uncle, the father "picked up a chair and slammed it down" while the child's feet were under it. The child was unhurt. The father was yelling. The uncle told him to go outside. The father asked the uncle "to come outside like he wanted to fight." The uncle refused and responded, " 'you go outside.' " The father "went to push" the uncle, but the uncle "knocked [his] arms away." The father yelled, threw "papers and hair bands," and stomped away. The uncle wanted the father to be "held accountable for his actions."

A police officer interviewed the grandmother, who urged him to arrest the father for harassment. She explained to the officer that she works for OCFS reviewing CPS reports, including cases of fatality, and that she believed the father was going to kill the child. She stated: "When we were in court yesterday, I could see he hasn't changed his mind or demeanor . . . We asked about [temporary visitation]. Nothing, okay? So, it was clear to me that he still doesn't feel anything he did was inappropriate . . . ." The grandmother then gave her version of the incident, which was consistent with the uncle's version. The District Attorney declined to press charges.

On November 24, the younger of the two subject children (baby) was born. Shortly thereafter, the grandmother filed a second petition

seeking visitation with the baby. The matter proceeded to a fact-finding hearing, after which the court ordered the parents to allow the grandmother to exercise visitation with the children two weekends per month. A Justice of this Court stayed execution of the order pending appeal.

It is well established that a fit parent has a "fundamental constitutional right" to make parenting decisions (*Troxel v Granville*, 530 US 57, 69-70 [2000]; *see Hilgenberg*, 100 AD3d at 1434). For that reason, the Court of Appeals has emphasized that "the courts should not lightly intrude on the family relationship against a fit parent's wishes. The presumption that a fit parent's decisions are in the child's best interests is a strong one" (*Matter of E.S. v P.D.*, 8 NY3d 150, 157 [2007]; *see Hilgenberg*, 100 AD3d at 1434).

The parents here are fit. Although the court did not make an express finding with respect to their fitness in its decision, it looked favorably upon the parents. Specifically, the court referred to the child's family situation as "fortunate," discussed her "good relationships" with her parents, and praised the "strength of her nuclear family." Moreover, the record is sufficiently complete for us to make our own finding that the parents are fit (*see generally Matter of Belcher v Morgado*, 147 AD3d 1335, 1336 [4th Dept 2017]). Their counselor provided glowing testimony about the parents' relationship with each other and with their children. Furthermore, the maternal grandmother, a retired neonatal nurse, testified that the parents are "great parents," the child "adores them," and she has no concerns about their parenting. The parents both testified that they have a loving relationship and provide the children with appropriate support and discipline. There was virtually no evidence to the contrary.

Because the parents are fit, their decision to prevent the children from visiting the grandmother is entitled to "special weight" (*Troxel*, 530 US at 70). Additionally, our examination of the record reveals that their decision is founded upon legitimate concerns. The father testified that he expected the argument following brunch to be forgiven by the next weekend and for the family relationship to return to normal. In light of the CPS investigation and the litigation in Family Court, however, he no longer felt comfortable leaving the child with the grandmother. The mother testified to her observation that the child's behavior has improved since she stopped visiting the grandmother, whom the mother believed to be a bad influence. The court wholly ignored that testimony by the parents, erroneously refusing to give it the weight to which it is entitled.

Additional factors for the court to consider in rendering a best interests determination include "whether the grandparent and grandchild have a preexisting relationship, whether the grandparent supports or undermines the grandchild's relationship with his or her parents, and whether there is any animosity between the parents and the grandparent" (*Hilgenberg*, 100 AD3d at 1433, citing *E.S.*, 8 NY3d at 157-158). Although the grandmother and the child have an extensive preexisting relationship, the grandmother exhibited a willingness to use her position in the legal system to undermine the parental

relationship by initiating Family Court proceedings almost immediately, rather than making a good faith attempt to fix her family relationships without resorting to litigation. That evidence makes it difficult to draw any conclusion other than that the grandmother "is responsible for escalating a minor incident into a full-blown family crisis, totally ignoring the damaging impact [her] behavior would have on the [family relationships] and making no effort to mitigate that impact" (*Matter of Articolo v Grasso*, 132 AD3d 1193, 1195 [3d Dept 2015]).

There is now palpable animosity between the parties. Approximately three months after the litigation commenced, the parents legally changed their hyphenated surname to remove the grandmother's surname. "I'm no longer part of that family," the father testified at the hearing. "[T]his is not how families act towards each other." Furthermore, there is evidence demonstrating that the grandmother and the uncle are an emotional trigger for the father. That evidence was corroborated by the testimony of the parents' counselor, who testified that the father is mild-mannered, but that he became upset with the grandmother because she "was very controlling." The grandmother eventually acknowledged the extent of the animosity that had developed in her family. During rebuttal, she testified that it would be better to pick the children up and drop them off at a neutral location. "After listening to [the parents]," she testified, "it's probably best that they don't come to the house. That seems like that's going to be stressful and difficult for everybody." Although animosity alone is not a sufficient reason to deny visitation (*see E.S.*, 8 NY3d at 157), here, the animosity threatens to disrupt the harmonious functioning of the family unit.

Thus, upon consideration of all the relevant factors, we conclude that visitation with the grandmother is not in the children's best interests and that the court's determination to the contrary lacks a sound and substantial basis in the record (*see Hilgenberg*, 100 AD3d at 1433-1434).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1278

CA 18-00924

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

DIANE MEKA AND JOHN MEKA,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

SCOTT PUFPAFF AND TRACY PUFPAFF,
DEFENDANTS-APPELLANTS-RESPONDENTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (THOMAS P. CUNNINGHAM OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LAW OFFICES OF EUGENE C. TENNEY, PLLC, BUFFALO (COURTNEY G. SCIME OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered December 5, 2017. The order denied the motion of defendants for summary judgment and denied the cross motion of plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint insofar as it alleges negligence, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly sustained by Diane Meka (plaintiff) as a result of the vicious propensities of defendants' dogs, Eli and Nyx. Plaintiff was walking her dog, Macie, around the neighborhood when Eli and Nyx approached them. Eli approached first and began sniffing Macie. Then, according to plaintiff's deposition testimony, Nyx came toward her at a "full run" and began "biting" Macie's neck. As plaintiff screamed for help, she lost her balance, fell over one of the dogs, and dropped to the curb, fracturing her arm. Defendants appeal and plaintiffs cross-appeal from an order that, inter alia, denied defendants' motion for summary judgment dismissing the complaint and plaintiffs' cross motion for summary judgment on the complaint.

Defendants contend on their appeal that Supreme Court erred in denying their motion with respect to the strict liability cause of action because their dogs had not demonstrated vicious propensities prior to the subject incident (*see generally Collier v Zambito*, 1 NY3d 444, 446-447 [2004]). We reject that contention. It is well settled that "an animal that behaves in a manner that would not necessarily be

considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*id.* at 447; *see Long v Hess*, 162 AD3d 1646, 1646 [4th Dept 2018]). " 'A known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[] liable for damages resulting from such an act' " (*Long*, 162 AD3d at 1647; *see Lewis v Lustan*, 72 AD3d 1486, 1487 [4th Dept 2010]). Although defendants testified that they never saw their dogs behave aggressively toward another dog, defendants submitted the deposition testimony of a neighbor, who testified that one day, when she was walking her dog past defendants' house, Eli and Nyx growled and "came charging" at them, thus raising an issue of fact by their own submissions (*see Lewis*, 72 AD3d at 1487).

Inasmuch as there are triable issues of fact whether defendants' dogs had vicious propensities, we likewise reject plaintiffs' contention on their cross appeal that the court erred in denying their cross motion with respect to the strict liability cause of action. Contrary to plaintiffs' further contention, the court properly disregarded the affidavit submitted with their surreply papers. It is generally improper for a party seeking relief by cross motion to submit evidence for the first time in surreply papers (*cf. Ferrari v Natl. Football League*, 153 AD3d 1589, 1590 [4th Dept 2017]), and plaintiffs have offered no justification for failing to submit the affidavit with their cross motion papers.

Finally, we agree with defendants on their appeal that the court erred in denying the motion with respect to the allegations of negligence, and we therefore modify the order accordingly. A claim sounding in ordinary negligence does not lie against the person responsible for a dog that causes injury (*see Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]; *Long*, 162 AD3d at 1646).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1286

KA 16-02358

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRIZELL AUGHTRY, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 16, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary 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 a plea of guilty of three counts of burglary in the third degree (Penal Law § 140.20). We agree with defendant that his waiver of the right to appeal his conviction does not encompass his challenge to the severity of the sentence (*see People v Maracle*, 19 NY3d 925, 928 [2012]). Supreme Court advised defendant that he was not waiving his right to appeal an illegal sentence but failed to clarify during the course of the allocution that he was waiving his right to appeal any issue concerning the severity of the sentence (*see generally People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015]). Further, "[a]lthough defendant executed a written waiver of the right to appeal, there was no colloquy between [the c]ourt and defendant regarding the written waiver to ensure that defendant read and understood it and that he was waiving his right to challenge the length of the sentence" (*People v Mack*, 124 AD3d 1362, 1363 [4th Dept 2015]; *see generally People v Carno*, 101 AD3d 1663, 1663-1664 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1287

KA 17-00194

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RYAN DONNELLY, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., SPECIAL DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), entered January 12, 2017. 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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1289

KA 15-01128

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESLIE W. HOKE, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered August 19, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted course of sexual conduct against a child in the first degree, criminal sexual act in the first degree and criminal sexual act 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, inter alia, criminal sexual act in the first degree (Penal Law § 130.50 [1]) and criminal sexual act in the third degree (§ 130.40 [2]). Defendant validly waived his right to appeal (*see People v Robinson*, 112 AD3d 1349, 1349 [4th Dept 2013], *lv denied* 23 NY3d 1042 [2014]; *People v Hinkson*, 59 AD3d 934, 935 [4th Dept 2009], *lv denied* 12 NY3d 817 [2009]; *see also People v King*, 151 AD3d 1651, 1652 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]), and that waiver encompasses his challenge to the severity of his sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]). Although defendant's remaining contentions survive his valid appeal waiver (*see People v Sears*, 158 AD3d 1293, 1294 [4th Dept 2018], *lv denied* 31 NY3d 1087 [2018]; *People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]), they are nevertheless unpreserved and we decline to review them as a matter of discretion in the interest of justice (*see Sears*, 158 AD3d at 1294; *People v Wilson*, 289 AD2d 1088, 1088 [4th Dept 2001], *lv denied* 98 NY2d 656 [2002]).

