SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JULY 8, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

232/15

KA 11-01614

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMELL R. MCCULLOUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 3, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, robbery in the first degree and attempted robbery in the first degree. The judgment was reversed by order of this Court entered March 27, 2015 in a memorandum decision (126 AD3d 1452), and the People on May 21, 2015 were granted leave to appeal to the Court of Appeals from the order of this Court (25 NY3d 1079), and the Court of Appeals on June 28, 2016 reversed the order and remitted the case to this Court for consideration of the facts and issues raised but not determined on the appeal to this Court (___ NY3d ___ [June 28, 2016]).

Now, upon remittitur from the Court of Appeals and having considered the issues raised but not determined on the appeal to this Court,

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

Memorandum: This case is before us upon remittitur from the Court of Appeals (*People v McCullough*, ___ NY3d ___, ___ [June 28, 2016], *revg* 126 AD3d 1452). We previously reversed the judgment convicting defendant upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [3]) and robbery in the first degree (§ 160.15 [4]), holding that Supreme Court abused its discretion in precluding defendant from presenting expert testimony on the reliability of eyewitness identifications. The Court of Appeals reversed our order and held that the trial court did not abuse its discretion as a matter of law when it precluded the introduction of such expert testimony, and the Court remitted the matter to us for consideration of the facts and issues raised but not determined on the appeal (*McCullough*, ___ NY3d at ___). We now affirm.

Defendant failed to preserve for our review his remaining contention that the trial court's ruling concerning the expert testimony in question violated his constitutional rights (*see People v Lane*, 7 NY3d 888, 889; *People v Chisolm*, 57 AD3d 223, 224, *lv denied* 12 NY3d 782), and we decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

453

CA 15-00882

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION.

BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

K&L GATES LLP, NEW YORK CITY (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered July 10, 2014. The order denied the motion of defendant Crane Co. to set aside a jury verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

454

CA 15-01237

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION.

BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

K&L GATES LLP, NEW YORK CITY (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered June 5, 2015. The order denied the motion of defendant Crane Co. for a stay.

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

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

455

CA 15-01238

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION.

BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH, DECEASED, PLAINTIFF-RESPONDENT,

V ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

K&L GATES LLP, NEW YORK CITY (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered June 10, 2015. The order directed entry of judgment for plaintiff against defendant Crane Co.

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

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

456

CA 15-01240

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

IN THE MATTER OF THE EIGHTH JUDICIAL DISTRICT
ASBESTOS LITIGATION.

BETH ANN PIENTA, AS SUCCESSOR EXECUTRIX OF THE
ESTATE OF LEE HOLDSWORTH, DECEASED, AND AS
EXECUTRIX OF THE ESTATE OF CAROL A. HOLDSWORTH,
DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

A.W. CHESTERTON COMPANY, ET AL., DEFENDANTS,
AND CRANE CO., DEFENDANT-APPELLANT.
(APPEAL NO. 4.)

K&L GATES LLP, NEW YORK CITY (MICHAEL J. ROSS, OF THE PENNSYLVANIA BAR, ADMITTED PRO HAC VICE, OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO, LLC, BUFFALO (DENNIS P. HARLOW OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered June 10, 2015. The judgment awarded plaintiff money damages against defendant Crane Co.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated on the law without costs, the order entered July 10, 2014 is modified on the law by granting the postverdict motion in part, setting aside the verdict in part, and granting a new trial on the claim that defendant Crane Co. acted with reckless disregard for the safety of plaintiff's decedent Lee Holdsworth, and as modified the order is affirmed in accordance with the following memorandum: Crane Co. (defendant) appeals from a judgment entered upon a jury verdict finding that it is 35% liable for the damages arising from injuries sustained by Lee Holdsworth (plaintiff's decedent) as a result of exposure to asbestos-containing products used as component parts with the valves that defendant produced. Because the jury determined that defendant acted with reckless disregard for the safety of plaintiff's decedent, defendant is jointly and severally liable for 100% of the damages (*see* CPLR 1601 [1]; 1602 [7]). We agree with defendant that Supreme Court erred in denying its request to charge the jury on plaintiff's claim that it acted with reckless disregard for the safety of plaintiff's decedent in accordance with the language set forth in *Matter of New York City Asbestos Litig. (Maltese)* (89 NY2d 955, 956-957). Indeed, although the court used the charge set forth in the

Pattern Jury Instructions, i.e., PJI 2:275.2, that charge does not accurately reflect the standard set by the Court of Appeals in *Maltese* because the charge in the Pattern Jury Instructions in effect reduced plaintiff's burden of proof on her claim that defendant acted with reckless disregard for the safety of plaintiff's decedent. We therefore vacate the judgment, and we modify the order denying defendant's postverdict motion by granting that part of the motion pursuant to CPLR 4404 to set aside the verdict on plaintiff's claim that defendant acted with reckless disregard for the safety of plaintiff's decedent and granting a new trial on that issue.

We reject defendant's further contention that the apportionment of 35% liability to defendant is against the weight of the evidence, and thus that the court erred in denying that part of its postverdict motion to set aside the verdict on that ground. It is axiomatic that a verdict may be set aside as against the weight of the evidence only if "the evidence so preponderate[d] in favor of the [defendant] that [the verdict] could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]), and that is not the case here. Indeed, the court properly determined that defendant did not meet its burden of establishing the equitable shares of fault attributable to other tortfeasors in order to reduce its own liability for damages (*see Matter of New York City Asbestos Litig.*, 121 AD3d 230, 246-247, *mot to dismiss appeal denied* 24 NY3d 1216; *Zalinka v Owens-Corning Fiberglass Corp.*, 221 AD2d 830, 831-832).

We also reject defendant's contention that the court erred in denying that part of its postverdict motion seeking to require plaintiff to apply for recovery from trusts set up pursuant to 11 USC § 524 (g) for three bankrupt nonparty tortfeasors prior to entering judgment against defendant. General Obligations Law § 15-108 does not apply to reduce defendant's liability inasmuch as there has been no settlement between plaintiff and the respective trusts (*see DeSano v Tower*, 129 AD2d 976, 977), and the court had no express authority to require plaintiff to apply for proceeds from the respective trusts before judgment was entered (*cf. Matter of New York City Asbestos Litig.*, 37 Misc 3d 1232[A], 2012 NY Slip Op 52298[U], *27 [Sup Ct, NY County 2012]).

Finally, defendant failed to preserve for our review its contention that, based upon our decision in defendant's prior appeal from the order denying its motion for summary judgment dismissing the complaint against it (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 129 AD3d 1502, 1504), the court erred in failing to instruct the jury that it must determine whether the valves could have operated effectively using component parts comprised of non-asbestos materials. Although the trial was concluded before our decision was released, defendant nevertheless was obligated to place the issue before the court, and it failed to do so (*see Sharrow v Dick Corp.*, 204 AD2d 966, 967, *revd on*

other grounds 86 NY2d 54).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

468

KA 14-00233

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE LETIZIA, DEFENDANT-APPELLANT.

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

SALVATORE LETIZIA, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated November 22, 2013. The order, insofar as appealed from, denied that part of the motion of defendant for DNA testing pursuant to CPL 440.30 (1-a).

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

Memorandum: Defendant appeals from an order that, inter alia, denied that part of his pro se motion seeking, pursuant to CPL 440.30 (1-a), DNA testing of a hair found on a knife involved in an attack in connection with defendant's conviction of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant's conviction arose from the beating and stabbing of a victim in his home by defendant and an accomplice (*People v Letizia*, 159 AD2d 1010, 1011, *lv denied* 76 NY2d 738). On appeal, we affirmed the judgment convicting defendant of those crimes (*id*.). At trial, the victim testified that defendant and his accomplice, among other things, both stabbed the victim using the same knife. A forensic scientist testified that the laboratory collected a "[s]uspected hair" on a knife collected from the scene. The laboratory did not perform DNA testing on that hair.

We conclude that Supreme Court properly denied without a hearing that part of the motion seeking DNA testing of the hair. "Even assuming, arguendo, that the requested item[] w[as] subjected to DNA testing and that such testing revealed DNA that did not belong to . . . defendant, we . . . conclude that there . . . would be no reasonable probability that defendant would have received a more favorable

verdict had those test results been introduced at trial" (*People v Swift*, 108 AD3d 1060, 1061, *lv denied* 21 NY3d 1077; *see People v Kaminski*, 61 AD3d 1113, 1116, *lv denied* 12 NY3d 917; *People v Sterling*, 37 AD3d 1158, 1158; *see also People v Burr*, 17 AD3d 1131, 1132, *lv denied* 5 NY3d 760, *reconsideration denied* 5 NY3d 804). The victim knew defendant prior to the attack, and the victim's testimony provided the primary evidence against defendant. "That testimony would not have been impeached or controverted by evidence that the DNA of another individual was discovered" on the knife (*Swift*, 108 AD3d at 1062).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

470

CA 15-00769

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

ELLIOTT B. PATER, AS ADMINISTRATOR OF THE
ESTATE OF JOYCE PECKY, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT
AND GREGG O'SHEI, DEFENDANTS-RESPONDENTS.
(ACTION NO. 1.)

SUSAN PHISTER, PLAINTIFF-APPELLANT,

V

CITY OF BUFFALO, BUFFALO POLICE DEPARTMENT
AND GREGG O'SHEI, DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

ERICA SNYDER, PLAINTIFF-APPELLANT,

V

CITY OF BUFFALO AND GREGG O'SHEI,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 3.)

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-APPELLANT ELLIOTT B. PATER, AS ADMINISTRATOR OF THE ESTATE OF JOYCE PECKY.

PAUL WILLIAM BELTZ, P.C., BUFFALO (WILLIAM QUINLAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS SUSAN PHISTER AND ERICA SNYDER.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (ROBERT E. QUINN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF BUFFALO AND BUFFALO POLICE DEPARTMENT.

Appeals from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 22, 2014. The order, inter alia, granted the motion of defendants City of Buffalo and Buffalo Police Department for summary judgment.

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

Memorandum: Plaintiffs commenced individual actions alleging personal injuries arising out of incidents of sexual abuse committed by defendant Gregg O'Shei while he was on duty as a police officer for defendants City of Buffalo and the Buffalo Police Department (City defendants). O'Shei allegedly selected his victims based on their previous criminal histories, drug abuse, and their status as single mothers. Supreme Court properly granted the motion of the City defendants for summary judgment dismissing the complaints against them. Initially, we note that plaintiffs have not challenged on appeal the court's determination that the City defendants cannot be vicariously liable for the conduct of defendant O'Shei, and they therefore have abandoned any contentions concerning the propriety of that part of the order (*see Pyramid Brokerage Co., Inc. v Zurich Am. Ins. Co.*, 71 AD3d 1386, 1388; *Brunette v Time Warner Entertainment Co., L.P.*, 32 AD3d 1170, 1170).

The court properly granted the motion with respect to plaintiffs' theory that the City defendants negligently retained or supervised O'Shei following his second of two on-duty motor vehicle accidents, the first in 1997 and the second in 2003. Plaintiffs contend that the City defendants failed to do an appropriate evaluation of O'Shei's neuropsychological status after the second motor vehicle accident. Recovery on a negligent retention theory "requires a showing that the employer was on notice of the relevant tortious propensit[y] of the wrongdoing employee" (*Gomez v City of New York*, 304 AD2d 374, 374-375; *see Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO*, 8 AD3d 1033, 1034, *lv denied* 4 NY3d 703), i.e., "that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 161, *lv dismissed* 91 NY2d 848, *cert denied* 522 US 967; *see Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 996, *lv denied* 96 NY2d 719; *Piniewski v Panepinto*, 267 AD2d 1087, 1088). Thus, contrary to plaintiffs' contention, the City defendants were under no common-law duty to institute specific procedures for supervising or retaining O'Shei inasmuch as they did not know of facts that would lead a reasonably prudent person to investigate the employee (*see Buck v Zwelling*, 272 AD2d 895, 895; *Kenneth R.*, 229 AD2d at 163; *see also Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933-934).

Our dissenting colleague applies a legal standard involving hiring procedures from *Travis v United Health Servs. Hosps., Inc.* (23 AD3d 884, 884-885), but neither the Court of Appeals nor we have applied that standard in cases such as this, where hiring procedures are not at issue. Indeed, as the dissent acknowledges, this is a retention case, and it is well settled that the common-law duty for retention does not require as high a degree of care as does hiring (*see Chapman v Erie Ry. Co.*, 55 NY 579, 583; 1B NY PJI3d 2:240 at 720 [2016]). The cases relied on by the dissent are therefore inapplicable. Even assuming, arguendo, that the common-law duty for hiring applies to the instant case, we conclude that the holding of *Travis* and similar cases does not control here. Although *Travis* has been interpreted as imposing a common-law duty on employers to conduct adequate hiring procedures *irrespective* of whether an employer knows

of facts that would lead a reasonably prudent person to investigate an employee (*see* 1B NY PJI3d 2:240 at 719-720 [2016]), we note that this Court has never imposed that broad legal duty on employers. We have held instead that " '[t]here is no common-law duty to institute specific procedures for hiring employees *unless* the employer knows of facts that would lead a reasonably prudent person to investigate the prospective employee' " (*Buck*, 272 AD2d at 895 [emphasis added]; *see also Judith M. v Sisters of Charity Hosp.*, 249 AD2d 890, 890, *affd* 93 NY2d 932). We also disagree with the dissent's conclusion that the foreseeability of the conduct gives rise to an employer's duty to investigate an employee's neuropsychological health inasmuch as foreseeability "is applicable to determine the scope of duty—only after it has been determined there is a duty" (*Pulka v Edelman*, 40 NY2d 781, 785). The duty here did not arise inasmuch as the City defendants did not know of O'Shei's propensity to commit sexual abuse and they did not know of any facts requiring a conclusion that they should have known of such a propensity (*see Zanghi*, 8 AD3d at 1034), and thus the issue of scope of duty is not before us.

