SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 23, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

983

CA 15-00242

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

LASALLE BANK, N.A., AS CUSTODIAN FOR WELLS FARGO BANK, N.A., THE TRUSTEE FOR THE REGISTERED HOLDERS OF GS MORTGAGE SECURITIES CORPORATION II, COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-GG4, PLAINTIFF-RESPONDENT,

V ORDER

SENECA ONE REALTY LLC, ET AL., DEFENDANTS.

PHILLIPS LYTLE LLP, PROPOSED INTERVENOR-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR PROPOSED INTERVENOR-APPELLANT.

BUCHANAN INGERSOLL & ROONEY PC, BUFFALO (PETER S. RUSS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 16, 2014. The order denied the motion of Phillips Lytle LLP for leave to intervene in this action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on October 16, 2015,

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1042

KA 12-01597

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLINTON JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 20, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]), defendant contends that he was denied due process based on the delay of 53 months and 10 days between the incident and the date of the indictment. We reject that contention.

"A defendant's right to a speedy trial is guaranteed by both the Constitution (US Const, 6th and 14th Amdts; *see Dickey v Florida*, 398 US 30, 37-38; *Smith v Hooey*, 393 US 374, 383; *Klopfer v North Carolina*, 386 US 213, 226) and by statute (CPL 30.20; Civil Rights Law § 12)" (*People v Taranovich*, 37 NY2d 442, 444; *see People v Romeo*, 12 NY3d 51, 55, *cert denied* 558 US 817). A defendant may also challenge, on due process grounds, preindictment delay (*see People v Singer*, 44 NY2d 241, 252), and "the factors utilized to determine if a defendant's rights have been abridged are the same whether the right asserted is a speedy trial right or the due process right to prompt prosecution" (*People v Vernace*, 96 NY2d 886, 887). The inquiry involves weighing the factors enunciated in *Taranovich*: "(1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay" (*Taranovich*, 37 NY2d at 445; *see Vernace*, 96 NY2d at 887). "Generally

when there has been a protracted delay, certainly over a period of years, the burden is on the prosecution to establish good cause" (*Singer*, 44 NY2d at 254).

Preliminarily, we note with respect to the first factor, i.e., the extent of the delay, that "[t]here is no specific temporal period by which a delay may be evaluated or considered 'presumptively prejudicial' " (*Romeo*, 12 NY3d at 56). "Where the delay is lengthy, an examination of the other factors is triggered, and the length of the delay becomes one factor in that inquiry" (*id.*). Although the 53-month and 10-day preindictment delay in this case was substantial, we discern no special circumstances in this case that impaired defendant's right to a fair trial (*see People v Velez*, 22 NY3d 970, 972). Furthermore, the record of the *Singer* hearing demonstrates with respect to the second factor, i.e., the reason for the delay, that the People established good cause for the delay in prosecuting defendant (*see id.*). We conclude that the People's decision to bring charges several years later "was not an abuse of the significant amount of discretion that the People must of necessity have, and there is no indication that the decision was made in anything other than good faith" (*People v Decker*, 13 NY3d 12, 15).

With respect to the third factor, i.e., the nature of the underlying charges, here defendant was charged with three counts of burglary in the first degree, two counts of robbery in the first degree, two counts of robbery in the second degree, and criminal possession of a weapon in the second degree. Those crimes are undoubtedly serious (*see e.g. People v Hill*, 106 AD3d 1497, 1498; *People v Bradberry*, 68 AD3d 1688, 1690-1691, *lv denied* 14 NY3d 838; *People v Gwynn*, 161 AD2d 1174, 1174, *lv denied* 76 NY2d 789).

With respect to the fourth factor, i.e., whether there has been an extended period of pretrial incarceration, it is undisputed that defendant was incarcerated on unrelated charges throughout most of the period between the incident and the filing of the indictment. We thus conclude that " 'the delay caused no further curtailment of [defendant's] freedom' " (*People v Jenkins*, 2 AD3d 1390, 1391; *see People v Doyle*, 50 AD3d 1546, 1546; *People v Robinson*, 49 AD3d 1269, 1269-1270, *lv denied* 10 NY3d 869; *People v Striplin*, 48 AD3d 878, 879, *lv denied* 10 NY3d 871). Moreover, the delay cannot be said to have prevented the possibility of defendant serving a concurrent sentence with a previously imposed term of incarceration (*cf. Singer*, 44 NY2d at 252-253).

Finally, with respect to the fifth factor, i.e., whether the defense was impaired by reason of the delay, we are unable to discern any prejudice suffered by defendant as a result of the delay, and his conclusory assertions of prejudice are insufficient to support that contention (*see People v Ortiz*, 16 AD3d 1130, 1130, *lv denied* 5 NY3d 766). In any event, even assuming, arguendo, that defendant suffered some prejudice as a result of the delay, we note that "a determination made in good faith to defer commencement of the prosecution for further investigation[,] or for other sufficient reasons, will not deprive the defendant of due process of law even though the delay may

cause some prejudice to the defense" (*Singer*, 44 NY2d at 254).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1109

KA 08-02649

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD G. BRINK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered December 9, 2008. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and grand larceny in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the second count of the indictment is dismissed without prejudice to the People to file or represent to another grand jury any appropriate lesser charge under that count, and a new trial is granted on the remaining count, in accordance with the following memorandum: Defendant was convicted upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]) and grand larceny in the fourth degree (§ 155.30 [1]). On a prior appeal, this Court modified the judgment by reducing the conviction of grand larceny to petit larceny and remitted the matter to County Court for sentencing on the petit larceny conviction (*People v Brink*, 78 AD3d 1483, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). We subsequently granted defendant's motion for a writ of error coram nobis, however, on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., whether County Court erred in failing to comply with CPL 310.30 in its handling of a jury note (*People v Brink*, 124 AD3d 1419, 1419). Upon reviewing the appeal de novo, we agree with defendant that the judgment of conviction must be reversed and a new trial granted.

We agree with defendant that the court violated the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict, and thereby committed reversible error (*see People v Silva*, 24 NY3d 294, 299-300; *People v O'Rama*, 78 NY2d 270, 277-278). The record establishes that, during its deliberations, the jury sent two notes

requesting certain specified testimony and legal instructions. The record reflects that the court read those notes into the record and formulated its response after discussing them with counsel. As the court brought the jury into the courtroom to respond to the first two notes, the jury gave a third note to the court. The court told the jury that it would respond to the first two notes at that time, and would then discuss the issue raised in the third note with counsel after sending the jury back to the jury room. The court stated that the "third note [had] not yet [been] shown to counsel nor have we had an opportunity to discuss it." The record further reflects that the jury resumed its deliberations after the court provided requested testimony and instruction in response to the first two notes, and then rendered a verdict of guilty. The third note, which is included in the record, indicates that the jury was seeking the testimony of a particular witness on a specific topic, but there is nothing in the record indicating that the note was shown to counsel, or that it was read into the record before the jury rendered its verdict. Where, as here, "the record fails to show that defense counsel was apprised of the specific, substantive contents of the note . . . [,] preservation is not required" (*People v Walston*, 23 NY3d 986, 990; *see Silva*, 24 NY3d at 299-300), and we conclude that the "[c]ourt committed reversible error by violating the core requirements of CPL 310.30 in failing to advise counsel on the record of the contents of a substantive jury note before accepting a verdict" (*People v Garrow*, 126 AD3d 1362, 1363). We therefore reverse the judgment and grant a new trial, but only on the burglary count.

We note that, in the order on the original appeal, this Court reduced the conviction of grand larceny in the fourth degree (Penal Law § 155.30 [1]), to petit larceny (§ 155.25), based on the insufficiency of the evidence on the greater charge (*Brink*, 78 AD3d at 1483-1484). In our order granting defendant's motion for a writ of error coram nobis, however, we vacated that order and indicated that we would consider the appeal de novo, and defendant does not address the sufficiency of the evidence in his brief on appeal (*Brink*, 124 AD3d at 1419). We further note the well-settled principle, however, that "dismissal of a count due to insufficient evidence is tantamount to an acquittal for purposes of double jeopardy and protects a defendant against additional prosecution for such count" (*People v Biggs*, 1 NY3d 225, 229). Consequently, we conclude, for the reasons stated in our original order in the matter (*Brink*, 78 AD3d at 1483-1484), that the evidence is not legally sufficient to support the conviction of grand larceny in the fourth degree. Nevertheless, because we further conclude that the evidence is legally sufficient to support a conviction of petit larceny, upon reversing the conviction of grand larceny in the fourth degree based on the court's error with respect to the jury note, we dismiss the second count of the indictment without prejudice to the People to file or represent to another grand jury any appropriate charge under that count (*see People v Walker*, 119 AD3d 1402, 1403).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1114

KA 14-00313

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONALD G. BRINK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS 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 Ontario County Court (Craig J. Doran, J.), dated December 18, 2013. The order denied the motion of defendant pursuant to CPL 440.10.

It is hereby ORDERED that said appeal is unanimously dismissed as academic (*see People v Wilson*, 5 NY3d 778, 779 n).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1124

CA 14-02060

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

IN THE MATTER OF GAIL MURTAUGH, INDIVIDUALLY
AND DOING BUSINESS AS CROSBY HILL AUTO RECYCLING,
RICHARD R. MURTAUGH AND MURTAUGH RECYCLING CORP.,
PETITIONERS-APPELLANTS,

V ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION AND DENISE M. SHEEHAN, COMMISSIONER,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 1.)

BRICKWEDDE LAW FIRM, SYRACUSE (KEVIN C. MURPHY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 22, 2014 in a proceeding pursuant to CPLR article 78. The order, among other things, denied petitioners' cross motion to dismiss the counterclaims.

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).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1125

CA 14-02061

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

IN THE MATTER OF GAIL MURTAUGH, INDIVIDUALLY
AND DOING BUSINESS AS CROSBY HILL AUTO RECYCLING,
RICHARD R. MURTAUGH AND MURTAUGH
RECYCLING CORP., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION AND DENISE M. SHEEHAN, COMMISSIONER,
RESPONDENTS-RESPONDENTS.
(APPEAL NO. 2.)

BRICKWEDDE LAW FIRM, SYRACUSE (KEVIN C. MURPHY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered October 17, 2014 in a proceeding pursuant to CPLR article 78. The order, among other things, granted petitioners' motion to reargue their cross motion to dismiss, and upon reargument, denied the cross motion to dismiss the counterclaims.

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

Memorandum: This appeal arises from a CPLR article 78 proceeding seeking various forms of relief, including the reversal of a summary abatement order (SAO) issued by respondent Denise M. Sheehan, Commissioner of respondent New York State Department of Environmental Conservation (DEC). Respondents answered and raised, inter alia, a series of counterclaims. Petitioners submitted a reply in which they raised the issue of jurisdiction over the counterclaims by contending that the Attorney General (AG) had not filed a summons or complaint to commence an action in which those claims could be raised, and that the AG was not a party to this proceeding and thus could not raise those claims as counterclaims herein. Respondents moved in 2006 to dismiss several causes of action and for summary judgment on the counterclaims, and petitioners, in effect, cross-moved to strike parts of the counterclaims. The court granted respondents' motion in part, dismissed the first three causes of action, and transferred to this Court the issue of whether the DEC's resolution of the SAO was supported by substantial evidence. The court further concluded that

"[n]o jurisdictional or statute of limitation issue [was] present." Petitioners appealed from that judgment without challenging the propriety of the counterclaims or the court's jurisdiction to entertain them. This Court affirmed the judgment, confirmed the DEC's determination, and dismissed the petition in its entirety (*Matter of Murtaugh v New York State Dept. of Envtl. Conservation*, 42 AD3d 986, *lv dismissed* 9 NY3d 971).

Respondents thereafter moved to consolidate this proceeding with other litigation, and petitioners again sought to dismiss the counterclaims on the ground that the court lacked jurisdiction over the counterclaims because the AG, as the person entitled to raise them, was not a party to this proceeding and thus was required to raise them in a separate proceeding. Petitioners appeal from an order that, upon reargument, adhered to the court's prior decision that, inter alia, denied the cross motion on res judicata grounds. We affirm. Petitioners' contentions regarding the imposition of counterclaims by the DEC "were previously raised . . . or could have been raised on a prior appeal in this matter . . . Therefore, reconsideration of these [contentions] is barred by the doctrine of the law of the case" (*Juhasz v Juhasz*, 101 AD3d 1690, 1690 [internal quotation marks omitted]), which "has been aptly characterized as 'a kind of intra-action res judicata' " (*People v Evans*, 94 NY2d 499, 502, *rearg denied* 96 NY2d 755, quoting Siegel, New York Practice § 448, at 723 [3d ed]). "The law of the case doctrine generally precludes relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (*Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 40 AD3d 1177, 1179), and petitioners had such an opportunity here.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1134

KA 13-01588

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELI E. CASILLAS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 1, 2013. The judgment convicted defendant, upon a jury verdict, of strangulation in the second degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress the statements made by defendant and the physical evidence seized from his apartment is granted, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of the crimes of strangulation in the second degree (Penal Law § 121.12) and assault in the second degree (§ 120.05 [2]). Contrary to defendant's contention, the conviction is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that Supreme Court erred in denying that part of his omnibus motion seeking to suppress statements made by defendant and tangible property seized by the police following their warrantless entry into his apartment (hereafter, motion). As a preliminary matter, we note that, as the People correctly concede, the court failed to place its findings of fact and conclusions of law on the record with respect to defendant's motion as required by CPL 710.60 (6). " 'The failure to do so is not fatal, however, where, as here, there has been a full and fair hearing. In such instances, this [C]ourt may make its own findings of fact and conclusions of law' " (*People v McNeill*, 107 AD3d 1430, 1431, *lv denied* 22 NY3d 957). We

reject the People's contention that the "emergency exception" justified the warrantless entry into defendant's apartment. To the contrary, based on our review of the record, we conclude that "the evidence at the suppression hearing [did] not establish that the police 'had reasonable grounds to believe that there [was] an emergency at hand and an immediate need for their assistance for the protection of life or property' " (*People v Liggins*, 64 AD3d 1213, 1215, *appeal dismissed* 16 NY3d 748). Indeed, the People did not present any evidence that the police observed anything unusual once they arrived at defendant's apartment. Although the record indicates that defendant and the victim may have been previously involved in domestic disputes, both police officers testified at the suppression hearing that they did not have direct, personal knowledge of any previous domestic violence or any indication that defendant and the victim were engaged in a domestic dispute at the time they arrived at the apartment. The police officers testified only that they knew that defendant was inside the apartment but would not answer the door. In our view, such testimony is insufficient to support a determination that the "emergency exception" applied to justify the warrantless entry. We therefore grant that part of the motion seeking to suppress the statements made by defendant and the physical evidence seized from his apartment, and we grant a new trial.

In view of our resolution of the suppression issue, there is no need to address defendant's remaining contentions. We note, however, that we agree with defendant that the court erred in denying his challenges for cause to five prospective jurors during voir dire, inasmuch as the court failed to obtain unequivocal assurances of impartiality from each juror. "It is well established that '[p]rospective jurors who make statements that cast serious doubt on their ability to render an impartial verdict, and who have given less-than-unequivocal assurances of impartiality, must be excused' " (*People v Mitchum*, 130 AD3d 1466, 1467; *see People v Strassner*, 126 AD3d 1395, 1396). While no "particular expurgatory oath or 'talismanic' words [are required,] . . . [prospective] jurors must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent them from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362). Here, the record establishes that five out of the six prospective jurors clearly expressed concerns that not hearing from defendant or someone on behalf of defendant would affect, inter alia, their ability to be fair and impartial. In response, the court instructed the jury panel that defendant has no responsibility to put on any proof, that he may or may not call witnesses, that he may or may not take the witness stand, and that it is the prosecution's burden to prove the elements of the crimes of which defendant is accused. The court then asked the jury panel whether anyone had "a problem sitting as a fair and impartial juror in this case?" The five prospective jurors at issue remained silent.

In our view, the statements of the five prospective jurors cast serious doubt on their ability to render an impartial verdict (*see People v Bludson*, 97 NY2d 644, 646; *People v Thorn*, 269 AD2d 756, 757). The court erred in not obtaining thereafter an "unequivocal

assurance . . . from each of those potential jurors" to the effect that he or she could render an impartial verdict (*People v Holmes*, 302 AD2d 936, 936 [internal quotation marks omitted]; *see People v Nicholas*, 98 NY2d 749, 751-752). Furthermore, "we can infer nothing from the [collective] silence of the challenged jurors" (*Holmes*, 302 AD2d at 936). "Inasmuch as defendant had exhausted all of his peremptory challenges before the completion of jury selection, the denial of defendant's challenges for cause" would likewise constitute reversible error (*Strassner*, 126 AD3d at 1396).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1160

KA 15-00505

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER A. WILSON, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (MARTIN P. MCCARTHY, II, OF COUNSEL), FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 10, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). We affirm for the reasons stated in *People v Richardson* (132 AD3d 1313).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1162

KA 14-00507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON W. PEDRO, DEFENDANT-APPELLANT.

MICHAEL G. CIANFARANO, OSWEGO, FOR DEFENDANT-APPELLANT.

VERNON W. PEDRO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered September 6, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree.

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

Memorandum: Defendant appeals from the judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]). We agree with defendant that his waiver of the right to appeal was invalid because, based on County Court's statements at the time of the plea, "defendant may have erroneously believed that the right to appeal is automatically extinguished upon entry of a guilty plea" (*People v Moyett*, 7 NY3d 892, 893). In the absence of a written waiver of the right to appeal "or some indication in the record that defendant understood the distinction between the right to appeal and other trial rights forfeited incident to a guilty plea, there is inadequate assurance that defendant entered into a knowing, intelligent and voluntary waiver" of the right to appeal (*id.*; *cf. People v Braxton*, 129 AD3d 1674, 1675, *lv denied* 26 NY3d 965).

Given the nature of the offense, we conclude that defendant's sentence is not unduly harsh or severe. Defendant failed to preserve for our review his contention in his pro se supplemental brief concerning the presentence report (*see People v Gibbons*, 101 AD3d 1615, 1616), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it lacks

merit.

Finally, we do not consider the additional issue raised by defendant in his main brief concerning the plea allocution inasmuch as his attorney withdrew that contention (*see People v Santoro*, 132 AD3d 1241, 1241).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1182

KA 12-02264

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC L. WILCOX, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, PHILLIPS LYTLE LLP, BUFFALO (RYAN A. LEMA OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC L. WILCOX, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 3, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts), criminal possession of a controlled substance in the fifth degree, criminal possession of a controlled substance in the seventh degree and unlawful possession of marihuana.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, defendant's motion to suppress tangible evidence is granted in part, counts one, three, six, and seven of the indictment are dismissed, and a new trial is granted on count two.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), and one count each of criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), criminal possession of a controlled substance in the seventh degree (§ 220.03) and unlawful possession of marihuana (§ 221.05). Defendant contends that Supreme Court erred in refusing to suppress drugs seized by police officers from the jacket he was wearing at the time he was arrested pursuant to a warrant. We agree.

