SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 18, 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

710

KA 11-00940

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY L. NEWTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered March 7, 2011. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and gang assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and gang assault in the first degree (§ 120.07). Contrary to defendant's contention, Supreme Court properly denied his *Batson* challenge with respect to prospective juror number two. Defendant failed to meet his prima facie burden of establishing that the prosecutor exercised the peremptory challenge in a discriminatory manner (*see generally People v Smocum*, 99 NY2d 418, 421). Defendant's assertion that "there wasn't anything obvious . . . in her responses that would seem to make her favorable to the defense," "standing alone, [is] generally insufficient to establish a prima facie case of discrimination" (*People v MacShane*, 11 NY3d 841, 842; *see People v May*, 125 AD3d 1465, 1466, *lv denied* 25 NY3d 1204).

We reject defendant's contention that the court abused its discretion in discharging a sworn juror based upon a medical emergency involving the juror's grandmother (*see People v Barkley*, 66 AD3d 1432, 1432, *lv denied* 13 NY3d 905), after having made the requisite "reasonably thorough inquiry" in determining that the juror was unavailable for continued service (CPL 270.35 [2] [a]).

Contrary to defendant's further contention, we conclude that the court did not abuse its discretion in concluding that the prejudicial effect of the jury learning that defendant was incarcerated was

outweighed by the probative value of the People's evidence of defendant's statements in a recorded jailhouse telephone conversation (*see generally People v Jenkins*, 88 NY2d 948, 950). We further conclude that, when viewed in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

735

KA 15-00027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW KUZDZAL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 28, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and predatory sexual assault against a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree for the depraved indifference killing of a person less than 11 years old (Penal Law § 125.25 [4]), and predatory sexual assault against a child (§ 130.96). On September 15, 2013, at around 7:30 p.m., defendant called 911 to report as unconscious his girlfriend's five-year-old son, with whom defendant had been home alone for approximately six hours. First responders found the child lying motionless on the living room floor. He arrived at the hospital with numerous injuries including a severely fractured skull, swelling and graying of the brain, a core body temperature of 89 degrees, and lacerations and abrasions to his anal and rectal areas. The child died from his injuries two days later. When the police confronted defendant with the evidence of the child's anal and rectal injuries, he became "very agitated" and said that he would tell the truth if the police "didn't charge him with rape." At trial, the child's physicians testified that his head injury was of a kind usually associated with "high speed, high velocity" incidents such as a car crash or an "assault with a baseball bat," and his anal and rectal injuries were consistent with traumatic penetration and "required some force" to inflict. The physicians further testified that the child's body temperature indicated that he suffered his head injury two to three hours before he arrived at the hospital, and that the graying of his brain matter indicated a prolonged period of lack of oxygen. That timing estimate

was consistent with evidence of defendant's cell phone records, which showed an unusual lapse in text messaging from his phone between 4:18 p.m. and 4:52 p.m. Furthermore, a forensic biologist testified that genetic material found on the inside rear portion of the child's underwear matched defendant's DNA profile, and that the probability of finding a match from individuals in the United States is 1 in 7.758 billion. Although the test on the genetic material to determine the presence of semen was inconclusive, the biologist testified that the material "did not have the visual appearance of a blood stain."

In light of the child's utter dependence on defendant as his caregiver, and the evidence of defendant's physical assault on the child and failure to seek immediate medical help, we reject defendant's contention that his conviction of depraved indifference murder of a person less than 11 years old is not based on legally sufficient evidence of " 'utter disregard for the value of human life' " (*People v Barboni*, 21 NY3d 393, 400; *see generally People v Bleakley*, 69 NY2d 490, 495). We reject defendant's further contention that his conviction of predatory sexual assault against a child is not based on legally sufficient evidence of anal sexual conduct. Contrary to defendant's contention, "penetration may be proven by circumstantial evidence" (*People v McDade*, 64 AD3d 884, 886, *affd* 14 NY3d 760). In addition, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We nonetheless agree with defendant that Supreme Court erred in failing to make a proper inquiry of two jurors who allegedly were overheard making disparaging comments about defendant during a recess. "If at any time after the trial jury has been sworn and before the rendition of its verdict, . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . the court must discharge such juror" (CPL 270.35 [1]). The standard for discharging a sworn juror is satisfied " 'when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict' " (*People v Buford*, 69 NY2d 290, 298; *see People v Dennis*, 91 AD3d 1277, 1279, *lv denied* 19 NY3d 995). There is a well-established framework by which the court must evaluate a sworn juror who, for one reason or another, may possess such a state of mind (*see People v Mejias*, 21 NY3d 73, 79, *rearg denied* 21 NY3d 1058; *see generally Buford*, 69 NY2d at 298-299).

To make a proper determination, the court "must question each allegedly unqualified juror individually in camera in the presence of the attorneys and defendant" (*Buford*, 69 NY2d at 299). "In a probing and tactful inquiry, the court should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case" (*id.*). During the inquiry, "the court should carefully consider the juror's answers and demeanor to ascertain whether [his or] her state of mind will affect [his or] her deliberations" (*id.*). That accomplished, the court must place the reasons for its ruling on the record (*see id.*).