As defendant correctly notes, County Court erroneously stated, prior to imposing sentence, that he had pleaded guilty to criminal sexual act in the *third* degree under count 32 of the indictment. In fact, defendant had pleaded guilty to criminal sexual act in the *first* degree under that count. Nevertheless, when viewed in context, it is

apparent that the court merely misspoke and actually intended to and did impose sentence for the appropriate crime consistent with the negotiated term. Thus, as the Second Department recognized under these exact circumstances, "a remittitur for what must necessarily be reimposition of the same sentence would serve no purpose whatsoever" (*People v Tarrant*, 109 AD2d 763, 764 [2d Dept 1985]; *see also People v Martinez*, 243 AD2d 923, 925 [3d Dept 1997]).

Finally, the uniform sentence and commitment form must be amended to state that the sentence on count 32 runs concurrently with the sentences on count 1 and count 8, and to reflect the correct offense dates as specified in counts 1, 8, and 32 of the indictment (*see People v Southard*, 163 AD3d 1461, 1462 [4th Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1290

KA 16-00791

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDALL C. HOLDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 10, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1291

KA 16-00789

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDALL C. HOLDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 10, 2016. The judgment convicted defendant, upon his plea of guilty, of forgery in the second degree (two counts), identity theft in the first degree and scheme to defraud in the first degree.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1292

KA 16-00788

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RANDALL C. HOLDEN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered February 11, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a misdemeanor (four counts) and aggravated unlicensed operation of a motor vehicle in the first degree (two counts).

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1302

CA 18-00604

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF M. B., PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

M. B., PETITIONER-APPELLANT PRO SE.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR RESPONDENT-RESPONDENT SUICIDE PREVENTION AND CRISIS SERVICES, INC.

HURWITZ & FINE, P.C., BUFFALO (ASHMITA ROKA OF COUNSEL), FOR RESPONDENT-RESPONDENT BRYLIN HOSPITAL.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE OFFICE OF MENTAL HEALTH.

RICOTTA & VISCO, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR RESPONDENT-RESPONDENT ERIE COUNTY MEDICAL CENTER.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered January 29, 2018. The order, among other things, conditionally dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Aho*, 39 NY2d 241, 248 [1976]).

Mark W. Bennett

Entered: December 21, 2018

Clerk of the Court

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

1303

CA 18-00605

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

IN THE MATTER OF M. B., PETITIONER-APPELLANT,

V ORDER

NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

M. B., PETITIONER-APPELLANT PRO SE.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR RESPONDENT-RESPONDENT SUICIDE PREVENTION AND CRISIS SERVICES, INC.

HURWITZ & FINE, P.C., BUFFALO (ASHMITA ROKA OF COUNSEL), FOR RESPONDENT-RESPONDENT BRYLIN HOSPITAL.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENT-RESPONDENT NEW YORK STATE OFFICE OF MENTAL HEALTH.

RICOTTA & VISCO, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR RESPONDENT-RESPONDENT ERIE COUNTY MEDICAL CENTER.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 6, 2018. The judgment dismissed the petition.

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

Mark W. Bennett

Entered: December 21, 2018

Clerk of the Court

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

1308

CA 18-01207

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

KATHERINE WALDECK, PLAINTIFF-RESPONDENT,

V ORDER

STARPOINT CENTRAL SCHOOL DISTRICT AND STARPOINT BOARD OF EDUCATION, DEFENDANTS-APPELLANTS.

BAXTER SMITH & SHAPIRO, P.C., BUFFALO (JOSHUA A. BLOOM OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Daniel Furlong, J.), entered October 6, 2017. The order 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 16, 2018,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1311

KA 13-00035

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JORDAN J. ELLISON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 7, 2013. The judgment convicted defendant, upon a jury verdict, of burglary in the third degree (two counts) and criminal possession of stolen property in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by vacating the finding that defendant is a persistent felony offender, reducing the sentences imposed for burglary in the third degree under counts one and two of the indictment to indeterminate terms of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the fourth degree under count three of the indictment to an indeterminate term of incarceration of 2 to 4 years, and directing that the sentences on counts one and two run concurrently with each other and consecutively to the sentence imposed on count three, and as modified the judgment is affirmed.

Memorandum: Following a jury trial, defendant was convicted of two counts of burglary in the third degree (Penal Law § 140.20) and one count of criminal possession of stolen property in the fourth degree (§ 165.45 [1]). The charges arose from two separate shoplifting incidents that occurred five days apart. As a result of the first theft, which occurred at a Macy’s store in Marketplace Mall, defendant was charged with two counts of burglary in the third degree because he had previously been banned for life from entering Macy’s and the mall itself. The second theft, occurring at a Gap store in a different mall, resulted in a felony possession of stolen property charge because the value of the items taken by defendant exceeded $1,000. All of the property from both thefts was recovered by the police minutes after defendant left the stores. Although defendant

had been offered the opportunity prior to trial to plead guilty in return for a sentencing promise of concurrent indeterminate terms of incarceration of 2 to 4 years, he rejected that offer and proceeded to trial. The proof of guilt at trial was overwhelming, and the jury quickly returned a guilty verdict on all counts. Supreme Court thereafter adjudicated defendant a persistent felony offender and sentenced him to 20 years to life on each count. The sentences are concurrent.

On a prior appeal, we modified the judgment by reducing the sentences imposed to concurrent indeterminate terms of incarceration of 15 years to life and otherwise affirmed (*People v Ellison*, 124 AD3d 1230 [4th Dept 2015], *lv denied* 25 NY3d 1201 [2015]). We thereafter granted defendant's motion for a writ of error coram nobis based on his appellate counsel's failure to contend that the court "abused its discretion in finding defendant a persistent felony offender" (*People v Ellison*, 136 AD3d 1354, 1354 [4th Dept 2016]). We now consider defendant's appeal de novo.

The sentencing court's determination to sentence a defendant as a persistent felony offender "cannot be held erroneous as a matter of law, unless [that] court acts arbitrarily or irrationally" (*People v Rivera*, 5 NY3d 61, 68 [2005], *cert denied* 546 US 984 [2005]). Even where the sentencing court does not err as a matter of law in adjudicating a defendant to be a persistent felony offender, however, "[t]he Appellate Division, in its own discretion, may conclude that a persistent felony offender sentence is too harsh or otherwise improvident" (*id*.). "In this way, the Appellate Division can and should mitigate inappropriately severe applications of the statute" (*id*.). A determination by the Appellate Division to vacate a harsh or severe persistent felony offender finding is authorized by CPL 470.20 (6), which grants the Appellate Division discretion to modify sentences in the interest of justice "without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783 [1992]; *see People v Meacham*, 151 AD3d 1666, 1670 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]).

Here, given defendant's extensive criminal record, we cannot conclude that the court acted arbitrarily or irrationally in finding defendant to be a persistent felony offender. Nevertheless, we exercise our discretion in the interest of justice to vacate that finding (*see People v Lusby*, 2 AD3d 1332, 1333 [4th Dept 2003]; *People v Beckwith*, 309 AD2d 1253, 1254 [4th Dept 2003]; *People v Collazo*, 273 AD2d 93, 93 [1st Dept 2000], *lv denied* 95 NY2d 889 [2000]). Although defendant has a lengthy criminal history, almost all of his offenses stem from him stealing from stores to get money to support his long-standing drug habit. It does not appear from the presentence report that defendant has ever inflicted violence on anyone, and he certainly did not physically harm anyone in this case.

We note that the People never requested that defendant be adjudicated a persistent felony offender; instead, the court sua sponte ordered the persistent felony offender hearing. As noted, the People, in a pretrial plea bargain, offered defendant a sentence of

concurrent indeterminate terms of incarceration of 2 to 4 years. Moreover, the judge who initially handled this case transferred it to Drug Treatment Court, which rejected defendant due to his extended period of sobriety—he had been in jail for more than a year at the time awaiting trial. Defendant thus went from having his case transferred to Drug Treatment Court, where successful completion may have resulted in reduction of the felony charges to misdemeanors, to being sentenced to 20 years to life, on the same charges. Such a disparity between the plea offer and the ultimate sentence militates in favor of a sentence reduction, especially for a nonviolent offender such as defendant.