The record at the suppression hearing established that the officers received information that defendant was at a particular residential address, and they observed defendant inside that residence, sleeping on a living room couch and wearing a black leather jacket. The officers entered the residence, asked defendant to

identify himself, and told defendant that he was under arrest. At that point, defendant began fumbling with his jacket pocket, and a pill bottle fell out of the pocket onto the couch. The officers handcuffed defendant, and one of them examined the contents of the pill bottle. The officer suspected that the pill bottle contained heroin. Shortly thereafter, the officers removed defendant's handcuffs in order to remove his jacket. After securing the jacket, the officers replaced the handcuffs on defendant and escorted him to the rear seat of their patrol car. One of the officers placed the jacket on the floor of the front seat of the patrol car, where it remained while defendant was transported to the Public Safety Building. Defendant was taken to an interview room, and the jacket was searched in another room at the Public Safety Building. A variety of drugs was discovered in the jacket pockets.

At the outset, we note that we may not address the People's contention that the court properly refused to suppress the drugs on the ground that defendant did not have an expectation of privacy in the clothing that he was wearing, inasmuch as the People did not rely on that theory at the suppression hearing, and the court did not deny suppression on that ground (*see People v Thompson*, 118 AD3d 922, 924).

Contrary to the court's determination, we conclude that the warrantless search of defendant's jacket was not justified as a search incident to a lawful arrest. "Under the State Constitution, to justify a warrantless search incident to an arrest, the People must satisfy two separate requirements. The first imposes spatial and temporal limitations to ensure that the search is not significantly divorced in time or place from the arrest . . . The second, and equally important, predicate requires the People to demonstrate the presence of exigent circumstances" (*People v Jimenez*, 22 NY3d 717, 721-722 [internal quotation marks omitted]). We conclude that, here, neither requirement is satisfied. At the time the jacket was searched, defendant was handcuffed in an interview room at the Public Safety Building. "[T]he jacket had been reduced to the exclusive control of the police[,] and there was no reasonable possibility that defendant could have reached it" (*People v Morales*, 126 AD3d 43, 46). Nor was there any exigency that would justify the warrantless search of the jacket in these circumstances (*see id*. at 47; *Thompson*, 118 AD3d at 924; *see also People v Boler*, 106 AD3d 1119, 1123). We therefore grant in part defendant's motion seeking to suppress tangible evidence, i.e., the drugs seized from his jacket, and we reverse those parts of the judgment convicting him of the counts of the indictment charging him with possessing those drugs, i.e., counts one, three, six and seven.

Count two, the only remaining count, charges defendant with knowingly and unlawfully possessing heroin with the intent to sell it pursuant to Penal Law § 220.16 (1). The heroin that defendant was accused of possessing under that count was found inside the pill bottle that fell out of defendant's jacket pocket shortly after the officers' entry into the living room. We conclude that the court properly denied defendant's motion to the extent that it sought suppression of the heroin, which was lawfully seized incident to

defendant's arrest (*see People v Smith*, 59 NY2d 454, 458). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict on count two is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We nevertheless reverse the judgment of conviction and grant a new trial on that count because the evidence of defendant's intent to sell, "although legally sufficient, was not overwhelming and was largely dependent upon" evidence of the quantity and variety of drugs unlawfully seized from defendant's jacket (*People v Chambers*, 73 AD2d 976, 976). We therefore conclude that the error in admitting that evidence was not harmless with respect to count two of the indictment (*see generally People v Almestica*, 42 NY2d 222, 227).

In view of our decision, we do not address the remaining contentions in defendant's main and pro se supplemental briefs.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1202

KA 12-00846

PRESENT: SCUDDER, P.J., SMITH, CENTRA, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEAN MANOR, ALSO KNOWN AS DEAN MCLEAN, ALSO KNOWN AS DEAN MCLANE, DEFENDANT-APPELLANT.

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

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

Appeal from a resentence of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered February 14, 2012. Defendant was resentenced by imposing terms of postrelease supervision.

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

Memorandum: On defendant's prior appeal from a judgment convicting him following a jury trial of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the second degree (former § 265.03 [2]), we modified the judgment by directing that the sentence on the criminal possession of a weapon in the second degree count run concurrently with the sentence on the murder count (*People v Manor*, 38 AD3d 1257, *lv denied* 9 NY3d 847). Defendant now appeals from a resentence imposing terms of postrelease supervision with respect to that conviction.

Defendant failed to preserve for our review his contention that the gap of approximately 10 years between his original sentence and his resentence "violated his statutory right to have his sentence pronounced 'without unreasonable delay' " (*People v Smikle*, 112 AD3d 1357, 1358, *lv denied* 22 NY3d 1141, quoting CPL 380.30 [1]; *see People v Woods*, 122 AD3d 1400, 1401, *lv denied* 25 NY3d 1210). 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]). He also failed to preserve for our review his contention that Supreme Court was deprived of jurisdiction by its failure to comply with the time limits in Correction Law § 601-d. In any event, that contention is without merit. "The Court of Appeals has held that the failure to comply with the time requirements set forth in Correction Law § 601-d (4) does not constitute a jurisdictional defect depriving the court of the

authority to correct an illegal sentence and to resentence a defendant to a term that includes a period of postrelease supervision" (*People v Langenbach*, 106 AD3d 1338, 1338, *lv denied* 21 NY3d 1043; *see generally People v Lingle*, 16 NY3d 621, 630-633; *People v Williams*, 14 NY3d 198, 217, *cert denied* 562 US 947).

Contrary to defendant's additional contention, the court at resentencing did not further modify the sentence beyond the imposition of terms of postrelease supervision, and indeed it specifically directed that the sentence remained as modified by this Court on defendant's prior appeal.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1205

KA 12-01045

PRESENT: SCUDDER, P.J., SMITH, CENTRA, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY F. ARMSTRONG, JR., DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 12, 2012. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and intimidating a victim or witness in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the second degree (Penal Law § 120.05 [2]) and intimidating a victim or witness in the third degree (§ 215.15 [1]), defendant contends that County Court erred in failing to discharge a juror who appeared to be asleep during a portion of the trial. Defendant failed to move to discharge that juror, and thus his contention is not preserved for our review (*see People v Phillips*, 34 AD3d 1231, 1231, *lv denied* 8 NY3d 848). Indeed, after bringing the matter to the court's attention, defense counsel stated that he did not "want to say anything right now," and the court stated that it would continue to observe the juror. We thus conclude that "defendant 'should not now be heard to complain' of the court's failure to discharge the juror" (*id*.).

Defendant failed to preserve for our review his contentions that the court failed to comply with CPL 300.10 (4) by proceeding with summations before holding its charge conference (*see People v Lugo*, 87 AD3d 1403, 1404, *lv denied* 18 NY3d 860), and that the indictment was either duplicitous on its face or rendered duplicitous by the testimony at trial (*see People v Allen*, 24 NY3d 441, 449-450). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1220

CA 14-02230

PRESENT: SCUDDER, P.J., SMITH, CENTRA, WHALEN, AND DEJOSEPH, JJ.

DIANE THORNTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HUSTED DAIRY, INC., DEFENDANT-RESPONDENT.

MORGAN LAW FIRM, P.C., SYRACUSE (WILLIAM R. MORGAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered September 8, 2014. The order denied the motion of plaintiff for partial summary judgment on serious injury and liability and granted the cross motion of defendant for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking economic and noneconomic damages arising from an accident in which a vehicle owned by defendant collided with her vehicle. Plaintiff moved for partial summary judgment on "[s]erious [i]injury and [l]iability," and defendant cross-moved for summary judgment dismissing the amended complaint. Supreme Court denied plaintiff's motion and granted defendant's cross motion, dismissing the amended complaint. Plaintiff now appeals.

We reject plaintiff's contention that the court erred in denying that part of her motion seeking partial summary judgment on the issue of defendant's negligence. Plaintiff contends that the emergency doctrine does not apply to the driver of defendant's vehicle, but we conclude that plaintiff's own submissions raise questions of fact regarding the applicability of that doctrine (*see Colangelo v Marriott*, 120 AD3d 985, 986-987).

Contrary to plaintiff's further contention, the court properly denied that part of her motion seeking partial summary judgment on the issue of serious injury, and properly granted that part of defendant's cross motion seeking dismissal of the first cause of action in the

amended complaint insofar as it sought damages based on plaintiff's alleged serious injury. We note that on appeal plaintiff relies only on the 90/180-day category of serious injury, and thus has abandoned the remaining categories of serious injury alleged in her bill of particulars and supplemental bill of particulars (*see Harrity v Leone*, 93 AD3d 1204, 1205; *Delk v Johnson*, 92 AD3d 1234, 1234; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

In support of its cross motion, defendant established that plaintiff did not sustain an injury that prevented her " 'from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury' " (*Hill v Cash*, 117 AD3d 1423, 1425, quoting *Nitti v Clerrico*, 98 NY2d 345, 357 n 5). Defendant relied on plaintiff's medical records, which showed that plaintiff's treating physician cleared plaintiff to work less than 90 days after the accident (*see Dann v Yeh*, 55 AD3d 1439, 1441). We conclude that defendant thereby established that plaintiff's activities were not curtailed to a "great extent" (*Licari v Elliott*, 57 NY2d 230, 236). In addition, defendant submitted evidence establishing that there was no objective proof that plaintiff sustained a serious injury (*see Lauffer v Macey*, 74 AD3d 1826, 1827; *see generally Nitti*, 98 NY2d at 357). The report of an orthopedic surgeon who examined plaintiff concluded that plaintiff had only degenerative disc changes (*see Lux v Jakson*, 52 AD3d 1253, 1254). In opposition to the cross motion, plaintiff failed to raise a triable issue of fact. The affirmation of her treating physician did not dispute his office notes showing that plaintiff was cleared for work less than 90 days after the accident, and he failed to address the degenerative changes in plaintiff's imaging results (*see id.*).

Contrary to plaintiff's contention, the court properly granted that part of defendant's cross motion with respect to her claim for economic loss in the first cause of action. While we agree with plaintiff that she is not required to show a serious injury on her claim for economic loss, she failed to establish that her total economic losses exceeded her basic economic loss (*see Wilson v Colosimo*, 101 AD3d 1765, 1767; *Colon v Montemurro*, 33 AD3d 512, 512-513). We agree with plaintiff, however, that the court erred in granting that part of defendant's cross motion with respect to the second cause of action in the amended complaint, seeking damages for her vehicle, and we therefore modify the order accordingly. Basic economic loss does not include property damage, including damage to a party's vehicle (*see Olsen v State of New York*, 2014 WL 10520538, *2 [Ct Cl]; *see also Porto v Blum*, 39 AD3d 614, 616; *Pajda v Pedone*, 303 AD2d 729, 730).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1224

TP 15-00560

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

IN THE MATTER OF HENRY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

JAMES THOMPSON, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY, RESPONDENT.

HENRY JOHNSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [M. William Boller, A.J.], entered March 31, 2015) to review a determination of respondent. The determination revoked the parole of petitioner.

It is hereby ORDERED that the order transferring this proceeding is unanimously vacated without costs.

Memorandum: Petitioner commenced this proceeding seeking a writ of habeas corpus pursuant to CPLR article 70, contending that the Parole Board improperly revoked his release after a final revocation hearing. Supreme Court (Feroleto, J.) denied the petition on the ground that the allegations therein, if taken as true, would not entitle petitioner to release from prison as a matter of law, but also converted the matter to a CPLR article 78 proceeding and signed an order directing respondent to appear before the court (Boller, A.J.) and to show cause why the relief requested in the petition should not be granted. The court then transferred the converted proceeding to this Court pursuant to CPLR 7804 (g).

As respondent correctly concedes, the court (Feroleto, J.), upon determining that petitioner was not entitled to habeas corpus relief, erred in converting this habeas corpus proceeding into one pursuant to CPLR article 78 inasmuch as "the sole basis for petitioner's continued incarceration is the determination of the Parole Board to revoke petitioner's parole" (*Matter of Zientek v Herbert*, 199 AD2d 1075, 1076; *see People ex rel. Brazeau v McLaughlin*, 233 AD2d 724, 725, *lv denied* 89 NY2d 810; *People ex rel. Smith v Mantello*, 167 AD2d 912, 912). Thus, there was no basis to transfer the proceeding to this Court pursuant to CPLR 7804 (g) (*see generally Matter of Cappon v Carballada*, 93 AD3d 1179, 1180). We note, however, that the court

(Feroleto, J.) properly determined that the habeas corpus petition is without merit. The evidence presented at the final parole revocation hearing established by the requisite preponderance of the evidence that petitioner violated a condition of his parole (*see People ex rel. Shannon v Khahaifa*, 74 AD3d 1867, 1867, *lv dismissed* 15 NY3d 868). Issues of credibility were for the Administrative Law Judge (ALJ) to resolve (*see Matter of Johnson v Alexander*, 59 AD3d 977, 977; *Matter of Miller v Board of Parole*, 278 AD2d 697, 697), and he was entitled to consider hearsay evidence (*see People ex rel. Fryer v Beaver*, 292 AD2d 876, 876; *see generally Matter of Currie v New York State Bd. of Parole*, 298 AD2d 805, 805-806).

We reject petitioner's further contention that collateral estoppel and res judicata precluded the ALJ from revoking his parole based on his alleged commission of a new crime inasmuch as the Grand Jury had declined to indict petitioner with respect thereto. "Contrary to petitioner's contention, the Grand Jury's determination not to indict with respect to [that] crime[] did not collaterally estop the Parole Board from proceeding against petitioner based on [that] crime[]" (*People ex rel. Thurman v Williams*, 275 AD2d 1022, 1022, *lv denied* 95 NY2d 770; *see People v West*, 283 AD2d 721, 722, *lv denied* 96 NY2d 836), nor did the revocation of petitioner's parole violate the principal of res judicata.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1237

CA 15-00556

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

HARRY P. DAUBNEY AND DIANA M. DAUBNEY,
PLAINTIFFS-RESPONDENTS,

V ORDER

DANIEL J. BENNETT AND MARIE E. BENNETT,
DEFENDANTS-APPELLANTS.

BRANDT, ROBERSON & BRANDT, P.C., LOCKPORT (ROBERT S. ROBERSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FREID & KLAWON, WILLIAMSVILLE (WAYNE I. FREID OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Mark A. Montour, J.), entered July 8, 2014. The order denied the motion of defendants for summary judgment.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1240

CA 15-00716

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

RICHARD J. FRONCE,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

PORT BYRON TELEPHONE COMPANY, INC.,
C/O CORPORATION SERVICE COMPANY, REGISTERED
AGENT AND TELEPHONE AND DATA SYSTEMS, INC.,
AND TDS TELECOMMUNICATIONS CORPORATION,
DEFENDANTS-RESPONDENTS-APPELLANTS.

MICHAELS & SMOLAK, P.C., AUBURN (MICHAEL G. BERSANI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 12, 2014 in a personal injury action. The order denied defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's cross motion, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he fell from an aerial bucket attached to a boom on a bucket truck while attempting to remove cables from a utility pole on defendants' property. Plaintiff appeals and defendants cross-appeal from an order that denied defendants' motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of liability with respect to the section 240 (1) cause of action. We agree with plaintiff that defendants are owners within the meaning of the Labor Law. "[E]ven under a liberal construction of section 240 (1), ownership of the premises where the accident occurred, standing alone, is insufficient to impose liability under section 240 (1) on an out-of-possession property owner who does not contract for the injury-producing work. Rather, a prerequisite to the imposition of liability upon such an owner is 'some nexus between the owner and the worker, whether by a lease agreement or grant of an easement, or other property interest' " (*Custer v Jordan*, 107 AD3d 1555, 1557, quoting

Abbatiello v Lancaster Studio Assoc., 3 NY3d 46, 51; *see Morton v State of New York*, 15 NY3d 50, 56). Here, there is a nexus between defendants and plaintiff inasmuch as plaintiff was employed by a successor in interest to a corporation to which defendants had granted an easement allowing the corporation and its successors to maintain its utility poles and cables on defendants' property (*see Celestine v City of New York*, 86 AD2d 592, 593, *affd* 59 NY2d 938; *cf. Abbatiello*, 3 NY3d at 51). Inasmuch as defendants, as grantors of the easement, remained the fee owner of the property, it is irrelevant that defendants did not own the utility pole and cables that were the subject of plaintiff's work at the time of the accident (*see Williams v LeChase*, 15 AD3d 988, 989, *lv dismissed in part and denied in part* 5 NY3d 730; *Hilbert v Sahlen Packing Co.*, 267 AD2d 940, 940; *see generally Gordon v Eastern Ry. Supply*, 82 NY2d 555, 560).

We further agree with plaintiff that Supreme Court erred in denying his cross motion for partial summary judgment on the issue of liability under Labor Law § 240 (1), and we therefore modify the order accordingly. There is no dispute that plaintiff met his initial burden on the cross motion by demonstrating that he was engaged in an activity covered by the statute, and that his accident involved an elevation-related hazard against which the statute was intended to protect (*see Hilbert*, 267 AD2d at 940-941). Plaintiff further "established the requisite causal link between his injuries and the violation of defendants' nondelegable duty to ensure that the [aerial bucket] was 'so . . . placed and operated as to give proper protection' to plaintiff" (*Ward v Cedar Key Assoc., L.P.*, 13 AD3d 1098, 1098; *see Thome v Benchmark Main Tr. Assoc., LLC*, 86 AD3d 938, 939). In opposition to the motion, defendants failed to raise a triable issue of fact whether plaintiff's "own conduct, rather than any violation of Labor Law § 240 (1), was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40). Contrary to defendants' contention, inasmuch as plaintiff was using the aerial bucket to reach the utility pole and cables in the manner directed and approved by his supervisor, it cannot be said that plaintiff's conduct in using a winch line and pulley to pull the pole closer was the sole proximate cause of the accident (*see Kuhn v Camelot Assn., Inc.* [appeal No. 2], 82 AD3d 1704, 1706; *see also Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555-556). Moreover, inasmuch as defendants' statutory violation was a proximate cause of the accident, we conclude that any failure by plaintiff to properly wear a safety harness and lanyard would merely constitute comparative negligence, which is not a defense under Labor Law § 240 (1) (*see Garzon v Viola*, 124 AD3d 715, 716-717; *see generally Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289-290).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1251

KA 14-00785

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD W. REINARD, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

DONALD W. REINARD, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 8, 2010. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree and attempted sexual abuse in the first degree (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him, upon his plea of guilty, of one count of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and two counts of attempted sexual abuse in the first degree (§§ 110.00, 130.65 [3]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of course of sexual conduct against a child in the first degree (§ 130.75 [1] [a]).

In his main and pro se supplemental briefs, defendant contends in both appeals that his respective waivers of the right to appeal were not valid. We reject those contentions. County Court's plea colloquies, together with the written waivers of the right to appeal, establish that defendant's waivers of the right to appeal were made knowingly, intelligently, and voluntarily (*see People v Johnson*, 122 AD3d 1324, 1324; *People v Arney*, 120 AD3d 949, 949).

In both appeals, defendant contends in his main and pro se supplemental briefs that his respective pleas were involuntarily entered. Although those contentions survive his valid waivers of the right to appeal, they are not preserved for our review inasmuch as

defendant failed to move to withdraw the respective pleas or to vacate the judgments of conviction (*see People v Guantero*, 100 AD3d 1386, 1387, *lv denied* 21 NY3d 1004; *People v Connolly*, 70 AD3d 1510, 1511, *lv denied* 14 NY3d 886), and nothing in the plea colloquies casts significant doubt on defendant's guilt or the voluntariness of his pleas, and the narrow exception to the preservation requirement therefore does not apply (*see People v Lopez*, 71 NY2d 662, 666; *People v Lewandowski*, 82 AD3d 1602, 1602).