Here, the City defendants established as a matter of law that they lacked notice of O'Shei's propensity for the type of behavior causing plaintiffs' harm (*see Paul J.H. v Lum*, 291 AD2d 894, 895; *Curtis v City of Utica*, 209 AD2d 1024, 1025). The City defendants demonstrated that O'Shei never exhibited any behaviors indicative of his alleged propensity to target vulnerable victims for sexual abuse, nor did the medical information submitted to the City following either of O'Shei's motor vehicle accidents contain any information alerting the City defendants to such propensity. Therefore, contrary to plaintiffs' contention, no duty arose on the part of the City defendants to employ any specific procedures or otherwise to investigate O'Shei's fitness to return to work following the 2003 accident.

We conclude that plaintiffs failed to raise an issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Contrary to plaintiffs' contention, the alleged conversation between one of the plaintiffs and her brother, a City of Buffalo patrol officer, does not raise an issue of fact whether the City defendants had actual notice of O'Shei's tortious propensity. The record developed by plaintiffs is inadequate to establish the content of that alleged conversation, as well as the context and circumstances thereof (*see generally Caselli v City of New York*, 105 AD2d 251, 255-256).

Plaintiffs also failed to raise an issue of fact that O'Shei's alleged traumatic brain injury, as purportedly exacerbated by the second motor vehicle accident, furnished constructive notice to the City defendants that O'Shei was likely to exhibit disinhibited behaviors. As noted above, there is nothing in the record supporting that contention.

The dissent conflates the traumatic brain injury O'Shei suffered in the 1997 motor vehicle accident, for which O'Shei was fully evaluated before his return to work in 2003, with "neuropsychological

issues" that could be related to such an injury, but the record here does not establish that such "neuropsychological issues" ever existed. To the contrary, following the first motor vehicle accident, O'Shei's physicians determined that there was "no evidence of emotional distress" and "no major psychological issues." O'Shei denied that he was experiencing depression, anxiety, or PTSD symptoms, and he also told his physicians he "was not willing to consider counseling for issues associated with his brain injury." Moreover, even after O'Shei was expelled from the Buffalo Police Department and convicted of official misconduct, he testified at his deposition that he had never treated with any psychiatrists or psychologists for any behavioral issues. Inasmuch as neither O'Shei nor his physicians ever detected any "neuropsychological issues" warranting treatment, we conclude that the City defendants were never under a duty to detect such issues in the absence of facts warranting an investigation.

Finally, we conclude that the affidavits of plaintiffs' experts failed to raise an issue of fact. Neither expert offered any detail with respect to the procedures or testing the City defendants should have engaged in following O'Shei's second motor vehicle accident and, therefore, both of their opinions are conclusory (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 545; *Keller v Liberatore*, 134 AD3d 1495, 1496; *Neville v Chautauqua Lake Cent. Sch. Dist.*, 124 AD3d 1385, 1386). Moreover, the opinion offered in the affidavit of plaintiffs' expert neuropsychologist—who is not a medical doctor—is speculative inasmuch as he failed to articulate any basis for asserting that "appropriate" testing would have revealed the type of sexually predatory propensity that O'Shei manifested against plaintiffs (*see Golden v Pavlov-Shapiro*, 138 AD3d 1406, 1406; *Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273-1274).

All concur except PERADOTTO, J.P., who dissents and votes to modify in accordance with the following memorandum: Viewing the facts in the light most favorable to plaintiffs, and drawing every available inference in their favor (*see De Lourdes Torres v Jones*, 26 NY3d 742, 763), I conclude that there are issues of fact that preclude granting summary judgment to defendants City of Buffalo and Buffalo Police Department (City defendants). I therefore respectfully dissent.

As an initial matter, contrary to the City defendants' contention, plaintiffs did not improperly rely on a new theory of liability for negligence in opposition to the City defendants' motion inasmuch as the allegations in plaintiffs' complaints and the original verified bills of particulars were sufficient to encompass plaintiffs' theory that the City defendants' negligence arose from the inadequacy of the procedures used in retaining defendant police officer Gregg O'Shei (*see Salvania v University of Rochester*, 137 AD3d 1607, 1608).

I disagree with the majority's conclusion, however, that the City defendants met their initial burden of eliminating all triable issues of fact with regard to that theory of negligence. Rather, the record establishes that there is an issue of fact whether the City defendants should have known—had they conducted an adequate procedure in retaining O'Shei and returning him to patrol duty following a head

injury he sustained in a motor vehicle accident in November 2003—that O'Shei's conduct was reasonably foreseeable, that is, that he had a propensity to engage in the type of harm alleged by plaintiffs (*see generally N.X. v Cabrini Med. Ctr.*, 280 AD2d 34, 42-43, *mod on other grounds* 97 NY2d 247; *Diana F. v Velez*, 126 AD3d 856, 856; *Travis v United Health Servs. Hosps., Inc.*, 23 AD3d 884, 884-885). As plaintiffs contend, while the evidence submitted by the City defendants established that O'Shei was subjected to neurological testing following his first motor vehicle accident in 1997, and that the resulting records were reviewed by the police department's then-commissioner of legal affairs in determining O'Shei's fitness to return to work in 2001, the City defendants' submissions failed to establish that O'Shei was subjected to any retention procedure before he was returned to work in 2004 following the second accident, shortly after which he began engaging in sexual misconduct directed against plaintiffs (*see generally Doe v Chenango Val. Cent. Sch. Dist.*, 92 AD3d 1016, 1017; *Jones v City of Buffalo*, 267 AD2d 1101, 1102). Indeed, the City defendants merely submitted a report from the City of Buffalo dated December 1, 2003 indicating that O'Shei had been removed from duty by the Erie County Medical Center and his primary physician following the second accident, and a letter stating that O'Shei was cleared to return to work by his primary physician as of April 23, 2004. The City defendants did not establish, however, who made the decision to return O'Shei to active duty, what actions were undertaken to evaluate O'Shei in reaching that decision, and whether such actions were reasonable (*see generally Doe*, 92 AD3d at 1017). The City defendants' own submissions established that they were aware of O'Shei's multiple traumatic brain injuries, including the 1997 injury that resulted in a lengthy absence from work of nearly five years during which time O'Shei received treatment for neuropsychological issues and the subsequent November 2003 "closed head injury" that resulted in another concussion. The City defendants' submissions even included, for example, a 1998 report from a clinical neuropsychologist who examined O'Shei following the first accident and explained that, "[g]iven [O'Shei's] history of multiple head injuries, and our understanding of the cumulative neuropsychological effects of head injuries, even a mild head injury could place [O'Shei] at significant neurologic risk." Nonetheless, the City defendants' submissions fail to establish whether O'Shei, after the second accident in which he sustained another head injury, was subjected to any neurological or psychological testing before being allowed to return to work by the City defendants. Contrary to the majority's conclusion that the City defendants had no duty to investigate O'Shei's fitness to return to work following the second accident, given the City defendants' knowledge of O'Shei's prior traumatic brain injury, his resulting absence from work, and his neuropsychological issues, I conclude that the City defendants were aware of facts that would lead a reasonably prudent person, in light of the subsequent concussive head injury, to investigate O'Shei's neurological and psychological health further before retaining him as an active duty police officer (*see "Jane Doe" v Goldweber*, 112 AD3d 446, 447; *Jones*, 267 AD2d at 1102; *cf. Buck v Zwelling*, 272 AD2d 895, 895; *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159, 163, *cert denied* 522 US 967, *lv dismissed* 91 NY2d 848; *see generally Chapman v Erie Ry. Co.*, 55 NY 579, 585-586).

Far from supporting the majority's conclusion, the lack of evidence in the record indicating whether there was any change in O'Shei's fitness to return to work following the second accident—information that may well have been developed by the City defendants upon conducting an adequate investigation—provides a reason to deny the City defendants' motion for summary judgment, not a reason to grant it. In other words, the City defendants failed to eliminate a triable issue of fact whether they should have known, had they required neurological or psychological testing based on their knowledge of O'Shei's physical and neuropsychological history, that O'Shei was not fit to return to active duty as a police officer because he had a propensity to engage in improper disinhibited behavior, including the coerced sexual conduct alleged by plaintiffs (*see "Jane Doe"*, 112 AD3d at 447).

Even assuming, arguendo, that the City defendants met their initial burden on their motion, I conclude that plaintiffs raised a triable issue of fact. Plaintiffs submitted the expert affidavit of a neuropsychologist, who reviewed O'Shei's medical records, personally examined him, and prepared a report. The neuropsychologist opined that had the City defendants engaged in appropriate psychological or neuropsychological testing following O'Shei's last reported brain injury in November 2003, they would have learned that such injury resulted in frontal lobe dysfunction that, in the neuropsychologist's medical opinion, ultimately led to the behavior O'Shei perpetrated against plaintiffs. In particular, the neuropsychologist opined that such testing would have revealed the propensity of O'Shei to potentially engage in "disinhibited behaviors" and that O'Shei's inhibitions against engaging in sexual predatory behaviors were compromised by his brain injuries. In his report, the neuropsychologist noted, inter alia, that, given O'Shei's documented history of frontal lobe and limbic brain impairments, and the potential for behavioral problems as a consequence of those conditions, it was prudent and necessary for the City defendants to order a detailed neuropsychological examination, which would have highlighted O'Shei's behavioral liabilities. Thus, according to the neuropsychologist, given the well-documented multiple traumatic brain injuries sustained by O'Shei, a proper fitness-for-duty examination after the second accident and prior to O'Shei's reinstatement as a police officer would have revealed his frontal lobe dysfunction, which would have precluded the City defendants from returning him to work and which, in turn, would have prevented him from engaging in the sexual misconduct directed against plaintiffs. Contrary to the majority's determination, the neuropsychologist's affidavit and incorporated report were not conclusory or speculative inasmuch as he averred that he had performed, and thus was familiar with, fitness-for-duty examinations for police officers, and he opined, in light of O'Shei's history of traumatic brain injuries, that psychological, neuropsychological, neurologic, and SPECT examinations should have been performed. Given those submissions, I agree with plaintiffs that they raised an issue of fact whether the City defendants, had they conducted an adequate procedure, should have known about O'Shei's propensity to engage in improper disinhibited behavior, including the alleged coerced sexual conduct alleged in this case.

I further disagree with the majority's conclusion that there is no triable issue of fact whether the City defendants had actual knowledge of O'Shei's conduct based on the information conveyed to the brother of one of the plaintiffs, who was also a City of Buffalo patrol officer. "The general rule is that knowledge acquired by an agent acting within the scope of his [or her] agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it" (*Center v Hampton Affiliates*, 66 NY2d 782, 784; *see Kirschner v KPMG LLP*, 15 NY3d 446, 465). Even assuming, arguendo, that the City defendants met their initial burden on their motion, I conclude that plaintiffs raised an issue of fact. The brother's deposition testimony established that one of the plaintiffs had informed him that O'Shei was subjecting her to constant harassment and that he never reported the complaint to any superior officers because he did not think the plaintiff was credible. Plaintiffs also submitted the deposition of a police captain who testified that when a citizen makes a complaint to a police officer about another officer's conduct, protocol requires that the officer take the information and provide a report to a supervisor in order to ensure that the report is submitted to the Internal Affairs Division of the police department. I recognize that a jury could conclude that the brother did not obtain the relevant information about O'Shei's harassment of the plaintiff in the course of his employment (*see Christopher S. v Douglaston Club*, 275 AD2d 768, 769), or that the information conveyed was not sufficiently specific to provide actual knowledge that O'Shei had engaged in coerced sexual activity with civilians, but this Court's function on a motion for summary judgment is issue finding, not issue determination (*see Bridenbaker v City of Buffalo*, 137 AD3d 1729, 1731), and the evidence must be viewed in the light most favorable to plaintiffs with every available inference drawn in their favor (*see De Lourdes Torres*, 26 NY3d at 763). Employing those principles, I conclude that plaintiffs raised an issue of fact whether the information received by the brother could be imputed to the City defendants " 'although the information [was] never actually communicated to [the principal]' " (*Chaikovska v Ernst & Young, LLP*, 78 AD3d 1661, 1663, quoting *Center*, 66 NY2d at 784).