It has been emphasized repeatedly that " 'each case must be evaluated on its unique facts' " (*Mejias*, 21 NY3d at 79, quoting *Buford*, 69 NY2d at 299). To that end, the court must hold a *Buford* inquiry whenever there are facts indicating the possibility of juror bias, and must not base its ruling on speculation (*see People v Henry*, 119 AD3d 607, 608, *lv denied* 24 NY3d 961; *People v Dotson*, 248 AD2d 1004, 1004, *lv denied* 92 NY2d 851). Not only does the court's failure to hold an inquiry under such circumstances constitute reversible error, but its failure to place the reasons for its ruling on the record also constitutes reversible error (*see People v Porter*, 77 AD3d 771, 773, *lv denied* 16 NY3d 799). Such errors are not subject to harmless error analysis (*see Mejias*, 21 NY3d at 83).

In the instant matter, before the jury began deliberating, one of defendant's friends, who had been observing the proceedings, reported that she had overheard two jurors using a derogatory term to refer to defendant. The court called the observer to the witness stand, where she identified two jurors whom she observed "outside smoking a cigarette talking about [defendant being] a scumbag . . . [and] in the back row laughing and making faces." Based on those observations, defense counsel asked the court to perform an inquiry of the two jurors. The prosecutor opposed an inquiry, and instead asked the court to "make a ruling as to whether [it found] this description credible first." The court denied defendant's request and stated: "I don't – – I don't believe that an inquiry of the juror is necessary or appropriate here . . . [b]ased on what I heard." The court failed to conduct an inquiry of the jurors.

We respectfully disagree with our dissenting colleagues that the court lacked sufficient credible information indicating the possibility of juror bias. The court's ruling that an inquiry was not "necessary or appropriate" was conclusory and, contrary to the People's contention, did not constitute an implied determination that the observer's testimony was incredible. Unlike in *People v Matiash* (197 AD2d 794, *lv denied* 82 NY2d 899), where the trial court made a thorough record explaining why the alleged juror misconduct was innocuous and thus did not warrant further inquiry (*id.* at 795), here the court did not explain on the record its reasons for denying defendant's request. Based on the record before us, we are compelled to conclude that the jurors' alleged reference to defendant as a "scumbag" indicated the possibility of juror bias, and thus that the court should have granted defendant's request to make an inquiry of the jurors. "[I]t might have been that removal of the juror[s] would have been unnecessary if a specific inquiry had been made by the court or counsel, but in the absence of such an inquiry, we cannot be certain that the defendant was fairly convicted" (*People v Ventura*, 113 AD3d 443, 446, *lv denied* 22 NY3d 1203). We therefore reverse the judgment and order a new trial.

Because a new trial must be held, we address in the interest of judicial economy defendant's contention that the court erred in refusing to charge him with manslaughter in the second degree as a lesser included offense. We reject that contention. Manslaughter in the second degree is not a lesser included offense of depraved

indifference murder of a person less than 11 years old (*see People v Santiago*, 101 AD3d 1715, 1716, *lv denied* 21 NY3d 946; *see generally People v Leak*, 129 AD3d 745, 746, *lv denied* 26 NY3d 969).

Finally, in light of our determination, defendant's challenge to the severity of the sentence is moot.

All concur except SMITH, J.P., and PERADOTTO, J., who dissent and vote to affirm in accordance with the following memorandum: We respectfully dissent and would affirm the judgment because we disagree with the majority that Supreme Court was required to conduct a further inquiry pursuant to *People v Buford* (69 NY2d 290). It is well settled that, " '[i]f at any time after the trial jury has been sworn and before the rendition of its verdict . . . the court finds, from facts unknown at the time of the selection of the jury, that a juror is *grossly unqualified* to serve in the case . . . the court *must* discharge such juror' " (*Buford*, 69 NY2d at 298, quoting CPL 270.35 [1]; *see People v Mejias*, 21 NY3d 73, 79, *rearg denied* 21 NY3d 1058). The Court of Appeals has stated that its "intention in *Buford* was to create a framework by which trial courts could evaluate sworn jurors who, for some reason during the trial, may possess[ ] a state of mind which would prevent the rendering of an impartial verdict" (*Mejias*, 21 NY3d at 79 [internal quotation marks omitted]).

We agree with the majority that, "[w]hen a sworn juror's comments or actions raise[] a question concerning his or her ability to be impartial, 'the trial court must question each allegedly unqualified juror individually in camera in the presence of the attorneys and defendant . . . In a probing and tactful inquiry, the court should evaluate the nature of what the juror has seen, heard, or has acquired knowledge of, and assess its importance and its bearing on the case' " (*People v Ruggiero*, 279 AD2d 538, 538, *lv denied* 96 NY2d 834, quoting *Buford*, 69 NY2d at 299). We conclude, however, that the issue presented on this appeal is not whether the court conducted a sufficient *Buford* inquiry of the jurors at issue, but rather whether there was sufficient credible information indicating that any juror made a comment or engaged in an action that "raises a question concerning his or her ability to be impartial" as required to trigger a *Buford* inquiry of the juror (*id.*).