In both appeals, the valid waivers of the right to appeal encompass defendant's challenges in his main and pro se supplemental briefs to the severity of the sentences (*see People v Hidalgo*, 91 NY2d 733, 737). Defendant's contentions in his pro se supplemental brief that the sentences in both appeals were imposed in violation of the United States Constitution also survive his valid waivers of the right to appeal (*see People v Lopez*, 6 NY3d 248, 255), but we reject those contentions inasmuch as it cannot be said that the sentences are "grossly disproportionate to the crime[s]" (*People v Broadie*, 37 NY2d 100, 111, *cert denied* 423 US 950; *see generally People v Thompson*, 83 NY2d 477, 484).

Contrary to defendant's contention in his pro se supplemental brief in appeal No. 1, his waiver of indictment and consent to be prosecuted under a superior court information was not jurisdictionally defective (*see generally* CPL 195.10 [1] [b]; *People v D'Amico*, 76 NY2d 877, 879).

Defendant's challenges in both appeals to the constitutionality of various statutes were not preserved for our review inasmuch as they were not raised during proceedings in County Court (*see People v Whitehead*, 46 AD3d 715, 716, *lv denied* 10 NY3d 772). In any event, those challenges are not properly before us inasmuch as defendant failed to notify the Attorney General that he would be making those challenges (*see People v Mills*, 117 AD3d 1555, 1556, *lv denied* 24 NY3d 1045, *reconsideration denied* 24 NY3d 1121; *Whitehead*, 46 AD3d at 716).

Defendant's contention in his pro se supplemental brief that he was denied effective assistance of counsel in both appeals does not survive his guilty pleas or the waivers of the right to appeal because defendant "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of his attorney[']s allegedly poor performance' " (*People v Grandin*, 63 AD3d 1604, 1604, *lv denied* 13 NY3d 744). We have reviewed the remaining contentions in both appeals in defendant's pro se supplemental brief and conclude that they do not require reversal or modification of the judgments.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1252

KA 15-00527

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD W. REINARD, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

DONALD W. REINARD, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 8, 2010. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Same memorandum as in *People v Reinard* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1255

CAF 14-01152

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF RONALD J. EAST,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RACHEL L. GILES, RESPONDENT-APPELLANT.

IN THE MATTER OF RACHEL L. GILES,
PETITIONER-APPELLANT,

V

RONALD J. EAST, RESPONDENT-RESPONDENT.

GERALD J. VELLA, SPRINGVILLE, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

TRAVIS J. BARRY, ATTORNEY FOR THE CHILDREN, HAMMONDSPORT.

Appeal from an amended order of the Family Court, Steuben County (Joseph W. Latham, J.), entered February 27, 2014 in proceedings pursuant to Family Court Act articles 6 and 8. The amended order, among other things, granted the petition of Ronald J. East to modify visitation and denied the family offense petition of Rachel L. Giles.

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

Memorandum: In these proceedings pursuant to Family Court Act articles 6 and 8, respondent-petitioner mother Rachel L. Giles appeals from an order that granted the petition of petitioner-respondent father Ronald J. East seeking to modify the visitation provisions of the judgment of divorce with respect to the subject children, and denied the mother's petitions seeking termination of the father's visitation and a determination that the father committed a family offense based on allegations that the father had sexually abused the parties' daughter. We note at the outset that Family Court issued an amended order that superseded the order from which the mother appeals. We nevertheless exercise our discretion to treat the notice of appeal as valid and deem the appeal as taken from the amended order (*see* CPLR 5520 [c]; *Matter of Donegan v Torres*, 126 AD3d 1357, 1358, *lv denied* 26 NY3d 905). We further note that the mother failed to include in the record on appeal the judgment of divorce. "Although [such an] omission . . . ordinarily would result in dismissal of the appeal

. . . , there is no dispute concerning the custody [and visitation] provisions contained in the judgment," and we therefore reach the merits (*Matter of Walker v Cameron*, 88 AD3d 1307, 1308 [internal quotation marks omitted]; *see Matter of Carey v Windover*, 85 AD3d 1574, 1574, *lv denied* 17 NY3d 710).

With respect to the parties' article 6 petitions, we conclude that the court did not abuse its discretion in determining that the daughter's out-of-court statements related to the alleged sexual abuse were not reliably corroborated. "It is well settled that there is 'an exception to the hearsay rule in custody [and visitation] cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family Ct Act § 1046 (a) (vi)' . . . , where . . . the statements are corroborated" (*Matter of Mateo v Tuttle*, 26 AD3d 731, 732; *see Matter of Ordona v Campbell*, 132 AD3d 1246, 1247). "Although the degree of corroboration [required] is low, a 'threshold of reliability' must be met" (*Matter of Zukowski v Zukowski*, 106 AD3d 1293, 1294; *see generally Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490, *lv denied* 17 NY3d 708). "The 'repetition of an accusation does not corroborate a child's prior statement' . . . , although the reliability threshold may be satisfied by the testimony of an expert" (*Zukowski*, 106 AD3d at 1294; *see Matter of Alexis S. [Edward S.]*, 115 AD3d 866, 867). "Family Court has considerable discretion in deciding whether a child's out-of-court statements alleging incidents of abuse have been reliably corroborated . . . , and its findings must be accorded deference on appeal where . . . the . . . [c]ourt is primarily confronted with issues of credibility" (*Matter of Nicole G. [Louis G.]*, 105 AD3d 956, 956).

Here, there is no direct or physical evidence of abuse, and thus "the case turns almost entirely on issues of credibility" (*Matter of Erinn G.*, 249 AD2d 879, 880). Although the mother correctly notes that some corroboration may be provided through the consistency of a child's statements and that a child's out-of-court statements may be corroborated by testimony regarding the child's increased sexualized behavior (*see Matter of Miranda HH. [Thomas HH.]*, 80 AD3d 896, 898-899), the court determined here that the mother's witnesses—who provided the corroborative testimony regarding the daughter's purportedly consistent statements and sexualized behavior—were not credible. Conversely, the court credited the testimony of the father and his witnesses that tended to cast doubt on the veracity of the allegations of sexual abuse, and those credibility determinations are entitled to deference (*see Nicole G.*, 105 AD3d at 956). In particular, we note that the court did not credit the mother's expert therapist because the therapist assumed from the outset that the daughter had been abused and relied on evidence based predominately on contact with the daughter in circumstances controlled by the mother and her family. Indeed, the court-appointed psychologist who evaluated the daughter criticized various aspects of the approach employed by the therapist, including his practice of permitting the mother to be present during some of the daughter's therapy sessions (*see Zukowski*, 106 AD3d at 1294). To the extent that the testimony of the psychologist and the therapist conflicted, the court was entitled

to give more probative weight to the testimony of the psychologist, who ultimately determined that, absent the court's determination that the mother's witnesses were credible, he could not conclude that the daughter had been abused (*see Matter of Breann B.*, 185 AD2d 711, 711). Contrary to the mother's contention, we conclude that the court properly gave weight to the opinion of the court-appointed psychologist, and agreed with the position of the Attorney for the Children, who contended that the mother's proof was insufficient to establish that the daughter had been sexually abused by the father (*see Matter of Ciccone v Ciccone*, 74 AD3d 1337, 1338, *lv denied* 15 NY3d 708).

To the extent that the mother contends that the court's determination to award the father unsupervised visitation with the children lacks a sound and substantial basis in the record, we reject that contention. It is well settled that " '[v]isitation with the noncustodial parent is presumed to be in the child[ren]'s best interests . . . , and . . . denial of visitation is justified only for a compelling reason' " (*Matter of Nwawka v Yamutuale*, 107 AD3d 1456, 1457, *lv denied* 21 NY3d 865). Here, inasmuch as the court determined that the evidence did not establish that the father had sexually abused the daughter, there was no compelling reason to deny the father visitation. Although the mother correctly notes that the psychologist recommended an incremental progression toward unsupervised visitation, we conclude that "[t]here is no merit to the mother's contention that the court erred in disregarding the opinion of the court-appointed [psychologist on that issue], as the . . . [c]ourt is not bound by the recommendations of forensic experts" (*Matter of Nelson v Nelson*, 276 AD2d 634, 634).

Finally, we conclude that the court did not err in dismissing the mother's family offense petition.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1264

CA 15-00504

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

THOMAS J. ARMELLA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT E. OLSON, DEFENDANT-RESPONDENT.

CAMPBELL & SHELTON LLP, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (BETSY F. VISCO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered June 12, 2014. The order, among other things, granted defendant's motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint, as amplified by the bill of particulars, 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 as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when his vehicle was struck from behind by a third party's vehicle that had been struck by defendant's vehicle. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). Plaintiff opposed the motion only with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury alleged in the complaint, as amplified by the bill of particulars, and has therefore abandoned his claims with respect to the other categories of serious injury (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 297; *Feggins v Fagard*, 52 AD3d 1221, 1222). We agree with plaintiff that Supreme Court erred in granting the motion with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, and we therefore modify the order accordingly. Even assuming, arguendo, that defendant met his initial burden, we conclude that plaintiff raised triable issues of fact with respect to those two categories (*see Austin v Rent A Ctr. E., Inc.*, 90 AD3d 1542, 1543). Plaintiff submitted the affidavit of his treating

physician, who reviewed plaintiff's cervical MRI and opined that plaintiff sustained a cervical whiplash superimposed on a degenerative cervical spine and at least two levels of cervical herniations. His physical examination of plaintiff revealed muscle spasms, which constitute objective evidence of injury (*see id.* at 1544), and plaintiff's range of motion was limited to a moderate or marked degree. He opined that, given plaintiff's absence of any prior neck pain, stiffness, or radiculopathy prior to the accident, the accident was a substantial factor in causing previously asymptomatic degenerative conditions in plaintiff's spine to become symptomatic, and in causing plaintiff's neck pain, stiffness, spasms, and restricted range of motion. "It is well settled that the aggravation of an asymptomatic condition can constitute a serious injury" (*Verkey v Hebard*, 99 AD3d 1205, 1206).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1269

TP 15-01020

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

IN THE MATTER OF RALPH ALICEA, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 11, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1270

KA 13-00167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYRONE BRIGGS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered July 17, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the first degree and criminal possession of stolen property in the fourth degree.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1272

KA 14-01167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH GRAHAM, II, DEFENDANT-APPELLANT.

ROBERT M. PUSATERI, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL J. VIOLANTE, 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 3, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his guilty plea, of assault in the second degree (Penal Law § 120.05 [1]). The record establishes that defendant knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and his challenge to the severity of the sentence is encompassed by that valid waiver (*see People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1273

KA 14-00297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH A. WHITE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered January 27, 2014. The judgment convicted defendant, upon a nonjury verdict, of driving while intoxicated, a class D felony (two counts), and aggravated unlicensed operation of a motor vehicle in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for a determination of the motion following further proceedings if necessary.

Memorandum: Defendant appeals from a judgment convicting her, following a nonjury trial, of two counts of driving while intoxicated as class D felonies (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). At the close of the People's case, defense counsel moved for a trial order of dismissal on the ground that the arresting officers, who were employed by the Town of Ellicott (Town), exceeded their jurisdictional authority when they arrested defendant in the City of Jamestown (City). Defendant also requested that County Court take judicial notice of the location of the arrest and the boundaries of the City and Town. The proof had not closed at that point, and the court reserved decision on the motion to allow the parties to make written submissions. The court never ruled on the motion, but issued a written verdict finding defendant guilty of the charges and noting that it had reviewed the parties' submissions.

Defendant contends that the court erred in refusing to take judicial notice of the relevant geographical facts and in denying her motion to dismiss the charges. We do not address that contention because, in accordance with *People v Concepcion* (17 NY3d 192, 197-198)

and *People v LaFontaine* (92 NY2d 470, 474, *rearg denied* 93 NY2d 849), "we cannot deem the court's failure to rule on the . . . motion as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on the motion following such further proceedings as may be necessary.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1274

KA 14-00720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAWAUN VAUGHN, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN B. HANNAY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 10, 2009. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although "[w]e 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] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]; *see People v Hassett*, 119 AD3d 1443, 1443-1444, *lv denied* 24 NY3d 961; *People v Mobley*, 118 AD3d 1336, 1336-1337, *lv denied* 24 NY3d 1121), we nevertheless reject defendant's challenge to the severity of the sentence.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1277

KA 15-00993

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN KACZMAREK, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TAHERI & TODORO, PC, WILLIAMSVILLE (BRIAN J. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 17, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal contempt in the second degree (Penal Law § 215.50 [3]). In appeal No. 2, defendant appeals from a judgment revoking a sentence of probation imposed upon his conviction of criminal possession of a weapon in the fourth degree (§ 265.01 [1]) and imposing a sentence of incarceration upon defendant's admission that he violated the conditions of his probation. Defendant's contention in appeal No. 1 that Supreme Court erred in enhancing his sentence without affording him the opportunity to withdraw his plea is not encompassed by his waiver of the right to appeal (*see People v Joyner*, 19 AD3d 1129, 1129), but defendant failed to preserve that contention for our review inasmuch as he failed to object to the alleged enhanced sentence and did not move to withdraw his plea or to vacate the judgment of conviction on that ground (*see People v Viele*, 124 AD3d 1222, 1223; *People v Epps*, 109 AD3d 1104, 1105). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Defendant's challenge to the severity of the sentence in both appeals is foreclosed by his waiver of the right to appeal inasmuch as the court advised defendant of the maximum sentence it could impose before defendant waived his right to appeal (*see People v*

Lococo, 92 NY2d 825, 827; *cf. People v Mingo*, 38 AD3d 1270, 1271).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1278

KA 15-00997

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN KACZMAREK, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TAHERI & TODORO, PC, WILLIAMSVILLE (BRIAN J. HUTCHISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 17, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Supreme Court, Erie County, for proceedings pursuant to CPL 460.50 (5).

Same memorandum as in *People v Kaczmarek* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1280

CA 14-02236

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE REDDY LAW FIRM, LLC, BUFFALO (PRATHIMA REDDY OF COUNSEL), AND PHILLIPS LYTLE LLP, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 3, 2014. The order denied plaintiff's motion for summary judgment and, upon searching the record, granted summary judgment to defendant and dismissed the complaint.

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

Same memorandum as in *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.* ([appeal No. 3] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1281

CA 14-02237

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE REDDY LAW FIRM, BUFFALO (PRATHIMA REDDY OF COUNSEL), AND PHILLIPS LYTLE LLP, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 30, 2014. The order granted plaintiff's motion for leave to reargue its prior motion for summary judgment and, upon reargument, the court adhered its prior decision.

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

Same memorandum as in *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.* ([appeal No. 3] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1282

CA 15-00742

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

DIPIZIO CONSTRUCTION COMPANY, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE CANAL HARBOR DEVELOPMENT CORPORATION,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

BARCLAY DAMON, LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE REDDY LAW FIRM, LLC, BUFFALO (PRATHIMA REDDY OF COUNSEL), AND PHILLIPS LYTLE LLP, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 21, 2015. The order, among other things, denied plaintiff's motion for leave to renew its prior motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting plaintiff's motion for leave to renew and, upon renewal, vacating the award of summary judgment to defendant and reinstating the complaint, and as modified the order is affirmed without costs in accordance with the following memorandum: As we set forth in earlier appeals between the same parties, plaintiff, DiPizio Construction Company, Inc. (DiPizio), and defendant, Erie Canal Harbor Development Corporation (Erie), entered into a construction agreement (Contract) pursuant to which DiPizio was to provide construction services for a certain revitalization project (*DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 905; *DiPizio Const. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 909; *DiPizio Constr. Co., Inc. v Erie Canal Harbor Dev. Corp.*, 120 AD3d 911). Those earlier appeals arose out of a hybrid breach of contract action and CPLR article 78 proceeding.

DiPizio commenced this related action seeking a judgment declaring that Erie's notice of intent to terminate the Contract (Notice) and its ultimate termination of the Contract were nullities and that the parties' Contract remains in full force and effect. DiPizio contended that Erie's Board of Directors (Board) was required to approve by a majority vote any official action to be taken by Erie and, because the Board did not vote on the decision to issue the Notice or to terminate the Contract, those actions taken by the

Board's President were nullities.

DiPizio moved for summary judgment on the complaint and, in the order in appeal No. 1, Supreme Court denied DiPizio's motion, searched the record under CPLR 3212 (b) and awarded Erie summary judgment. In the order in appeal No. 2, the court granted DiPizio's motion for reargument and, upon reargument, adhered to its prior decision. In the order in appeal No. 3, the court denied DiPizio's motion for leave to renew the earlier motion for summary judgment and adhered to its award of summary judgment to Erie. We note at the outset that the appeal from the order in appeal No. 1 must be dismissed (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985).

We agree with DiPizio with respect to appeal No. 3 that the court abused its discretion in denying DiPizio's motion for leave to renew. "It is well established that a motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination,' and 'shall contain reasonable justification for the failure to present such facts on the prior motion' " (*DiPizio Constr. Co., Inc.*, 120 AD3d at 910, quoting CPLR 2221 [e] [2], [3]; *see Fuentes v Hoffman*, 122 AD3d 1319, 1320). DiPizio, "as the movant, 'bore the burden of proving that the new evidence [it] sought to present could not have been discovered earlier with due diligence and would have led to a different result' " (*DiPizio Constr. Co., Inc.*, 120 AD3d at 910). Here, DiPizio met its burden.

In support of the renewal motion, DiPizio submitted deposition transcripts containing information relevant to the underlying motion for summary judgment. Contrary to Erie's contention, we conclude that DiPizio provided a reasonable justification for its failure to submit those depositions on the earlier motion, i.e., the court had denied DiPizio's requests to conduct such depositions (*see Luna v Port Auth. of N.Y. & N.J.,* 21 AD3d 324, 325-326; *cf. Justino v Santiago*, 116 AD3d 411, 411; *Eskenazi v Mackoul*, 92 AD3d 828, 829; *see also State Farm Fire & Cas. v Parking Sys. Valet Serv.*, 85 AD3d 761, 764).

We further conclude that the new facts offered in support of the renewal motion would change the prior determination awarding Erie summary judgment in this declaratory judgment action (*see* CPLR 2221 [e] [2]). In denying DiPizio's initial motion and awarding Erie summary judgment, the court concluded that, although Erie's Board had not taken any formal action to issue the Notice or to terminate the Contract, the Board ratified the actions of its president. The deposition testimony submitted by DiPizio in support of the renewal motion establishes that there are triable issues of fact whether the president's action could have been ratified by Erie's Board.
" 'Ratification is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority[,] . . . [and it] relates back and supplies original authority to execute [an agreement]' . . . Ratification requires 'full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts or language' " (*Rocky Point Props. v Sear-Brown Group*, 295 AD2d 911, 913; *see Holm v C.M.P. Sheet Metal*, 89 AD2d

229, 232-233; *see generally Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 131). In support of its renewal motion, DiPizio submitted deposition testimony from a majority of the Board members raising triable issues of fact whether a majority of the Board had " 'full knowledge of the material facts relating' " to DiPizio's termination (*Rocky Point Props.*, 295 AD2d at 913).