Thus, as a matter of discretion in the interest of justice, we modify the judgment by vacating the finding that defendant is a persistent felony offender, reducing the sentences imposed for burglary in the third degree under counts one and two of the indictment to indeterminate terms of incarceration of 3½ to 7 years, reducing the sentence imposed for criminal possession of stolen property in the fourth degree under count three to an indeterminate term of incarceration of 2 to 4 years, and directing that the sentences imposed on counts one and two run concurrently with each other and consecutively to the sentence imposed on count three. Those are the maximum sentences that may be imposed upon a second felony offender for the subject crimes. The aggregate sentence as modified is 5½ to 11 years.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1313

KA 18-00289

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN CONSIDINE, II, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered November 14, 2017. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]). Defendant was sentenced to an indeterminate term of 1 to 3 years' imprisonment, a consecutive one-year conditional discharge, and a fine of $1,000. That sentence is illegal because the conditional discharge term must be three years under these circumstances (*see* Penal Law §§ 60.21, 65.05 [3] [a]; Vehicle and Traffic Law § 1193 [1] [c] [iii]). Although the issue is not raised by either party, we cannot allow an illegal sentence to stand (*see People v Southard*, 163 AD3d 1461, 1461 [4th Dept 2018]; *People v Sellers*, 222 AD2d 941, 941 [3d Dept 1995]). We therefore vacate the sentence and remit the matter to Supreme Court to afford defendant the opportunity to either withdraw his plea or be resentenced to the legal term of conditional discharge (*see Sellers*, 222 AD2d at 941; *see generally People v Ciccarelli*, 32 AD3d 1175, 1176 [4th Dept 2006]). Defendant's appellate contentions are academic in light of our determination.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1314

KA 16-01246

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT L. SMITH, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered October 8, 2015. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. The record establishes that his waiver of the right to appeal was knowing, intelligent and voluntary (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of the sentence (*see id*. at 255).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1315

KA 15-01850

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

MARK H. STAHL, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Stephen D. Aronson, A.J.), rendered September 24, 2015. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony (two counts), and unlawful possession of marihuana.

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 two counts of driving while intoxicated (DWI) as a class E felony (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]) and one count of unlawful possession of marihuana (Penal Law § 221.05), defendant contends that County Court erred in refusing to suppress all evidence seized as a result of the stop of his vehicle at a DWI checkpoint. We reject that contention; therefore, we affirm.

It is well settled that "individualized suspicion is not a prerequisite to a constitutional seizure of an automobile which is 'carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers' " (*People v Scott*, 63 NY2d 518, 525 [1984]). Here, we agree with the People that defendant's vehicle was stopped "pursuant to a nonarbitrary, nondiscriminatory and uniform procedure, involving the stop of all vehicles" approaching the checkpoint (*People v John BB.*, 56 NY2d 482, 488 [1982], *cert denied* 459 US 1010 [1982]). Moreover, the State Troopers "were given explicit verbal instructions on the procedures to be used at the roadblock, including the nature of the questions to be asked of every driver, and those instructions 'afforded little discretion to [the] personnel' " at the checkpoint (*People v Gavenda*, 88 AD3d 1295, 1296 [4th Dept 2011]; *see People v LaFountain*, 283 AD2d 1013, 1014 [4th Dept 2001]). Contrary to defendant's further contention, the Trooper who initiated the removal of defendant's

vehicle from the line at the checkpoint for further investigation was not the sergeant who determined where and when the checkpoint should be set up (*see generally Matter of Muhammad F.*, 94 NY2d 136, 144 [1999], *cert denied* 531 US 1044 [2000]). Furthermore, we reject defendant's contention that the checkpoint was illegal because there were no written guidelines concerning the operation of the checkpoint (*see People v Haskins*, 86 AD3d 794, 796 [3d Dept 2011], *lv denied* 17 NY3d 903 [2011]; *People v Sinzheimer*, 15 AD3d 732, 734 [3d Dept 2005], *lv denied* 5 NY3d 794 [2005]; *People v Serrano*, 233 AD2d 170, 171 [1st Dept 1996], *lv denied* 89 NY2d 929 [1996]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1317

KA 14-02101

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON K. NIKITEAS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 18, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). Defendant contends that Supreme Court erred in refusing to suppress evidence obtained after the police stopped his vehicle because the testimony of officers regarding their reasons for the stop were incredible and tailored to nullify constitutional objections. We reject that contention.

"It is well settled that, 'where a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation, a stop does not violate [the state or federal constitutions, and] . . . neither the primary motivation of the officer nor a determination of what a reasonable traffic officer would have done under the circumstances is relevant' " (*People v Howard*, 129 AD3d 1469, 1470 [4th Dept 2015], *lv denied* 26 NY3d 968 [2015], *reconsideration denied* 26 NY3d 1089 [2015]). Furthermore, "the credibility determinations of the suppression court 'are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record' " (*id*.).

Here, one of the officers who participated in the stop testified at the suppression hearing that he initially chose to follow defendant's vehicle because he could not see its registration sticker.

While following the vehicle, the officers saw the vehicle's turn signal activated within only 50 feet of a turn in violation of Vehicle and Traffic Law § 1163 (b), which requires that a turn signal be activated no less than 100 feet before the turn. The officers then stopped the vehicle and observed that the registration sticker was affixed to the windshield but was curling at the corners, making it difficult to see. The officers roughly measured the distance between the intersection and where defendant activated his turn signal, confirming their estimate that the distance was approximately 50 feet.

Although the officers were mistaken in their initial belief that the vehicle lacked a registration sticker (*see generally People v Jean-Pierre*, 47 AD3d 445, 445 [1st Dept 2008], *lv denied* 10 NY3d 865 [2008]), that mistake and the issue whether it was reasonable is irrelevant because defendant's failure to activate his turn signal at the requisite distance before making the turn was alone sufficient to justify the stop (*see* Vehicle and Traffic Law § 1163 [b]; *see also People v Cuffie*, 109 AD3d 1200, 1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]). Indeed, the suppression court expressly determined as much by concluding that "defendant's failure to properly signal a turn . . . provided an independent lawful basis for the stop."

Finally, contrary to defendant's further contention, " '[n]othing about the officer[s'] testimony was unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, . . . self-contradictory' " or tailored to nullify constitutional objections (*People v Knighton*, 144 AD3d 1594, 1594-1595 [4th Dept 2016], *lv denied* 28 NY3d 1147 [2017]). We therefore discern no basis in the record for disturbing the court's finding that probable cause existed for the traffic stop (*see People v Rucker*, 165 AD3d 1638, 1638 [4th Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1318

KA 16-01231

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONZELL CAMBER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered April 12, 2016. 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 now affirm.

Supreme Court properly refused to suppress a loaded gun recovered from defendant's person after the vehicle in which he was riding pulled over. Within approximately one minute and three blocks of a corroborated 911 report of shots fired, a police officer observed a vehicle that appeared to match the description provided by the 911 caller of a vehicle "possibly involved" in the shooting. Although defendant correctly argues that the officer effectuated a level three seizure at the moment he ordered defendant and the other occupants to remain in the vehicle (*see People v Harrison*, 57 NY2d 470, 476 [1982]), we nevertheless agree with the People that, given the circumstances described above, the officer possessed the requisite reasonable suspicion of criminality to effect that seizure (*see People v Martinez*, 147 AD3d 642, 642 [1st Dept 2017], *lv denied* 29 NY3d 1034 [2017]; *People v Williams*, 126 AD3d 1304, 1304-1305 [4th Dept 2015], *lv denied* 25 NY3d 1209 [2015]; *People v Sanchez*, 216 AD2d 207, 208 [1st Dept 1995], *lv denied* 87 NY2d 850 [1995]). Defendant's ensuing refusal to follow that officer's directive to show his hands and related evasive conduct justified the subsequent pat frisk in which the gun was discovered (*see People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008]).

The sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1321

CAF 17-01215

PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF TARA BUTLER,
PETITIONER-RESPONDENT,

V ORDER

DIANE L. BUTLER, RESPONDENT-APPELLANT,
AND RICHARD E. VANGORDEN, RESPONDENT-RESPONDENT.

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

EDWARD F. MURPHY, III, HAMMONDSPORT, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered June 19, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded custody of the subject child to petitioner.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1331

KA 16-00445

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRISON LESTER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 27, 2014. The appeal was held by this Court by order entered November 9, 2017, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (155 AD3d 1579 [4th Dept 2017]). The proceedings were held and completed.

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 first degree (Penal Law § 140.30 [3]) and burglary in the second degree (§ 140.25 [2]). We previously held the case, reserved decision, and remitted the matter for County Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*People v Lester*, 155 AD3d 1579, 1579 [4th Dept 2017]; *see generally People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon remittal, the court determined that defendant should not be afforded youthful offender status. We conclude that the court did not thereby abuse its discretion, particularly in view of the nature of the crimes, in which defendant, on one occasion, broke into the home of a 98-year-old woman by climbing through a front porch window, and on another occasion entered the same woman's home through a rear side door and threatened her with a hammer (*see generally People v Mobley*, 118 AD3d 1336, 1338 [4th Dept 2014], *lv denied* 24 NY3d 1121 [2015]). In addition, upon our review of the record, we decline to exercise our own discretion in the interest of justice to adjudicate defendant a youthful offender (*see People v Mohawk*, 142 AD3d 1370, 1371 [4th Dept 2016]; *cf. People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]). Finally, we

conclude that the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1332

TP 18-01252

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

IN THE MATTER OF MAURICE BURGESS, 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.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO 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 July 11, 2018) 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 amended petition is dismissed.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1334

KA 16-01163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN R. CRAMER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered September 29, 2014. 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 his plea of guilty of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carroll*, 148 AD3d 1546, 1546 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017] [internal quotation marks omitted]; *see People v Lewis* [appeal No. 1], 161 AD3d 1588, 1588 [4th Dept 2018]). Moreover, the colloquy concerning the waiver of the right to appeal, which was immediately preceded by a colloquy concerning the rights automatically forfeited by a guilty plea, conflated the right to appeal with the rights forfeited by a guilty plea (*see People v Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 27 NY3d 1067 [2016]). We nevertheless reject defendant's challenge to the severity of the sentence.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1335

KA 17-01686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON YINGST, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Stephen J. Dougherty, A.J.), entered July 12, 2017. 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: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order classifying him as a level two risk. Defendant pleaded guilty to a federal sex offense arising from his possession of, among other things, 3,246 images of child pornography, 553 videos of child pornography, 1,160 images of child erotica, and 4,988 other images of children. Contrary to defendant's contention, although the risk assessment instrument prepared by the Board of Examiners of Sex Offenders (Board) classified defendant as a presumptive level one risk, County Court did not grant an upward departure or improperly employ an automatic override in order to raise defendant's presumptive risk level from a level one to a level two risk. Instead, the court determined that defendant was a presumptive level two risk after it assigned points under risk factor 3 in addition to those also assessed by the Board under risk factors 5, 9, and 11. To the extent that defendant contends that the court erred in assessing defendant 30 points under risk factor 3, we reject that contention. It is well established that "children depicted in pornographic images are each separate victims for purposes of the Sex Offender Registration Act in general and risk factor 3 in particular" (*People v Bernecky*, 161 AD3d 1540, 1540 [4th Dept 2018], *lv denied* 32 NY3d 901 [2018] [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 859-860 [2014]; *People v Poole*, 90 AD3d 1550, 1550 [4th Dept 2011]).