"The right to a trial by jury in criminal cases is 'fundamental to the American scheme of justice' and essential to a fair trial . . . At the heart of this right is the need to ensure that jury deliberations are conducted in secret, and not influenced or intruded upon by outside factors" (*People v Rivera*, 15 NY3d 207, 211, quoting *Duncan v Louisiana*, 391 US 145, 148-149). Thus, a court may not simply intrude on the jury and begin questioning a member or members thereof unless there is some credible information indicating that a juror may have made a comment or taken an action that raises a question regarding that juror's ability to be impartial. Here, we agree with the court that no such credible information was presented and that no personal inquiry of the jurors at issue was necessary or proper.

It is well settled that "a determination of whether an inquiry by the court is warranted should be based on the unique facts of each case" (*People v Paulino*, 131 AD3d 65, 72, *lv denied* 26 NY3d 1042, *reconsideration denied* 27 NY3d 1004). As the majority notes, this issue arose when a spectator apparently told defense counsel that a juror made an inappropriate statement to another juror while court was not in session. Defense counsel asked to approach the bench after summations, and then the court directed the spectator to take the witness stand and be sworn. The spectator testified that she observed two jurors talking to each other while smoking outside the courthouse, and that one of them stated that defendant was a "scumbag." The spectator also testified that she noticed that those same jurors "were in the back row laughing and making faces" during the trial proceedings. The spectator initially stated that she merely walked past the jurors when she overheard that remark because she did not want to get involved, and that it had happened the day before she testified, after court. Upon further questioning by the court and counsel, however, the spectator repeatedly stated that the incident occurred while the court was taking a break. The record establishes, however, that the court did not take a break on the day the spectator said she overheard the conversation. Rather the court conducted proceedings without a break in the morning, and then the jury was sent home for the day at about lunchtime. The spectator also stated that she overheard the conversation at issue immediately after she was ejected from the courthouse, and she was not permitted to reenter the courthouse to inform defense counsel. Conversely, she also stated that she was ejected because she was telling her friend about this incident and saying that it was not right. In addition, she testified that she overheard the conversation when she "stopped and listened for a minute," but seconds earlier she had testified that she and the friend "were going to stop and smoke a cigarette but [they] kept going because [they] didn't want to be involved." Finally, the prosecutor in questioning the spectator stated, without objection, that defense counsel had said that the spectator was defendant's girlfriend, but the spectator testified that she was merely a family friend, despite also admitting that she had visited defendant in jail.

At the conclusion of the spectator's testimony, defense counsel asked the court to conduct an inquiry of the jurors, and the prosecutor contended that no further inquiry was warranted based on the spectator's information. The prosecutor further stated that he thought "the Court should make a ruling as to whether [it] find[s] this description credible first." The court replied: "I don't – – I don't believe that an inquiry of the juror is necessary or appropriate here . . . [b]ased on what I heard."

In this case, the "[c]ourt chose to begin its in camera interrogation not with the jurors themselves, but rather with the witness[, i.e., the spectator,] in an effort to first ascertain exactly what that witness had seen and heard. This being the least disruptive method of initially ascertaining the particulars, we see no error in this mode of proceeding" (*People v Matiash*, 197 AD2d 794, 796, *lv denied* 89 NY2d 899). We further conclude that the court, by stating that it was basing its ruling on what it had heard, determined

that the spectator's testimony was not sufficiently credible to warrant disrupting the normal trial procedure or further inquiring into the actions of the two jurors in question.

The record fully supports that determination. The spectator's testimony was riddled with inconsistencies, and it did not comport with the chronology of the proceedings in court as they are reflected in the record. Additionally, the prosecutor noted without objection that the spectator had previously informed defense counsel that she was defendant's girlfriend, yet she denied such a relationship while testifying. Finally, the spectator testified about actions that the subject jurors allegedly took during the proceedings, and thus the court had the ability to assess the credibility of the spectator by comparing her account to events that the court itself had observed. It is clear that the court was closely observing the jury throughout the proceedings, as demonstrated by the fact that the court previously noted that a juror had fallen asleep, and that another juror was tired but paying attention. Consequently, the court, having a full opportunity to observe the spectator while she was testifying and judge her demeanor, and having the ability to assess her credibility against known facts, properly concluded that her testimony was not credible. It is well settled that a hearing court's credibility determinations are entitled to deference due to its ability to carefully evaluate the answers and demeanor of witnesses (*see generally People v Harris*, 288 AD2d 610, 616, *affd* 99 NY2d 202; *People v Chatt*, 77 AD3d 1285, 1286, *lv denied* 17 NY3d 793). Here, especially in light of the significant evidence in the record supporting the court's determination not to credit the testimony of the spectator, we see no reason to disturb that determination. Consequently, inasmuch as there is no credible evidence indicating that any juror engaged in misconduct, there was no need for a further inquiry of the individual jurors.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

794

KA 12-01813

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MALCOLM DAME, DEFENDANT-APPELLANT.