Erie contends, as an alternative ground for affirmance (*see Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546), that no formal Board vote was required. Contrary to DiPizio's contention, Erie may properly raise this theory on appeal inasmuch as this ground was raised by Erie in opposition to the original motion (*see Summers v City of Rochester*, 60 AD3d 1271, 1273). We nevertheless conclude, however, that there are triable issues of fact whether a formal vote of the Board was required. Despite the language of Erie's bylaws and the presumption that the Board's president had the authority to enter into and terminate contracts "in the ordinary course of the corporation's business" (*A & M Wallboard v Marina Towers Assoc.*, 169 AD2d 751, 752, *lv denied* 78 NY2d 854; *see Odell v 704 Broadway Condominium*, 284 AD2d 52, 56-57; *see generally Hardin v Morgan Lithograph Co.*, 247 NY 332, 338-339), there are triable issues of fact whether the termination of the $20 million Contract was " 'extraordinary' or 'unusual' and outside of the ordinary course of [Erie's] business" (*Arrow Communication Labs. v Pico Prods.*, 206 AD2d 922, 923). Thus, there are triable issues of fact whether the Board's president could terminate the Contract in the absence of the express authority of the Board (*see Liebermann v Princeway Realty Corp.*, 17 AD2d 258, 260, *affd* 13 NY2d 999; *Arrow Communication Labs.*, 206 AD2d at 923). Moreover, the evidence of the Board's past practices in taking formal action to enter into and to amend contracts raises triable issues of fact whether the Board's president could terminate the Contract without formal action of the Board (*see Hellman v Hellman*, 60 AD3d 1468, 1468-1469; *see also 56 E. 87th Units Corp. v Kingsland Group, Inc.*, 30 AD3d 1134, 1134-1135; *Saleh v Saleh*, 239 AD2d 165, 167). We thus conclude that the order in appeal No. 3 must be modified by granting plaintiff's motion for leave to renew and, upon renewal, vacating the award of summary judgment to Erie and reinstating the complaint. Based on our determination in appeal No. 3, we conclude that the appeal from the order in appeal No. 2 must be dismissed as academic (*see e.g. Fan-Dorf Props., Inc. v Classic Brownstones Unlimited, LLC*, 103 AD3d 589, 589-590; *Del Bene v Frank C. Perry, DDS, P.C.*, 83 AD3d 771, 771-772).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1283

CA 15-00863

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

CARLA M. MANCUSO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. MANCUSO, DEFENDANT-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR DEFENDANT-APPELLANT.

DENTINO, CAMMARATA & FAZIO, LLC, ROCHESTER (MICHAEL PAUL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered December 22, 2014. The order, insofar as appealed from, granted that part of plaintiff's motion seeking an upward modification of child support.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs and that part of the motion seeking an upward modification of child support is denied.

Memorandum: Defendant appeals from an order that, insofar as appealed from, granted that part of plaintiff's motion for an upward modification of child support. We agree with defendant that Supreme Court erred in concluding that it was required to recalculate child support upon the termination of defendant's maintenance obligation and in granting that part of plaintiff's motion on that ground. The judgment of divorce reflected an award of child support to plaintiff in which defendant's maintenance payments had been deducted from his income in calculating child support, but there was no provision in the judgment for an adjustment to child support upon the termination of maintenance, as required by Domestic Relations Law § 240 (1-b) (b) (5) (vii) (C) (*see Antinora v Antinora*, 125 AD3d 1336, 1338; *Lazar v Lazar*, 124 AD3d 1242, 1244-1245). Neither party took an appeal from the judgment of divorce, however, and we conclude that the court erred in essentially correcting the error upon plaintiff's subsequent request for a modification of child support (*see generally Matter of Baker v Baker*, 291 AD2d 751, 752-753). Rather, plaintiff was required to show a substantial change in circumstances warranting an upward modification of child support (*see* § 236 [B] [9] [b] [2] [i]), and we conclude that she failed to make that showing.

"Among the factors to be considered in determining whether there has been a change in circumstances warranting an upward modification

of support are the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children" (*Matter of DiGiorgi v Buda*, 26 AD3d 434, 434 [internal quotation marks omitted]; *see Shedd v Shedd*, 277 AD2d 917, 917-918, *lv dismissed* 96 NY2d 754). " 'While an increase in the noncustodial parent's income is a factor which may be considered in deciding whether to grant an upward modification of child support, this factor alone is not determinative' " (*DiGiorgi*, 26 AD3d at 434).

Here, the record establishes that defendant's income had decreased since the judgment was entered, and therefore the termination of his maintenance obligation would result in only a small increase in his income. Although plaintiff contends that the termination of maintenance resulted in a substantial change in her income, she failed to show that she would be unable to replace that lost income through employment. Indeed, in recalculating defendant's child support obligation, the court imputed income to plaintiff in the amount she had been receiving in maintenance (*see Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397-1398; *Irene v Irene* [appeal No. 2], 41 AD3d 1179, 1180-1181). Plaintiff failed to demonstrate any other factors in support of an upward modification in child support inasmuch as she did not introduce any evidence of increased needs of the children, a loss of assets, or a change in the current and prior lifestyles of the children (*see Matter of Rosenthal v Buck*, 281 AD2d 909, 909-910; *Matter of Faery v Piedmont*, 181 AD2d 1014, 1014).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1286

CA 15-00899

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

TOWN OF PARIS, PLAINTIFF-APPELLANT,

V ORDER

MARK PIRGER AND ALISON PIRGER,
DEFENDANTS-RESPONDENTS.

FINER & GIRUZZI-MOSCA, UTICA (STUART E. FINER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANN W. MANION, UTICA, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered September 24, 2014. The order and judgment, among other things, denied plaintiff's request for a permanent injunction.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1287

TP 15-00834

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

IN THE MATTER OF ELAINE D. FISHER, PETITIONER,

V MEMORANDUM AND ORDER

ADMINISTRATIVE APPEALS BOARD OF NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES, ET AL., RESPONDENTS.

WARD & KUTZUBA, ARCADE (ROBERT D. STRASSEL OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH 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 [Diane Y. Devlin, J.], entered April 10, 2015) to review a determination of respondent Administrative Appeals Board of New York State Department of Motor Vehicles. The determination dismissed petitioner's administrative appeal and denied petitioner's request to stay an order of the New York State Department of Motor Vehicles, which suspended her driver's license.

It is hereby ORDERED that the order transferring this proceeding is unanimously vacated without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Petitioner commenced this CPLR article 78 proceeding challenging the suspension of her driver's license after she failed or refused to submit to an examination to determine her qualifications to operate a motor vehicle pursuant to Vehicle and Traffic Law § 506 (1) and (3). " '[T]his CPLR article 78 proceeding was improperly transferred to this Court inasmuch as petitioner does not challenge a determination made as a result of an evidentiary hearing directed by law' " (*Matter of Femia v Administrative Appeals Bd. of N.Y. State Dept. of Motor Vehs.*, 42 AD3d 951, 951). We therefore vacate the order transferring the proceeding to this Court, and we remit the matter to Supreme Court for disposition on the merits.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1288

CA 14-01930

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

GARY PALUMBO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREN PALUMBO, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 31, 2013 in a divorce action. The judgment, among other things, granted plaintiff a divorce.

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

Memorandum: In appeal No. 1, plaintiff appeals from a judgment of divorce and, in appeal No. 2, he appeals from a subsequent order that modified the judgment by including a provision regarding the refinancing or sale of the marital residence. Addressing first appeal No. 1, we reject plaintiff's contention that Supreme Court erred in allocating debt incurred from three separate loans all to him rather than to him and defendant, jointly. "A trial court . . . has broad discretion in deciding what is equitable under all of the circumstances" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420). Here, the court found that the debts "were not 'predominantly . . . marital' " (*Dietz v Dietz*, 203 AD2d 879, 882). The money from the loans was used to further plaintiff's business interests, and defendant was not given any interest in those business interests in the court's equitable distribution of property (*cf. Markel v Markel*, 197 AD2d 934, 935). We see no reason to disturb the court's determination (*see Rivera v Rivera*, 126 AD3d 1355, 1356).

We reject plaintiff's contention that the court erred in concluding that defendant was entitled to a credit for marital funds that were used to pay a separate debt of plaintiff (*see Mahoney-Buntzman*, 12 NY3d at 421; *Khan v Ahmed*, 98 AD3d 471, 472-473). Defendant had no knowledge of the loan or that plaintiff used marital funds to pay off the loan. Plaintiff's contention that the court further erred in failing to credit him for his contribution of

separate property to purchase the marital residence is raised for the first time on appeal and is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We have considered plaintiff's remaining contention with respect to appeal No. 1 and conclude that it is without merit.

With respect to appeal No. 2, the parties stipulated during the nonjury trial to the value of the marital residence, and they further stipulated that plaintiff could keep the marital residence only if he was able to refinance it within three months. The parties otherwise agreed that plaintiff would sell the residence. The three months was to be measured from the date of the court's decision or the date of the judgment. Neither the decisions nor the judgment rendered by the court mentioned that part of the stipulation regarding the refinancing or sale of the residence. A little more than three months after the date of the judgment, defendant moved for, inter alia, a money judgment in the amount of her distributive award, including her share of the marital residence, or the sale of the marital residence so that plaintiff would then pay her the amount of her distributive award. Plaintiff opposed the motion, arguing that the judgment and decisions failed to reference the stipulation regarding the refinancing or sale of the residence, and cross-moved for a stay of enforcement pending appeal. However, plaintiff had no objection to a modification of the judgment to incorporate the stipulation provided that the court granted his cross motion for a stay. By the order in appeal No. 2, the court granted that part of defendant's motion seeking a sale of the residence and granted the cross motion for a stay. The court amended the judgment to incorporate the stipulation nunc pro tunc, and ordered the residence to be listed for sale inasmuch as plaintiff had not refinanced the residence within three months from the date of the judgment.

On appeal, plaintiff contends that the amendment was improper because it placed him in immediate default, and he requests an additional three months to refinance. We note that plaintiff does not contend that the court erred in incorporating the oral stipulation into the judgment of divorce and does not seek to vacate the provision but, rather, he seeks only to modify it (*cf. Lewis v Lewis*, 70 AD3d 1432, 1433). Under the circumstances of this case, we modify the order in appeal No. 2 by providing that, if the marital residence is not refinanced within 90 days of service of a copy of the order of this Court with notice of entry, the marital residence is to be sold.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1289

CA 14-01931

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

GARY PALUMBO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LAUREN PALUMBO, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

MICHAEL A. ROSENHOUSE, ROCHESTER, FOR PLAINTIFF-APPELLANT.

BROWN HUTCHINSON LLP, ROCHESTER (KIMBERLY J. CAMPBELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered May 29, 2014 in a divorce action. The order, among other things, modified the judgment of divorce by adding a provision directing that if the marital residence is not refinanced within 90 days of the date of the judgment, the marital residence is to be sold in conformance with the parties' stipulation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that, if the marital residence is not refinanced within 90 days of service of a copy of the order of this Court with notice of entry, the marital residence is to be sold, and as modified the order is affirmed without costs in accordance with the same memorandum as in *Palumbo v Palumbo* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1291

CA 15-00444

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

THE HOUSE OF THE GOOD SHEPHERD,
PLAINTIFF-APPELLANT,

V ORDER

HENRY S. LEHR, INC., BROWN AND BROWN OF LEHIGH VALLEY, INC., AS SUCCESSOR IN INTEREST TO HENRY A. LEHR, INC., WILLIAM H. LEHR, PATSY A. LEHR, ROBERT M. MCCORMICK AND LAURIE CORIALE,
DEFENDANTS-RESPONDENTS.

ROSSI & ROSSI, ATTORNEYS AT LAW, PLLC, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOWITCH & COFFEY, LLC, ALBANY (DANIEL W. COFFEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 9, 2014. The order and judgment, insofar as appealed from, granted the motion of defendants for summary judgment and dismissed the sixth amended complaint.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1295

TP 15-01019

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

IN THE MATTER OF DEMETRIUS LOVING, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 11, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1299

KA 14-01663

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEANA M. MRZYGUT, DEFENDANT-APPELLANT.

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

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 6, 2014. The judgment convicted defendant, upon her plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). "The valid waiver by defendant of [her] right to appeal encompasses [her] challenge to the severity of the sentence and also 'includes waiver of the right to invoke [this Court's] interest-of-justice jurisdiction' " (*People v Keiser*, 38 AD3d 1254, 1254, *lv denied* 9 NY3d 877, *reconsideration denied* 9 NY3d 991, quoting *People v Lopez*, 6 NY3d 248, 255).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1307

CA 15-00875

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

AMY MECH, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF ALLISON MECH, AN INFANT, PLAINTIFF-APPELLANT,

V ORDER

UNITED CEREBRAL PALSY AND HANDICAPPED CHILDREN'S ASSOCIATION OF SYRACUSE, INC., ENABLE, INC., AND EXPLORING YOUR WORLD, DEFENDANTS-RESPONDENTS.

UNITED CEREBRAL PALSY AND HANDICAPPED CHILDREN'S ASSOCIATION OF SYRACUSE, INC., ENABLE, INC., AND EXPLORING YOUR WORLD, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

MASON CORPORATION, THIRD-PARTY DEFENDANT-RESPONDENT.

DEFRANCISCO & FALGIATANO LAW FIRM, SYRACUSE (JEAN MARIE WESTLAKE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, GARDEN CITY (MOLLY RYAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (JAMES P. MCELHENY OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 12, 2014. The order granted the motion of defendants for summary judgment dismissing the complaint and granted the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1317

CA 15-00781

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

TIMOTHY C. LONG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GENE C. TINGUE, DEFENDANT-RESPONDENT.

WARD & KUTZUBA, ARCADE (ROBERT D. STRASSEL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered February 13, 2015. The judgment awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the damages award except with respect to the $510 for "Damage to Realty," and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Cattaraugus County, to determine the amount of damages to be awarded pursuant to RPAPL 861 (1) in accordance with the following memorandum: Plaintiff commenced this RPAPL 861 action seeking damages for, inter alia, defendant's cutting and removal of trees from a parcel of plaintiff's property. The complaint sought, among other damages, treble the stumpage value of the trees, as well as $250 per tree and damages for permanent and substantial damage to the land. Plaintiff appeals from a judgment awarding him the stumpage value of the trees and $510 for "Damage to Realty."

We conclude that Supreme Court properly awarded plaintiff the $510 for the "Damage to Realty," but we agree with plaintiff that the court erred in limiting the remainder of his damages to the stumpage value of the trees. "Damages pursuant to RPAPL may be awarded 'equal to treble the stumpage value (as defined) of the trees or timber, or $250 per tree, or both such treble value and amount per tree, and for any permanent and substantial damage to land or improvements caused by such violation' " (*Vanderwerken v Bellinger*, 72 AD3d 1473, 1476, quoting Winter and Loeb, Practice Commentaries, McKinney's Cons Laws of NY, Book 49½, RPAPL 861, at 439). Plaintiff presented evidence of the damages to the land and the stumpage value of the trees (*cf. id.* at 1473-1474; *Western N.Y. Land Conservancy, Inc. v Cullen*, 66 AD3d 1461, 1464, *appeal dismissed* 13 NY3d 904, *lv denied* 14 NY3d 705), and the court awarded him that amount. The statute, however, provides that plaintiff is entitled to treble the stumpage value, or $250 per tree, or both (RPAPL 861 [1]), in addition to "permanent . . . damage to the land." We therefore modify the judgment by vacating the

damages award except for the award of $510 for the “Damage to Realty,” and we remit the matter to Supreme Court for a determination whether plaintiff is also entitled to treble the stumpage value, $250 per tree, or both (RPAPL 861 [1]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1318

CA 14-01447

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

IN THE MATTER OF DEXTER BOSTIC,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 11, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1319

KA 10-01432

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Frank P. Geraci, Jr., A.J.), rendered April 21, 2010. The appeal was held by this Court by order entered October 3, 2014, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (121 AD3d 1536). The proceedings were held and completed (Alex R. Renzi, J.).

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

Memorandum: We held this case and remitted the matter to Supreme Court to conduct a reconstruction hearing with respect to the lost recording of a 911 call (*People v Thomas*, 121 AD3d 1536). At the hearing, the People called only one witness, a police officer who had only a "vague" recollection of what was said by the complainant on the 911 call. We agree with defendant that the People were unable to meet their burden of establishing the content of the 911 call, and thus meaningful appellate review of defendant's contentions is not possible (*see People v Hasenflue*, 48 AD3d 888, 890, *lv denied* 11 NY3d 789; *People v Ha*, 18 AD3d 1068, 1068, *lv denied* 5 NY3d 788; *People v Jacobs*, 286 AD2d 404, 405; *see generally People v Yavru-Sakuk*, 98 NY2d 56, 59). We therefore reverse the judgment and grant a new trial on count one of the indictment.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1320

TP 15-01028

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

IN THE MATTER OF JAMES ADAMS, PETITIONER,

V ORDER

DALE ARTUS, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

JAMES ADAMS, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. ARNOLD 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 [Penny M. Wolfgang, J.], entered September 4, 2014) to review a determination of respondents. The determination found after a tier III 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).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1322

KA 14-00476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY WILLIAMS, DEFENDANT-APPELLANT.

JASON J. BOWMAN, ONTARIO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wayne County Court (John B. Nesbitt, J.), rendered February 13, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a misdemeanor.

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 driving while intoxicated as a misdemeanor (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [b] [i]). We reject defendant's contention that County Court erred in refusing to suppress his statements to the arresting officer. The officer's initial questioning of defendant was investigatory in nature (*see People v Tieman*, 132 AD3d 703, 703-704; *People v Allen*, 15 AD3d 933, 934, *lv denied* 4 NY3d 883), and "he was not, as a matter of law, in custody at this time for purposes of the need to give *Miranda* warnings" (*People v Bennett*, 70 NY2d 891, 894; *see People v Fong*, 233 AD2d 115, 115-116, *lv denied* 89 NY2d 942).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1324

KA 13-01807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 12, 2010. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1325

KA 11-01594

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANEUDI VASQUEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered June 27, 2011. The judgment convicted defendant, upon a jury verdict, of attempted burglary in the second degree and attempted criminal trespass in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of attempted criminal trespass in the second degree (Penal Law §§ 110.00, 140.15) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him following the same jury trial of three counts of burglary in the second degree (§ 140.25 [2]). Defendant contends that Supreme Court erred in denying his motion to sever the two indictments, as well as the individual counts of the indictments. We reject that contention. In all of the offenses, which occurred during a nine-day period, the perpetrator accessed or attempted to access residences through a window after mutilating the window screen, and the residences were located in the same general neighborhood. "Even though the offenses were based upon [five] separate incidents, proof of one criminal transaction 'would be material and admissible as evidence[-]in[-]chief upon a trial' of the other charges" (*People v Davis*, 156 AD2d 969, 970, *lv denied* 75 NY2d 867, quoting CPL 200.20 [2] [b]; *see People v Griffin*, 26 AD3d 594, 595, *lv denied* 7 NY3d 756). Here, as in *Davis*, the "modus operandi in all [of the incidents] was sufficiently similar to tend to establish [the perpetrator's] identity" (156 AD2d at 970; *see generally People v Beam*, 57 NY2d 241, 250), and the evidence of defendant's commission of the completed burglaries "was material and relevant on the [attempted offenses] to establish defendant's intent to commit a crime" in those

residences (*Griffin*, 26 AD3d at 595).