Finally, with respect to the alternative ground for affirmance properly raised by the City defendants (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-546; *Matter of Harnischfeger v Moore*, 56 AD3d 1131, 1131), i.e., that they are entitled to governmental immunity, I conclude that Supreme Court did not abuse its discretion in declining to consider that untimely and unpleaded affirmative defense (*see generally Mawardi v New York Prop. Ins. Underwriting Assn.*, 183 AD2d 758, 758; *Fulford v Baker Perkins, Inc.*, 100 AD2d 861, 861-862).

In light of the foregoing, I would modify the order on the law by denying the City defendants' motion for summary judgment to the extent that plaintiffs allege negligent retention, reinstate that claim, and

otherwise affirm.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

489

KA 13-00647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARLO S. HELMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered February 14, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]). We agree with defendant that he was improperly sentenced as a second violent felony offender inasmuch as the predicate conviction, i.e., the Georgia crime of burglary, is lacking an essential element required by the equivalent New York statute (*cf. People v Toliver*, 226 AD2d 255, 256, *lv denied* 88 NY2d 970; *People v Thompson*, 140 AD2d 652, 654).

Defendant pleaded guilty to burglary in 1999, at which time the Georgia burglary statute provided that "[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another" (Ga Code Ann former § 16-7-1 [a]). The equivalent New York burglary statute provides that "[a] person is guilty of burglary . . . when he *knowingly* enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling" (Penal Law § 140.25 [2] [emphasis added]). Thus, on its face, the Georgia statute is lacking an essential element—*knowledge* that the entry or decision to remain is unlawful. Because New York law requires proof of an element that Georgia law does not, defendant's Georgia conviction cannot serve as a predicate (*see generally People v Ramos*, 19 NY3d 417, 420).

We must remind our dissenting colleague of the recent decision of the Court of Appeals reciting the general rule that the inquiry into whether a foreign state's conviction should be used as a predicate is limited " 'to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes' " (*People v Jurgins*, 26 NY3d 607, 613, quoting *People v Muniz*, 74 NY2d 464, 467-468). Although it is a requirement that a person act intentionally in order to be convicted of burglary in Georgia, the fact remains that the element of acting "knowingly" is not included in the statute. We note that the First Department was referring to affirmative defenses in *Toliver* when it stated that the Georgia code included "express statutory provisions, requiring acquittal where 'intention' [was] lacking (Ga Code Ann[ ] § 16-2-2) or where the otherwise unlawful act or omission [was] justified by the defendant's 'misapprehension of fact' (Ga Code Ann[ ] § 16-3-5)" (*id.* at 256). Those provisions, however, plainly are not elements of burglary in Georgia. Thus, in view of the statement in *Ramos* that a foreign statute is strictly equivalent only when it contains the "essential" elements of a comparable New York statute (*id.* at 419), the lack of knowledge element in the Georgia burglary statute renders defendant's prior conviction insufficient for the purpose of sentencing him as a predicate felon.

In addition, we note that the Georgia Legislature has included a knowing requirement in other crimes. By way of example, the Georgia statute for criminal trespass states that "[a] person commits the offense of criminal trespass when he or she knowingly and without authority . . . [e]nters upon the land or premises of another person . . . for an unlawful purpose" (Ga Code Ann § 16-7-21 [b] [1]). Based on general rules of statutory construction, we may not read "knowingly" into the burglary statute. Indeed, "[a] court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended" (McKinney's Cons Laws of NY, Book 1, Statutes § 74). Thus, in our view, the Georgia Legislature's failure to include such a requirement in this statute requires a finding that such element is not part of the crime.

While we agree with the dissent that Georgia case law indicates that criminal trespass is a lesser included offense of burglary (*see Waldrop v Georgia*, 300 Ga App 281, 284, 684 SE2d 417, 420), we cannot assume from this that "knowingly" must be an element of the greater offense. To do so would move our analysis much past the required direct comparison of the elements of the crimes that is mandated by the Court of Appeals. In any event, the dissent has failed to present any Georgia case law specifically reading the "knowingly" requirement into the Georgia burglary statute. We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to resentence defendant (*see People v Nieves-Rojas*, 126 AD3d 1373, 1373-1374).

All concur except CURRAN, J., who dissents and votes to affirm in

the following memorandum: I respectfully dissent and would vote to affirm the judgment, following the decision of the First Department in *People v Toliver* (226 AD2d 255, *lv denied* 88 NY2d 970), which relies on, inter alia, its decision in *People v Hall* (158 AD2d 69, *lv denied* 76 NY2d 940, *reconsideration denied* 76 NY2d 1021).

Pursuant to New York's " 'strict equivalency' standard" for determining whether foreign felonies can serve as a basis for enhanced sentencing (*People v Ramos*, 19 NY3d 417, 418; *see People v Gonzalez*, 61 NY2d 586, 589), our inquiry is generally "limited to a comparison of the crimes' elements as they are respectively defined in the foreign and New York penal statutes" (*People v Yusuf*, 19 NY3d 314, 321, quoting *People v Muniz*, 75 NY2d 464, 467-468). I respectfully disagree with the majority's mechanical application of this standard inasmuch as the Court of Appeals routinely looks to the foreign state's statutory definitions and to case law from that state (*see People v Jurgins*, 26 NY3d 607, 614-615; *Ramos*, 19 NY3d at 419-420; *Gonzalez*, 61 NY2d at 589, 591-592). The restriction on this standard, i.e., that the courts generally "may not consider the allegations contained in the accusatory instrument underlying the foreign conviction" (*Jurgins*, 26 NY3d at 613, citing *People v Olah*, 300 NY 96, 98), is intended to avoid "abuse," "impossibility of administration," and the relitigation of facts settled by the foreign judgment (*People ex rel. Newman v Foster*, 297 NY 27, 30). As demonstrated by the Court of Appeals, there is no prohibition of an interpretative analysis of the foreign state's statutes and case law.

In August 1999, defendant pleaded guilty to the Georgia felony of "residential burglary" (Ga Code Ann former § 16-7-1) and was sentenced to a term of 10 years' imprisonment. According to the record, defendant pleaded guilty to one count of burglary alleging that, "without authority and with intent to commit a felony, to-wit: Aggravated Assault . . . , [defendant] did enter [a] dwelling house."

The applicable Georgia statute provided that "[a] person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another" (Ga Code Ann former § 16-7-1 [a]). The term "without authority" is defined as "without legal right or privilege or without permission of a person legally entitled to withhold the right" (§ 16-1-3 [18]).

The equivalent New York statute is burglary in the second degree, which is committed when a person "knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when . . . [t]he building is a dwelling" (Penal Law § 140.25 [2]). "A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so" (§ 140.00 [5]). "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists" (§ 15.05 [2]).

As the majority correctly points out, the New York statute contains the word "knowingly" whereas the Georgia statute does not.

However, I respectfully disagree with the majority that this distinction amounts to a difference in the "elements" of the crime of burglary under the respective state statutes. Since 1965, when the Penal Law was substantially updated and recompiled, New York's burglary statute has been structured with "two basic elements . . . (1) unlawfully entering or remaining in premises, and (2) intent to commit a crime therein" (3d Interim Rpt of Temp St Commn on Rev of Penal Law and Crim Code, 1964 NY Legis Doc No. 14 at 23). As part of these revisions, the Penal Law also adopted four levels of culpable mental state (intentionally, knowingly, recklessly and negligently), as "borrow[ed]" from Model Penal Code § 2.02 (William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, Book 39, Penal Law § 15.00 at 83). The culpable mental state of "knowingly" relates to the conduct embodied in the first element of the crime of burglary, i.e., entering or remaining unlawfully (*see* Penal Law § 15.15 [1]).

The Georgia burglary statute, similar to the New York statute, contains two basic elements: (1) "without authority . . . he enters or remains within the dwelling house of another"; and (2) "with the intent to commit a felony or theft therein" (Ga Code Ann former § 16-7-1 [a]). These are the same two basic elements set forth in the Model Penal Code (*see* Model Penal Code § 221.1, "Explanatory Note for Sections 221.1 and 221.2" ["Section 221.1 proscribes as burglary an unprivileged entry into a building or occupied structure with intent to commit a crime therein"]). They also are consistent with the "generic" definition for burglary applied to the federal predicate violent felony statute (18 USC § 924 [e]; *see Taylor v United States*, 495 US 575, 592, 598-599).

In my view, the majority is comparing words in the two burglary statutes rather than elements. It is a form over substance approach that I cannot accept is required by the "strict equivalency" test. While the strict equivalency test may involve " 'technical distinctions' " (*Ramos*, 19 NY3d at 419), this does not mean that the test is premised solely on verbiage and without an analysis of substantive law.

Furthermore, by concluding that the Georgia statute lacks a mens rea requirement for the element of "without authority . . . he enters or remains within the dwelling house of another," the majority has determined that Georgia's burglary statute lacks "a culpable mental state on the part of the actor . . . with respect to every material element of an offense," as is required under New York law (Penal Law § 15.10). In other words, the burglary of which defendant was convicted in Georgia is not even a crime in New York, let alone a felony. Moreover, by logical extension, the majority has concluded that, because there is no culpable mental state for an element of the crime in Georgia, the Georgia law must be a strict liability statute, a determination that has no support in Georgia law.

Just as we must draw from article 15 of the Penal Law to identify principles of criminal liability and culpability, and the definition of "knowingly" (§ 15.05 [2]), we should do the same for Georgia law (Ga Code Ann, ch 2, §§ 16-2-1 *et seq*.). Under Georgia law, burglary

is a "crime," which is defined as "a violation of a statute of this state in which there is a joint operation of an act or omission to act and intention or criminal negligence" (§ 16-2-1 [a]). Further, Georgia's principles of criminal culpability specify that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will but the presumption may be rebutted" (§ 16-2-4), and "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted" (§ 16-2-5). Thus, the "act" of entering under Georgia's burglary statute is only a "crime" if it was "intentional." This statutory interpretation is substantiated by Georgia case law.

In *Price v Georgia* (289 Ga 459, 459, 712 SE2d 828, 829), the Georgia Supreme Court held that a criminal conviction must be reversed due to a failure to charge the jury with the mistake of fact defense in a burglary trial. The defendant claimed that he believed the house in which he was found was for sale and he therefore was authorized to enter it. The court held that, because his defense was based on a mistake of fact that, if true, would negate an essential element of the crime, the defendant was entitled to a jury charge in that respect (*see Prince*, 289 Ga at 460, 712 SE2d at 830). This, in my view, implies that there is a mens rea element of at least "knowing" for the unauthorized entry into the house. If the unauthorized nature of the entry was, in effect, a strict liability element, then the defendant's defense that he believed the house was for sale and that he was authorized to enter would be inconsequential to his guilt or innocence. Consequently, no mistake of fact defense would need to be charged (*see* Ga Code Ann § 16-3-5). Furthermore, in Georgia, the mistake of fact defense has been held to apply to burglary when it " 'negates the existence of the *mental state* required to establish a material element of the crime' " (*Stillwell v Georgia*, 329 Ga App 108, 110, 764 SE2d 419, 422 [emphasis added]). Thus, by requiring a mistake of fact jury charge where a defendant's assertions make the issue relevant, the Georgia courts have recognized the mens rea requirement embodied in the Georgia burglary statute.

I see no substantive difference between the burglary statutes in New York and Georgia with regard to the necessity of a mens rea requirement for entering or remaining without authority. Whether the People must prove a knowing entry without authority in New York, or the State must prove an intentional entry without authority in Georgia, the prosecution is required in both states to prove the defendant's culpable state of mind beyond a reasonable doubt (*see* CPL 70.20; Ga Code Ann § 16-1-5). Although it concedes that intent is required to be convicted of burglary in Georgia, the majority has not addressed any difference it perceives in the "knowingly" requirement in New York law and the "intentional" requirement in Georgia law. Whether under the traditional view defining intent to include knowledge, or under the modern view where the "failure to distinguish between intent (strictly defined) and knowledge is . . . of little consequence" (Wayne R. LaFave, Substantive Criminal Law, § 5.2 [b] [2d ed 2015]), the majority's failure to explain the difference may indicate that there is in fact no distinction to be made.

Further, because the mens rea requirement for a knowing unlawful entry is typically satisfied by circumstantial evidence (*see People v Daniels*, 8 AD3d 1022, *lv denied* 3 NY3d 705), it is generally acknowledged that a "defendant's state of mind in respect to whether he or she knew that his or her entry of the premises was without the consent of the person in lawful possession is irrelevant where the defendant makes no assertion that he or she assumed he or she had consent or that he or she purported to be acting under legal authority" (12A CJS, Burglary § 32, citing *Hanson v Wisconsin*, 52 Wis 2d 396, 402, 190 NW2d 129, 133). The difference the majority tries to identify between New York law and Georgia law is immaterial because the mens rea requirement of an unlawful entry is typically met by the circumstantial evidence surrounding the unlawfulness, and the mens rea is irrelevant unless the defendant introduces evidence to negate it. It is therefore not surprising that the majority does not describe any practical difference between a burglary in New York and a burglary in Georgia to illustrate a substantive distinction between the states' laws on burglary. Moreover, in my view, it is for this reason that the First Department in *Toliver* referenced the Georgia affirmative defenses, inasmuch as the mens rea issue for entering or remaining unlawfully does not arise until the defendant raises it.