Contrary to defendant's further contention, the court did not

abuse its discretion in denying defendant's request for a downward departure from his presumptive risk level (*see Bernecky*, 161 AD3d at 1541).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1336

KA 16-01963

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY B., DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered October 4, 2016. Defendant was adjudicated a youthful offender upon his plea of guilty of attempted robbery in the first degree.

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

Memorandum: On appeal from a youthful offender adjudication based upon his plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [2]), defendant contends that his waiver of the right to appeal is invalid. We agree. The minimal perfunctory inquiry made by Supreme Court was "insufficient to establish that the court 'engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]; *see People v Hamilton*, 49 AD3d 1163, 1164 [4th Dept 2008]). Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe. We note, however, that the certificate of conviction contains internal inconsistencies and must therefore be amended to reflect that defendant was sentenced to an indeterminate term of incarceration of 1⅓ to 4 years (*see People v Tumolo*, 149 AD3d 1544, 1544 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1337

KA 15-02050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY S. ORTIZ, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Douglas A. Randall, J.), rendered June 2, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, assault in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]), assault in the second degree (§ 120.05 [2]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that he was deprived of effective assistance of counsel because defense counsel failed to ask County Court to instruct the jury on a justification defense and objected to the prosecutor's request that the jury be charged with manslaughter in the first degree (§ 125.20 [1]) as a lesser included offense of murder in the second degree. We reject that contention.

"[I]t 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 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]), and defendant failed to meet that burden here (*see People v Hicks*, 110 AD3d 1488, 1489 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]). Although there was a reasonable view of the evidence that defendant was justified in shooting one of the victims, who was chasing defendant as he fled a violent brawl, defense counsel chose instead to pursue a misidentification defense. "Each defense theory available to defendant posed its own challenges, and the choice of one, instead of the other, was not 'determinative of the verdict' " (*People v Clark*,

28 NY3d 556, 564 [2016], quoting *People v Petrovich*, 87 NY2d 961, 963 [1996]). Further, "the misidentification theory had the potential to achieve defendant's acquittal on all charges," whereas a successful justification defense under the circumstances here "would only have resulted in acquittal on the murder charge" (*id.*). Therefore, defense counsel's decision to advance the misidentification defense "was consistent with strategic decisions of a reasonably competent attorney" (*Benevento*, 91 NY2d at 712 [internal quotation marks omitted]). Defendant also failed to demonstrate the lack of a strategic basis for defense counsel's alleged ineffectiveness in objecting to the prosecutor's request that the jury be instructed on the lesser included offense of manslaughter in the first degree (*see generally People v Malaussena*, 44 AD3d 349, 350 [1st Dept 2007], *affd* 10 NY3d 904 [2008]). Thus, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation," establish that defendant received meaningful representation (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1339

KA 15-01964

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUY DILLON, JR., DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 13, 2015. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny.

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]) and petit larceny (§ 155.25). Defendant contends that Supreme Court erred in denying his pro se speedy trial motion because defense counsel did not execute a valid written waiver of defendant's statutory speedy trial rights prior to the expiration of the six-month time period in which the People were required to be ready for trial (*see* CPL 30.30 [1] [a]). That contention is raised for the first time on appeal and thus is not preserved for our review (*see generally People v Beasley*, 16 NY3d 289, 292 [2011]; *People v Goode*, 87 NY2d 1045, 1047 [1996]). In any event, we conclude that the contention is without merit. It is undisputed that defendant met his initial burden "of alleging that the People were not ready for trial within the statutorily prescribed time period" (*People v Allard*, 28 NY3d 41, 45 [2016]), and the burden therefore shifted to the People to demonstrate "sufficient excludable time" (*People v Kendzia*, 64 NY2d 331, 338 [1985]). The People met their burden by establishing that defense counsel orally waived defendant's speedy trial rights within the statutory period, thus extending the time for the People to proceed with prosecution (*see People v Wheeler*, 159 AD3d 1138, 1141 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]; *see generally People v Dickinson*, 18 NY3d 835, 836 [2011]). The written waiver produced by the People here establishes the validity of the oral waiver (*cf. People v Rousaw*, 151 AD3d 1179, 1180 [3d Dept 2017]). We reject

defendant’s further contention that the sentence is unduly harsh and severe. We have considered defendant’s remaining contention and conclude that it lacks merit.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1341

KA 11-00416

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONNEY L. ELLIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 22, 2010. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts) and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts of predatory sexual assault against a child (Penal Law § 130.96). Contrary to defendant's contention, his sentence is not unduly harsh or severe. Defendant failed to preserve his remaining contentions 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]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1342

KA 16-01258

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS DE LA CRUZ, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), entered March 11, 2016 pursuant to the 2009 Drug Law Reform Act. The order denied the application of defendant to be resentenced upon defendant's 1991 conviction of criminal possession of a controlled substance in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from an order denying his application for resentencing pursuant to the 2009 Drug Law Reform Act (*see* CPL 440.46), defendant contends that County Court erred in concluding that certain factors overcame the statutory presumption in favor of resentencing. We conclude that the court did not abuse its discretion in denying defendant's application.

It is well settled that a "defendant who is eligible for resentencing pursuant to CPL 440.46 enjoys a statutory presumption in favor of resentencing . . . However, resentencing is not automatic, and the determination is left to the discretion of the" sentencing court (*People v Bethea*, 145 AD3d 738, 738 [2d Dept 2016], *lv denied* 29 NY3d 946 [2017]; *see People v Arroyo*, 99 AD3d 515, 515 [1st Dept 2012], *lv denied* 20 NY3d 1059 [2013]). Contrary to defendant's contention, the court did not abuse its discretion in determining that substantial justice dictated denial of his application for resentencing, given "the seriousness of the underlying crime[s], and defendant's illegal reentry into the United States" and resumption of drug sales after being released from custody and deported (*People v Rodriguez*, 68 AD3d 543, 543 [1st Dept 2009]; *see People v Peña*, 55 AD3d 393, 393 [1st Dept 2008]; *People v Alcaraz*, 46 AD3d 253, 253 [1st Dept 2007]), as well as defendant's numerous disciplinary infractions

while incarcerated (*see People v Darwin*, 102 AD3d 807, 808 [2d Dept 2013]; *People v Colon*, 77 AD3d 849, 850 [2d Dept 2010], *lv denied* 15 NY3d 952 [2010]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1344

CA 18-01262

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

ISIDRO MORALES, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ADIRONDACK TRAILWAYS, INC., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

BARCLAY DAMON LLP, ROCHESTER (GABRIEL L. BOUVET-BOISCLAIR OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered April 19, 2018. The order denied the motion of defendant Adirondack Trailways, Inc., for summary judgment dismissing the complaint against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell from his seat after the bus he was riding purportedly came to an abrupt stop in the bus terminal. Supreme Court properly denied the motion of Adirondack Trailways, Inc. (defendant) seeking summary judgment dismissing the complaint against it. In common carrier negligence cases involving "injuries sustained by a passenger when [a] vehicle comes to a halt, [a] plaintiff must establish that the stop caused a jerk or lurch that was 'unusual and violent[,]' . . . [using] more than a mere characterization of the stop in those terms" (*Urquhart v New York City Tr. Auth.*, 85 NY2d 828, 830 [1995]). The plaintiff must show that the incident was "of a different class than the jerks and jolts commonly experienced in . . . bus travel" (*id.*). As the moving party on the motion for summary judgment, defendant had "the burden of establishing, prima facie, that the stop was not unusual and violent" (*Gani v New York City Tr. Auth.*, 159 AD3d 673, 673 [2d Dept 2018]).

We conclude that defendant failed to meet its burden (*see Owens v Niagara Falls Coach Lines*, 16 AD3d 1164, 1164 [4th Dept 2005]). Defendant submitted the deposition testimony of one of its bus drivers and the expert affidavit of a bus safety consultant, in which the driver and consultant disputed whether hard braking could cause the rear of the bus to rise in the manner described by plaintiff in his

deposition. Defendant, however, also submitted the deposition testimony of plaintiff, who testified that when the bus came to a stop in the terminal, the force of the stop caused him to rise off his seat, and that he fell onto the foot rest attached to the seat in front of him and then back against his seat, causing injuries to his knee and back. That testimony was sufficient to raise "a triable issue of fact as to whether the stop at issue was unusual and violent" (*Gani*, 159 AD3d at 674; *see Branda v MV Pub. Transp., Inc.*, 139 AD3d 636, 637 [1st Dept 2016]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1346

CA 18-01123

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

CENTRAL CITY ROOFING CO., INC.,
PLAINTIFF-APPELLANT,

V ORDER

ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT, BOARD OF EDUCATION OF
ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL
DISTRICT, AND ROSS, WILSON & ASSOCIATES, INC.,
DEFENDANTS-RESPONDENTS.