We reject the further contention of defendant that he was denied a fair trial by prosecutorial misconduct on summation. Defendant specifically challenges two statements, and he failed to preserve for our review any challenge to the second statement based on his failure to specify the basis for that objection (*see People v Tonge*, 93 NY2d 838, 839-840; *People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803). We nevertheless exercise our power to review defendant's challenge to the second statement as well as the first, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). The prosecutor began his summation by telling the jury that, although the length of the trial and the number of witnesses suggested that there was a question about defendant's guilt, there was no real question of defendant's guilt and the only reason they were all in the courtroom was "simply because the defendant pled not guilty to the[ ] crimes." After defense counsel's objection to that statement was sustained and a curative instruction was given to the jury, the prosecutor continued by stating, "[N]o matter how guilty you are, even if a police officer actually sees you in the act . . . [,] even if your fresh footprints in the snow lead directly back to an apartment window that you had just attempted to burglarize minutes earlier, even if you leave your fingerprints on property that was moved during the course of three separate burglaries, our system of justice allows you to plead not guilty and have a trial." We agree with defendant that those statements "inappropriately insinuated that the defendant should not have elected to exercise his right to a trial because" of the amount of evidence against him (*People v Pagan*, 2 AD3d 879, 880), and "impermissibly denigrated the fact that defendant elected to avail himself of his due process right to a trial" (*People v Rivera*, 116 AD2d 371, 373). Contrary to defendant's contention, however, reversal is not warranted and would be " 'an ill-suited remedy' " in this case (*People v Galloway*, 54 NY2d 396, 401). The comments were isolated, and they were not so egregious as to deprive defendant of a fair trial (*see People v Rivera*, 281 AD2d 927, 928, *lv denied* 96 NY2d 906; *cf. Pagan*, 2 AD3d at 880-881; *Rivera*, 116 AD2d at 373-376; *see generally People v Rubin*, 101 AD2d 71, 77-78, *lv denied* 63 NY2d 711). Finally, we conclude that the sentence, as reduced by operation of law (*see* Penal Law § 70.30 [1] [former (e) (i)]), is not unduly harsh and severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1326

KA 14-02038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SUSAN M. CALLAHAN, DEFENDANT-APPELLANT.

NELSON S. TORRE, BUFFALO, 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 March 28, 2014. The judgment revoked a sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the matter is remitted to Steuben County Court for a new hearing in accordance with the following memorandum: On appeal from a judgment revoking the term of probation imposed upon her conviction of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]) and imposing a term of incarceration, defendant contends that County Court erred in conducting the violation of probation hearing in her absence. We agree.

Initially, we reject the People's contention that defendant failed to preserve her contention for our review. The record establishes that defense counsel informed the court immediately prior to the start of the hearing that defendant was requesting an adjournment of the proceeding, and the court responded that it would proceed with the hearing and did so immediately. Consequently, the record establishes that the court, "in response to defendant's [request], 'expressly decided the question raised on appeal,' thus preserving the issue for review" (*People v Smith*, 22 NY3d 462, 465).

Contrary to defendant's contention, the court provided the requisite *Parker* warnings (*People v Parker*, 57 NY2d 136, 141). The record establishes that the court informed defendant at a prior appearance that the hearing would proceed in her absence if she failed to appear, and that she could be sentenced to a maximum state prison sentence if she was found to have violated the conditions of her probationary sentence. Although *Parker* concerned a defendant's failure to appear at trial, the same precepts apply to violation of probation proceedings (*see e.g. People v Severino*, 44 AD3d 1077, 1079,

lv denied 9 NY3d 1038; *People v Smith [Robert E.]*, 148 AD2d 1007, 1007-1008, *lv denied* 74 NY2d 747).

We agree with defendant, however, that the record fails to establish that "the court had inquired into the surrounding circumstances and determined that the defendant's absence was deliberate" before proceeding with the hearing (*People v Brooks*, 75 NY2d 898, 899, *mot to amend remittitur granted* 76 NY2d 746; *see People v Bynum*, 125 AD3d 1278, 1278, *lv denied* 26 NY3d 927). Here, after defense counsel informed the court of defendant's request for an adjournment, the court immediately indicated that it was prepared to proceed in her absence, and the court began the hearing. We therefore reverse the judgment and remit the matter to County Court for a new hearing.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1327

KA 14-01139

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER ANNIS, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC R. SCHIENER, SPECIAL PROSECUTOR, GENESEO, 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 Allegany County Court (Thomas P. Brown, J.), dated May 21, 2014. The order denied the motion of defendant pursuant to CPL article 440.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Allegany County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order denying, without a hearing, his CPL 440.10 motion to vacate a judgment convicting him following a jury trial of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). We previously affirmed the judgment of conviction (*People v Annis*, 126 AD3d 1525). With respect to defendant's contention concerning an alleged improper communication between an assistant district attorney and a sworn juror, we conclude that County Court properly denied the motion without a hearing inasmuch as the motion papers "do not contain sworn allegations substantiating or tending to substantiate all the essential facts" of defendant's claim (CPL 440.30 [4] [b]; *see People v Howington*, 122 AD3d 1289, 1289-1290, *lv denied* 25 NY3d 1165). With respect to defendant's contentions that he was denied a fair trial by prosecutorial misconduct and that the court erred in excluding photographs of the vehicle, we conclude that the court properly denied the motion without a hearing inasmuch as "sufficient facts appear[ed] on the record with respect to [those contentions] to permit adequate review thereof upon" a direct appeal (CPL 440.10 [2] [b]; *see People v Rossborough*, 122 AD3d 1244, 1246) and, indeed, defendant's direct appeal from the judgment was pending.

Defendant's contentions that trial counsel was ineffective in failing to provide an offer of proof regarding the photographs of the vehicle and to object to the prosecutor's summation were not raised in his CPL 440.10 motion and are therefore not properly before us (*see*

People v Pennington, 107 AD3d 1602, 1604, *lv denied* 22 NY3d 958). With respect to defendant's remaining claims of ineffective assistance of counsel, however, we conclude that nonrecord facts may support defendant's contention that his trial counsel unreasonably withdrew his request for a *Martin* hearing (*see People v Martin*, 143 Misc 2d 341) and failed to request a *Huntley* hearing. In support of his motion, defendant submitted a police report indicating that, in response to an officer's request for a chemical test and before defendant made statements to the police, defendant asked to speak to an attorney. Based on the evidence in the record, "we can discern no tactical reason for trial counsel's" withdrawal of his request for a *Martin* hearing or failure to request a *Huntley* hearing (*People v Dombrowski*, 87 AD3d 1267, 1268). We thus conclude that "a hearing is required to afford defendant's trial counsel an opportunity . . . to provide a tactical explanation for the omission[s]" (*id.* [internal quotation marks omitted]). We therefore reverse the order and remit the matter to County Court to conduct a hearing on defendant's CPL 440.10 motion (*see People v Washington*, 128 AD3d 1397, 1400).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1328

KA 12-00608

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMANUEL B. INMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered January 18, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts each of robbery in the first degree (Penal Law § 160.15 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that he was denied effective assistance of counsel. We reject that contention. Viewing defendant's representation in its entirety, we conclude that defendant was afforded meaningful representation (*see generally People v Schulz*, 4 NY3d 521, 530-531). "[I]t is well settled that disagreement over trial strategy is not a basis for a determination of ineffective assistance of counsel" (*People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 19 NY3d 959). In this case, the alleged instances of ineffective assistance "are based largely on his hindsight disagreements with defense counsel's trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Morrison*, 48 AD3d 1044, 1045, *lv denied* 10 NY3d 867). To the extent that defendant contends that defense counsel was ineffective for failing to object to the prosecutor's remarks during summation, that contention is without merit inasmuch as the prosecutor's comments were fair comment on the evidence and did not constitute prosecutorial misconduct (*see People v Martinez*, 114 AD3d 1173, 1174, *lv denied* 22 NY3d 1200; *People v Goupil*, 104 AD3d 1215, 1217, *lv denied* 21 NY3d 943).

Contrary to defendant's further contention, County Court did not err in admitting in evidence a hat found at the crime scene and the results of DNA testing of the hat, based on a gap in the chain of custody. " 'The People provided sufficient assurances of the identity and unchanged condition of the [hat] . . . , and any alleged gaps in the chain of custody went to the weight of the evidence and not its admissibility' " (*People v Jefferson*, 125 AD3d 1463, 1464, *lv denied* 25 NY3d 990; *see People v Hawkins*, 11 NY3d 484, 494).

Finally, we reject defendant's contention that the court erred in admitting in evidence a photograph of a vehicle parked in the driveway of defendant's home. "In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule . . . Evidence is relevant if it has a tendency in reason to prove the existence of any material fact" (*People v Scarola*, 71 NY2d 769, 777). Nevertheless, relevant evidence may be determined to be inadmissible if its "probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury" (*id.*). Here, a witness testified that the perpetrator of the crime fled the scene in a vehicle that was similar to the one depicted in the photograph, and we conclude that "the probative value of the [photograph] far outweighs any unfair prejudice inasmuch as it was relevant to the issue of the [perpetrator's] identity" (*People v McCullough*, 117 AD3d 1415, 1416, *lv denied* 23 NY3d 1040). In any event, any error in the admission of the photograph is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1329

KA 12-00099

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS R. BURKE-WELLS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARK C. DAVISON 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 (Frank P. Geraci, Jr., J.), rendered November 9, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Defendant failed to preserve for our review his contention that he was deprived of his right to a fair trial by the testimony of the People's fingerprint analyst on the ground that her testimony "suggest[ed] absolute certainty" and was not presented as an opinion (*see generally People v Comerford*, 70 AD3d 1305, 1305-1306) and, in any event, we reject that contention. It is well settled that a fingerprint match may provide the basis for a burglary conviction (*see People v Safford*, 74 AD3d 1835, 1836, *lv denied* 16 NY3d 746, *reconsideration denied* 16 NY3d 899), and here the People's fingerprint analyst testified that she matched a known fingerprint belonging to defendant to a latent fingerprint recovered from the entry point at the crime scene. Defendant also failed to preserve for our review his contention that he was deprived of a fair trial based on prosecutorial misconduct (*see People v Torres*, 125 AD3d 1481, 1484, *lv denied* 25 NY3d 1172). In any event, we conclude that the prosecutor's comments during summation were a fair response to comments made by defense counsel (*see People v Santana*, 55 AD3d 1338, 1339, *lv denied* 12 NY3d 762; *People v Beggs*, 19 AD3d 1150, 1151, *lv denied* 5 NY3d 803), and any improprieties with respect to the remaining allegations of misconduct "were not so pervasive or egregious as to deprive defendant of a fair trial" (*Torres*, 125 AD3d at 1484 [internal quotation marks omitted]).

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1330

KA 11-01595

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANEUDI VASQUEZ, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered June 27, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree (three counts).

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

Same memorandum as in *People v Vasquez* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1331

CA 15-00461

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

IN THE MATTER OF ROBERT CARDEW,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

ROBERT CARDEW, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Orleans County (James P. Punch, A.J.), entered January 16, 2015 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that said appeal insofar as it concerns petitioner's work assignment is unanimously dismissed and the judgment is otherwise affirmed without costs.

Memorandum: Petitioner, a prison inmate, appeals from a judgment denying his petition seeking to annul the determination denying various grievances filed by him. We note at the outset that the Attorney General has advised this Court that, after petitioner commenced this proceeding, he was given a new work assignment. Thus, petitioner's appeal is moot with respect to the grievances concerning his placement as a housing porter, "[i]nasmuch as petitioner is no longer aggrieved by the administrative action that was the subject of his grievance[s]" (*Matter of Patel v New York State Dept. of Corr. Servs.*, 84 AD3d 1668, 1669; *see Matter of Campbell v Fischer*, 105 AD3d 1222, 1222, *lv denied* 22 NY3d 853; *Matter of Parrilla v Donelli*, 25 AD3d 1046, 1047; *Matter of McKenna v Goord*, 245 AD2d 1074, 1075, *lv denied* 91 NY2d 812). Upon our review of the record, we conclude that petitioner failed to demonstrate that the denials of his remaining grievances were affected by an error of law or were arbitrary and capricious (*see generally Matter of Kalwasinski v Fischer*, 68 AD3d 1722, 1723).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1333

CA 15-00857

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

DANIEL J. VERNA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BERNADETTE VERNA, DEFENDANT-RESPONDENT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFF-APPELLANT.

KARONNE JARRETT WATSON, SCHENECTADY, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 16, 2014 in a divorce action. The order, inter alia, denied plaintiff's motion seeking modification of the parties' judgment of divorce.

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

Memorandum: On appeal from an order that, inter alia, denied his motion seeking to modify a judgment of divorce, plaintiff contends that the parties' stipulation of settlement was unconscionable. We reject that contention. We note at the outset that, "[i]nasmuch as the stipulation was incorporated but not merged into the judgment of divorce, [plaintiff] cannot challenge the stipulation by way of motion but, rather, must do so by commencement of a plenary action" (*Marshall v Marshall*, 124 AD3d 1314, 1317; *see Barany v Barany*, 71 AD3d 613, 614; *see generally Bryant v Carty*, 118 AD3d 1459, 1459). Nevertheless, "[b]ecause the determination in this case was made after a full hearing tantamount to a plenary trial, we address the merits in the interest of judicial economy" (*Gaines v Gaines*, 188 AD2d 1048, 1048; *see Dunham v Dunham*, 214 AD2d 961, 961-962). On the merits, we conclude that, contrary to plaintiff's contention, the agreement is not unconscionable insofar as it requires plaintiff to obtain a $350,000 life insurance policy and to name defendant as the beneficiary of the policy. Although the insurance premiums for this policy may have been higher than plaintiff anticipated, the parties' agreement is not "one such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other" (*Christian v Christian*, 42 NY2d 63, 71 [internal quotation marks omitted]; *see Colello v Colello*, 9 AD3d 855, 859; *Skotnicki v Skotnicki*, 237 AD2d 974, 975).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1334

CA 15-00289

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

JUSTIN COFFEE, PLAINTIFF-RESPONDENT,

V ORDER

TANK INDUSTRY CONSULTANTS, INC.,
DEFENDANT-APPELLANT,
AND WORLDWIDE INDUSTRIES CORP., DEFENDANT.

WORLDWIDE INDUSTRIES CORP., THIRD-PARTY
PLAINTIFF,

V

CDK INDUSTRIES, INC., THIRD-PARTY DEFENDANT.
(APPEAL NO. 1.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered May 23, 2014. The order denied the motion of defendant Tank Industry Consultants, Inc. for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on September 28, 2015,

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1335

CA 15-00894

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

JUSTIN COFFEE, PLAINTIFF-RESPONDENT,

V ORDER

TANK INDUSTRY CONSULTANTS, INC.,
DEFENDANT-APPELLANT,
AND WORLDWIDE INDUSTRIES CORP., DEFENDANT.

WORLDWIDE INDUSTRIES CORP., THIRD-PARTY
PLAINTIFF,

V

CDK INDUSTRIES, INC., THIRD-PARTY DEFENDANT.
(APPEAL NO. 2.)

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (ROBERT A. QUATTROCCI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 14, 2014. The order, among other things, denied the motion of defendant Tank Industry Consultants, Inc. for leave to reargue and/or renew its motion for summary judgment.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on September 28, 2015,

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1336

CA 15-00881

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

LLOYD PICHE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SYNERGY TOOLING SYSTEMS, INC.,
DEFENDANT-RESPONDENT,
N. CHOOPS PAINTING AND DECORATING, INC.,
DEFENDANT-APPELLANT,
AND C.V.M. ELECTRIC, INC., DEFENDANT.

SYNERGY TOOLING SYSTEMS, INC., THIRD-PARTY
PLAINTIFF,

V

AMHERST ACOUSTICAL, INC., THIRD-PARTY
DEFENDANT.

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

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered August 13, 2014. The order, among other things, denied the motion of defendant N. Choops Painting and Decorating, Inc. for summary judgment dismissing plaintiff's further amended complaint and any cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion with respect to the Labor Law claims against defendant N. Choops Painting and Decorating, Inc. in the further amended complaint and dismissing those claims against it and as modified the order is affirmed without costs in accordance with the following memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he fell while wearing stilts in order to install a ceiling tile. Plaintiff fell when he stepped on a piece of flexible electrical wire conduit (conduit) that was on the floor. It is undisputed that there was a 1- to 1½-foot pile of conduit in the room

where plaintiff was working. We note as a preliminary matter that plaintiff and defendant-third-party-plaintiff properly concede that N. Choops Painting and Decorating, Inc. (defendant) is not liable for the alleged violations of the Labor Law. We therefore modify the order by granting those parts of defendant's motion for summary judgment dismissing the Labor Law claims against it.

We conclude, however, that Supreme Court properly determined that defendant failed to establish its entitlement to judgment dismissing the first cause of action, for common-law negligence. Although defendant is correct that the record does not establish who placed the conduit on the floor in the room in which plaintiff was working, we note that a defendant " 'does not meet its burden by noting gaps in its opponent's proof' " (*New York Mun. Ins. Reciprocal v Casella Constr., Inc.*, 105 AD3d 1440, 1441). It is well established that a subcontractor "may be held liable for negligence 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 plaintiff's work or work area" (*Burns v Lecesse Constr. Servs. LLC*, 130 AD3d 1429, 1433-1434 [internal quotation marks omitted]; *see Babiack v Ontario Exteriors, Inc.*, 106 AD3d 1448, 1450; *cf. Barto v NS Partners, LLC*, 74 AD3d 1717, 1718-1719). We conclude that defendant failed to establish that its employees did not place the conduit in the room, thereby creating the dangerous condition (*see Burns*, 130 AD3d at 1433-1434). Indeed, defendant's submission of plaintiff's deposition testimony in support of its motion raised an issue of fact (*see Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1196; *see generally Hunt v Ciminelli-Cowper Co., Inc.*, 66 AD3d 1506, 1508). Plaintiff testified therein that defendant's employees were painting outside the room where he was working, that the conduit had previously been located in that area, and that he had seen defendant's employees move the conduit the week before his accident in order to access the area they needed to paint.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1339

CA 15-00518

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

LUZ ALVARADO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WEGMANS FOOD MARKETS, INC., DEFENDANT-RESPONDENT.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

THE LAW FIRM OF JANICE M. IATI, P.C., PITTSFORD (AMANDA B. BURNS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered January 5, 2015. The order granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained when she slipped and fell on snow or ice in defendant's parking lot. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. "Defendant met its initial burden by establishing that a storm was in progress at the time of the accident and, thus, that it 'had no duty to remove the snow [or] ice until a reasonable time ha[d] elapsed after cessation of the storm' " (*Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541). In opposition to the motion, plaintiff failed to raise a triable issue of fact "whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition" (*Meyers v Big Six Towers, Inc.*, 85 AD3d 877, 878). Contrary to plaintiff's contention, evidence that it was only snowing lightly at the time of the accident does not render the storm in progress doctrine inapplicable. The " 'doctrine is not limited to situations where blizzard conditions exist; it also applies in situations where there is some type of less severe, yet still inclement, winter weather' " (*Camacho v Garcia*, 273 AD2d 835, 835). The assertions of plaintiff's property management expert that defendant's snow and ice removal practices deviated from accepted and customary practices of property management also failed to raise an issue of fact, inasmuch as "defendant's duty in this regard was suspended until a reasonable period of time after the storm ended"

(*Wood v Converse*, 263 AD2d 860, 861).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1343

TP 14-02071

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

IN THE MATTER OF PAMELA G. FERRIS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES APPEALS BOARD, RESPONDENT.