Additionally, under Georgia law, criminal trespass is a lesser included offense of burglary (*see Waldrop v Georgia*, 300 Ga App 281, 284, 684 SE2d 417, 420). Georgia law includes a "knowing" requirement for its criminal trespass offense, and thus a "knowing" requirement must be a part of the greater offense of burglary because it is included within the lesser offense of criminal trespass (Ga Code Ann § 16-7-21 [b] [1]). Stated alternatively, under Georgia law, a defendant in a burglary prosecution is not entitled to a jury charge for the lesser included trespass offense when the defendant asserts that he or she believed that the entry into the structure was lawful (*see Sanders v Georgia*, 293 Ga App 534, 536, 667 SE2d 396, 398-399; *Moore v Georgia*, 280 Ga App 894, 898, 635 SE2d 253, 258). Thus, trespass is only a lesser included offense of burglary when the defendant knew his or her entry was unlawful. It is only logical, therefore, that under Georgia law a defendant convicted of burglary must have known his or her entry was unlawful.

The definition of a lesser included offense in Georgia is one that is "included in a crime charged in the indictment" and "is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged" (Ga Code Ann § 16-1-6). Inasmuch as the "mental state" for an unlawful entry to constitute trespass is "knowing," and such a "mental state" logically cannot be "*less* culpable" than is required for an unlawful entry in the burglary statute, the "culpable mental state" for an unlawful entry for both trespass and burglary must either be the same or the "culpable mental state" for burglary must be *greater* than what is required under the trespass statute (i.e., an "intention" to "act" [§ 16-2-1 (a)]).

Finally, focusing solely on the word "knowingly" and determining that the absence of that word in a foreign state's criminal statute

negates the mens rea requirement for a crime may have significant further ramifications for application of our predicate felony statute because only about half of the states have adopted the culpable mental states New York borrowed from the Model Penal Code (Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 Duke LJ 285, 294-295). In my view, under the majority's analysis, we are determining that approximately half of the states lack a critical mens rea requirement for their burglary statutes and that none is a crime under New York law. This is an unacceptable conclusion, both conceptually and practically.

For all of these reasons, I respectfully dissent.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

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CAF 15-00314

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

IN THE MATTER OF BRIAN S., KATIE S., AND ALYSSA S.

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

CAYUGA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

SCOTT S., RESPONDENT, AND TANYA S., RESPONDENT-APPELLANT.

SUSAN JAMES, ESQ., ATTORNEY FOR THE CHILD KATIE S., APPELLANT.

MARYBETH D. BARNET, ESQ., ATTORNEY FOR THE CHILD ALYSSA S., APPELLANT.

THEODORE W. STENUF, ESQ., ATTORNEY FOR THE CHILD BRIAN S., APPELLANT.

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR RESPONDENT-APPELLANT.

SUSAN JAMES, ATTORNEY FOR THE CHILD, WATERLOO, APPELLANT PRO SE.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA, APPELLANT PRO SE.

HARRIS BEACH PLLC, BUFFALO (ALLISON A. BOSWORTH OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered March 2, 2015 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent Tanya S. had neglected the subject children.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Family Court, Cayuga County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother and each Attorney for the Child assigned to the three subject children (appellate AFC) appeal from an order that, inter alia, determined that the mother neglected the children and placed the children in the custody of petitioner. Initially, we

reject the contentions of the mother and the appellate AFCs that petitioner failed to meet its burden of establishing neglect by a preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). Although the evidence of neglect at the fact-finding hearing consisted largely of hearsay statements made by the children to a caseworker employed by petitioner, those statements were adequately corroborated by other evidence tending to establish their reliability (*see* § 1046 [a] [vi]; *Matter of Gabriel J. [Stacey J.]*, 127 AD3d 667, 667; *Matter of Tristan R.*, 63 AD3d 1075, 1076-1077). Moreover, the children's out-of-court statements to the caseworker cross-corroborated each other (*see Gabriel J.*, 127 AD3d at 667; *Tristan R.*, 63 AD3d at 1076-1077). In sum, we conclude that the children's statements, "together with [the] negative inference drawn from the [mother's] failure to testify, [were] sufficient to support [Family Court's] finding of neglect" (*Matter of Imman H.*, 49 AD3d 879, 880).

The mother failed to preserve her further contention that her attorney was improperly excluded from an in camera examination of two of the subject children (*see Matter of Jennifer WW.*, 274 AD2d 778, 779, *lv denied* 95 NY2d 764). In any event, it appears that the limited purpose of the examination was for the court to determine where the children would live during the pendency of the proceeding, and the court did not consider the children's statements at the examination as evidence of the mother's neglect.

Children in a neglect proceeding are entitled to effective assistance of counsel (*see Matter of Jamie TT.*, 191 AD2d 132, 136-137). Here, the appellate AFC for Katie and the appellate AFC for Brian contend that Katie and Brian were deprived of effective assistance of counsel by the Attorney for the Children who jointly represented them as well as their sister Alyssa during the proceeding (trial AFC). Katie's appellate AFC contends that the trial AFC never met with or spoke to Katie. Although an AFC is obligated to "consult with and advise the child to the extent of and in a manner consistent with the child's capacities" (22 NYCRR 7.2 [d] [1]; *see Matter of Lamarcus E. [Jonathan E.]*, 90 AD3d 1095, 1096), there is no indication in the record whether the trial AFC consulted with Katie. The contention of Katie's appellate AFC is therefore based on matters outside the record and is not properly before us (*see Matter of Gridley v Syrko*, 50 AD3d 1560, 1561; *Matter of Harry P. v Cindy W.*, 48 AD3d 1100, 1100).

We agree with Brian's appellate AFC, however, that Brian was deprived of effective assistance of counsel because the trial AFC failed to advocate his position. The Rules of the Chief Judge provide that an AFC "must zealously advocate the child's position" (22 NYCRR 7.2 [d]), even if the AFC "believes that what the child wants is not in the child's best interests" (22 NYCRR 7.2 [d] [2]; *see Matter of Mark T. v Joyanna U.*, 64 AD3d 1092, 1093-1094). There are two exceptions to this rule: (1) where the AFC is convinced that the "child lacks the capacity for knowing, voluntary and considered judgment"; or (2) where the AFC is convinced that "following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child" (22 NYCRR 7.2 [d] [3]; *see Matter of*

Viscuso v Viscuso, 129 AD3d 1679, 1680; *Matter of Lopez v Lugo*, 115 AD3d 1237, 1238). Here, there is no dispute that the trial AFC took a position contrary to the position of two of the subject children, Brian and Alyssa, both of whom maintained that Katie was lying with respect to her allegations against the mother. Alyssa expressed a strong desire to continue living with the mother, while Brian said that he wanted to live with either the mother or his father, who entered an admission of neglect prior to the hearing and was thus not a custodial option. Nevertheless, when the mother moved to dismiss the petition at the close of petitioner's case based on insufficient evidence of neglect, the trial AFC opposed the motion, stating that, although this was "probably not a very strong case," petitioner had met its burden of proof. Also, during his "cross-examination" of petitioner's sole witness, the trial AFC asked questions designed to elicit unfavorable testimony regarding the mother, thus undercutting Brian and Alyssa's position.

Inasmuch as the trial AFC failed to advocate Brian and Alyssa's position at the fact-finding hearing, he was required to determine that one of the two exceptions to the Rules of the Chief Judge applied, as well as "[to] inform the court of the child[ren]'s articulated wishes" (22 NYCRR 7.2 [d] [3]). Here, the trial AFC did not fulfill either obligation (*cf. Matter of Alyson J. [Laurie J.]*, 88 AD3d 1201, 1203). Indeed, the record establishes that neither of the two exceptions applied. Because all three children were teenagers at the time of the hearing, there was no basis for the trial AFC to conclude that they lacked the capacity for knowing, voluntary and considered judgment, and there is no evidence in the record that following the children's wishes was "likely to result in a substantial risk of imminent, serious harm to the child[ren]" (22 NYCRR 7.2 [d] [3]). According to the trial AFC, the most serious concern he had about the children was that they frequently skipped school which, although certainly not in their long-term best interests, did not pose a substantial risk of *imminent* and serious harm to them. Similarly, the fact that the mother may have occasionally used drugs in the house, and was thus unable to care for the children, does not establish a substantial risk of imminent and serious harm to Brian or Alyssa. Finally, the fact that the mother, on a single occasion, may have struck Katie on the arm with a belt, leaving a small mark, did not establish a substantial risk of imminent and serious harm to Brian or Alyssa if they continued living with the mother.

We note that, although the record does not reveal whether the trial AFC consulted with Katie, it is clear that Katie's position with respect to the neglect proceeding differed from that of her siblings. Under the circumstances, it was impossible for the trial AFC to advocate zealously the children's unharmonious positions and, thus, "the children were entitled to appointment of separate attorneys to represent their conflicting interests" (*Matter of James I. [Jennifer I.]*, 128 AD3d 1285, 1286; *see Corigliano v Corigliano*, 297 AD2d 328, 329; *Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 971-972). We therefore remit the matter to Family Court for appointment of new counsel for the children and a new fact-finding hearing.

Finally, the contention of Brian's appellate AFC that there was insufficient evidence of neglect against respondent father is not reviewable on appeal because, among other reasons, the father entered an admission of neglect, and the resulting order was thereby entered upon consent of the parties (*see Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497; *Matter of Violette K. [Sheila E.K.]*, 96 AD3d 1499, 1499; *Matter of Carmella J.*, 254 AD2d 70, 70).

All concur except CENTRA, J.P., and NEMOYER, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent because, in our view, the children received effective assistance of counsel, and we would therefore affirm the order. Respondent mother and respondent father are the parents of Alyssa, Brian, and Katie, who were 15, 13, and 12 years old at the time petitioner filed the neglect petition herein against the parents. The parents lived in separate homes and, at the time of the filing of the petition, the girls lived with the mother and Brian lived with the father. One attorney was assigned to represent the children as Attorney for the Children (trial AFC), as he had done in prior proceedings involving the parents. On this appeal, the three children are each represented by a different attorney (appellate AFC), and only the appellate AFCs for Brian and Katie contend that they were denied the effective assistance of counsel by the trial AFC.

As a preliminary matter, we agree with the majority that petitioner established by a preponderance of the evidence that the children were neglected by the parents. The evidence established educational neglect by the mother inasmuch as Brian's and Alyssa's school attendance was poor while they were in the mother's custody (*see* Family Ct Act § 1012 [f] [i] [A]; *Matter of Cunntrel A. [Jermaine D.A.]*, 70 AD3d 1308, 1308, *lv dismissed* 14 NY3d 866). In fact, the school made a PINS referral for Alyssa based on her excessive absences, but the mother did not follow through with the referral. The evidence also established that the mother inadequately supervised the children inasmuch as she remained in her bedroom for excessive periods of time and was oblivious to the fact that the children were leaving the home to drink alcohol and smoke marihuana (*see* § 1012 [f] [i] [B]). Finally, there was evidence that the mother snorted crushed "hydros, oxies," thus supporting the determination that the mother neglected the children by misusing drugs (*see id.*; *Matter of Edward J. Mc. [Edward J. Mc.]*, 92 AD3d 887, 887-888). With respect to the father, he admitted that he inappropriately abused alcohol, which was sufficient to establish that he repeatedly misused alcohol "to the extent that it has or would ordinarily have the effect of producing in the user thereof a substantial state of . . . intoxication" (§ 1046 [a] [iii]), and that he thereby neglected the children (*see* § 1012 [f] [i] [B]; *Matter of Samantha R. [Laurie R.]*, 116 AD3d 867, 868, *lv denied* 23 NY3d 909; *Matter of Tyler J. [David M.]*, 111 AD3d 1361, 1362).

Children who are the subject of a Family Court Act article 10 proceeding are entitled to the assignment of counsel to represent them (§ 249 [a]; § 1016), and the children are entitled to the effective assistance of counsel, or meaningful representation (*see Matter of*

Dwayne G., 264 AD2d 522, 523; *Matter of Jamie TT.*, 191 AD2d 132, 135-136). As the above evidence shows, the children were neglected by the parents, and the trial AFC understandably argued in summation that petitioner had proven its case. Although the trial AFC did not set forth the wishes of the children, Family Court was aware that Alyssa wanted to live with the mother, that Brian wanted to live with the mother or the father, and that Katie wanted to live with an aunt. Nevertheless, the appellate AFCs for Brian and Katie contend that Brian and Katie were denied effective assistance of counsel because the trial AFC advocated a finding of neglect, which was against the apparent wishes of his clients.