J. SCOTT PORTER, SENECA FALLS, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered February 1, 2012. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant failed to preserve for our review his contention that County Court did not provide him with an opportunity to suggest appropriate responses to a jury note indicating that the jury was at a "three way stand still" (*see People v Nealon*, 26 NY3d 152, 158). We reject defendant's contention that preservation is not required because the court's handling of the jury note is a mode of proceedings error (*see generally People v O'Rama*, 78 NY2d 270, 279). When "counsel has meaningful notice of a substantive jury note because the court has read the precise content of the note into the record in the presence of counsel, defendant, and the jury, the court's failure to discuss the note with counsel before recalling the jury is not a mode of proceedings error. Counsel is required to object to the court's procedure to preserve any such error for appellate review" (*Nealon*, 26 NY3d at 161-162; *see People v Mack*, 27 NY3d 534, 542, *rearg denied* 28 NY3d 944). Here, the record establishes that defendant had meaningful notice of the jury note inasmuch as the court provided counsel with copies of the note before the jury returned to the courtroom, and the court read the note into the record in the presence of counsel, defendant, and the jury (*see Nealon*, 26 NY3d at 161-162*; People v Parker*, 304 AD2d 146, 159, *lv denied* 100 NY2d 585). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6]

[a]).

With respect to defendant's contention that the court erred in the handling of a separate jury note requesting exhibits, the record establishes that defendant waived his right to be notified of the jury's request for the trial exhibits, to be present for the reading of any jury note containing such a request, and to have any input into the manner of delivery of the exhibits to the jury (*see People v Brown*, 125 AD3d 1550, 1551, *lv denied* 27 NY3d 993). Defendant further contends that the court erred in responding to another jury note by providing the jury with a report that was not in evidence. Defendant failed to object or seek any remedy when the court discussed the issue in the presence of counsel, defendant and the jury, and his "silence at a time when any error by the court could have been obviated by timely objection renders the [contention] unpreserved" for our review (*People v Starling*, 85 NY2d 509, 516; *see People v Geroyianis*, 96 AD3d 1641, 1643, *lv denied* 19 NY3d 996, *reconsideration denied* 19 NY3d 1102). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant's further contention that the court erred in dismissing a hearing-impaired prospective juror without inquiring into the availability of a reasonable accommodation is not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence in light of the elements of the crime of manslaughter in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801). Defendant failed to preserve for our review his contention that the jury was coerced into reaching a verdict by the court's alleged denial of the jury's request for smoking breaks during deliberations (*see generally People v Ford*, 155 AD2d 863, 863, *affd* 76 NY2d 868). In any event, the record belies the contention that the jury was denied smoking breaks, and we therefore conclude that defendant's contention is without merit. Finally, the sentence is not unduly harsh or severe.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

804

CAF 14-02290

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

IN THE MATTER OF ETA ROTTENBERG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE CLARKE, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

WAYNE CLARKE, RESPONDENT-APPELLANT PRO SE.

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILD, MIDDLESEX.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 13, 2014 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order by requiring respondent's visitation with the subject child to be supervised.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the denial of his motion for recusal, and the order entered February 20, 2014 is affirmed without costs.

Memorandum: Respondent father appeals from two orders in a proceeding pursuant to Family Court Act article 6. The order in appeal No. 1 granted petitioner mother's petition seeking to modify the visitation provisions contained in a prior order by requiring that the father's visits with the subject child be supervised. The order in appeal No. 2 granted the mother's petition seeking an order of protection on behalf of the child.

With respect to the order in appeal No. 1, the record establishes that, during the hearing on the mother's petition, the father discharged his assigned counsel, advised Family Court that he would proceed pro se, and failed to appear for the remainder of the hearing. Thus, we conclude that the order in appeal No. 1 was entered upon the father's default, and it is well settled that no appeal lies from an order that is entered upon the default of the appealing party (*see* CPLR 5511; *Matter of Li Wong v Fen Liu*, 121 AD3d 692, 693; *Matter of Alexandria M. [Mattie M.]*, 108 AD3d 548, 549). In any event, even assuming, arguendo, that the order was not entered on the father's default, we nevertheless reject his contention that the court erred in modifying the prior order of visitation inasmuch as the court's determination is supported by a sound and substantial basis in the record (*see Matter of Green v Bontzolakes*, 111 AD3d 1282, 1284).