TALARICO LAW FIRM, SYRACUSE (JOSEPH R. TALARICO, II, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT, AND BOARD OF EDUCATION OF ALTMAR-PARISH-WILLIAMSTOWN CENTRAL SCHOOL DISTRICT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered October 6, 2017. The order, among other things, granted the motion for summary judgment of defendants Altmar-Parish-Williamstown Central School District and Board of Education of Altmar-Parish-Williamstown Central School District.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1347

CA 18-01075

PRESENT: WHALEN, P.J., SMITH, CARNI, AND TROUTMAN, JJ.

HART LYMAN CONSTRUCTION LLC, PLAINTIFF-APPELLANT,

V ORDER

SCOTT BERGIN, INDIVIDUALLY, EPMM COLORADO LLC, AND SCOTT BERGIN LLC, COLLECTIVELY DOING BUSINESS AS EDIPURE, DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (DAVID G. BURCH, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered December 18, 2017. The order granted the motion of defendants to dismiss the 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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1348

CA 18-01352

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

JESIOLOWSKI ENTERPRISES, INC., FORMERLY KNOWN AS
DATA KEY COMMUNICATIONS, INC.,
PLAINTIFF-APPELLANT,

V ORDER

DATA KEY HOLDINGS, LLC, AND WILLIAM BROD,
DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, SYRACUSE (SANJEEV DEVABHAKTHUNI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered January 16, 2018. The order denied plaintiff's motion for summary judgment.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1353

TP 17-01004

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

IN THE MATTER OF DARNELL BALLARD, PETITIONER,

V ORDER

NUNZIO DOLDO, SUPERINTENDENT, CAPE VINCENT CORRECTIONAL FACILITY, RESPONDENT.

DARNELL BALLARD, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, 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, Jefferson County [James P. McClusky, J.], entered May 25, 2017) 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 the determination is unanimously confirmed without costs and the petition is dismissed.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1354

TP 18-01224

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

IN THE MATTER OF CHRIS SAWYER FEWELL, PETITIONER,

V ORDER

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

CHRIS SAWYER FEWELL, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, 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, Erie County [E. Jeannette Ogden, J.], entered May 8, 2018) 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 said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996, 996 [4th Dept 1996])

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1355

TP 17-01995

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

IN THE MATTER OF ANTHONY MEDINA, PETITIONER,

V MEMORANDUM AND ORDER

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

ANTHONY MEDINA, PETITIONER PRO SE.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO 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, Erie County [Russell P. Buscaglia, A.J.], entered November 14, 2017) to review two determinations of respondent. The determinations found after separate tier III hearings that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determinations, following two separate tier III disciplinary hearings, that he violated certain inmate rules alleged in two misbehavior reports. Specifically, with respect to the first misbehavior report, petitioner was determined to have violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]), 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statements or information]), and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]). With respect to the second misbehavior report, petitioner was determined to have violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing direct order]) and 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]).

Contrary to petitioner's contention, the misbehavior reports constitute substantial evidence supporting the determinations that he violated the subject inmate rules (*see Matter of Perez v Wilmot*, 67 NY2d 615, 616-617 [1986]; *Matter of McMillian v Lempke*, 149 AD3d 1492, 1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]). Petitioner's claims that he did nothing wrong and that the misbehavior reports were written in retaliation for prior litigation that he had

brought merely created credibility issues for the Hearing Officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Furthermore, the record does not establish " 'that the Hearing Officer was biased or that the determination[s] flowed from the alleged bias' " (*Matter of Colon v Fischer*, 83 AD3d 1500, 1501 [4th Dept 2011]). "The mere fact that the Hearing Officer ruled against . . . petitioner is insufficient to establish bias" (*Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011] [internal quotation marks omitted]).

We have considered petitioner's remaining contentions and conclude that they do not require a different result.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1363

CAF 17-01462

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

IN THE MATTER OF ARMANI W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ADIFAH W., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (RICHARD L. SULLIVAN OF COUNSEL), ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 7, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, determined that the subject child had been abandoned by respondent and placed the subject child in the custody and guardianship of petitioner.

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

Memorandum: On appeal from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of abandonment, respondent mother contends that she had sufficient significant, meaningful contact with the child and petitioner to preclude a finding of abandonment. We reject that contention. "A child is deemed abandoned where, for the period six months immediately prior to the filing of the petition for abandonment (*see* Social Services Law § 384-b [4] [b]), a parent 'evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or [petitioner], although able to do so and not prevented or discouraged from doing so by [petitioner]' " (*Matter of Azaleayanna S.G.-B. [Quaneesha S.G.]*, 141 AD3d 1105, 1105 [4th Dept 2016], quoting § 384-b [5] [a]). Here, despite being afforded the opportunity to visit with the child twice each week, the mother merely delivered items for the child on one occasion at the beginning of the six-month period when the child was not present, visited the child on just two occasions in close succession several months later but failed to visit the child thereafter, and contacted petitioner once by telephone to cancel a visit. We conclude that "those are merely 'sporadic and insubstantial

contacts' . . . , and it is well settled that 'an abandonment petition is not defeated by a showing of sporadic and insubstantial contacts where[, as here,] clear and convincing evidence otherwise supports granting the petition' " (*Matter of Kaylee Z. [Rhiannon Z.]*, 154 AD3d 1341, 1342 [4th Dept 2017], *lv denied* 30 NY3d 911 [2018]; *see Matter of Jamal B. [Johnny B.]*, 95 AD3d 1614, 1615-1616 [3d Dept 2012], *lv denied* 19 NY3d 812 [2012]; *Matter of Maddison B. [Kelly L.]*, 74 AD3d 1856, 1856-1857 [4th Dept 2010]). We further conclude that the mother failed to demonstrate that " 'there were circumstances rendering contact with the child or [petitioner] infeasible, or that [she] was discouraged from doing so by [petitioner]' " (*Matter of Madelynn T. [Rebecca M.]*, 148 AD3d 1784, 1785 [4th Dept 2017]; *see Matter of Drevonne G. [Darrell G.]*, 96 AD3d 1348, 1349 [4th Dept 2012]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1364

CAF 16-01129

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

IN THE MATTER OF YADIEL S. AND DAMIAN S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

JOHANNA A., RESPONDENT-APPELLANT,
VICENTE S. AND CHRISTEN G., RESPONDENTS.

IN THE MATTER OF ANGELINA T.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

JOHANNA A., RESPONDENT-APPELLANT,
VICENTE S. AND CHRISTEN G., RESPONDENTS.

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

AMBER R. POULOS, BUFFALO, FOR PETITIONER-RESPONDENT.

AYOKA A. TUCKER, BUFFALO, ATTORNEY FOR THE CHILDREN.

MINDY L. MARRANCA, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered June 15, 2016 in proceedings pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Johanna A., abused Yadiel S., and derivatively abused Damian S. and Angelina T.

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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1371

CA 17-01876

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

MARK V. THOMPSON, PLAINTIFF-APPELLANT,

V ORDER

CLIFFSTAR CORPORATION, DEFENDANT-RESPONDENT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (MICHAEL T. SZCZYGIEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered September 20, 2017. The judgment dismissed the action in its entirety.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs for reasons stated in the decision at Supreme Court dated July 13, 2017.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1373

KA 17-00104

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LELAND S. BURKS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, 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 December 20, 2016. The judgment convicted defendant, upon his plea of guilty, of identity theft in the first degree and scheme to defraud 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 identity theft in the first degree (Penal Law § 190.80 [1]) and scheme to defraud in the first degree (§ 190.65 [1] [b]). 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 [2006]). That valid waiver of the right to appeal encompasses defendant's contention that the sentence is unduly harsh and severe (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1374

KA 14-00633

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS A. VAZQUEZ-DIAZ, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered September 24, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a controlled substance in the seventh degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea 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 controlled substance in the seventh degree (§ 220.03). Contrary to defendant's contention, County Court properly refused to suppress physical evidence seized by the police from defendant after a traffic stop of a vehicle in which defendant was a passenger. We previously determined that the initial traffic stop was lawful on the appeal of another passenger in the same vehicle (*see People v Vadell*, 153 AD3d 1638, 1639 [4th Dept 2017]), and there is no reason to reach a different result here inasmuch as the evidence at the suppression hearing established that the officers lawfully stopped the vehicle because the driver was operating it with no headlights and was not wearing a seat belt.

After properly stopping the vehicle for traffic infractions, officers ordered the other passenger out of the vehicle and recovered a gun from him while defendant remained inside of the vehicle. The officers then lawfully asked defendant to exit the vehicle (*see People v Mundo*, 99 NY2d 55, 58 [2002]; *People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]; *People v Daniels*, 117 AD3d 1573, 1574 [4th Dept 2014]). Based on the gun already recovered from the other passenger, the officers "reasonably suspected that defendant

was armed and posed a threat to their safety" (*People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* 571 US 907 [2013]; *see People v Dempsey*, 79 AD3d 1776, 1777 [4th Dept 2010], *lv denied* 16 NY3d 830 [2011]), and the fact that one officer drew his weapon as defendant exited the vehicle and defendant was placed in handcuffs after he exited did not transform defendant's detention into an arrest (*see People v Franqueira*, 143 AD3d 1164, 1166 [3d Dept 2016]). Further, after recovering the gun from the other passenger, the officers had " 'the requisite reasonable suspicion to believe that at least one of the occupants of the vehicle was armed prior to conducting the pat-down search[ ]' of defendant" (*Dempsey*, 79 AD3d at 1777). The officers thereafter acquired probable cause to arrest defendant when they observed a gun in a satchel on defendant's chest (*see Fagan*, 98 AD3d at 1271).

Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1376

KA 16-01977

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THEODORE E. MYERS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARK C. DAVISON 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 (Marianne Furfure, A.J.), rendered June 1, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted 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 a plea of guilty of attempted manslaughter in the first degree (Penal Law §§ 110.00, 125.20 [1]). Defendant's valid waiver of the right to appeal, which included a waiver of the right to challenge both the "conviction and sentence," encompasses his contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Defendant failed to preserve for our review his challenge to the plea on the ground that it was not knowingly, voluntarily, and intelligently entered, and we reject his contention that this case falls within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666 [1988]). Contrary to defendant's contention, because he was indicted on a count of attempted murder in the first degree (§§ 110.00, 125.27 [1] [a] [vi]), which is a class A-I felony (*see* § 110.05 [1]), his plea was required to include a plea of guilty to at least a class C violent felony offense (*see* CPL 220.10 [5] [d] [i]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1378

KA 15-01902

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

HENRY JIMENEZ, DEFENDANT-APPELLANT.

PATRICK J. BRACKLEY, NEW YORK CITY, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, 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 Jefferson County Court (Kim H. Martusewicz, J.), dated September 24, 2015. 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 for reasons stated in the decision at County Court.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1381

KA 14-01313

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES HARVEY, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered May 20, 2014. The judgment convicted defendant, upon a jury verdict, of assault 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 assault in the second degree (Penal Law § 120.05 [4]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). This case arose from an incident in which defendant entered a crowded restaurant in the early morning while carrying a loaded revolver in his waistband. During an encounter with a police officer, the revolver discharged and a customer was shot.

Defendant contends that County Court erred in refusing to suppress physical evidence, i.e. the revolver, because the officer lacked probable cause to effect an arrest. We reject that contention. The record establishes that the officer had an articulable reason for initially approaching defendant "to conduct a common-law inquiry, i.e., [he] had 'a founded suspicion that criminal activity [was] afoot' " (*People v Mack*, 49 AD3d 1291, 1292 [4th Dept 2008], *lv denied* 10 NY3d 866 [2008], quoting *People v De Bour*, 40 NY2d 210, 223 [1976]). More particularly, a security guard from a nearby bar told the officer that defendant brushed up against him and, when defendant did so, the guard felt a hard object in defendant's waistband, which he knew to be a gun. After the guard identified defendant in the restaurant, the officer observed a bulge in defendant's waistband that looked like a gun inasmuch as it was hard, stuck upwards, and was inconsistent with an object other than a gun. Given defendant's subsequent furtive movements after making eye contact with the

officer, and the fact that the incident occurred in a crowded restaurant, the officer was justified in asking him to step outside "to request clarification as to the source of the waistband bulge" (*De Bour*, 40 NY2d at 221). Defendant's subsequent act of leaning back and reaching for his waistband "provided the officer[] with reasonable suspicion to believe that defendant posed a threat to [his] safety" (*Mack*, 49 AD3d at 1292; *see People v Benjamin*, 51 NY2d 267, 271 [1980]). The officer was thus justified in grabbing defendant's right arm in order to prevent him from drawing what turned out to be a revolver (*see Mack*, 49 AD3d at 1292). In the ensuing struggle, the revolver discharged, providing probable cause to effect an arrest (*see generally People v Daniels*, 147 AD3d 1392, 1393 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence with respect to assault in the second degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1382

CAF 17-01794

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF ANA I. MALDONADO,
PETITIONER-RESPONDENT,

V ORDER

EZEQUIEL SANTANA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LORENZO NAPOLITANO, ROCHESTER, FOR RESPONDENT-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PETITIONER-RESPONDENT.

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered July 12, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted petitioner permission to relocate with the subject child to Texas.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1383

CAF 17-01795

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF EZEQUIEL SANTANA,
PETITIONER-APPELLANT,

V ORDER

ANA I. MALDONADO, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

LORENZO NAPOLITANO, ROCHESTER, FOR PETITIONER-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered July 12, 2017 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1384

CAF 17-01796

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF EZEQUIEL SANTANA,
PETITIONER-APPELLANT,

V ORDER

ANA I. MALDONADO, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

LORENZO NAPOLITANO, ROCHESTER, FOR PETITIONER-APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

ELLA MARSHALL, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Julie A. Gordon, R.), entered July 12, 2017 in a proceeding pursuant to Family Court Act article 6. The order denied the petition.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1385

CAF 17-00982

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF NICHOLAS PALIANI,
PETITIONER-RESPONDENT,

V ORDER

STEPHANIE SELAPACK, RESPONDENT-APPELLANT.

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

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

AUDREY ROSE HERMAN, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 11, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted custody of the subject child to petitioner.

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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1386

CAF 17-01516

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF JACQUELINE BONTZOLAKES,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

NORMAN E. GREEN, RESPONDENT-RESPONDENT.

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

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered July 31, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition seeking unsupervised visitation with the subject child, and granted petitioner supervised visits with the subject child "every other week" for one hour.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the second ordering paragraph the word "other," and as modified the order is affirmed without costs.

Memorandum: Petitioner mother appeals from an order that denied her petition seeking to modify a prior visitation order. We conclude that Family Court properly denied the petition because the mother failed to establish "a change in circumstances which reflect[ed] a real need for change to ensure the best interest[s] of the child" (*Matter of Vasquez v Barfield*, 81 AD3d 1398, 1399 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Miller v Pederson*, 121 AD3d 1598, 1599 [4th Dept 2014]; *Matter of Harder v Phetteplace*, 93 AD3d 1199, 1200 [4th Dept 2012], *lv denied* 19 NY3d 808 [2012]).

In its order denying mother's petition, however, the court erred in also ordering that mother's visitation would occur "every other week," which was a modification of the prior visitation order's provision granting the mother weekly visitation. The issue of decreasing the mother's visitation was not before the court in the mother's petition, respondent father did not petition to reduce the mother's visitation time, and that issue was not the subject of the hearing. Although the mother had informally agreed with the visitation supervisor to have visits every other week with the apparent intent that it would improve her relationship with the child and, over time, result in additional visitation, the mother did not

consent to an order reducing her visitation. We therefore modify the order accordingly.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1388

CA 18-01088

PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

PATRICIA M. SCHULT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PYRAMID WALDEN COMPANY, L.P., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.

GOLDBERG SEGALLA LLP, ROCHESTER (RAUL E. MARTINEZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Emilio L. Colaiacovo, J.), entered April 5, 2018. The order, insofar as appealed from, denied the motion of defendant Pyramid Walden Company, L.P., for summary judgment dismissing the amended complaint against it.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she allegedly sustained when she slipped and fell on snow in the parking lot of a shopping mall owned and operated by Pyramid Walden Company, L.P. (defendant). Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint on the ground that there was a storm in progress inasmuch as defendant failed to meet its prima facie burden of establishing that plaintiff's injuries were caused by a storm in progress (*see Wrobel v Tops Mkts., LLC*, 155 AD3d 1591, 1592 [4th Dept 2017]; *cf. Sheldon v Henderson & Johnson Co., Inc.*, 75 AD3d 1155, 1156 [4th Dept 2010]). Defendant submitted the deposition testimony of plaintiff, who testified that it was snowing at approximately 2:30 p.m. when she slipped and fell on approximately five inches of snow in the parking lot. Defendant, however, also submitted the testimony of plaintiff's husband, who testified that it stopped snowing sometime during the preceding two-hour period, while he and plaintiff were shopping. The affidavit of defendant's expert meteorologist and the data upon which he relied were insufficient to establish that it was snowing after 12:54 p.m. at the location of the accident (*see Smith v United Ref. Co. of Pennsylvania*, 148 AD3d 1733, 1733-1734 [4th Dept 2017]).

Inasmuch as defendant failed to meet its burden, the court

properly denied its motion without regard to the sufficiency of plaintiff's opposing papers (*see Wrobel*, 155 AD3d at 1592; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1421

KA 18-00973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

LAWRENCE F. WEHNER, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (BRIAN SHIFFRIN 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 (Stephen T. Miller, A.J.), dated April 4, 2017. 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.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1439

CA 18-01295

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

ERIN L. BISHOP, PLAINTIFF-RESPONDENT,

V ORDER

ZACHARY L. SPAULDING AND F.A. SPAULDING,
DEFENDANTS-APPELLANTS.

ADAMS & KAPLAN, WILLIAMSVILLE (KEVIN J. GRAFF OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (CHARLES S. DESMOND, II, OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered January 22, 2018. The order denied the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiff for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 29, 2018, and filed in the Erie County Clerk’s Office on August 29, 2018,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1440

CA 18-01353

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

ALBERT G. FRACCOLA, JR., INDIVIDUALLY AND AS 50 PERCENT SHAREHOLDER, PRESIDENT AND DIRECTOR, COMMITTEEMAN OF ONE, AND CREDITOR OF 1ST CHOICE REALTY, INC., ET AL., PLAINTIFF-APPELLANT,

V ORDER

1ST CHOICE REALTY, INC., A DOMESTIC CORPORATION IN DISSOLUTION, ET AL., DEFENDANTS, ROBERT K. HILTON, III, JAY G. WILLIAMS, III, AND GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI AND PRIORE, LLP, DEFENDANTS-RESPONDENTS.

ALBERT G. FRACCOLA, JR., PLAINTIFF-APPELLANT PRO SE.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR DEFENDANT-RESPONDENT JAY G. WILLIAMS, III.

GETNICK LIVINGSTON ATKINSON & PRIORE LLP, UTICA (PATRICK G. RADEL OF COUNSEL), FOR DEFENDANT-RESPONDENT GETNICK, LIVINGSTON, ATKINSON, GIGLIOTTI AND PRIORE, LLP.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 5, 2017. The order, inter alia, granted the motions of defendants Robert K. Hilton, III, Jay G. Williams, III, and Getnick, Livingston, Atkinson, Gigliotti and Priore, LLP, to dismiss the complaint against them.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1441

CA 18-01320

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

JOSEPH L. STAATS, PLAINTIFF-RESPONDENT,

V ORDER

MEGAN M. EBERL, DEFENDANT-RESPONDENT,
AND THOMAS A. KOWALCZYK, DEFENDANT-APPELLANT.