LEONARD & CURLEY, PLLC, ROME (MARK C. CURLEY OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (DOROTHY F. POWELL OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [David A. Murad, J.], entered November 10, 2014) to vacate and annul the determination of respondent. The determination revoked the driver's license of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking her driver's license based upon her refusal to submit to a chemical test to determine her blood alcohol level (*see* Vehicle and Traffic Law § 1194 [2] [d]). Respondent upheld the determination of the Administrative Law Judge (ALJ) following a hearing that petitioner refused, by her conduct, to submit to a chemical test to determine her blood alcohol level following her arrest for driving while intoxicated (*see* § 1194 [2] [c]). Contrary to petitioner's contention, the ALJ was entitled to credit the testimony of two police officers that the inability to obtain an adequate sample from petitioner following two attempts to complete a chemical breath test was the result of petitioner's failure to blow adequately into the breathalyzer machine, and that she verbally refused their offer to allow her to provide a third sample (*see Matter of Miracle v New York State Dept. of Motor Vehs.*, 303 AD2d 1053, 1053). We conclude that the determination is supported by substantial evidence (*see Matter of Beaver v Appeals Bd. of Admin. Adjudication Bur., State Dept. of Motor Vehs.*, 68 NY2d 935, *revg on dissenting mem* 117 AD2d 956, 958-959; *Miracle*, 303 AD2d at 1053;

Matter of Van Sickle v Melton, 64 AD2d 846, 846).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1345

TP 15-00842

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

IN THE MATTER OF KWESI NOBLE, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 13, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1346

TP 15-01021

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

IN THE MATTER OF MICHAEL SENNON, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 11, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1347

KA 12-00686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TERRANCE HOBBS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, TREVETT CRISTO SALZER & ANDOLINA, P.C. (ERIC M. DOLAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 9, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1350

KA 12-00909

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY D. BROOMFIELD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 14, 2012. The judgment convicted defendant, upon a nonjury verdict, of assault in the second degree and robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [1]) and robbery in the first degree (§ 160.15 [1]). Defendant's conviction stems from a savage beating of the victim on the street by a group of men. A witness testified that defendant came to her house after the incident and used her telephone to call a number to change the PIN number on an Electronic Benefits Transfer (EBT) card that had the victim's name on it; defendant also had the victim's identification and social security cards. Nine days later, defendant used the victim's EBT card to pay for items at a store.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to establish that he intended to use force to steal the victim's property (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention is without merit inasmuch as the evidence was sufficient to permit the inference that defendant had the requisite intent (*see People v Gordon*, 23 NY3d 643, 649-650; *People v Smith*, 79 NY2d 309, 315). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well settled that "[g]reat deference is to be accorded to the fact[ ] finder's resolution of credibility issues based upon its superior

vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]; *see People v Curry*, 82 AD3d 1650, 1651, *lv denied* 17 NY3d 805). Although an acquittal would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we perceive no reason to disturb the court's resolution of credibility issues and the weight that the court accorded to the evidence (*see People v Cook*, 128 AD3d 1355, 1355-1356, *lv denied* 25 NY3d 1200). The eyewitness's testimony was at times confusing, but his testimony did not include "hopeless contradictions" (*People v Foster*, 64 NY2d 1144, 1147 [internal quotation marks omitted], *cert denied* 474 US 857). The eyewitness consistently testified that he saw defendant at the scene of the incident and at the time of the incident (*see People v Reynolds*, 269 AD2d 735, 736, *lv denied* 95 NY2d 838, *cert denied* 531 US 945). In addition, the victim testified that he recognized defendant's voice immediately before the attack on him, and the witness who saw defendant after the incident testified that, although defendant said that he found the victim's cards in an alley, he also said "something, like, he had his kick in."

We reject the further contention of defendant that he was denied effective assistance of counsel. Inasmuch as the evidence is legally sufficient to support the robbery conviction, counsel's failure to move for a trial order of dismissal does not constitute ineffective assistance (*see People v Graham*, 125 AD3d 1496, 1497, *lv denied* 26 NY3d 1008; *People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922). Contrary to defendant's contention, defense counsel's summation was coherent and adequate (*see People v Taylor*, 1 NY3d 174, 176; *People v Simmons*, 184 AD2d 1062, 1062, *lv denied* 82 NY2d 726). Defendant's contention regarding defense counsel's alleged failure to investigate the reliability of "earwitness" testimony involves matters outside the record and must be raised by way of a motion pursuant to CPL 440.10 (*see People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Washington*, 39 AD3d 1228, 1230, *lv denied* 9 NY3d 870). We conclude that, "[v]iewing the evidence, the law and the circumstances of this case, in totality and as of the time of representation, . . . defendant received meaningful representation" (*People v Hildreth*, 86 AD3d 917, 918; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1355

KAH 14-01542

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
ALEX NANCE, PETITIONER-APPELLANT.

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), dated July 8, 2014 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1358

CAF 14-01236

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

IN THE MATTER OF MAKIA S.

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

CATHERINE S., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, LAKE WORTH, FLORIDA, FOR RESPONDENT-APPELLANT.

WENDY S. SISSON, GENESEO, FOR PETITIONER-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, WILLIAMSVILLE.

Appeal from an order of the Family Court, Wyoming County (Michael M. Mohun, J.), entered June 18, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred guardianship and custody of the subject child to petitioner.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights and freeing her child for adoption. The mother refused to appear at the dispositional hearing and her attorney, although present, elected not to participate in the mother's absence. Under those circumstances, we conclude that the mother's refusal to appear constituted a default, and we therefore dismiss the appeal (*see Matter of Shawn A. [Milisa C.B.]*, 85 AD3d 1598, 1598-1599, *lv denied* 17 NY3d 713).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1360

CA 15-00790

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

MARY PINTER, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF ERIN PINTER, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF JAVA, TOWN OF JAVA HIGHWAY DEPARTMENT,
DEFENDANTS-APPELLANTS,
WYOMING COUNTY AND WYOMING COUNTY HIGHWAY
DEPARTMENT, DEFENDANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (MICHAEL P. MCCLAREN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered April 16, 2015. The order denied the motion of defendants Town of Java and Town of Java Highway Department for summary judgment dismissing the complaint and cross claim against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint and cross claim against defendants Town of Java and Town of Java Highway Department are dismissed.

Memorandum: Plaintiff commenced this wrongful death action after decedent lost control of her vehicle, and the vehicle flipped onto its roof and eventually came to rest in a pond adjacent to the road. Supreme Court erred in denying the motion of Town of Java and Town of Java Highway Department (defendants) seeking summary judgment dismissing the complaint and cross claim against them. Plaintiff did not oppose that part of defendants' motion seeking to dismiss the complaint to the extent that it alleged that defendants were negligent in allowing the road to exist in an icy or slippery condition, and we therefore agree with defendants that the court should have granted their motion to that extent (*see Hagenbuch v Victoria Woods HOA, Inc.*, 125 AD3d 1520, 1521; *Langensiepen v Kruml*, 92 AD3d 1302, 1303).

Plaintiff further alleged in her complaint that defendants were negligent in failing to install a guardrail to prevent vehicles from entering the pond. We conclude that defendants met their initial

burden of establishing their entitlement to summary judgment dismissing that claim, and that plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We therefore further agree with defendants that the court should have granted the motion with respect to that claim, as well. It is well settled that a municipality is not an insurer of the safety of its roadways (*see Tomassi v Town of Union*, 46 NY2d 91, 97). "The design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities and so long as a highway may be said to be *reasonably safe* for people who obey the rules of the road, the duty imposed upon the municipality is satisfied" (*id.* [emphasis added]). A municipality has a duty to maintain roads in a reasonably safe condition in order to guard against contemplated and foreseeable risks to motorists, and that duty includes providing guardrails (*see Gomez v New York State Thruway Auth.*, 73 NY2d 724, 725; *Sweet v Town of Wirt*, 23 AD3d 1097, 1098; *Gillooly v County of Onondaga*, 168 AD2d 921, 922).

Defendants submitted proof establishing that the road had been in existence since the 1800s, that the pond was created by the adjacent landowner approximately 50 years prior to the accident, and that there were no previous accidents at the accident site. They further established that the road had not undergone any major reconstruction since it was built and that no nationally accepted highway standards required guardrails at the location of the accident. In opposition to the motion, plaintiff's experts did not establish that guardrails were required under any existing standard, and their opinions were conclusory and without probative value (*see Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 61; *cf. Popolizo v County of Schenectady*, 62 AD3d 1181, 1182-1183). Plaintiff also failed to raise a triable issue of fact that there were prior accidents at the site that would have put defendants on notice of a defective condition (*see e.g. Gillooly*, 168 AD2d at 921). Plaintiff's hearsay submissions may not be relied on where, as here, they are the only proof offered by plaintiff to establish that defendants had notice that the condition of the highway was not reasonably safe (*see Savage v Anderson's Frozen Custard, Inc.*, 100 AD3d 1563, 1564).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1365

CA 15-00819

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

MARJORIE E. BERNARD, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF BARRY A. BERNARD, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIANE B. SPEAR, DEFENDANT-RESPONDENT.

STANLEY LAW OFFICES, SYRACUSE (BRIANNE M. CARBONARO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (NICOLE MARLOW-JONES OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (Hugh A. Gilbert, J.), entered March 3, 2015. The order, insofar as appealed from, granted defendant's motion insofar as it sought summary judgment dismissing plaintiff's complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied with respect to the issue of liability, and the complaint is reinstated except with respect to the damages claim for decedent's conscious pain and suffering.

Memorandum: Plaintiff commenced this wrongful death action after her husband (decedent), who was crossing the road, was struck by a motor vehicle driven by defendant. Supreme Court erred in granting defendant's motion insofar as it sought summary judgment dismissing the complaint on the ground that she was not negligent as a matter of law. We note that defendant moved for summary judgment dismissing the complaint or, in the alternative, for summary judgment dismissing the damages claim for decedent's conscious pain and suffering, and we further note that plaintiff's attorney averred in his opposing attorney's affirmation that plaintiff had "no objection to the portion of the motion dismissing the conscious pain and suffering claim."

With respect to her motion, we conclude that defendant failed to meet her initial burden on the issue of liability inasmuch as she failed to establish as a matter of law that she "could not have seen [decedent] in time to stop or to take evasive maneuvers to avoid hitting him" (*Bishop v Curry*, 83 AD3d 1431, 1432; *see Burkhart v People, Inc.*, 106 AD3d 1535, 1536). Defendant submitted evidence establishing that the weather conditions were poor at the time of the

accident inasmuch as it was dark, windy, and raining. Plaintiff's vehicle was stopped in the road, and decedent exited plaintiff's vehicle and walked behind it. Defendant saw plaintiff's stopped vehicle, but she did not recall if her foot remained on the gas, and she did not apply her brakes until her vehicle struck decedent. Although decedent had come from defendant's left side, he was struck by the passenger side of her vehicle. There was no evidence that decedent darted out in front of defendant's vehicle (*see Burkhart*, 106 AD3d at 1536; *cf. Gonzalez v 98 Mag Leasing Corp.*, 95 NY2d 124, 127). We therefore conclude that there are triable issues of fact on the issue of liability, i.e., whether defendant operated her vehicle in a negligent manner and whether decedent's actions were the sole proximate cause of the accident (*see Brandt v Zahner*, 110 AD3d 752, 752-753; *Spicola v Piracci*, 2 AD3d 1368, 1369; *cf. Green v Hosley*, 117 AD3d 1437, 1438).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1368

KA 14-01975

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. DAVEY, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered March 25, 2014. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon a jury verdict of two counts of promoting prison contraband in the first degree (Penal Law § 205.25 [2]), as charged in separate indictments. Defendant, while an inmate at a correctional facility, was searched in the recreation yard and was found to have a folded tin can lid secreted in a glove in his pocket, resulting in a charge of promoting prison contraband in the first degree in one indictment. Defendant's cell was then searched, where a correction officer found a second folded tin can lid in a desk drawer and a metal shank hidden in defendant's mattress, resulting in two charges of promoting prison contraband in the first degree in a second indictment. The People presented the case to two different grand juries, and County Court granted the People's motion to consolidate the indictments. The jury found defendant not guilty regarding the can lid found in his cell, but guilty of the remaining counts.

By failing to renew his motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to establish that defendant knowingly possessed

dangerous contraband (Penal Law § 205.25 [2]). Both the folded can lid and the metal shank had characteristics "such that there is a substantial probability that the item[s] will be used in a manner that is likely to cause death or other serious injury" (*People v Finley*, 10 NY3d 647, 657).

Defendant's further contention that the verdict is repugnant is not preserved for our review because he did not object to the verdict on that ground before the jury was discharged (*see People v Satloff*, 56 NY2d 745, 746, *rearg denied* 57 NY2d 674; *People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172). In any event, that contention is without merit. "[A] conviction will be reversed only in those instances where acquittal on one crime as charged to the jury is conclusive as to a necessary element of the other crime, as charged, for which the guilty verdict was rendered" (*People v Tucker*, 55 NY2d 1, 7, *rearg denied* 55 NY2d 1039). "A determination of whether a verdict is repugnant is based solely on a review of the trial court's charge regardless of its accuracy" (*People v Green*, 71 NY2d 1006, 1008). Here, the court gave the same charge to the jury on the first two counts of promoting prison contraband in the first degree, but stated that the first count was with respect to the folded can lid that was allegedly found on defendant when he was in the prison yard, and the second count was with respect to the folded can lid that was allegedly found in the desk located in defendant's cell. Defendant's acquittal of the one count was not conclusive of the other count because they were separate items of dangerous contraband. In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the evidence established that inmates were allowed to possess a folded can lid inside their cells to cut food, they were not allowed to carry them outside their cells.

Defendant next contends that the court's *Sandoval* ruling denied him his right to due process and a fair trial. "By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve that contention for our review" (*People v Poole*, 79 AD3d 1685, 1685, *lv denied* 16 NY3d 862). In any event, the court's *Sandoval* ruling does not constitute an abuse of discretion (*see People v Smalls*, 16 AD3d 1154, 1155, *lv denied* 5 NY3d 769). "The extent to which prior convictions bear on the issue of a defendant's credibility is a question entrusted to the sound discretion of the court, reviewable only for clear abuse of discretion" (*Poole*, 79 AD3d at 1685-1686 [internal quotation marks omitted]). Defendant's prior convictions for petit larceny, criminal possession of stolen property, and robbery were "acts of individual dishonesty" (*People v Sandoval*, 34 NY2d 371, 377), and were particularly relevant to the issue of defendant's credibility (*see People v Walker*, 66 AD3d 1331, 1332, *lv denied* 13 NY3d 942). Defendant's contention that certain convictions were too remote in time is without merit inasmuch as defendant was incarcerated for much of the time following those convictions (*see Smalls*, 16 AD3d at 1154-1155; *see generally People v Stevens*, 109 AD3d 1204, 1205, *lv*

denied 23 NY3d 1043). We conclude that "[t]he record establishes that the court 'weighed appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination' " (*People v Rogers*, 32 AD3d 1221, 1221-1222, *lv denied* 7 NY3d 928; *see People v Bausano*, 122 AD3d 1341, 1341, *lv denied* 25 NY3d 1069; *Poole*, 79 AD3d at 1686).

Contrary to defendant's contention, the court did not err in admitting in evidence the folded can lid recovered from him in the yard. There were "sufficient assurances of the identity and unchanged condition of the evidence . . . , and thus any alleged gaps in the chain of custody went to the weight of the evidence, not its admissibility" (*People v Kennedy*, 78 AD3d 1477, 1478, *lv denied* 16 NY3d 798; *see People v Hawkins*, 11 NY3d 484, 494). We further reject defendant's contention that the court abused its discretion in granting the People's motion to consolidate the indictments (*see People v Bankston*, 63 AD3d 1616, 1616-1617, *lv denied* 14 NY3d 885; *see generally People v Lane*, 56 NY2d 1, 8). Although the offenses are based upon different criminal transactions, they are the "same or similar in law" (CPL 200.20 [2] [c]; *see People v Cooper*, 128 AD3d 1431, 1433, *lv denied* 26 NY3d 966). Moreover, evidence of defendant's possession of the can lid on his person with respect to one indictment would be admissible at the trial of the second indictment regarding his knowledge of the can lid in his desk drawer, and the offenses therefore were joinable under CPL 200.20 (2) (b) (*see People v Rodriguez*, 68 AD3d 1351, 1353, *lv denied* 14 NY3d 804; *People v Burroughs*, 191 AD2d 956, 956-957, *lv denied* 82 NY2d 715). Defendant did not show that he would be prejudiced by the consolidation (*see People v Torra*, 309 AD2d 1074, 1075, *lv denied* 1 NY3d 581; *see generally People v Ward*, 104 AD3d 1323, 1323, *lv denied* 21 NY3d 1011). He made no showing that he had important testimony to give regarding the charge in one indictment but the need to refrain from testifying regarding the charges in the other indictment (*see Cooper*, 128 AD3d at 1433; *see generally Lane*, 56 NY2d at 9-10). Indeed, the fact that the jury acquitted defendant of one of the charges demonstrates that he was not prejudiced by the consolidation (*see Ward*, 104 AD3d at 1323-1324; *Rodriguez*, 68 AD3d at 1353).

The court properly denied defendant's request to charge the lesser included offense of promoting prison contraband in the second degree. Viewing the evidence in the light most favorable to defendant (*see People v Johnson*, 45 NY2d 546, 549), we conclude that there is no reasonable view of the evidence that defendant possessed contraband but not dangerous contraband (*see People v Carralero*, 9 AD3d 790, 791, *lv denied* 4 NY3d 742; *see generally People v Glover*, 57 NY2d 61, 63). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1369

KA 14-02089

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID M. DAVEY, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered March 25, 2014. The judgment convicted defendant, upon a jury verdict, of promoting prison contraband in the first degree.

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

Same memorandum as in *People v Davey* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1370

KA 13-01198

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES L. LINDSAY, III, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (JOSEPH M. CALIMERI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John L. LaMancuso, A.J.), rendered June 13, 2013. The judgment convicted defendant, upon his plea of guilty, of, inter alia, reckless endangerment in the first degree and driving while intoxicated, a misdemeanor (2 counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, reckless endangerment in the first degree (Penal Law § 120.25) and two counts of driving while intoxicated (Vehicle and Traffic Law § 1192 [3]). We reject defendant's contention that County Court erred in denying his pro se motion to withdraw his plea without conducting an adequate inquiry. The record establishes that the court afforded defendant the requisite "reasonable opportunity to present his contentions" (*People v Tinsley*, 35 NY2d 926, 927; *see People v Carter-Doucette*, 124 AD3d 1323, 1324, *lv denied* 25 NY3d 988), and properly denied the motion inasmuch as defendant's "claims were conclusory and unsubstantiated" (*People v Temple*, 89 AD3d 644, 644, *lv denied* 19 NY3d 968). We also reject defendant's contention that the court erred in failing to assign him new counsel before making that determination. "[T]he record belies defendant's contention that defense counsel took a position adverse to that of defendant in his pro se motion to withdraw the plea, and thus there was no reason for the court to assign new counsel" (*People v Rossborough*, 105 AD3d 1332, 1333, *lv denied* 21 NY3d 1045).