Nevertheless, the father's appeal from the final order brings up for our review "matters which were the subject of contest" before the court (*James v Powell*, 19 NY2d 249, 256 n 3, *rearg denied* 19 NY2d 862; *see Britt v Buffalo Mun. Hous. Auth.*, 109 AD3d 1195, 1196), i.e., the underlying order denying the father's recusal motion. We conclude that the father's contention that the court should have recused itself is without merit. Absent a ground for disqualification under Judiciary Law § 14, a trial judge is the sole arbiter of whether recusal is warranted (*see Matter of Hogan v Fischer*, 90 AD3d 1544, 1545, *lv denied* 19 NY3d 801). Here, we conclude that the court did not abuse its discretion in denying the father's motion for recusal because he failed to set forth any evidence of bias or prejudice on the part of the court (*see Matter of Montesdeoca v Montesdeoca*, 38 AD3d 666, 667).

With respect to the order in appeal No. 2, even assuming, arguendo, that the order of protection was not entered upon the father's default and thus that the appeal is properly before us, that order expired by its own terms on March 13, 2015, and the appeal must therefore be dismissed as moot (*see Matter of Rochester v Rochester*, 26 AD3d 387, 387-388).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

805

CAF 15-00036

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

IN THE MATTER OF ETA ROTTENBERG,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

WAYNE CLARKE, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

WAYNE CLARKE, RESPONDENT-APPELLANT PRO SE.

SHEILA SULLIVAN DICKINSON, ATTORNEY FOR THE CHILD, MIDDLESEX.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered March 13, 2014 in a proceeding pursuant to Family Court Act article 6. The order restrained respondent from injurious actions with respect to the subject child.

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

Same memorandum as in *Matter of Rottenberg v Clarke* ([appeal No. 1] ___ AD3d ___ [Nov. 18, 2016]).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

907

KA 13-02206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GILBERTO LOPEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered January 30, 2013. The appeal was held by this Court by order entered May 6, 2016, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings. The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to rule on defendant's motion to dismiss the indictment based on an alleged violation of CPL 190.75 (3) (*People v Lopez*, 139 AD3d 1381). The basis of defendant's motion is his allegation that the People sought an indictment from the grand jury on only one charge, for criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), which stemmed from defendant's alleged possession of heroin during a traffic stop (hereafter, traffic stop charge). Defendant also alleged in his motion that the People withdrew from the consideration of the grand jury two other charges, i.e., criminal sale of a controlled substance in the third degree (§ 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), which stemmed from defendant's alleged sale of heroin to an individual in a gas station parking lot (hereafter, criminal sale charges). Defendant contended that the withdrawal of the criminal sale charges constituted an effective dismissal thereof, and that the People were therefore required to obtain authorization of the court to re-present those charges to another grand jury. Inasmuch as the People failed to obtain such authorization before presenting the criminal sale charges to a second grand jury, the indictment was rendered jurisdictionally defective. Upon remittal, the court denied the motion.

Contrary to defendant's contention, the court properly denied the motion. We agree with defendant that, had the People actually withdrawn from the first grand jury consideration of the criminal sale charges that it had presented, such withdrawal would have constituted the functional equivalent of a dismissal of those charges under *People v Wilkins* (68 NY2d 269, 274). The minutes from the first grand jury, however, do not support the allegations in defendant's motion. Those minutes make clear that, although the People presented the first grand jury with evidence of both the traffic stop and the criminal sale, they asked the first grand jury to consider only the traffic stop charge. We conclude that asking the first grand jury to consider only the traffic stop charge did not constitute the withdrawal of the criminal sale charges and the functional equivalent of their dismissal. Although the first grand jury heard some of the facts underlying the criminal sale charges, they never considered the criminal sale charges, and " 'the extent to which the grand jury *considered the evidence and the charge[s]*' " is the "key factor" in an analysis "whether an unauthorized withdrawal of [charges] must be treated as a dismissal" (*People v Gelman*, 93 NY2d 314, 319; *see Wilkins*, 68 NY2d at 274; *see also People v Davis*, 17 NY3d 633, 638). Indeed, there is no indication in the first grand jury minutes that the grand jury was even aware of the existence or possibility of the criminal sale charges, and the Court of Appeals has made clear that, " '[b]efore a grand jury may be said to have acted upon a charge, there must be some indication that it knew about it' " (*Wilkins*, 68 NY2d at 274). Moreover, "[t]here is no evidence in this record that would raise the primary concern of . . . *Wilkins*, namely that the People withdrew [the criminal sale charges] in order to present [them] to a more compliant grand jury" (*Davis*, 17 NY3d at 639). The People's decision not to present the criminal sale charges for the consideration of the first grand jury is not " 'fundamentally inconsistent with the objectives underlying CPL 190.75' " (*Davis*, 17 NY3d at 638, quoting *Gelman*, 93 NY2d at 319), and we therefore conclude that this case does not present those " 'limited circumstances' " to which the holding of *Wilkins* applies (*id.*).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

926

CA 15-01939

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

IN THE MATTER OF THE ESTATE OF MANSFIELD B. JORDAN, DECEASED.

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

NORMA J. MOBLEY AND MANSFIELD B. JORDAN, JR., CO-EXECUTORS OF THE ESTATE OF MANSFIELD B. JORDAN, DECEASED, PETITIONERS-RESPONDENTS;

VERONICA T. REYES, RESPONDENT-APPELLANT.