The appellate AFCs and the majority rely on 22 NYCRR 7.2 (d), which provides that the AFC "must zealously advocate the child's position," and 22 NYCRR 7.2 (d) (2), which provides that, "[i]f the child is capable of knowing, voluntary and considered judgment, the [AFC] should be directed by the wishes of the child, even if the [AFC] believes that what the child wants is not in the child's best interests." If an AFC is convinced, however, "that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the [AFC] would be justified in advocating a position that is contrary to the child's wishes" (22 NYCRR 7.2 [d] [3]). We conclude that the trial AFC was reasonably of the view, in light of the evidence supporting a finding of neglect, that there was a substantial risk of imminent, serious harm to the children if they remained in the custody of the parents, and was not ineffective for advocating a finding of neglect (*see generally Matter of Lopez v Lugo*, 115 AD3d 1237, 1238). Indeed, we note that in cases where an AFC has been found to have rendered ineffective assistance of counsel to his or her client in a Family Court Act article 10 proceeding, the reason is that the AFC did not do *enough* to establish that the child had been abused or neglected (*see Matter of Colleen CC.*, 232 AD2d 787, 788-789; *Jamie TT.*, 191 AD2d at 137). In addition, even assuming, arguendo, that the exception set forth in 22 NYCRR 7.2 (d) (3) does not apply to the circumstances of this case, we nevertheless would conclude, under all the circumstances presented, that Brian and Katie received meaningful representation (*cf. Jamie TT.*, 191 AD2d at 137; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

527

CA 15-01711

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

IN THE MATTER OF TODD SPRING,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF MONROE, MONROE COMMUNITY HOSPITAL,
MAGGIE BROOKS, AS MONROE COUNTY EXECUTIVE,
JUSTIN FEASEL, AS MONROE COUNTY RECORDS
ACCESS OFFICER AND DIRECTOR OF COMMUNICATIONS,
AND DANIEL M. DELAUS, JR., AS MONROE COUNTY
RECORDS APPEAL OFFICER, RESPONDENTS-APPELLANTS.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (EUGENE WELCH OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered January 7, 2015 in a CPLR article 78 proceeding. The judgment, insofar as appealed from, granted in part the petition to compel disclosure of certain documents pursuant to the Freedom of Information Law.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the petition insofar as it seeks disclosure of documents contained in the confidential record at pages 1, 2, 4 through 6, 9 through 21, 46 through 50, 54 through 64, 68, 72 through 82, 88 through 99, 104 through 108, 110, 111, and 120, and as modified the judgment is affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking disclosure of approximately 200 documents, emails, memoranda, and reports pursuant to the Freedom of Information Law (FOIL). After conducting an in camera review, Supreme Court directed the disclosure of several documents, and respondents appeal.

Initially, we note that the court erred in applying the arbitrary and capricious standard of review and instead should have determined whether the Records Appeal Officer's determination " 'was affected by an error of law' " (*Mulgrew v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 87 AD3d 506, 507, *lv denied* 18 NY3d 806). In any event, we have conducted a de novo review applying the appropriate standard relating to the disputed documents, and we modify the judgment as discussed herein.

We conclude that the email correspondence between petitioner and

"in-house" counsel for respondent County of Monroe (County) found in the confidential record at pages 1, 2, 4 through 6, and 9 through 21 is exempt from FOIL disclosure. Counsel for the County represented petitioner only in petitioner's capacity as a County employee. Thus, only the County could waive the attorney-client privilege protecting the correspondence. Petitioner's "unilateral belief" that he was the client is, by itself, of no moment (*Berry v Utica Nat. Ins. Group*, 66 AD3d 1376, 1376). Similarly, the email correspondence found in the confidential record at pages 104 through 108, 110, 111, and 120 between a County employee and hired counsel for the County is protected by attorney-client privilege.

We also conclude that the draft informal dispute resolution (IDR) request found in the confidential record at pages 46 through 50 is also exempt from FOIL disclosure inasmuch as it is protected by attorney-client privilege, by attorney work product privilege, and as inter-agency material pursuant to Public Officers Law § 87 (2) (g). The draft IDR request "does not contain statistical or factual tabulations or data . . . or final agency policies or determinations. It consists solely of . . . evaluations, recommendations and other subjective material and is therefore exempt from disclosure" (*Matter of Rome Sentinel Co. v City of Rome*, 174 AD2d 1005, 1006). Similarly, the documents found in the confidential record at pages 54 through 58, representing a "chronological explanation" of a County Human Resources investigation are exempt from disclosure by attorney-client privilege and under section 87 (2) (g).

We further conclude that the documents found in the confidential record at pages 59 through 64, 68, 72 through 74, and 88 through 99 are exempt from disclosure under Public Officers Law § 87 (2) (g) inasmuch as those documents contain, inter alia, " 'opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making' " (*Matter of Sell v New York City Dept. of Educ.*, 135 AD3d 594, 595). The hearing transcript found in the confidential record at pages 75 through 82 constitutes predecisional intra-agency material and is also exempt from FOIL disclosure (*see Sinicropi v County of Nassau*, 76 AD2d 832, 833, *lv denied* 51 NY2d 704).

With respect to the remaining materials at issue, we conclude that respondents have failed to show that they are exempt from disclosure.

Finally, respondents are correct that there is an inconsistency between the decision portion of the "decision, order and judgment" on appeal and the decretal paragraphs therein. In its decision, the court held that emails located in the confidential record at pages 112 through 119 were protected by attorney-client privilege. In the second and third decretal paragraphs, however, the court included those records as items to be disclosed to petitioner. We conclude that the second and third decretal paragraphs should be conformed to the decision by excluding the documents found in the confidential record at pages 112 through 119 (*see Nicastro v New York Cent. Mut. Fire Ins. Co.*, 117 AD3d 1545, 1546, *lv dismissed* 24 NY3d 998). We

further conclude, based on our review of those emails, that they are exempt from FOIL disclosure by attorney-client privilege.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

570

CA 15-01427

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

JAMES MYKYTYN, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

HANNAFORD BROS. CO., DOING BUSINESS AS HANNAFORD SUPERMARKETS, BOB SCHNEIDER, DAVID ROSATI, ET AL., DEFENDANTS-APPELLANTS-RESPONDENTS.

HARRIS BEACH PLLC, SYRACUSE (TED H. WILLIAMS OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

BOSMAN LAW FIRM, L.L.C., CANASTOTA (A.J. BOSMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered May 14, 2015. The order granted in part and denied in part the motion of defendants for summary judgment dismissing the second amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified by denying that part of the motion with respect to the eighth and twelfth causes of action, and reinstating those causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, employment discrimination pursuant to the New York State Human Rights Law (Executive Law § 290 *et seq.*) and Title VII of the Civil Rights Act of 1964 ([Title VII] 42 USC § 2000e *et seq.*) by his employer, defendant Hannaford Bros. Co., doing business as Hannaford Supermarkets (Hannaford), and defendants-coemployees David Rosati and Bob Schneider. Plaintiff's second amended complaint alleges that while employed by Hannaford in the meat department he was subjected to a course of sexual harassment directed at him by Schneider that included calling plaintiff sexy; stating that plaintiff wore too much clothing for Schneider's liking; making sexually suggestive noises directed at plaintiff; engaging in acts of physical intimidation; belittling plaintiff when he needed to use the restroom and making patronizing comments about plaintiff's "wee wee"; following plaintiff into the bathroom to intimidate him; intentionally working in close quarters so that his buttocks would rub against plaintiff; making sexually suggestive gestures and comments with respect to meat products directed at plaintiff; and carving meat products into phallic shapes and leaving them for plaintiff to finish processing. Plaintiff further alleged that he complained to, inter alia, Rosati, the meat

department manager, about Schneider's conduct, but Rosati took no action and failed to report plaintiff's complaints to upper management at Hannaford.

Following the completion of discovery, defendants moved for summary judgment seeking dismissal of the second amended complaint. Supreme Court granted the motion with respect to that part of the third cause of action asserting against Schneider a claim of reckless infliction of emotional distress; the fourth through eighth causes of action; that part of the ninth cause of action asserting against Schneider a claim of aiding and abetting violations of the Human Rights Law; that part of the tenth cause of action asserting against Hannaford a claim of discrimination in violation of the Human Rights Law; the eleventh and twelfth causes of action; and that part of the thirteenth cause of action asserting against Hannaford a claim of discrimination in violation of Title VII. The court otherwise denied the motion. Defendants appeal and plaintiff cross-appeals.

At the outset, we reject defendants' contention that the court erred in denying their request to strike factual allegations that concern events that would be time-barred if advanced by plaintiff as a basis for recovery. It is well settled that an earlier discriminatory practice "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue" (*United Air Lines v Evans*, 431 US 553, 558; *see also Malarkey v Texaco, Inc.*, 983 F2d 1204, 1211; *Ganguly v New York State Dept. of Mental Hygiene-Dunlap Manhattan Psychiatric Ctr.*, 511 F Supp 420, 427).

We reject defendants' further contention that the court erred in denying the motion with respect to the first cause of action, against Schneider for assault. Defendants' own submissions in support of the motion raise issues of fact whether Schneider engaged in physical conduct that placed plaintiff in imminent apprehension of harmful contact (*see Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 475; *Bastein v Sotto*, 299 AD2d 432, 433). Similarly, with respect to the second cause of action, against Schneider for battery, defendants' own submissions raise issues of fact whether Schneider intentionally made bodily contact of an offensive nature with plaintiff (*see Cerilli v Kezis*, 16 AD3d 363, 364; *Tillman v Nordon*, 4 AD3d 467, 468). The court also properly denied the motion with respect to that part of the third cause of action asserting a claim against Schneider for intentional infliction of emotional distress. Defendants' own submissions, including plaintiff's deposition transcript, raise issues of fact whether Schneider subjected plaintiff to a course of conduct sufficiently outrageous to support a claim for intentional infliction of emotional distress (*see Cavallaro v Pozzi*, 28 AD3d 1075, 1078-1079; *see generally Nader v General Motors Corp.*, 25 NY2d 560, 569).

Defendants failed to preserve for our review their contention that the court erred in denying the motion with respect to the tenth and thirteenth causes of action insofar as they assert against Hannaford claims of unlawful retaliation under the Human Rights Law (*see* Executive Law § 296 [7]), as well as Title VII (*see Matter of Santoshia L.*, 202 AD2d 1027, 1028), and that contention lacks merit in

any event (*see generally Zann Kwan v Andalex Group LLC*, 737 F3d 834, 843-845).

We reject defendants' contention that the court erred in denying that part of the motion with respect to the ninth cause of action insofar as that cause of action asserts against Rosati a claim of aiding and abetting Schneider's alleged violations of the Human Rights Law (*see* Executive Law § 296 [6]; *Nesathurai v University at Buffalo, State Univ. of N.Y.*, 23 AD3d 1070, 1072). Contrary to defendants' contention, we conclude that plaintiff alleged facts sufficient to state a claim against Rosati individually for aiding and abetting the alleged discriminatory conduct (*see Moskal v Utica Coll.*, 59 AD3d 956, 957; *Mitchell v TAM Equities, Inc*., 27 AD3d 703, 707; *Murphy v ERA United Realty*, 251 AD2d 469, 472).

We agree with plaintiff on his cross appeal that the court erred in granting that part of the motion seeking dismissal of plaintiff's eighth and twelfth causes of action asserting against Hannaford claims premised on hostile work environment under the Human Rights Law (*see* Executive Law § 296 [1] [a]) and Title VII. We note that plaintiff does not contend that Schneider was plaintiff's supervisor, and Hannaford concedes that he was not. Thus, it is clear that plaintiff is not asserting claims of hostile work environment under a supervisor-based strict liability theory (*see Vance v Ball State University*, ___ US ___, ___, 133 S Ct 2434, 2448), but instead under a negligence theory. To establish that an employer was negligent in the context of a claim of hostile work environment, a plaintiff "must demonstrate that [his] employer 'failed to provide a reasonable avenue for complaint' or that 'it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action' " (*Duch v Jakubek*, 588 F3d 757, 762). Although we agree with defendants that they established on their motion that Hannaford had a reasonable avenue for complaint in place with respect to sexual harassment in the workplace, their submissions raise issues of fact whether plaintiff complained to Rosati, and whether Rosati was " 'charged with a duty to inform the company of the harassment' " and failed to do so (*Duch*, 588 F3d at 763). We therefore conclude that the court erred in granting the motion with respect to the eighth and twelfth causes of action, and we therefore modify the order accordingly.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

572

CA 15-01755

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

JABARI PENDA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MARY J. DUVALL, LEKEISHA N. DENMAN-DUVALL,
DEFENDANTS,
AND MICHAEL F. BARTOWSKI, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, LIVERPOOL (KEITH D. MILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ROBERT E. LAHM PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered June 11, 2015. The order denied the motion of defendant Michael F. Bartowski 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 Michael F. Bartowski is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained as a passenger in a motor vehicle accident. Defendant Michael F. Bartowski moved for summary judgment dismissing the complaint against him, contending that the negligence of defendant Lekeisha N. Denman-Duvall was the sole proximate cause of the accident. Bartowski appeals from an order denying that motion, and we now reverse.