Finally, we conclude that defendant's sentence is not unduly

harsh or severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1373

KA 12-01600

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK A. SMITH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, ORRICK, HERRINGTON & SUTCLIFFE LLP, WASHINGTON, DC (JEREMY R. PETERMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered May 30, 2012. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a controlled substance in the fourth degree (§ 220.09 [1]). We agree with defendant that County Court erred in denying that part of his omnibus motion to suppress evidence that a police officer retrieved from his underwear during a traffic stop. The officer testified at the suppression hearing that he responded to a 911 call reporting that a man was selling drugs at a certain address. The officer observed an occupied vehicle in the driveway of the residence and, when he saw the vehicle drive away, he followed it and observed dark tinted windows. The officer stopped the vehicle based upon that apparent traffic infraction and, because defendant advised him that he did not have a driver’s license, the officer was justified in asking defendant to exit the vehicle (*see People v Mundo*, 99 NY2d 55, 58; *People v Everett*, 82 AD3d 1666, 1666). The officer testified that he began a pat search at defendant’s waist area and, when he moved his hands toward defendant’s back in that area, defendant leaned forward. The officer told defendant to stand straight and placed him in

handcuffs for the officer's safety before continuing the pat search in the back area of defendant's waist. When defendant leaned forward a second time, the officer asked defendant if there was something in his pants that the officer "needed to know about." Defendant did not respond, and the officer pulled open the front of defendant's underwear, looked at his genital area and saw a plastic bag in the bottom of defendant's underwear, which he retrieved. The court determined that the search of that area constituted a visual cavity inspection, which was supported by "a reasonable suspicion to believe that defendant had secreted a weapon or contraband in the area that the officer was attempting to search." That was error.

We note that the record does not support a conclusion that the pat search was justified based on a "reasonable suspicion that defendant committed or was about to commit a crime at the time of the [pat search]" (*People v Burnett*, 126 AD3d 1491, 1493), nor did the officer otherwise have a reasonable basis for fearing for his safety, to justify the pat search (*cf. People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* 22 NY3d 992). Nevertheless, because the officer intended to transport defendant to the police station to charge him with the traffic infractions, he was justified in conducting a pat search for weapons before placing defendant in the patrol vehicle (*see People v Taylor*, 57 AD3d 1504, 1504-1505, *lv denied* 12 NY3d 788). We note that a person's underwear, "unlike a waistband or even a jacket pocket, is not 'a common sanctuary for weapons' " (*Burnett*, 126 AD3d at 1494) and, in any event, the officer did not pat the outside of defendant's clothing to determine whether defendant had secreted a weapon in his underwear after defendant leaned forward. Instead, he conducted a strip search by engaging in a visual inspection of the private area of defendant's body (*see Matter of Demitrus B.*, 89 AD3d 1421, 1422; *see generally People v Hall*, 10 NY3d 303, 306, *cert denied* 555 US 938). The officer did not, however, engage in a visual cavity inspection, as determined by the hearing court (*see Hall*, 10 NY3d at 306). We conclude that a visual inspection of the private area of defendant's body on a city street was not based upon reasonable suspicion that defendant was concealing a weapon or evidence underneath his clothing (*cf. Demitrus B.*, 89 AD3d at 1422; *People v Harry*, 63 AD3d 604, 604-605, *lv denied* 13 NY3d 860), and thus it was "patently unreasonable" (*Hall*, 10 NY3d at 311 n 8). Because the officer's actions violated defendant's Fourth Amendment right against unreasonable search and seizure (*see generally id.* at 310-311), we reverse the judgment, vacate the plea, grant that part of the omnibus motion seeking to suppress physical evidence, dismiss the indictment and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1374

KA 08-02459

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL CRUZ, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (DENNIS A. RAMBAUD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 25, 2008. The judgment convicted defendant, upon a jury verdict, of conspiracy in the second degree, attempted criminal possession of a controlled substance in the first degree, attempted criminal possession of a controlled substance in the third degree, criminal sale 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 judgment so appealed from is unanimously affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him following a jury trial of, inter alia, conspiracy in the second degree (Penal Law § 105.15), attempted criminal possession of a controlled substance in the first degree (§§ 110.00, 220.21 [1]), and criminal sale of a controlled substance in the second degree (§ 220.41 [1]). In appeal No. 2, defendant appeals from a judgment convicting him following the same jury trial of criminal possession of a weapon in the second degree (§ 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in granting the People's motion to consolidate the indictments (*see People v Bankston*, 63 AD3d 1616, 1616-1617, *lv denied* 14 NY3d 885; *see generally People v Lane*, 56 NY2d 1, 8). The offenses were joinable under CPL 200.20 (2) (a) or, alternatively, CPL 200.20 (2) (b) (*see People v Burroughs*, 191 AD2d 956, 956-957, *lv denied* 82 NY2d 715).

We reject defendant's contention that the court erred in denying

his motion to suppress the evidence obtained from eavesdropping warrants. The applications established that "normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ" (CPL 700.15 [4]; *see People v Rabb*, 16 NY3d 145, 152-153, *cert denied* ___ US ___, 132 S Ct 453; *People v Hanks*, 87 AD3d 1370, 1371, *amended on rearg* 90 AD3d 1592, *lv denied* 18 NY3d 883). Contrary to defendant's further contention, reversal is not required based on lost trial exhibits. The recorded telephone conversations obtained pursuant to the eavesdropping warrants, which are now lost, were introduced in evidence, and many of those recordings were in Spanish. English transcripts were provided to the jury as an aid while the recordings were played during the trial, but they were not admitted in evidence. The transcripts were, however, marked as court exhibits and are part of the record before us. Defendant does not contest that the transcripts were accurate translations of the audiotaped recordings. We therefore conclude that reversal is not required inasmuch as the record includes the information contained in the lost recordings and allows for effective appellate review (*see People v Yavru-Sakuk*, 98 NY2d 56, 59-60; *People v Strollo*, 191 NY 42, 67-68). In addition, the lost bill of sale for the vehicle in which the police found a weapon does not preclude effective appellate review inasmuch as defendant raises no challenge to the sufficiency or weight of the evidence with respect to the weapons counts in appeal No. 2.

Defendant failed to preserve for our review his contention that either the transcripts should have been admitted in evidence or the court should have appointed an interpreter to translate the conversations as they were played to the jury (*see People v Martinez*, 222 AD2d 702, 702, *lv denied* 87 NY2d 1022). Contrary to defendant's contention, this was not a mode of proceedings error (*see People v Rincon*, 40 AD3d 538, 539, *lv denied* 9 NY3d 880; *see e.g. People v Morel*, 246 AD2d 311, 311, *lv denied* 91 NY2d 1010; *Martinez*, 222 AD2d at 702). In any event, the court acted within its discretion in declining to admit the transcripts in evidence (*see People v Mendez*, 26 NY3d 1004, ___; *People v Tapia*, 114 AD2d 983, 984-985, *lv denied* 67 NY2d 951; *see also People v Robinson*, 158 AD2d 628, 628-629).

Viewing the evidence in light of the elements of the crimes in appeal No. 1 as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see id.* at 348-349; *People v Bleakley*, 69 NY2d 490, 495). Defendant contends that he received ineffective assistance of counsel based on defense counsel's failure to move to suppress the eavesdropping evidence pursuant to CPL 700.70 and defense counsel's failure to object to an officer's identification of defendant's voice on the ground that no notice was given pursuant to CPL 710.30. Defendant failed to show that defense counsel did not have a strategic reason for not making the motion pursuant to CPL 700.70 inasmuch as the record shows no colorable basis for such a motion (*see People v Rivera*, 71 NY2d 705, 708-709). The record before us indicates that the People complied with CPL 700.70 by turning over a disc containing the eavesdropping warrants and applications at the time defendant was arraigned. In addition, there was no pretrial police-arranged voice

identification made by the officer (*see People v Jackson*, 94 AD3d 1559, 1560, *lv denied* 19 NY3d 1026; *People v Morenito*, 281 AD2d 928, 928-929, *lv denied* 96 NY2d 904), and therefore any objection on the ground of lack of notice pursuant to CPL 710.30 would have had little or no chance of success (*see People v Raszl*, 108 AD3d 1049, 1050).

Defendant initially pleaded guilty to a reduced count but, at sentencing, the court granted defendant's request to withdraw his plea, whereupon the case proceeded to trial. On appeal, defendant contends that the court should not have granted his application to withdraw his plea without first, sua sponte, affording him the opportunity to confer with defense counsel. That contention is not preserved for our review (*see People v Umali*, 10 NY3d 417, 423, *rearg denied* 11 NY3d 744, *cert denied* 556 US 1110) and, in any event, it is without merit (*see generally People v O'Conner*, 21 AD3d 1287, 1288, *lv denied* 6 NY3d 816).

As the People correctly concede, the court erred in sentencing defendant as a persistent violent felony offender on the conviction of criminal possession of a weapon in the second degree in appeal No. 2 where, as here, defendant committed the second predicate violent felony before being sentenced on the first predicate violent felony (*see People v Davis*, 43 AD3d 448, 449, *lv denied* 9 NY3d 990, *reconsideration denied* 10 NY3d 763; *see generally People v Morse*, 62 NY2d 205, 224-225, *appeal dismissed* 469 US 1186). We therefore modify the judgment in appeal No. 2 by vacating the sentence imposed on count one of the indictment, and we remit the matter to County Court for resentencing on that count. We note, however, that the People are not precluded at resentencing "from attempting to establish, on the basis of a different conviction or convictions, that defendant is nonetheless a persistent violent felony offender" (*People v Colon*, 45 AD3d 457, 458, *lv denied* 10 NY3d 809; *see generally People v Johnson*, 124 AD3d 1318, 1319, *lv denied* 25 NY3d 951).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1375

KA 08-02460

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL CRUZ, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (DENNIS A. RAMBAUD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Richard A. Keenan, J.), rendered September 25, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on the first count of the indictment and as modified the judgment is affirmed and the matter is remitted to Monroe County Court for further proceedings in accordance with the same memorandum as in *People v Cruz* ([appeal No. 1] ___ AD3d ___ [Dec. 23, 2015]).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1376

KA 12-02071

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN HUDDLESTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Donald E. Todd, A.J.), rendered September 14, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the surcharge to 5% of the amount of restitution and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of burglary in the third degree (Penal Law § 140.20). We agree with defendant that his waiver of the right to appeal is not valid (*see People v Jackson*, 99 AD3d 1240, 1240-1241, *lv denied* 20 NY3d 987; *see generally People v Lopez*, 6 NY3d 248, 256), inasmuch as "the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Jackson*, 99 AD3d at 1241 [internal quotation marks omitted]). Although defendant's challenge to the severity of the sentence therefore is not encompassed by the invalid waiver (*see e.g. id.*), we nevertheless conclude that the sentence is not unduly harsh or severe.

Even assuming, arguendo, that defendant's waiver of the right to appeal was valid, we conclude that it would not encompass his challenge to the 10% restitution surcharge because County Court failed to advise defendant before he waived his right to appeal of the potential surcharge that could be imposed as part of the requirement to pay restitution (*see People v Schultz*, 117 AD3d 1560, 1560, *lv denied* 23 NY3d 1067). Although defendant failed to preserve for our review his contention that the court erred in imposing a surcharge of 10% of the amount of restitution ordered, instead of the 5% surcharge

directed by Penal Law § 60.27 (8), we exercise our power to review it as a matter of discretion in the interest of justice (*see People v Perez*, 130 AD3d 1496, 1497; *cf. People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043), and we modify the judgment accordingly. The additional surcharge was not authorized because there was no "filing of an affidavit of the official or organization designated pursuant to [CPL 420.10 (8)] demonstrating that the actual cost of the collection and administration of restitution . . . in [this] case exceeds five percent of the entire amount of the payment or the amount actually collected" (Penal Law § 60.27 [8]; *see Perez*, 130 AD3d at 1497).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1378

KA 14-01512

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN DAVIS, DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (JOSEPH M. CALIMERI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered July 7, 2014. 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 [3]). Defendant's contention that he was denied effective assistance of counsel does not survive his guilty plea where, as here, "[t]here is no showing that the plea bargaining process was infected by any allegedly ineffective assistance or that defendant entered the plea because of his attorney[']s allegedly poor performance" (*People v Abdulla*, 98 AD3d 1253, 1254, *lv denied* 20 NY3d 985 [internal quotation marks omitted]; *see People v Boswell*, 117 AD3d 1493, 1493-1494). Defendant further contends that County Court failed to conduct a sufficient inquiry into whether he possessed the requisite intent to commit the offense and thus that his plea was not voluntarily entered. Defendant failed to preserve that contention for our review because he did not move to withdraw his plea or to vacate the judgment of conviction, and this case does not fall within the rare exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666) because nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (*see People v Laney*, 117 AD3d 1481, 1482).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1379

CA 15-01014

PRESENT: SCUDDER, P.J., CENTRA, CARNI, AND DEJOSEPH, JJ.

A.R.K. PATENT INTERNATIONAL, L.L.C., TARKSOL, INC. AND A. RICHARD KOETZLE, PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

MARK LEVY AND MARK LEVY & ASSOCIATES, PLLC, DEFENDANTS-APPELLANTS-RESPONDENTS.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WOODBURY (LORIN A. DONNELLY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered December 10, 2014. The order, among other things, denied in part defendants' motion for summary judgment dismissing the amended complaint and denied in part plaintiffs' spoliation motion.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1380

CA 15-00503

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

CHRISTOPHER WRIGHT, PLAINTIFF-APPELLANT,

V ORDER

JOSEPH MARRA AND SUSAN MARRA,
DEFENDANTS-RESPONDENTS.

LEWIS & LEWIS, P.C., BUFFALO (EMILY F. JANICZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (KEITH N. BOND OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered December 8, 2014. The order, among other things, granted defendants' cross motion for summary judgment dismissing the complaint in its entirety.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1383

CA 15-00880

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

ELDIN KOVACIC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RALPH DELMONT, DEFENDANT-APPELLANT,
CAITLIN BUTLER AND DAVID P. BUTLER,
DEFENDANTS-RESPONDENTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARK A. FORDEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FEROLETO LAW, BUFFALO (JOEL P. FEROLETO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

SCHNITTER CICCARELLI MILLS, PLLC, EAST AMHERST (BRITTANY A. NASRADINAJ OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered November 12, 2014. The order denied the motion of defendant Ralph Delmont for summary judgment dismissing the complaint against him.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when the vehicle operated by Ralph Delmont (defendant), in which plaintiff was a passenger, was rear-ended by a vehicle operated by defendant Caitlin Butler. We agree with defendant that Supreme Court erred in denying his motion for summary judgment dismissing the complaint against him. Defendant met his initial burden by establishing that he had brought his vehicle to a complete stop when it was rear-ended by the vehicle operated by Caitlin Butler (*see Zielinski v Van Pelt* [appeal No. 2], 9 AD3d 874, 875-876; *Ruzycki v Baker*, 301 AD2d 48, 50). In opposition, plaintiff and the Butler defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to their contentions, plaintiff consistently testified at his deposition that defendant had brought his vehicle to a complete stop at the time of the collision, and there are no issues of witness credibility that would preclude summary judgment. " 'The papers submitted by the plaintiff [and the Butler defendants] fail to show any [conduct by defendant] from which it could be inferred that any negligence on

[defendant's] part caused the . . . accident' " (*Zielinski*, 9 AD3d at 875-876; *see Nozine v Anurag*, 38 AD3d 631, 631-632).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1386

CA 15-00904

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

SONYA HARGRO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SCOTT ROSS, INDIVIDUALLY AND DOING BUSINESS AS UNCORKED, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered January 20, 2015 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained from a dog bite. Plaintiff was inside defendant's restaurant at the time of the incident, and the dog allegedly was owned by another patron. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint. We agree with defendant that Supreme Court erred in denying the motion insofar as plaintiff alleges that defendant was negligent in failing to maintain a safe premises. Plaintiff cannot recover for her alleged injuries based upon the alleged negligence of defendant in failing to maintain a safe premises, and may recover only under a theory of strict liability (*see Bernstein v Penny Whistle Toys, Inc.*, 40 AD3d 224, 224, *affd* 10 NY3d 787; *Claps v Animal Haven, Inc.*, 34 AD3d 715, 716). The court also erred in denying defendant's motion insofar as plaintiff alleges that he violated a provision of the State Sanitary Code regarding the presence of animals in food service establishments (*see* 10 NYCRR 14-1.183). A violation of a regulation is only some evidence of negligence, and negligence is not a basis for imposing liability herein (*see Petrone v Fernandez*, 12 NY3d 546, 550).

We further conclude that the court erred in denying defendant's motion with respect to plaintiff's strict liability claim. Here,

defendant met his initial burden by establishing that he lacked actual or constructive knowledge that the dog had any vicious propensities (*see Doerr v Goldsmith*, 25 NY3d 1114, 1116), and plaintiff failed to raise a triable issue of fact in that respect (*see id.*; *see also Collier v Zambito*, 1 NY3d 444, 447; *Buicko v Neto*, 112 AD3d 1046, 1047).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1388

CA 15-00498

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

SHELLEY CHMIEL, PLAINTIFF-RESPONDENT,

V ORDER

ROCKWELL CONSTRUCTION, INC., DOING BUSINESS AS
BROWNSTONE HOMES, ROBERT BRICELAND, INDIVIDUALLY,
DEFENDANTS-RESPONDENTS,
ZELASKO CONSTRUCTION, INC., JRZ ARCHITECTURE, PLLC,
JOHN ZYWICZYNSKI, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

ROCKWELL CONSTRUCTION, INC., THIRD-PARTY
PLAINTIFF-RESPONDENT,

V

EARTH DIMENSIONS, INC., THIRD-PARTY
DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT ZELASKO CONSTRUCTION, INC.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS JRZ ARCHITECTURE, PLLC AND JOHN ZYWICZYNSKI.

PILLINGER MILLER TARALLO, LLP, SYRACUSE (JEFFREY D. SCHULMAN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered June 17, 2014. The order, among other things, denied in part the motions of defendants JRZ Architecture, PLLC, John Zywiczynski and Zelasko Construction, Inc., for summary judgment, and denied the motion of third-party defendant Earth Dimensions, Inc., for summary judgment.

It is hereby ORDERED that the order so appealed from is

unanimously affirmed without costs.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1390

KA 14-01515

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEPHEN SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered July 3, 2014. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree and sexual abuse in the third degree.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1402

CAF 14-02090

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

IN THE MATTER OF AMELIA S. AND MARGARET L.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

ELIZABETH S., RESPONDENT-APPELLANT.

IN THE MATTER OF AMELIA S.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ELIZABETH S., RESPONDENT-APPELLANT.

MICHAEL J. PULVER, NORTH SYRACUSE, FOR RESPONDENT-APPELLANT.

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

SUSAN A. SOVIE, ATTORNEY FOR THE CHILD, WATERTOWN.

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

Appeal from an order of the Family Court, Jefferson County (John J. Brennan, A.J.), entered October 14, 2014 in proceedings pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected and abused the subject children.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1411

KA 13-02152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHERRELL L. MOORE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 18, 2013. The judgment convicted defendant, upon her plea of guilty, of robbery in the first degree.