MCMAHON, KUBLICK & SMITH, P.C., SYRACUSE (RALPH S. ALEXANDER OF COUNSEL), FOR RESPONDENT-APPELLANT.

THE MARRONE LAW FIRM, P.C., EAST SYRACUSE (ANTHONY A. MARRONE, II, OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered June 8, 2015. The order denied the motion of respondent for summary judgment dismissing the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, and judgment is granted in favor of respondent as follows:

> It is ORDERED, ADJUDGED and DECREED that respondent is entitled to the proceeds of the Fidelity investment account at issue.

Memorandum: As relevant on appeal, petitioners commenced this proceeding in Surrogate's Court seeking a declaration that the proceeds of a Fidelity investment account must be issued to petitioners. Decedent's will was admitted to probate on April 23, 2013 and letters testamentary were issued to petitioners. Petitioner Norma J. Mobley was the sole beneficiary on the Fidelity investment account until December 17, 2012, when decedent designated respondent, a woman he had been dating prior to his death, as the sole beneficiary. Respondent moved for summary judgment dismissing the petition and requested that the proceeds of the Fidelity investment account be distributed to her. The Surrogate denied the motion, and we reverse. We note at the outset that the proper remedy is to grant a declaration in favor of respondent, and not to dismiss the petition (*see generally Boyd v Allstate Life Ins. Co. of N.Y.*, 267 AD2d 1038, 1039).

It is well established that "[t]he essential elements of a gift

are (1) donative intent, (2) delivery, and (3) acceptance" (*Spallina v Giannoccaro*, 98 AD2d 103, 106, *appeal dismissed* 62 NY2d 646). "The element of donative intent presupposes that the donor possesses the mental capacity to make a gift" (*id.*). In support of her motion, respondent submitted the sworn statements of two disinterested witnesses who indicated that they were decedent's close friends, had spent time with him during December 2012, including Christmas of that year, were aware of respondent's criminal history, and ultimately concluded that decedent was of sound mind and was fully cognizant of his intent to transfer the subject Fidelity investment account to respondent. In addition, respondent provided a sworn statement in which she attached a Fidelity envelope, dated December 19, 2012, addressed to decedent with "Happy Birthday Veronica" handwritten in the area above decedent's printed address. In view of the foregoing, we conclude that respondent established her entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In opposition, petitioners submitted the affidavit of counsel and the affidavit of a medical expert with his attached expert report. Counsel contended that, because respondent has a criminal history and decedent left financial related passwords out in the open, there is a question of fact whether respondent changed the designation on the subject Fidelity account herself. That contention, however, is based on "mere conclusions, expressions of hope or unsubstantiated allegations," which are insufficient to defeat a motion for summary judgment (*id.*). In addition, although we agree with petitioners that "an expert may rely on out-of-court material if 'it is of a kind accepted in the profession as reliable in forming a professional opinion,' " it is well established that "there must be evidence establishing the reliability of the out-of-court material" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726). Here, petitioners' expert concluded that decedent did not have the capacity to change the beneficiary designation on the Fidelity investment account, and would not have done so but for his dementia. The expert then listed the "sources of information" upon which he relied in forming his opinion, but the expert failed to attach any of those "sources," and thus his affidavit and report have no probative value (*see Costanzo v County of Chautauqua*, 108 AD3d 1133, 1133-1134; *Daniels v Meyers*, 50 AD3d 1613, 1614). Inasmuch as petitioners' expert did not examine decedent prior to his death, the expert did not reference any medical records that established decedent's incapacity during the relevant time period, and the expert relied to "a great extent on hearsay statements from unspecified witnesses," we conclude that the expert's affidavit and report are insufficient to raise an issue of fact (*Gardner v Ethier*, 173 AD2d 1002, 1003; *see San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 592). We therefore reverse the order and grant judgment in favor of respondent, declaring that respondent is entitled to the proceeds of the Fidelity investment account.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

932

KA 15-00647

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRI T. HAVENS, DEFENDANT-APPELLANT.

JEANNIE D. MICHALSKI, CONFLICT DEFENDER, GENESEO, FOR DEFENDANT-APPELLANT.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), entered February 26, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: 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 the contention of defendant that County Court erred in determining that he is a level three risk. At the outset, we note that "[d]efendant failed to request a downward departure to a level two risk, and thus he failed to preserve for our review his contention that the court erred in failing to afford him that downward departure from his presumptive level three risk" (*People v Quinones*, 91 AD3d 1302, 1303, *lv denied* 19 NY3d 802).