It is well settled that "[a] driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way . . . Although a driver with the right-of-way has a duty to use reasonable care to avoid a collision . . . , a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision" (*Vazquez v New York City Tr. Auth.*, 94 AD3d 870, 871; *see Walker v Patrix Trucking NY Corp.*, 115 AD3d 943, 944). Here, we conclude that Bartowski demonstrated his prima facie entitlement to judgment as a matter of law by submitting evidence that, at the time of impact, he was lawfully proceeding in the center lane of travel when Denman-Duvall lost control of her vehicle after striking a large puddle of

water, and that within seconds, Denman-Duvall's vehicle entered Bartowski's lane from the left lane and collided with his vehicle (*see Vazquez*, 94 AD3d at 871; *Rivera v Corbett*, 69 AD3d 916, 917).

Contrary to Supreme Court's determination, we further conclude that plaintiff's submissions in opposition failed to raise a triable issue of fact (*see Walker*, 115 AD3d at 944; *Vainer v DiSalvo*, 79 AD3d 1023, 1024). Plaintiff's expert's affidavit is "speculative and conclusory inasmuch as the expert failed to submit the data upon which he based his opinions, and thus the affidavit had no probative value" (*Costanzo v County of Chautauqua*, 110 AD3d 1473, 1473). Further, "[s]peculation regarding evasive action that a defendant driver should have taken to avoid a collision, especially when the driver had, at most, a few seconds to react, does not raise a triable issue of fact" (*Hubbard v County of Madison*, 93 AD3d 939, 942, *lv denied* 19 NY3d 805 [internal quotation marks omitted]; *see Fiore v Mitrowitz*, 280 AD2d 919, 920).

The opinion of plaintiff's expert that Bartowski was driving at an imprudent speed for the road conditions also is speculative and therefore insufficient to raise an issue of fact to defeat the motion (*see Stewart v Kier*, 100 AD3d 1389, 1390). Moreover, even if the expert's opinion as to speed was based on physical evidence, it still fails to raise an issue of fact inasmuch as it does not address whether the speed at which Bartowski was traveling was a proximate cause of the accident (*see Heltz v Barratt*, 115 AD3d 1298, 1299, *affd* 24 NY3d 1185; *Wallace v Kuhn*, 23 AD3d 1042, 1044).

Finally, plaintiff's assertion that the motion should be denied based on his expert's opinion that there are "many questions of fact" is without merit because it addresses an issue of law, and "[e]xpert opinion as to a legal conclusion is impermissible" (*Colon v Rent-A-Center*, 276 AD2d 58, 61; *see generally Singh v Kolcaj Realty Corp.*, 283 AD2d 350, 351; *Sawh v Schoen*, 215 AD2d 291, 293-294).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

591

CA 15-01751

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

AUSTIN HARVARD LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF CANANDAIGUA, AND DAVID FORREST,
CITY MANAGER OF CITY OF CANANDAIGUA,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

CHARLES J. GENESE, WEBSTER, FOR PETITIONER-PLAINTIFF-APPELLANT.

MICHELE O. SMITH, CORPORATION COUNSEL OF CITY OF CANANDAIGUA, CANANDAIGUA, FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Ontario County (Craig J. Doran, A.J.), entered April 7, 2015 in a hybrid CPLR article 78 proceeding and declaratory judgment action. The judgment dismissed the petition-complaint.

It is hereby ORDERED that said appeal insofar as it concerns the CPLR article 78 proceeding is unanimously dismissed and the judgment is modified on the law by reinstating the second cause of action and denying plaintiff's motion for summary judgment and as modified the judgment is affirmed without costs in accordance with the following memorandum: Petitioner-plaintiff (plaintiff) commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking, inter alia, a declaration that it is unlawful for respondents-defendants (defendants) to impose a fee equaling two-thirds of the admission charges collected by plaintiff in the operation of its annual arts festival at a public park. We note at the outset that, as correctly set forth in the judgment on appeal, the parties "agree[d] that the [a]rticle 78 claim is moot," and the judgment thus dismissed the proceeding to that extent. We therefore dismiss the appeal insofar as it concerns the CPLR article 78 proceeding because plaintiff is not aggrieved by that part of the judgment (*see* CPLR 5511; *Husak v 45th Ave. Hous. Co.*, 52 AD3d 781, 782; *Fuller v City of Yonkers*, 100 AD2d 926, 927).

With respect to the declaratory judgment action, it is well settled that "parties to a civil dispute are free to chart their own litigation course" (*Mitchell v New York Hosp.*, 61 NY2d 208, 214), and "may fashion the basis upon which a particular controversy will be resolved" (*Cullen v Naples*, 31 NY2d 818, 820). Here, the record establishes that the parties charted a summary judgment course, and

Supreme Court's bench decision reflects that the court denied plaintiff's motion for summary judgment seeking a declaration in the second cause of action. The judgment, however, recites that the complaint "is in all respects denied and the matter is dismissed," and "[w]here, as here, there is a conflict between [a judgment] and a decision, the decision controls" (*Wilson v Colosimo*, 101 AD3d 1765, 1766 [internal quotation marks omitted]; *see generally Del Nero v Colvin*, 111 AD3d 1250, 1253). We therefore modify the judgment to conform to the court's bench decision. On the merits, we conclude that the court properly denied plaintiff's motion for summary judgment inasmuch as it failed to meet its initial burden of establishing its entitlement to judgment as a matter of law (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

592

CA 15-00223

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

IN THE MATTER OF THE APPLICATION OF MICHELE M. AZZI, PETITIONER-RESPONDENT, FOR THE APPOINTMENT OF A GUARDIAN OF THE PROPERTY OF DAVID J.D., AN ALLEGED INCAPACITATED PERSON, RESPONDENT.

MEMORANDUM AND ORDER

JENNY S. TRAPANI, APPELLANT.

JENNY S. TRAPANI, APPELLANT PRO SE.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (BRIAN LAUDADIO OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Surrogate's Court, Monroe County (Edmund A. Calvaruso, S.), entered December 10, 2014 pursuant to Mental Hygiene Law article 81. The order and judgment, among other things, granted the petition and appointed petitioner as guardian of the property of David J.D.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, the cross petition is reinstated, and the matter is remitted to Surrogate's Court, Monroe County, for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding in Surrogate's Court pursuant to Mental Hygiene Law article 81, seeking a determination that her brother (hereafter, AIP) is an incapacitated person and seeking an order appointing her as guardian of his property. The Surrogate granted the petition and appointed petitioner guardian of the property of the AIP. We reverse.

In 2011, the AIP, the youngest of 10 adult siblings, was named beneficiary of two annuities purchased by his mother from a life insurance company. The AIP's mother also executed a will in January 2012 directing in part that a trust for the AIP's benefit be established with half of the proceeds from the sale of her house after her death, and naming two of the AIP's brothers as cotrustees. The AIP's mother died less than two weeks later, whereupon one of the brothers serving as cotrustee had the AIP sign a disclaimer renouncing almost 70% of his interest in the annuities in favor of his siblings, allegedly consistent with the mother's wishes. Another of the AIP's brothers objected to the validity of the disclaimer, and the life insurance company commenced a federal interpleader action in June 2012 to determine the parties' rights with respect to the annuities.

The AIP moved to Arizona to live near the other brother serving

as cotrustee of the trust established by their mother, and he lived there for over a year before petitioner, without notice to the brother living in Arizona, drove the AIP back to New York in June 2013. Immediately upon arriving in New York, petitioner commenced this proceeding seeking to be appointed guardian of the AIP's property. The petition, which also requested petitioner's appointment as temporary guardian for the AIP pending the outcome of this proceeding, listed all of the AIP's nine siblings as "interested parties." The day after the petition was filed, the AIP, represented by the same attorney who represented petitioner in this proceeding, moved to stay the proceedings in the federal interpleader action pending the outcome of this guardianship proceeding. Less than a week later, the Surrogate, without appointing independent counsel for the AIP, appointed petitioner as temporary guardian for the AIP.

Six of the AIP's siblings (objectants) opposed the petition and, through one objectant, filed a cross petition. The cross petition asserted that the AIP, while requiring some assistance with financial and other personal matters, does not require the appointment of a guardian. The cross petition further asserted that, if the Surrogate were to conclude that the appointment of a guardian was necessary, petitioner should not be appointed. Petitioner, represented by the same attorney who represented the AIP in the federal interpleader action and who appeared on behalf of the AIP in this proceeding, moved to dismiss the cross petition. In support of that motion, petitioner submitted a psychological evaluation diagnosing the AIP with "mild mental retardation" and "mild intellectual disability," and recommending the appointment of a guardian to assist the AIP with his personal and property management needs. Objectants moved to dismiss the petition and to disqualify the law firm representing petitioner based on an alleged conflict of interest arising from the law firm's dual representation of both the AIP and petitioner. Objectants also requested that the Surrogate appoint independent counsel for the AIP.

The Surrogate denied objectants' motion and granted petitioner's motion to dismiss the cross petition on the grounds that objectants, although named as "interested parties" in the petition, lacked standing to participate as parties in this proceeding, and that the cross petition failed to state a cause of action. The Surrogate thereafter conducted a "hearing," apparently without notice to objectants, at which it admitted the psychological evaluation of the AIP prepared on behalf of petitioner and took judicial notice of the court evaluator's report, but took no testimony. The Surrogate then granted the petition, determining that the AIP is an incapacitated person and appointing petitioner as his guardian. At the request of petitioner's counsel, the Surrogate also invalidated the annuity disclaimer signed by the AIP, even though the petition did not seek that relief. An order and judgment granting that relief was thereafter entered, and objectants appealed.

Initially, we reject petitioner's contention that objectants are not aggrieved by the order and judgment and thus lack standing to appeal. A person is aggrieved and has standing to appeal if he or she "has a direct interest in the controversy which is affected by the

result and . . . the adjudication has a binding force against the rights, person or property of the party or person seeking to appeal" (*Matter of Grace R.*, 12 AD3d 764, 765 [internal quotation marks omitted]; *see Matter of Harold W.S. [Mark P.—Lauralyn W.]*, 134 AD3d 724, 724). Here, objectants are aggrieved by the nullification in the order and judgment of the annuity disclaimer, in which objectants had a direct financial interest.

We agree with objectants that the Surrogate erred in dismissing the cross petition based on lack of standing. We conclude that objectants, the AIP's and petitioner's adult siblings, are "person[s] otherwise concerned with the welfare of the [AIP]" (Mental Hygiene Law § 81.06 [a] [6]), and were entitled to notice pursuant to section 81.07 (g) (1) (i). Objectants are therefore proper parties to this proceeding (*see Matter of Astor*, 13 Misc 3d 862, 866-867), with the right to present evidence, call witnesses, cross-examine witnesses, and be represented by counsel (*see* § 81.11 [b]; *Matter of Eggleston [Muhammed]*, 303 AD2d 263, 266). Further, the petition did not seek to have the annuity disclaimer signed by the AIP invalidated, and objectants reasonably expected that the issue of the disclaimer's validity would be resolved in the federal interpleader action that was commenced to address that issue. Given objectants' financial interest in the validity of the disclaimer, "[t]he failure . . . to provide notice that the issue of the validity of the [disclaimer] was to be an object of the proceeding[] deprived [objectants] of notice and an opportunity to be heard" (*Matter of Lucille H.*, 39 AD3d 547, 549; *see Matter of Dandridge*, 120 AD3d 1411, 1413-1414). We also conclude that the cross petition, which, contrary to the Surrogate's conclusion, sought relief in the alternative, should not have been dismissed for failure to state a cause of action.

Objectants next contend, and petitioner correctly concedes, that the Surrogate erred in failing to appoint independent counsel for the AIP or to inform the AIP of his right to counsel. Mental Hygiene Law § 81.10 (c) (5) requires a court to appoint counsel when a petition requests the appointment of a temporary guardian unless the court is satisfied that the AIP is represented by counsel of his or her own choosing. Here, the Surrogate failed to appoint counsel for the AIP when petitioner was appointed temporary guardian, and there is no basis in the record to conclude that the Surrogate was satisfied that the AIP, who indeed was alleged in the petition to be incompetent, was represented by counsel of his own choosing. Petitioner also correctly concedes that, at the hearing in this guardianship proceeding, the Surrogate was required to explain to the AIP, on the record, that he had the right to have counsel appointed (*see* § 81.11 [e]), and the Surrogate failed to do so.

We cannot agree with petitioner that the Surrogate's errors are harmless based on the AIP's agreement to her appointment as guardian (*cf. Matter of Gladwin*, 35 AD3d 1236, 1237). The petition itself avers that the AIP is "easily influenced and persuaded by others" and that the disclaimer is invalid in part because the AIP "did not have the benefit of his own independent counsel" before signing the disclaimer. In our view, the failure to appoint independent counsel

for the AIP renders it impossible to determine whether the AIP's agreement to petitioner's appointment as guardian was an informed decision. We therefore reverse the order and judgment, reinstate the cross petition and remit the matter to Surrogate's Court for appointment of counsel for the AIP and further proceedings on the petition and cross petition.