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

Memorandum: On appeal from a judgment convicting her upon her plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]), defendant contends that her concededly valid waiver of the right to appeal does not encompass her challenge to the severity of the sentence because County Court failed to abide by the sentencing provisions of the plea agreement. The record does not support defendant's contention that the court did not comply with the sentencing provisions of the plea agreement. During the plea colloquy, the court promised to impose a determinate sentence between 5 and 15 years should defendant comply with certain conditions of the plea, including cooperating in the prosecution of the codefendants. Defendant fulfilled the conditions, and the court sentenced defendant to a determinate term of incarceration of 9½ years. We thus conclude that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the bargained-for sentence (*see People v Lopez*, 6 NY3d 248, 256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1418

KA 10-00798

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHAY N. TUBBS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered February 18, 2010. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of manslaughter in the second degree (Penal Law § 125.15 [1]), based on her conduct in stabbing the victim in the neck with a knife. Contrary to defendant's contention, County Court properly denied her request to charge the jury on the defense of justification. There is "no reasonable view of the evidence, viewed in the light most favorable to defendant, to support a justification defense" (*People v Hall*, 48 AD3d 1032, 1033, *lv denied* 11 NY3d 789). A defendant may use deadly physical force only if he or she reasonably believes that the other person is using or about to use deadly physical force (*see* § 35.15 [2]). Here, in her statement to the police, defendant stated that she told her live-in boyfriend that she wanted him to move out of their residence immediately, and she started grabbing his clothes out of the closet. They began pushing each other, and he told her to leave his belongings alone. The record establishes that, at some point, the victim called 911 and said he needed the police to come to the residence. Before the call was disconnected, the victim was heard saying, "If you stab me with that knife, we are going to have a problem." In her statement to the police, defendant stated that she was not in the room when the victim made that telephone call. She said that she went to the kitchen and grabbed a knife, telling the victim to leave her alone. She said that the victim came toward her with his arms raised, and she swung the knife three or four times, stabbing him in the neck. Defendant told the police that the victim was unarmed and that, prior to the

incident, they had never argued. She also stated that the victim had never pushed or hit her, nor had he raised his voice to her. We conclude based on that evidence that "the force employed by defendant . . . far exceeded that which was necessary to defend [herself]" (*People v Cruickshank*, 277 AD2d 1043, 1043, *lv denied* 96 NY2d 799; *see People v Marzug*, 280 AD2d 974, 974, *lv denied* 96 NY2d 904).

Contrary to defendant's further contention, the court properly denied her request to charge criminally negligent homicide as a lesser included offense inasmuch as there was no reasonable view of the evidence, viewed in the light most favorable to defendant, "that defendant merely failed to perceive the risk of death that would result from defendant's use of a knife against the victim" (*People v Carter*, 283 AD2d 371, 371; *see People v Randolph*, 81 NY2d 868, 869). Defendant's contention that the court erred in handling a note received from a juror during the trial is not preserved for our review (*see generally People v Nealon*, 26 NY3d 152, ___; *People v Starling*, 85 NY2d 509, 516), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1421

CAF 14-00811

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

IN THE MATTER OF MEGAN M. STRUMPF,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN A. AVERY, JR., RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

DAVID H. FRECH, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Haendiges, J.), entered March 19, 2014 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent to vacate a default order.

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

Memorandum: Respondent father appeals from an order denying his motion to vacate an order, entered upon his default, that awarded petitioner mother sole custody of the parties' children and limited the father's contact with the children to agency-supervised visitation. We conclude that Supreme Court properly denied the father's motion.

"Although default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously in those cases . . . , that policy does not relieve the defaulting party of the burden of establishing a reasonable excuse for the default" or a meritorious defense (*Matter of Roshia v Thiel*, 110 AD3d 1490, 1491, *lv dismissed in part and denied in part* 22 NY3d 1037 [internal quotation marks omitted]; *see Matter of Cummings v Rosoff*, 101 AD3d 713, 714). Here, the father established neither.

Although the father contended that he did not appear in court because he never received notice of the proceedings, text messages that he sent to the mother establish that his failure to appear in court "was willful and intentional" (*Matter of Silverman v Reid*, 259 AD2d 550, 551; *see Matter of Burns v Carriere-Knapp*, 278 AD2d 542, 544). Moreover, the father's claim that he never received notice of

the court date is belied by his attorney's statements that he was "noticed" and the court's statement that the notice it mailed to the father was not returned (*see Matter of Colin D. v Latoya A.*, 132 AD3d 438, 438). Even assuming, arguendo, that the father established a reasonable excuse for his default based on the fact that he had changed residences several times and thus may not have received notice (*cf. Dudley v Steese*, 228 AD2d 931, 931-932), we conclude that the father failed to establish a meritorious defense.

In order to support his claim of a meritorious defense, the father was "required 'to set forth sufficient facts [or legal arguments] to demonstrate, on a prima facie basis, that a defense existed' " (*Matter of Susan UU. v Scott VV.*, 119 AD3d 1117, 1118), but he failed to do so. His bare assertion that he had a meritorious defense without stating the facts or legal arguments to establish that defense is insufficient (*see Matter of Atkin v Atkin*, 55 AD3d 905, 905).

Finally, the father contends that he was denied due process by the withdrawal of his attorney without appropriate notice. That contention, which is raised for the first time on appeal, is not preserved for our review (*see Matter of Rodney W. v Josephine F.*, 126 AD3d 605, 606, *lv dismissed* 25 NY3d 1187; *Matter of Kimberly Carolyn J.*, 37 AD3d 174, 175, *lv dismissed* 8 NY3d 968).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1425

CA 15-00887

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

WILLIAM SEAVER, PLAINTIFF-APPELLANT,

V ORDER

MARIA JAMES, ET AL., DEFENDANTS,
AND MICHAEL BOHALL, JR., DEFENDANT-RESPONDENT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (ROBERT J. MARANTO, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (RACHEL A. EMMINGER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John M. Curran, J.), entered September 11, 2014. The order granted the motion of defendant Michael Bohall, Jr., for summary judgment and dismissed the amended complaint and cross claims against him.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1426

CA 14-01934

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

JOSEPH F. BORRELLI, PLAINTIFF-APPELLANT,

V ORDER

CHRISTINA BORRELLI, DEFENDANT-RESPONDENT.

CHARLES W. ROGERS, ROCHESTER, FOR PLAINTIFF-APPELLANT.

NIGOS KARATAS, ROCHESTER, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered June 3, 2014. The order denied plaintiff's motion seeking to reopen the proof in this divorce action.

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

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1427

CA 15-01023

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

STEVEN MUELLER MOTORS, INC.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TONYA HICKEY AND FRED LAURY,
DEFENDANTS-RESPONDENTS.

COMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FRANCIS E. MALONEY, JR., SYRACUSE, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 10, 2014. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this lawsuit asserting causes of action for breach of contract and replevin arising from plaintiff's sale of a motor vehicle to defendants. Plaintiff moved for summary judgment seeking the relief demanded in its complaint as well as dismissal of defendants' counterclaim for fraud. Contrary to plaintiff's contention, Supreme Court properly denied the motion.

Initially, we conclude that plaintiff failed to meet its burden on that part of the motion seeking summary judgment dismissing the counterclaim for fraud. Defendants' counterclaim "allege[d] the basic facts to establish the elements" of a cause of action for fraud (*Sargiss v Magarelli*, 12 NY3d 527, 531 [internal quotation marks omitted]; *see Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178), and plaintiff's submissions on the motion failed to eliminate all triable issues of fact with respect thereto (*see Widewaters Herkimer Co., LLC v Aiello*, 28 AD3d 1107, 1108; *cf. MS Partnership v Wal-Mart Stores, Inc.*, 2 AD3d 1482, 1483). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Contrary to plaintiff's further contention, the court properly denied that part of the motion seeking the relief demanded in the complaint. Plaintiff failed to meet its burden on that part of the

motion concerning the replevin cause of action inasmuch as the evidence submitted in support of the motion failed to eliminate all "triable issues of fact . . . whether the plaintiff has a possessory right to the" vehicle at issue (*Bugarsky v Marcantonio*, 254 AD2d 384, 384; *see generally Winegrad*, 64 NY2d at 853). Furthermore, although plaintiff met its initial burden on that part of the motion concerning the breach of contract cause of action (*see generally Resetarits Const. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1455; *Polyfusion Electronics, Inc. v AirSep Corp.*, 30 AD3d 984, 985), defendants raised a triable issue of fact whether plaintiff violated Vehicle and Traffic Law § 417, which would entitle them to, inter alia, rescission of the contract of sale (*see generally Pinelli v De Paula Chevrolet*, 101 AD2d 643, 644; *Rayhn v Martin Nemer Volkswagen Corp.*, 77 AD2d 394, 396-397, *appeal dismissed* 53 NY2d 796).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1428

CA 14-01923

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

WELLS FARGO BANK, N.A., AS TRUSTEE FOR
SECURITIZED ASSET BACKED RECEIVABLES LLC
2004-OP2, MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2004-OP2, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHERYL A. DEERING, CARL G. DEERING,
ET AL., DEFENDANTS-APPELLANTS.

JASON L. SCHMIDT, FREDONIA, FOR DEFENDANTS-APPELLANTS.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (KHARDEEN I. SHILLINGFORD OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered January 3, 2014. The order, inter alia, granted the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this foreclosure action after Cheryl A. Deering and Carl G. Deering (defendants) stopped paying on a note. We reject defendants' contention that Supreme Court erred in granting plaintiff's motion for summary judgment. As a preliminary matter, we note that defendants waived the defense of standing by failing to raise it in their answer to the complaint (*see* CPLR 3211 [e]; *JP Morgan Chase Bank, N.A. v Butler*, 129 AD3d 777, 780; *Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156, 1158). Defendants "could not raise that defense for the first time in opposition to plaintiff's motion for summary judgment" (*Wells Fargo Bank, N.A. v Erobobo*, 127 AD3d 1176, 1177-1178, *lv dismissed* 25 NY3d 1221).

With respect to the substantive merits of the motion, we conclude that plaintiff met its initial burden of establishing its entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of a default (*see HSBC Bank USA, N.A. v Prime, L.L.C.*, 125 AD3d 1307, 1308; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895, 895; *I.P.L. Corp. v Industrial Power & Light. Corp.*, 202 AD2d 1029, 1029). The burden then shifted to defendants to produce "evidentiary material in admissible form demonstrating a triable issue of fact with respect to some defense to plaintiff's recovery on the note[]" (*I.P.L. Corp.*, 202 AD2d at 1029; *see HSBC Bank*

USA, N.A., 125 AD3d at 1308), such as "waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Emigrant Mtge. Co., Inc.*, 105 AD3d at 895 [internal quotation marks omitted]; *see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 183, *rearg denied* 57 NY2d 674).

Defendants contend that they have asserted a defense to the action inasmuch as there is a dispute regarding the exact amount owed under the promissory note. It is well settled, however, that such a dispute does not constitute a defense where, as here, it is undisputed that defendants stopped making payments and were in default (*see Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886). Defendants also failed to raise a triable issue of fact whether plaintiff acted in bad faith. One of the defendants testified that, when she spoke with a representative of plaintiff regarding outstanding amounts due on the escrow account, she was told that she could seek a loan modification if she missed three payments on the note (*see Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 17). That defendant further testified, however, that defendants never applied for a loan modification even though plaintiff sent them several applications, that they had not made any payments on the note for over a year, and that they had no intention of making any further payments on the note. Such testimony does not support defendants' assertion of bad faith on the part of plaintiff. Under the circumstances, we conclude that defendants have not raised a triable issue of fact with respect to any defense to the action (*see HSBC Bank USA, N.A.*, 125 AD3d at 1308; *Emigrant Mtge. Co., Inc.*, 105 AD3d at 895-896).

Finally, defendants did not raise a triable issue of fact whether plaintiff acted fraudulently. Indeed, we note that defendants' fraud counterclaim, which asserts that plaintiff altered the description of the mortgaged property by adding an additional parcel when the mortgage was recorded, is not pleaded with the requisite particularity (*see* CPLR 3016 [b]). Defendants did not allege, among other things, that they justifiably relied on the improper description of the mortgaged premises or that they were injured thereby (*see Merrill Lynch Credit Corp. v Lynch*, 87 AD3d 1391, 1392-1393; *cf. Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255; *see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178). In any event, the court made it clear that the foreclosure action was with respect to only the parcel listed in the original mortgage (*see generally United Cos. Lending Corp. v Rogers*, 45 AD3d 1419, 1419-1420). Thus, the court did not err in dismissing the fraud counterclaim.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1431

KA 13-00574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN M. CAMP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered February 6, 2013. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and disseminating indecent material to minors in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the first degree (Penal Law § 130.35 [4]) and two counts of disseminating indecent material to minors in the second degree (§ 235.21 [3]). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and he therefore failed to preserve for our review his contention that the plea was improperly entered (*see People v McNair*, 13 NY3d 821, 822; *People v Lopez*, 71 NY2d 662, 665; *People v Pitcher*, 126 AD3d 1471, 1472, *lv denied* 25 NY3d 1169). This case does not fall into the "rare exception to the preservation requirement set forth in *Lopez* because nothing in the plea allocution calls into question the voluntariness of the plea or casts 'significant doubt' upon his guilt" (*Pitcher*, 126 AD3d at 1472). Defendant waived his right to a hearing on restitution and therefore failed to preserve for our review his contention that County Court erred in its determination of the amount of restitution (*see People v Miller*, 87 AD3d 1303, 1304, *lv denied* 18 NY3d 926; *People v Roots*, 48 AD3d 1031, 1032). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see Miller*, 87 AD3d at 1304). Defendant also failed to preserve for our review his contention that the court erred in imposing a collection surcharge of 10%, rather than 5%, of the amount of restitution, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see*

People v Kosty, 122 AD3d 1408, 1409, *lv denied* 24 NY3d 1220; *People v Kirkland*, 105 AD3d 1337, 1338-1339, *lv denied* 21 NY3d 1043).

Defendant next contends that the court did not comply with CPL 400.15 in sentencing him as a second violent felony offender. Defendant failed to preserve that contention for our review (*see People v Judd*, 111 AD3d 1421, 1423, *lv denied* 23 NY3d 1039; *see also People v Loper*, 118 AD3d 1394, 1395, *lv denied* 25 NY3d 1204) and, in any event, it lacks merit. Although the court misspoke when it asked defendant if he was a second felony offender rather than a second violent felony offender, the People filed a second violent felony offender statement pursuant to CPL 400.15 (2). In addition, defendant was asked, and he admitted, that he was convicted of the prior offense, which was a violent felony (*see* CPL 400.15 [3]). We thus conclude that there was substantial compliance with CPL 400.15 (*see People v Myers*, 52 AD3d 1229, 1230). To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea of guilty (*see People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869), we reject that contention. The record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Arney*, 120 AD3d 949, 950). Finally, the sentence is not unduly harsh or severe.

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

MOTION NO. (553/94) KA 11-01141. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KENT A. KROEMER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (286/02) KA 97-05362. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SPIRLES, DEFENDANT-APPELLANT. -- Motions for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (69/13) KA 11-01222. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL WHITE, ALSO KNOWN AS MICHAEL BREWER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1006/13) KA 11-02320. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V GREGORY A. JONES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, VALENTINO, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1220/13) KA 11-00574. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL WILSON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, LINDLEY,

VALENTINO, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (191/14) KA 05-01611. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

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: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (955/15) CA 15-00234. -- RONALD KIMBALL, JR., PLAINTIFF-APPELLANT, V LAWRENCE E. NORMANDEAU, JR., RONALD MATTESON, DONNA MATTESON, MICHELLE T. NORMANDEAU AND WILLIAM MARONEY, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (955/15) CA 15-00234. -- RONALD KIMBALL, JR., PLAINTIFF-APPELLANT, V LAWRENCE E. NORMANDEAU, JR., RONALD MATTESON, DONNA MATTESON, MICHELLE T. NORMANDEAU AND WILLIAM MARONEY, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of

Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, VALENTINO, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1009/15) CA 15-00392. -- TODD T. POHLMAN AND TMAC HOLDINGS, LLC, PLAINTIFFS-RESPONDENTS, V MICHAEL R. MADIA, JOSEPH J. MADIA, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT. -- Motion insofar as it seeks leave to reargue is granted to the extent that, upon reargument, the memorandum and order entered October 9, 2015 (132 AD3d 1370) is amended by deleting the words "Grand Island" from the first sentence of the first paragraph of the memorandum and substituting in place thereof the words "Michigan Avenue in the City of Buffalo"; and motion insofar as it seeks in the alternative leave to appeal to the Court of Appeals is denied. PRESENT: SCUDDER, P.J., SMITH, LINDLEY, VALENTINO, AND WHALEN, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1023/15) CAF 14-01469. -- IN THE MATTER OF KEVIN BLAIR, PETITIONER-APPELLANT, V CRYSTAL DIGREGORIO, RESPONDENT-RESPONDENT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1051/15) CA 14-02062. -- ERIE MATERIALS, INC., PLAINTIFF-RESPONDENT, V CENTRAL CITY ROOFING CO., INC., DEFENDANT-APPELLANT, AND JAMES T. PIPINES, DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT:

SCUDDER, P.J., SMITH, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1052/15) CA 15-00118. -- DONNOVAN CRUTCHFIELD, PLAINTIFF-APPELLANT, V BRIAN JONES, POWER & CONSTRUCTION GROUP, INC., AND LIVINGSTON ASSOCIATES, INC., DEFENDANTS-RESPONDENTS. -- Motion for reargument denied. PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1067/15) CA 14-02111. -- JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS-RESPONDENTS, V CITY OF NIAGARA FALLS, GLENN SPRINGS HOLDINGS, INC., GROSS PHC LLC, MILLER SPRINGS REMEDIATION MANAGEMENT, INC., OXY, INC., FORMERLY KNOWN AS OCCIDENTAL CHEMICAL CORPORATION, INDIVIDUALLY AND AS SUCCESSOR IN INTEREST TO HOOKER CHEMICALS AND PLASTICS CORPORATION, OP-TECH ENVIRONMENTAL SERVICES, DEFENDANTS-RESPONDENTS-APPELLANTS, ROY'S PLUMBING, INC., DEFENDANT-RESPONDENT, SCOTT LAWN YARD, INC., DEFENDANT-RESPONDENT-APPELLANT, ET AL., DEFENDANTS. (APPEAL NO. 1.) -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

(Filed Dec. 23, 2015.)

MOTION NO. (1068/15) CA 14-02112. -- JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS, V CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND SEVENSON ENVIRONMENTAL SERVICES, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 2.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1069/15) CA 14-02113. -- JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS, V CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND CONESTOGA-ROVERS & ASSOCIATES, DEFENDANT-RESPONDENT. (APPEAL NO. 3.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER,

P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1070/15) CA 14-02114. -- JOANN ABBO-BRADLEY, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF DYLAN J. BRADLEY, TREVOR A. BRADLEY AND CHASE Q. BRADLEY, INFANTS, ZACHARY HERR AND MELANIE HERR, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF COLETON HERR AND HEATHER HERR, INFANTS, AND NATHAN E. KORSON AND ELENA KORSON, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF LOGAN J. KORSON, AN INFANT, PLAINTIFFS-APPELLANTS, V CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND CECOS INTERNATIONAL, INC., DEFENDANT-RESPONDENT. (APPEAL NO. 4.) -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, LINDLEY, AND VALENTINO, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1094/15) CA 15-00286. -- STEFKA FERREL, PLAINTIFF-RESPONDENT, V CHRISTOPHER J. FERREL, DEFENDANT-APPELLANT. CHRISTOPHER J. FERREL, THIRD-PARTY PLAINTIFF-APPELLANT, V ANDREW FERREL, THIRD-PARTY DEFENDANT-RESPONDENT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, VALENTINO, WHALEN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

MOTION NO. (1171/15) CA 15-00035. -- IN THE MATTER OF ROBERT REED, PETITIONER-APPELLANT, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND CHRISTOPHER MOSS, CHEMUNG COUNTY SHERIFF, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.) --

Motion for reargument denied. PRESENT: SCUDDER, P.J., CENTRA, CARNI, WHALEN, AND DEJOSEPH, JJ. (Filed Dec. 23, 2015.)

KA 13-02039. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON J. ALEJANDRO, ALSO KNOWN AS JASON GINTHER, DEFENDANT-APPELLANT. -- Motion to dismiss granted. Memorandum: The matter is remitted to Erie County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Dec. 23, 2015.)