Contrary to defendant's contention, the court properly assessed 10 points against him under risk factor 12, for failure to accept responsibility for his crime (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 15-16 [2006]). Although defendant pleaded guilty to the crime underlying the SORA determination, the case summary, defendant's preplea investigation statement, and the statements that he made during the SORA hearing did not "reflect a genuine acceptance of responsibility as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Noriega*, 26 AD3d 767, 767, *lv denied* 6 NY3d 713 [internal quotation marks omitted]; *see People v Smith*, 75 AD3d 1112, 1112). Rather than accepting responsibility, defendant attributed his behavior to being under the influence of alcohol and marihuana, blamed

the victim, and refused to show remorse (*see People v Wilson*, 117 AD3d 1557, 1557-1558, *lv denied* 24 NY3d 902; *People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707; *People v Kyle*, 64 AD3d 1177, 1177, *lv denied* 13 NY3d 709; *Noriega*, 26 AD3d at 767).

Contrary to defendant's further contention, the court's assessment of 10 points under risk factor 13, for conduct while confined (*see* Guidelines, at 16), is supported by evidence establishing that, even though the case summary described defendant's conduct while confined as "acceptable" (*see People v Belile*, 108 AD3d 890, 891, *lv denied* 22 NY3d 853), his record while incarcerated included 19 tier II violations and five tier III violations (*see People v Anderson*, 137 AD3d 988, 988, *lv denied* 27 NY3d 909; *People v Correnti*, 126 AD3d 681, 681; *People v Catchings*, 56 AD3d 1181, 1182, *lv denied* 12 NY3d 701).

Even assuming, arguendo, that defendant was a presumptive level two risk based on his total risk factor score, we conclude that the court properly determined, in the alternative, that an upward departure to a level three risk was warranted because there is clear and convincing evidence of "aggravating . . . circumstances . . . not adequately taken into account by the guidelines" (*People v Gillotti*, 23 NY3d 841, 861; *see People v Witherspoon*, 140 AD3d 1674, 1674-1675, *lv denied* ___ NY3d ___ [Oct. 25, 2016]), including that defendant was diagnosed with pedophilia and had difficulty controlling his urges (*see People v Moore*, 130 AD3d 1498, 1498; *People v Mallaber*, 59 AD3d 989, 990, *lv denied* 12 NY3d 710; *People v Seils*, 28 AD3d 1156, 1156, *lv denied* 7 NY3d 709).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

936

KA 14-01243

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH MACHADO, DEFENDANT-APPELLANT.

STEPHEN J. BIRD, ROCHESTER, FOR DEFENDANT-APPELLANT.

JOSEPH MACHADO, DEFENDANT-APPELLANT PRO SE.

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (JOSHUA J. TONRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered May 22, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), burglary in the first degree (two counts), grand larceny in the fourth degree (three counts) and unlawful imprisonment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, two counts each of robbery in the first degree (Penal Law § 160.15 [3], [4]) and burglary in the first degree (§ 140.30 [3], [4]). At trial, the victim testified that two men entered his home, placed a pillowcase over his head, and took many of his belongings, including a shotgun. Before leaving the victim's home, one of the men held the shotgun to the victim's head, and the victim noticed that one of the intruders wore red sneakers. One of the intruders testified at defendant's trial that he and defendant committed the crimes, and that defendant had been wearing the red sneakers during the incident. The victim's neighbor testified that defendant had been at his house the evening prior to the crimes, and that defendant was wearing red sneakers. The neighbor further testified that, while defendant was at his house, a video was recorded that depicted defendant's red sneakers. Although the video did not show defendant's face, the victim testified that the red sneakers depicted in the video were the same ones that he observed on one of the intruders.

We reject defendant's contention that County Court should have dismissed the indictment on the ground that the integrity of the grand jury proceeding was impaired. Although the People submitted some

hearsay evidence to the grand jury, the remaining evidence was sufficient to sustain the indictment (*see People v Huston*, 88 NY2d 400, 409; *People v Butcher*, 11 AD3d 956, 958, *lv denied* 3 NY3d 755).

Defendant contends that the evidence is legally insufficient to sustain the conviction of one count of robbery in the first degree (Penal Law § 160.15 [3]) and one count of burglary in the first degree (§ 140.30 [3]) because the People did not establish that the shotgun was used or threatened to be used as a dangerous instrument. We reject that contention. To establish that a gun is a dangerous instrument, the People must present evidence that it was loaded and operable or that it was used as a club or bludgeon (*see People v Spears*, 125 AD3d 1400, 1400, *lv denied* 25 NY3d 1172; *People v Wilson*, 252 AD2d 241, 249). Here, the People established through circumstantial evidence that the weapon was a dangerous instrument inasmuch as it was loaded and operable (*see People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172). The shotgun was never recovered, but the victim testified that he kept it loaded and in his bedroom, and that he had fired it on previous occasions.