Finally, we conclude that the Surrogate erred in denying, without a hearing, objectants' motion to disqualify the law firm representing petitioner. That law firm represented the AIP in the federal interpleader action, and previously appeared on behalf of both the AIP and petitioner in this guardianship proceeding. Although, as noted, independent counsel must be appointed for the AIP, it is not clear on this record whether the interests of petitioner and the AIP are materially adverse; whether the AIP is capable of giving informed consent in writing to such representation in light of his alleged incapacity; and whether the AIP imparted confidential information to the law firm that could be used to the AIP's disadvantage (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9; *Matter of Strasser*, 129 AD3d 457, 457-458; *Matter of Wogelt*, 171 Misc 2d 29, 34-36). Thus, we further remit the matter to Surrogate's Court to determine the disqualification motion following a hearing.

In light of our determination, we do not address objectants' remaining contentions.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

594

KA 15-00787

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. BERTOLLINI, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 29, 2015. The judgment convicted defendant, upon his plea of guilty, of failure to report a change of address as a sex offender.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Bertollini* ([appeal No. 2] ___ AD3d ___ [July 8, 2016]).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

595

KA 15-00788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. BERTOLLINI, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VANBUSKIRK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered January 29, 2015. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Cayuga County Court for further proceedings on the superior court information.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of failure to report a change of address as a sex offender (Correction Law § 168-f [4]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25). We note at the outset that defendant does not raise any contentions with respect to the judgment in appeal No. 1, and we therefore dismiss the appeal therefrom (*see People v Michael A.C.* [appeal No. 2], 128 AD3d 1359, 1360, *lv denied* 25 NY3d 1168).

By failing to move to withdraw the plea or vacate the judgment of conviction in appeal No. 2, defendant has failed to preserve for our review his challenge to the factual sufficiency of the plea allocution with respect to the charge of reckless endangerment in the first degree (*see People v Kozody*, 74 AD3d 1907, 1908, *lv denied* 15 NY3d 806). We agree with defendant, however, that his recitation of the facts underlying that charge cast significant doubt upon his guilt insofar as it negated the element of depraved indifference, and thus that his plea falls within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666-667; *People v Hinckley*, 50 AD3d 1466, 1466, *lv denied* 10 NY3d 959). Although County

Court attempted to conduct a further inquiry before accepting defendant's guilty plea, that inquiry was insufficient to reestablish the negated element, and the court therefore failed to ensure that the plea was knowing and voluntary. We therefore reverse the judgment in appeal No. 2, vacate the plea, and remit the matter to County Court for further proceedings on the superior court information. Although defendant does not challenge his plea with respect to the charge of failure to report a change of address as a sex offender in appeal No. 1, because both charges were encompassed by a negotiated agreement, we note that in the event that defendant does not enter a plea of guilty to the charge of reckless endangerment in the first degree upon remittal, the court " 'should entertain a motion by the People, should the People be so disposed, to vacate the plea [in appeal No. 1] and set aside th[at] conviction' " as well (*Hinckley*, 50 AD3d at 1467).

In light of our determination, we do not reach defendant's alternative contention in appeal No. 2 that the sentence imposed by the court for reckless endangerment in the first degree is unduly harsh and severe.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

600

KA 13-00465

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRION B. FREEMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 16, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (two counts) and criminal possession of marihuana in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and one count of criminal possession of marihuana in the third degree (§ 221.20), defendant contends that County Court erred in denying that part of his omnibus motion seeking to suppress tangible property and statements obtained by the police following their warrantless entry into his home. We reject that contention and affirm the judgment.

"Where, as here, the People contend that a suspect gave his or her consent to the police to enter the suspect's home, 'the burden of proof rests heavily upon the People to establish the voluntariness of that waiver of a constitutional right' " (*People v Forbes*, 71 AD3d 1519, 1520, *lv denied* 15 NY3d 773, quoting *People v Whitehurst*, 25 NY2d 389, 391). Based on the totality of the circumstances surrounding defendant's consent to enter his home, we conclude that the consent was voluntary (*see People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104). Testimony at the suppression hearing established that, although defendant was in custody at the time he gave consent, he cooperated with the police and assisted them in gaining entry by indicating which of his keys opened the front door (*see People v Nance*, 132 AD3d 1389, 1389, *lv denied* 26 NY3d 1091; *McCray*, 96 AD3d at 1481). Once inside the home, the police observed

marihuana in plain view and immediately read defendant his *Miranda* rights. After defendant waived those rights, he voluntarily consented, both verbally and in writing, to a search of the premises.

We reject defendant's further contention that any voluntary consent he may have given did not encompass a search of a duffel bag inside of his closet. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (*People v Gomez*, 5 NY3d 416, 419 [internal quotation marks omitted]; *see Florida v Jimeno*, 500 US 248, 251). Where an officer informs a suspect of the specific items the officer is searching for, " '[t]he scope of a search is generally defined by its expressed object' " (*Gomez*, 5 NY3d at 420, quoting *Jimeno*, 500 US at 251). Here, defendant responded affirmatively when the officer asked him whether he "could have permission to search both the room and the house for drugs or any other weapons or illegal contraband in the house." Additionally, defendant signed a written consent that included the "premises" and his "personal property." We therefore conclude that defendant's consent encompassed the duffel bag. "It was objectively reasonable for the police to conclude that the consent to search the apartment . . . encompassed a thorough search of any location where a gun [or narcotics] might have been secreted" (*People v Bruno*, 294 AD2d 179, 179-180, *lv denied* 99 NY2d 533).

All concur except WHALEN, P.J., and TROUTMAN, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. In our view, the People failed to meet their burden at the suppression hearing of establishing that defendant voluntarily consented to the police officers' entry into and search of his residence. We would therefore reverse the judgment, vacate the plea, grant that part of defendant's omnibus motion seeking suppression of tangible property and statements obtained following the entry into defendant's residence, dismiss the first and second counts of the indictment, and remit the matter to County Court for further proceedings on the third count of the indictment.

The record of the suppression hearing establishes that two Rochester police officers were on routine patrol in a marked patrol vehicle when they noticed a vehicle operated by defendant. They followed his vehicle a short distance. When defendant turned into the driveway of his residence, one of the officers observed that the windows were excessively tinted in violation of Vehicle and Traffic Law § 375 (12-a) (b) (3). As defendant exited his vehicle, the officers approached him on foot. One of the officers detected the odor of marihuana and observed that defendant appeared to be nervous. Defendant disclosed to the officer that he was on probation. When he was unable to produce a license or other identification in response to the officer's request, defendant was frisked and, during the frisk, defendant's keys fell to the ground. The officer seized them and placed them on the trunk of the vehicle defendant had been driving. He then handcuffed defendant, escorted him to the patrol car and locked him in the backseat. Inside the patrol car, defendant provided

his name and date of birth and a record check disclosed that defendant's driver's license had been suspended. At that point defendant was under arrest for aggravated unlicensed operation of a motor vehicle.

While defendant remained in the backseat of the patrol car, the officer asked him whether there was anything illegal in the vehicle, and defendant responded that the vehicle did not belong to him, and to his knowledge there was nothing illegal in the vehicle. The officer requested to search the vehicle, and defendant said that he "d[id]n't have a problem with that." The officer unlocked the vehicle and found a small quantity of marihuana in the pocket of defendant's sweatshirt and a larger quantity of marihuana under the driver's seat.

The officer returned to the patrol car and advised defendant that marihuana possession was not "that serious of a charge," but that defendant must produce identification "if there was any chance for him to bail out on the charge." The officer asked if defendant would accompany him inside the residence to retrieve defendant's identification, and defendant agreed to do so. As they approached the rooming house where defendant resided, defendant specified which keys opened the main door to the building and the door to his room. Once inside defendant's room, the officer saw a digital scale and a small quantity of marihuana in an open cigar box. Defendant advised the officer that his identification was in his dresser and he began to walk toward the dresser, but the officer stopped him and directed him to sit on the bed. Defendant complied, and the officer advised him that he was under arrest on drug charges. The officer pointed out that there were drugs and paraphernalia in plain sight, but "it really wasn't a big deal and [the officer] would like [defendant's] cooperation." The officer then advised defendant of his *Miranda* rights, and defendant agreed to speak to him. When asked whether he had any marihuana in the house, defendant responded that it was all in the basement. The officer asked defendant whether he could have "permission to search both the room and the basement for marijuana," and defendant replied affirmatively.

Before conducting the proposed search, the officer prepared a written consent to search form. The form misspelled defendant's name, and misidentified the place to be searched and the person giving consent. The officer acknowledged in his testimony at the suppression hearing that he did not read the form to defendant and did not know whether defendant read the form himself. Nevertheless, while defendant's hands remained handcuffed behind his back, defendant signed the form card. The officer searched the room and found a handgun and a large quantity of marihuana in a duffel bag inside a closet next to the bed.

At the outset, we agree with the majority that the People bear a heavy burden of proving that defendant consented to the entry into his home (*see People v Gonzalez*, 39 NY2d 122, 128; *People v Forbes*, 71 AD3d 1519, 1520, *lv denied* 15 NY3d 773), and whether such consent was voluntary must be determined from the totality of the circumstances (*see Schneckloth v Bustamonte*, 412 US 218, 227; *Gonzalez*, 39 NY2d at

128; *People v Harper*, 100 AD3d 772, 774, *lv denied* 21 NY3d 943). We add that we are "required to indulge every reasonable presumption against the waiver of constitutional rights guaranteed by the Fourth Amendment" (*People v McNeeley*, 77 AD2d 205, 209; *see Johnson v Zerbst*, 304 US 458, 464). With those principles in mind, we cannot agree with the majority that defendant's consent to enter and search his home was voluntarily given. "Submission to authority is not consent" (*Gonzalez*, 39 NY2d at 129) and, here, the circumstances support a finding that defendant's "apparent consent was but a capitulation to authority" (*id*.).

The factors guiding our assessment of the voluntariness of defendant's consent include whether defendant was: (1) in custody or under arrest; (2) handcuffed; (3) evasive or cooperative; (4) advised of his right to refuse consent; and (5) experienced in dealing with the police (*see id.* at 128-130; *Matter of Daijah D.*, 86 AD3d 521, 521-522). None of those factors weighs in favor of a finding of voluntariness in this case. Rather, the evidence establishes that, from the outset, the encounter between defendant and the officer "included highly intrusive police conduct[,] the coercive effect of which could not have abated when . . . defendant consented to the" entry and search of his room (*People v Packer*, 49 AD3d 184, 187, *affd* 10 NY3d 915). Within two minutes of the officers' approach of defendant based upon a minor Vehicle and Traffic Law violation, he was frisked, handcuffed, arrested, and placed in the backseat of a locked patrol vehicle. While defendant was thus confined, the officer asked defendant whether he would agree to accompany him into defendant's residence, suggesting that he intended to enter regardless of whether defendant granted or withheld his consent. Under the circumstances, defendant had no reason to suppose that his consent was required or even sought by the officer and, indeed, defendant was never advised that he had a right to refuse consent (*see People v Flores*, 181 AD2d 570, 572; *People v Guzman*, 153 AD2d 320, 324; *cf. People v Green*, 104 AD3d 126, 132). Rather, defendant was persuaded to accompany the officer into his residence by the officer's misleading assurances that his identification was the practical equivalent of the keys to the jail (*see generally People v Skardinski*, 24 AD3d 1207, 1208; *People v Cioffi*, 55 AD2d 682, 682). No evidence was presented at the suppression hearing that defendant was "a case-hardened sophisticate in crime, calloused in dealing with the police," and thus resistant to coercive police tactics (*Gonzalez*, 39 NY2d at 129). Indeed, the only evidence of other bad acts or criminality at the hearing was that defendant was on probation as the result of a Vehicle and Traffic Law offense. We conclude that the totality of those circumstances weighs heavily against a determination that defendant's consent to the officer's entry into the residence was voluntary (*see id.* at 128-129; *Harper*, 100 AD3d at 774).

Contrary to the conclusion of the suppression court and the majority, moreover, we cannot conclude that defendant's conduct in pointing out the keys that opened the doors to the rooming house and his room evinced a desire to be cooperative (*cf. People v McCray*, 96 AD3d 1480, 1481, *lv denied* 19 NY3d 1104; *People v Abrams*, 95 AD2d 155, 157). The officer had seized defendant's keys at the beginning of the

encounter, and defendant merely facilitated what he must have perceived to be the officers' inevitable entry into his residence. Nor did the remainder of defendant's actions indicate cooperation with the police. To the contrary, defendant was evasive during the encounter, denying that there were drugs in the vehicle he was driving, and falsely advising the officer that any drugs in the rooming house would be found in the basement (*cf. People v Yoneyama*, 128 AD3d 616, 616, *lv denied* 26 NY3d 937). In sum, therefore, we conclude that the People failed to meet their burden of establishing that defendant's consent to the officer's entry was "a true act of the will, an unequivocal product of an essentially free and unconstrained choice" (*Gonzalez*, 39 NY2d at 128). Inasmuch as the entry into defendant's residence was illegal, the People cannot rely on the plain view doctrine to support the seizure of the marihuana and paraphernalia that the officer saw upon entering the residence (*see People v Marcial*, 109 AD3d 937, 938, *lv denied* 22 NY3d 1200).