HAGELIN SPENCER, LLC, BUFFALO (MEGAN F. ORGANEK OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRIEDMAN & RAZENHOFER, P.C., AKRON (SAMUEL A. ALBA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 26, 2018. The order denied the motion of defendant Thomas A. Kowalczyk for summary judgment on the issue of negligence.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 29, and December 5 and 11, 2018,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1446

KA 17-01342

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. HAVLEN, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (MARK A. ADRIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. FLAHERTY, SPECIAL DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from an order of the Wyoming County Court (Michael M. Mohun, J.), dated May 23, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court erred in granting an upward departure from his presumptive classification as a level one risk to a level two risk. We reject that contention.

It is well settled that, when the People establish, by clear and convincing evidence (*see* Correction Law § 168-n [3]), the existence of aggravating factors that are, "as a matter of law, of a kind or to a degree not adequately taken into account by the [risk assessment] guidelines," a court "must exercise its discretion by weighing the aggravating and [any] mitigating factors to determine whether the totality of the circumstances warrants a departure" from a sex offender's presumptive risk level (*People v Gillotti*, 23 NY3d 841, 861 [2014]; *see People v Sincerbeaux*, 27 NY3d 683, 689-690 [2016]; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]). Here, the People established by clear and convincing evidence that defendant not only used the internet to engage with an undercover police officer posing as a 15-year-old boy and communicate to him that he wanted to engage in sexual activity with him, but also " 'exhibited a willingness to act on his compulsions' " by arranging to meet with the intended victim and traveling from his home to the arranged meeting site (*People v Blackman*, 78 AD3d 803, 804 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]; *see People v DeDona*, 102 AD3d 58,

68-69 [2d Dept 2012]; *People v Agarwal*, 96 AD3d 1450, 1451 [4th Dept 2012]). The People further established that defendant sought photographs from the intended victim and admitted that he hoped those photographs would contain child pornography, and that defendant enticed the intended victim to meet with the promise of illicit drugs. Together, these are "aggravating . . . circumstances . . . of a kind or to a degree not adequately taken into account by the guidelines" (*Gillotti*, 23 NY3d at 861).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1447

KA 13-01731

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHNATHON W. GIBBS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 19, 2013. The judgment convicted defendant, upon a nonjury verdict, of driving while ability impaired 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: Defendant appeals from a judgment convicting him upon a nonjury verdict of driving while ability impaired (Vehicle and Traffic Law § 1192 [1]) and 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 his statement to the police and evidence that was seized by the police inasmuch as the arresting officer did not have probable cause to stop the vehicle that he was driving. We reject that contention. A traffic stop is lawful "when 'a police officer has probable cause to believe that the driver of an automobile has committed a traffic violation' " (*People v Guthrie*, 25 NY3d 130, 133 [2015], *rearg denied* 25 NY3d 1191 [2015]). Here, the officer testified at the probable cause hearing that he stopped the vehicle at approximately 9:00 p.m. on July 15, 2012 because it did not have a working rear license plate lamp, which was a violation of Vehicle and Traffic Law § 375 (2) (a) (4) (*see People v Williams*, 132 AD3d 1155, 1155-1156 [3d Dept 2015], *lv denied* 27 NY3d 1157 [2016]; *People v Hale*, 130 AD3d 1540, 1540 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016]). Defendant contends that there was no violation of section 375 (2) (a) (4) because the stop occurred less than one-half hour after sunset, which occurred at 8:48 p.m. The statute, however, requires that a rear license plate be illuminated "during the period from one-half hour after sunset . . . *and* at such other times as

visibility for a distance of [1,000] feet ahead of such motor vehicle is not clear" (§ 375 [2] [a] [emphasis added]). The officer's testimony that it was "dark" outside established that he had probable cause to believe that defendant violated section 375 (2) (a) (4) and therefore had " 'a reasonable basis to effectuate a [traffic] stop' " (*Guthrie*, 25 NY3d at 133).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1452

KA 17-01204

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MOTHERSELL, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, A.J.), rendered June 6, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [5]). County Court issued two orders of restitution, one of which defendant contends must be vacated because there was no mention of it during the plea proceeding and thus the sentence was improperly enhanced, and because there was no record basis to support it. Initially, we disagree with the People that defendant's contention is precluded by the waiver of the right to appeal. Contrary to their assertion, there was no written waiver of the right to appeal. Although there is an oral waiver of the right to appeal, it is invalid inasmuch as the court "conflated the right to appeal with those rights automatically forfeited by the guilty plea" (*People v Rogers*, 159 AD3d 1558, 1558 [4th Dept 2018], *lv denied* 31 NY3d 1152 [2018]). As a result, the record does not establish that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a guilty plea" (*People v Lopez*, 6 NY3d 248, 256 [2006]).

We conclude, however, that defendant failed to preserve his contention for our review by failing to object to the order of restitution or request a hearing (*see People v Meyer*, 156 AD3d 1421, 1421-1422 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]; *People v Lawson* [appeal No. 7], 124 AD3d 1249, 1250 [4th Dept 2015]; *People v Lovett*, 8 AD3d 1007, 1008 [4th Dept 2004], *lv denied* 3 NY3d 677 [2004]). We decline defendant's request that we exercise our power to

review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). The record establishes that, at sentencing, the parties agreed that an additional criminal charge against defendant would be encompassed by the plea, and the restitution order at issue corresponds to that charge. Contrary to defendant's contention, the restitution order does not render the sentence illegal. While we agree with defendant that there is nothing in the record that shows that the person named in the restitution order is a "victim" within the meaning of Penal Law § 60.27 (4) (b), there is nothing in the record to refute that he is a victim. "[I]t is well established that potential illegality does not trigger the illegal sentence exception to the preservation rule" (*People v Graves*, 163 AD3d 16, 24 [4th Dept 2018]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1454

KAH 18-00046

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
VINCENT TORRES, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HAROLD T. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ADAM H. VANBUSKIRK, AUBURN, FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered June 13, 2017 in a habeas corpus proceeding. The judgment, among other things, dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment that, among other things, dismissed his habeas corpus petition. He contends that Supreme Court erred in denying him habeas corpus relief without an evidentiary hearing because he made a meritorious initial showing that he was arrested pursuant to an improper "John Doe" warrant that was not subsequently amended to include his name or a description of him. We reject that contention. Insofar as petitioner directs us to testimony in the record of his direct appeal (*People v Torres*, 129 AD3d 1535 [4th Dept 2015]), or information discovered through a Freedom of Information Law request, habeas corpus relief is not appropriate because he could have raised his contention on direct appeal or in a CPL article 440 motion (*see People ex rel. Frederick v Superintendent, Auburn Corr. Facility*, 156 AD3d 1468, 1468 [4th Dept 2017], *lv denied* 31 NY3d 908 [2018]; *People ex rel. Haddock v Dolce*, 149 AD3d 1593, 1593 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see generally People v Rossborough*, 122 AD3d 1244, 1245 [4th Dept 2014]). We have considered petitioner's remaining arguments and conclude that they do not warrant modification or reversal of the judgment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1456

CAF 16-00088

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF KEON D.W.

NIAGARA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DESIRE E., RESPONDENT-APPELLANT.

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

ANTHONY L. RESTAINO, LOCKPORT, FOR PETITIONER-RESPONDENT.

MELISSA A. CAVAGNARO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Niagara County (John F. Batt, J.), entered December 22, 2015 in a proceeding pursuant to Family Court Act article 10. The order placed the subject child in the temporary custody of his father.

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

Memorandum: Respondent mother appeals from an order entered in a proceeding pursuant to Family Court Act article 10, which awarded temporary custody of her son to the son's biological father while she was incarcerated. We dismiss the appeal because a finding of neglect and final dispositional order was entered during the pendency of this appeal. An appeal from a temporary order is "rendered moot by Family Court's subsequent finding of neglect" and issuance of a final dispositional order, and thus "must be dismissed" (*Matter of Makayleigh A. [Miranda A.]*, 146 AD3d 1103, 1104 [3d Dept 2017]; *see Matter of Bruce P.*, 138 AD3d 864, 865 [2d Dept 2016]; *Matter of John S.*, 26 AD3d 870, 870 [4th Dept 2006]). " 'Inasmuch as a temporary order is not a finding of wrongdoing, the exception to the mootness doctrine does not apply' " (*Matter of Faith B. [Rochelle C.]*, 158 AD3d 1282, 1282-1283 [4th Dept 2018], *lv denied* 31 NY3d 910 [2018]; *see Matter of Cali L.*, 61 AD3d 1131, 1133 [3d Dept 2009]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1457

CAF 17-00660

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MAYCI W. AND CHASE W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DANIEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered October 28, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject 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 [4th Dept 1994]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1458

CAF 17-00661

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF CHASE W. AND MAYCI W.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DANIEL W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

KIMBERLY S. CONIDI, BUFFALO, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, BUFFALO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered March 7, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent abused the subject children and directed respondent to comply with the terms and conditions of an order of protection.

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 21, 2018

Mark W. Bennett
Clerk of the Court

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

1459

CAF 17-01277

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF WILLIAM J. TOWNSEND III,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RASHIDA MIMS, RESPONDENT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (DANIELLE K. BLACKABY OF COUNSEL), FOR RESPONDENT-APPELLANT.

STUART J. LAROSE, SYRACUSE, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered June 13, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, authorized petitioner to relocate with the subject children to North Carolina.

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, granted the amended cross petition of petitioner father seeking to modify a prior order of custody and visitation by allowing the parties' teenage children to relocate with him to North Carolina. We affirm.