We further conclude that, apart from the illegal entry, the People failed to establish that defendant voluntarily consented to the search of his room. Defendant signed a written consent form that was nonsensical as completed, and the officer who prepared it testified that he "presented" it to defendant but neither read it aloud nor sought any assurance from defendant that he had read it (*see Skardinski*, 24 AD3d at 1208). Further, defendant signed the form *while his hands were handcuffed behind his back*, as they had been almost from the inception of the encounter. In our view, "the coercive logic of the situation would have been obvious to any reasonable, innocent person in defendant's place" (*Packer*, 49 AD3d at 188-189). "Voluntariness is incompatible with official coercion, actual or implicit, overt or subtle" (*Gonzalez*, 39 NY2d at 128). Here, the totality of the circumstances compel the conclusion that defendant's consent to the search of his residence, like his consent to the entry, was the product of coercion rather than his free and unconstrained choice.

We would therefore grant defendant's omnibus motion to the extent that it sought suppression of physical evidence and statements obtained following the entry, which includes the weapon seized from the duffel bag. Suppression of the weapon would eliminate the evidence supporting the first and second counts of the indictment, and those counts should therefore be dismissed. Inasmuch as it is unclear from the record whether the evidence supporting the third count of the indictment charging criminal possession of marihuana was obtained from the vehicle or the residence, we would remit the matter to County Court for further proceedings on that count.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

629

KA 15-00655

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN G. TERNOOIS, III, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Wayne County Court (Dennis M. Kehoe, J.), dated March 2, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Defendant contends that County Court's assessment of 25 points in the risk assessment instrument under risk factor 2, sexual contact with victim, for engaging in "anal sexual conduct" with the seven-year-old victim is not supported by the requisite clear and convincing evidence (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 9 [2006]; *see* Correction Law § 168–n [3]). We reject that contention. The People submitted, inter alia, defendant's sworn postarrest statement to the police, made shortly after the incident, in which he admitted that he anally raped the victim by penetrating her anus with his penis. The People also submitted a presentence report reflecting that, during the presentence interview with the Probation Department, defendant admitted that he penetrated the victim's anus with his penis. The presentence report also reflects that defendant equivocated on that admission later in the interview. We note, however, that "where an unsworn statement is equivocal, inconsistent with other evidence, or seems dubious in light of other information in the record, a SORA court is free to disregard it" (*People v Mingo*, 12 NY3d 563, 577). Here, we conclude that the court properly disregarded defendant's equivocation during the presentence interview as an attempt to distance himself from his prior sworn statement to the police.

Alleged inconsistencies in the victim's account do not preclude

the assessment of the disputed points. During a sexual abuse forensic investigation five months after the incident, the victim gave an inconsistent description of the sexual contact, but the investigator concluded that the victim had been coached by her mother in an effort to protect defendant. Thus, contrary to defendant's contention, we conclude that the court's assessment of 25 points under risk factor 2 is supported by clear and convincing evidence (*see People v Ramirez*, 53 AD3d 990, 991, *lv denied* 11 NY3d 710; *People v Walker*, 15 AD3d 692, 692).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

632.1

KA 14-00665

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID C. BENSON, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (KELLY M. BALCOM OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered January 27, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), defendant contends that County Court improperly adjudicated him a predicate felony offender. We reject that contention.

Initially, we agree with defendant's contention that "the predicate felony statement filed by the People was insufficient to support a finding that the defendant had been subjected to a predicate . . . felony conviction" (*People v Nelson*, 100 AD3d 785, 785). For a prior conviction to qualify as a predicate felony conviction, the sentence for the prior conviction "must have been imposed not more than ten years before commission of the felony of which the defendant presently stands convicted" (Penal Law § 70.06 [1] [b] [iv]). The ten-year period, however, is also extended by a period "equal to the time served" when defendant was incarcerated for any reason between the commission of the two pertinent felony convictions (§ 70.06 [1] [b] [v]). In the instant case, the predicate felony statement alleged that defendant had previously been subjected to a felony conviction for a crime, and that sentence was imposed upon that crime 10 years plus approximately 1,556 days prior to the commission of the present felony. The predicate felony statement further alleged, however, that defendant had been incarcerated for only 1,257 days in the interim. Consequently, even accepting the allegations in the statement as true,

the People failed to allege that defendant had been incarcerated for a sufficient length of time to bring the previous conviction within the statutory limit.

Nevertheless, the record does not support defendant's further contention that the court sentenced him as a second felony offender. Notwithstanding the filing of the predicate felony statement, the court made no finding that defendant had been subjected to a predicate felony conviction, nor did it state that it was sentencing defendant as a second felony offender (*cf.* CPL 400.21 [4]). Furthermore, the certificate of conviction does not indicate that the court adjudicated defendant a predicate felony offender, and the sentence that the court imposed was within the legal range for a nonpredicate felony drug offender (*see* Penal Law § 70.70 [2] [a] [i]). Consequently, we reject defendant's contention that the court improperly sentenced him as a predicate felon.

Finally, although "[w]e agree with defendant that the waiver of the right to appeal is invalid because the minimal inquiry made by [the 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 Callahan*, 80 NY2d 273, 283; *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: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

638

KA 14-00782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLAS WEATHINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 10, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the second degree and burglary in the second degree.

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

Same memorandum as in *People v Weathington* ([appeal No. 2] ___ AD3d ___ [July 8, 2016]).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

639

KA 15-01803

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NICOLAS WEATHINGTON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Erie County Court (Sheila A. DiTullio, J.), rendered July 22, 2014. Defendant was resentenced following his conviction, upon his plea of guilty, of robbery in the second degree and burglary in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]) and burglary in the second degree (§ 140.25 [2]) and, in appeal No. 2, he appeals from the resentence on that conviction. We note at the outset that, inasmuch as the sentence in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence must be dismissed (*see People v Primm*, 57 AD3d 1525, 1525, *lv denied* 12 NY3d 820).

We otherwise affirm the judgment in appeal No. 1 and affirm the resentence in appeal No. 2. Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal, and that waiver encompasses his challenge to the severity of the resentence in this case (*see People v Lopez*, 6 NY3d 248, 256; *People v Matsulavage*, 121 AD3d 1581, 1581, *lv denied* 24 NY3d 1045; *People v O'Harrow*, 107 AD3d 1601, 1601-1602, *lv denied* 21 NY3d 1076). "Defendant waived his right to appeal both orally and in writing, and the record demonstrates that County Court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). As the People correctly concede, however, no mention of

youthful offender status was made on the record before defendant waived his right to appeal, and thus defendant's valid waiver does not encompass his challenge to the court's denial of youthful offender status (*see People v Gibson*, 134 AD3d 1517, 1518; *People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991). We nonetheless conclude that the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Digges*, 10 AD3d 769, 769-770; *People v Mettler*, 259 AD2d 834, 835). Despite the existence of some factors weighing in favor of such an adjudication, the record establishes that defendant, in concert with other individuals, engaged in a planned home invasion burglary and robbery of an 84-year-old woman during which defendant grabbed the victim by her face and mouth, causing her pain, restrained her against the rocking chair in which she was sitting, and demanded to know the location of her money (*see Digges*, 10 AD3d at 769-770; *Mettler*, 259 AD2d at 835). Defendant and the other individuals subsequently used the victim's credit card to make several fraudulent purchases. In addition, under these circumstances, we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see e.g. People v Phillips*, 289 AD2d 1021, 1022).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

642

KA 14-01483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALLEN COBB, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Michael F. Pietruszka, J.), entered July 21, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We reject defendant's contention that the People failed to establish by clear and convincing evidence the applicability of an override to a presumptive level three risk based on his diagnosis of pedophilia (*see People v Lagville*, 136 AD3d 1005, 1006; *cf. People v McCollum*, 41 AD3d 1187, 1188, *lv denied* 9 NY3d 807). We nevertheless agree with defendant that County Court erred in denying his request for a downward departure to a level two risk on the ground that it applied an incorrect burden of proof, i.e., clear and convincing evidence rather than preponderance of the evidence (*see People v Gillotti*, 23 NY3d 841, 863-864). We therefore reverse the order, and we remit the matter to County Court for a determination of defendant's request for a downward departure, following a further hearing if necessary. We note that the record is not clear whether information provided to this Court in connection with defendant's appeal had been received by County Court before it issued its decision. Finally, we reject defendant's contention that he was denied effective assistance of counsel (*see People v Russell*, 115 AD3d 1236, 1236, *lv denied* 118 AD3d 1369; *see generally People v Baldi*, 54 NY2d 137, 147).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

647

KA 14-01248

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN P. CORRA, DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered September 21, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the first degree.

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

Memorandum: On this appeal from a judgment convicting defendant upon his plea of guilty of attempted burglary in the first degree (Penal Law §§ 110.00, 140.30 [3]), we note that "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence (*see People v Maracle,* 19 NY3d 925, 928 [2012])" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 706). We thus conclude that the waiver of the right to appeal does not encompass the challenge to the severity of the sentence (*see People v Doblinger*, 117 AD3d 1484, 1485). We nevertheless further conclude that the sentence is not unduly harsh or severe.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

648

KA 13-01076

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON J. BOLLING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered March 7, 2013. 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 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

651

KA 14-02104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON M. MOSHMAN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Kenneth F. Case, J.), dated September 26, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing 15 points against him under risk factor 11 based upon his history of drug and alcohol abuse. We reject that contention inasmuch as " '[t]he statements in the case summary . . . with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under the risk factor for history of drug or alcohol abuse' " (*People v St. Jean*, 101 AD3d 1684, 1684). Furthermore, based on defendant's admissions to a history of substance abuse and regular past use of marihuana, along with his "unacceptable" performance in an alcohol and substance abuse treatment program, we conclude that there is clear and convincing evidence that defendant had a history of substance abuse, and the court properly assessed the disputed 15 points (*see People v Mundo*, 98 AD3d 1292, 1293, *lv denied* 20 NY3d 855; *People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see also People v Merkley*, 125 AD3d 1479, 1479; *see generally* § 168-n [3]).

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

652

KA 14-01170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALVA C. RINKER, JR., DEFENDANT-APPELLANT.

KARPINSKI, STAPLETON & TEHAN, P.C., AUBURN (ADAM H. VAN BUSKIRK OF COUNSEL), FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (J. THOMAS FUOCO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered May 7, 2014. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of reckless endangerment in the first degree (Penal Law § 120.25). Defendant's challenge to the factual sufficiency of the plea allocution is unpreserved for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Williams*, 91 AD3d 1299, 1299; *see generally People v Lopez*, 71 NY2d 662, 665). This case does not fall within the narrow exception to the preservation requirement because "defendant's recitation of the facts underlying the crime pleaded to" did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*Lopez*, 71 NY2d at 666). We decline to exercise our power to review defendant's challenge as a matter of discretion in the interest of justice (*see People v Carlisle*, 120 AD3d 1607, 1607-1608, *lv denied* 24 NY3d 1082; *see generally* CPL 470.15 [3] [c]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court

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

653

KA 14-01893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LORENZO GEORGE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered September 15, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

It is hereby ORDERED that the order so appealed from is unanimously modified in the exercise of discretion by determining that defendant is a level two risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Pursuant to the total risk factor score in the risk assessment instrument, defendant was presumptively a level three risk. The evidence at the SORA hearing established that the 19-year-old defendant engaged in nonforcible sexual intercourse with a 14-year-old female acquaintance. Defendant was convicted upon his guilty plea of, among other things, sexual misconduct (Penal Law § 130.20 [1]), a class A misdemeanor, and the original charge of rape in the second degree (§ 130.30 [1]) was dismissed.

We agree with defendant that a downward departure from the presumptive risk level is warranted in this case. Contrary to the contention of the People, we conclude that defendant preserved for our review his request for a downward departure inasmuch as he asked County Court to exercise its discretion to depart from the recommendation of the Board of Examiners of Sex Offenders (*cf. People v Johnson*, 11 NY3d 416, 421; *see generally Matter of New York State Bd. of Examiners of Sex Offenders v Ransom*, 249 AD2d 891, 891-892). In light of the totality of the circumstances, particularly the relatively slight age difference between defendant and the victim, as

well as the undisputed evidence that the victim's lack of consent was premised only on her inability to consent by virtue of her age, we conclude in the exercise of our own discretion that the assessment of 25 points under the second risk factor, for sexual contact with the victim, results in an overassessment of defendant's risk to public safety (*see People v Carter*, 138 AD3d 706, 707-708; Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 9 [2006]; *see generally People v Goossens*, 75 AD3d 1171, 1172). We therefore modify the order by determining that defendant is a level two risk.

Entered: July 8, 2016

Frances E. Cafarell
Clerk of the Court