Contrary to the mother's contention, upon our review of the relevant factors (*see generally Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]), we conclude that the father met his burden of demonstrating by a preponderance of the evidence that the proposed relocation is in the children's best interests. The father established that the proposed relocation would enhance the children's lives economically, emotionally, and educationally, inasmuch as, among other things, the father and the children would unite under a single household with the father's new wife and her daughter, with whom the children are close, thereby allowing for the combination of two incomes and consolidation of household expenses (*see Matter of Bobroff v Farwell*, 57 AD3d 1284, 1286 [3d Dept 2008]; *Matter of Scialdo v Cook*, 53 AD3d 1090, 1092 [4th Dept 2008]). The father, who was the children's primary caretaker, also has another child in North Carolina with whom the children have a close relationship (*see generally Scialdo*, 53 AD3d at 1092). In addition, the children expressed their desire to relocate with the father to North Carolina and, " '[w]hile

the express wishes of children are not controlling, they are entitled to great weight, particularly where[, as here,] their age and maturity . . . make[s] their input particularly meaningful' " (*Matter of Minner v Minner*, 56 AD3d 1198, 1199 [4th Dept 2008]). Although the relocation will affect the frequency of the mother's visitation, the father demonstrated his willingness to foster communication and to facilitate extended visitation during school recesses and summer vacation, including by bearing the costs and responsibility for transportation, that will enable the mother "to maintain a positive nurturing relationship" with the children (*Tropea*, 87 NY2d at 740; *see Scialdo*, 53 AD3d at 1092; *Matter of Boyer v Boyer*, 281 AD2d 953, 953 [4th Dept 2001]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1463

CA 18-00089

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

HELENE KIM JENNINGS, FORMERLY KNOWN AS HELENE KIM DOMAGALA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL BRIAN DOMAGALA, DEFENDANT-APPELLANT.

JASON R. DIPASQUALE, BUFFALO, FOR DEFENDANT-APPELLANT.

ASHLEA L. PALLADINO, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered April 6, 2017. The order, insofar as appealed from, ordered defendant to pay child support to plaintiff.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the award of child support is vacated, and the matter is remitted to Supreme Court, Niagara County, for further proceedings in accordance with the following memorandum: As limited by his brief, defendant appeals from that part of an order that granted plaintiff's motion insofar as it sought an upward modification of defendant's child support obligation. Pursuant to the terms of a separation agreement that was incorporated but not merged into the judgment of divorce, the parties agreed to joint legal and shared physical custody of their child, and they agreed to opt out of the Child Support Standards Act requirements by waiving any obligation to pay child support to each other. In plaintiff's motion, she alleged that she was no longer able to work due to injuries she sustained in an automobile accident and sought, among other things, child support from defendant. At the hearing on plaintiff's motion, Supreme Court, over defendant's objection, admitted in evidence two documents prepared by plaintiff's physician to show that plaintiff was temporarily totally disabled. That was error. Plaintiff failed to lay a proper foundation for the admission of those documents (*see generally* CPLR 4518 [a]; *Matter of Fortunato v Murray*, 72 AD3d 817, 818 [2d Dept 2010]; *Wilson v Bodian*, 130 AD2d 221, 231 [2d Dept 1987]). Without those documents, plaintiff failed to meet her burden of establishing a substantial change in circumstances sufficient to warrant an upward modification of child support inasmuch as she " 'did not provide competent medical evidence of [her] disability or establish that [her] alleged disability rendered [her] unable to work' " (*Matter of Kelley v Holmes*, 151 AD3d 1704, 1704 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *see Mancuso v Mancuso*, 134 AD3d 1421, 1421-1422 [4th Dept 2015]). We therefore

reverse the order insofar as appealed from, vacate the award of child support, and remit the matter to Supreme Court for a new hearing on that part of plaintiff's motion seeking an upward modification of child support.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1464

CA 17-00630

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF CARL S., CONSECUTIVE NO. 17979, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER, PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF MENTAL HEALTH AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS-RESPONDENTS.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (CAROLINE L. LEVITT OF COUNSEL), FOR PETITIONER-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered February 15, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is a sex offender requiring civil management and subject to strict and intensive supervision and treatment.

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1467

KA 16-02284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KOREY GARRETT, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 22, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [1]). Contrary to defendant's contention, the oral and written waivers of the right to appeal obtained during the plea proceeding establish that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Eaton*, 151 AD3d 1950, 1951 [4th Dept 2017]; *People v Butler*, 151 AD3d 1959, 1959 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]), and that valid waiver encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1468

KA 16-01764

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOMINIQUE YOUNG, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 29, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). 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 [2006]), and that valid waiver forecloses defendant's challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1471

KA 16-01933

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARON FLEMING, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (LAUREN M. SILVERSTEIN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 30, 2016. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We reject defendant's contention that Supreme Court erred in refusing to suppress a gun. Defendant failed to establish standing to challenge the seizure of the gun because he did not demonstrate that he had a legitimate expectation of privacy in the place where the gun was found (*see People v Trotter*, 224 AD2d 1013, 1013 [4th Dept 1996]; *see generally People v Sweat*, 159 AD3d 1423, 1423-1424 [4th Dept 2018]). Furthermore, the court properly determined that "defendant's abandonment of the gun was not in response to unlawful police conduct" (*People v Rozier*, 143 AD3d 1258, 1259 [4th Dept 2016]; *see also People v Brown*, 148 AD3d 1562, 1564 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]).

Defendant further contends that he was denied effective assistance of counsel because his attorney failed to move to suppress statements defendant made to the police following his arrest. We reject that contention as well. Viewing the evidence, the law, and the circumstances of this case in their totality at the time of the representation, we conclude that counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's next contention, we conclude that the conviction is based on legally sufficient evidence (*see Rozier*, 143 AD3d at 1259-1260; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1474

KA 17-01506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY F. CRAFT, JR., DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 7, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [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 [2006]). That valid waiver forecloses defendant's challenge to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

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

1481

CA 18-01134

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

JAVIER RIOS, PLAINTIFF-RESPONDENT,

V ORDER

LEE SHEPTER AND GAIL SHEPTER,
DEFENDANTS-APPELLANTS.

OSBORN REED & BURKE, LLP, ROCHESTER (CHRISTIAN C. CASINI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ & PONTERIO, LLC, BUFFALO (ANNE E. JOYNT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered September 25, 2017. The order denied defendants' motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on October 29, 2018, and filed in the Monroe County Clerk's Office on November 2, 2018,

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

Entered: December 21, 2018

Mark W. Bennett
Clerk of the Court

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (788/06) KA 04-02067. -- THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V DANIEL GAFFNEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (1166/06) KA 03-01135. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MELVIN J. MOORE, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, NEMOYER, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (1038/10) KA 09-00533. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANDRE M. MCMILLON, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (221/11) KA 09-01583. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ORLANDO O. OCASIO, DEFENDANT-APPELLANT. -- Motion for reargument dismissed. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (632/12) KA 10-01368. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BERNARD THOMAS, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (1448/12) KA 10-01825. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DASHAWN DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, AND CARNI, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (933/14) KA 12-01069. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE E. SCARVER, ALSO KNOWN AS "C," DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, AND WINSLOW, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (371/15) KA 10-00599. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RAMON RELEFORD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (68/16) KA 14-01980. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TIMOTHY C. DEPETRIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (673/16) KA 12-00874. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FAHEEM ABDUL-JALEEL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (638/18) KA 15-01174. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALEXANDER KATES, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (877/18) KA 16-00063. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STORM U. LANG, ALSO KNOWN AS STORM U. J. LANG, ALSO KNOWN AS STORM LANG, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (910/18) CA 17-02085. -- VILLAGE OF SOLVAY, PLAINTIFF-RESPONDENT, V RANA J. ZAHRAN AND STEVEN'S FOOD MARKET, INC., DEFENDANTS-APPELLANTS. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (911/18) CA 18-00119. -- VILLAGE OF SOLVAY, PLAINTIFF-RESPONDENT, V RANA J. ZAHRAN AND STEVEN'S FOOD MARKET, INC.,

DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (957/18) CA 17-00426. -- INMATE M., CLAIMANT-APPELLANT, V STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 125930.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (1064/18) CA 18-00041. -- AGNIESZKA CHEN, PLAINTIFF-RESPONDENT, V WILLIAM CHEN, DEFENDANT-APPELLANT. (APPEAL NO. 1.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Dec. 21, 2018.)

MOTION NO. (1065/18) CA 18-00098. -- AGNIESZKA CHEN, PLAINTIFF-RESPONDENT, V WILLIAM CHEN, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND CURRAN, JJ. (Filed Dec. 21, 2018.)

KA 17-00111. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JERMAINE HARRISON, DEFENDANT-APPELLANT. -- The case is held, the decision is

reserved, the motion to relieve counsel of assignment is granted and new counsel is to be assigned. Memorandum: Defendant was convicted of, inter alia, assault in the second degree (Penal Law § 120.05 [3]) and was sentenced on that conviction, as a second felony offender, to a determinate term of imprisonment of three years and three years' postrelease supervision. Defendant's assigned appellate counsel has moved to be relieved of the assignment pursuant to *People v Crawford* (71 AD2d 38 [4th Dept 1979]). However, a nonfrivolous issue exists concerning the legality of defendant's sentence with respect to the period of postrelease supervision imposed (*see* Penal Law § 70.45 [2]). Therefore, we relieve counsel of his assignment and assign new counsel to brief this issue, as well as any other issues that counsel's review of the record may disclose. (Appeal from Judgment of Wayne County Court, Dennis M. Kehoe, J. - Assault, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)

KA 17-00461. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL D. MUNOZ, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [1979]). (Appeal from Judgment of Wyoming County Court, Michael M. Mohun, J. - Criminal Possession Forged Instrument, 2nd Degree). PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 21, 2018.)