Defendant further contends that the conviction on all counts should be reversed because there is legally insufficient evidence identifying him as the perpetrator. According to defendant, the People did not provide the required notice pursuant to CPL 710.30 that the victim would identify the red sneakers at trial and that identification testimony therefore should have been precluded. We conclude that no CPL 710.30 notice was required because there was no police-arranged identification procedure in which the victim identified defendant (*see* CPL 710.30 [1] [b]; *People v Jackson*, 71 AD3d 1457, 1457-1458, *lv dismissed in part and denied in part* 17 NY3d 774). We further conclude that the evidence, including the testimony of the second intruder identifying defendant and the testimony of the neighbor that defendant was wearing red sneakers around the time of the offense, is sufficient to establish defendant's identity. Contrary to defendant's further contention, upon viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation (*see People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014; *People v Clark*, 138 AD3d 1449, 1451, *lv denied* 27 NY3d 1130). In any event, any alleged improprieties were not so egregious as to deprive defendant of a fair trial (*see Clark*, 138 AD3d at 1451; *People v Walker*, 117 AD3d 1441, 1442, *lv denied* 23 NY3d 1044). Defendant also failed to preserve for our review his contention in his main brief that the prosecutor improperly bolstered the victim's identification of the red sneakers worn by defendant, and his contention in his pro se supplemental brief that the prosecutor offered precluded testimony (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of

discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Viewing the evidence, the law and circumstances of this case, in totality and as of the time of representation, we reject defendant's further contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147). Finally, the sentence is not unduly harsh or severe.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

938

KA 16-00161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY WILLIAMS, III, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (HERBERT L. GREENMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 29, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05). Defendant contends that County Court erred in refusing to suppress the physical evidence obtained from him as well as the statements he made both before and after his arrest inasmuch as the police did not have reasonable suspicion or probable cause to ask defendant a question that was intended to evoke an inculpatory response. We reject that contention.

At the suppression hearing, the arresting police officer testified that defendant was a passenger in a vehicle that had been pulled over for failing to signal before a turn. Upon approaching the vehicle, the officer asked for defendant's name and identification, and observed that defendant was patting his pocket and was shaking and visibly nervous. After the officer inquired why defendant was shaking and was so nervous, defendant replied, "I'm not going to lie. I got a little bit of weed on me." In response to the officer's further questions, defendant admitted that he possessed five bags of marihuana and, after defendant was taken out of the vehicle, the police found a small handgun and five or six bags of marihuana on defendant's person.

We conclude that, after the stop, the officer was permitted to

approach defendant as a passenger in the vehicle and ask nonincriminating questions (*see generally People v Hollman*, 79 NY2d 181, 190-191; *People v Rodriguez*, 82 AD3d 1614, 1615, *lv denied* 17 NY3d 800; *People v Faines*, 297 AD2d 590, 593, *lv denied* 99 NY2d 558). Contrary to defendant's contention, the officer's question in response to defendant's manifest nervousness did not "exceed[ ] a request for information and the question[ ] was neither invasive nor focused on possible criminality" (*Faines*, 297 AD2d at 593 [internal quotation marks omitted]; *see People v Tejada*, 270 AD2d 655, 656, *lv denied* 95 NY2d 805). Indeed, defendant's admission that he possessed marihuana in response to the officer's inquiry "went far beyond what the officer's words could reasonably expect to evoke" (*Faines*, 297 AD2d at 594).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

942

CAF 15-00684

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

IN THE MATTER OF OMIA M., DE'KARI M., ARIEL M., AND DWAYNE M.

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

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

TYKIA B., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

ELISABETH M. COLUCCI, BUFFALO, FOR PETITIONER-RESPONDENT.

DEAN S. PULEO, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered January 26, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order denied respondent's motion to vacate an order approving respondent's surrender of her parental rights.

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

Memorandum: Respondent mother appeals from an order denying her motion pursuant to CPLR 5015 (a) to vacate an order approving her conditional judicial surrender of parental rights with respect to her five children (*see* Social Services Law § 383-c [3] [a], [b]). The mother's motion was based solely upon Family Court's inherent power to open its prior orders or judgments in the interest of justice (*see generally Oneida Natl. Bank & Trust Co. of Cent. N.Y. v Unczur*, 37 AD2d 480, 483). Thus, the mother's contention that she did not knowingly enter into the surrender of her parental rights is raised for the first time on appeal and therefore is not preserved for our review (*see generally Matter of Arkadian S. [Crystal S.]*, 130 AD3d 1457, 1458, *lv dismissed* 26 NY3d 995). In any event, that contention is without merit. It is well settled that, in the absence of "fraud, duress or coercion in the execution or inducement of a surrender[, n]o action or proceeding may be maintained by the surrendering parent . . . to revoke or annul such surrender" (§ 383-c [6] [d]). Here, the mother failed to allege fraud, duress or coercion as a basis for vacatur (*see Matter of Sabrina H.*, 245 AD2d 1134, 1135). Moreover, the record establishes that the court's voir dire of the mother substantially complied with the requirements of Social Services Law § 383-c (3) (b) (*see Matter of Naquan L.G. [Carolyn C.]*, 140 AD3d 757,

760).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

952

CA 16-00239

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

BRANDY KOCH, INDIVIDUALLY AND AS PARENT AND
NATURAL GUARDIAN OF CASSIDY KOCH,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LISA RICHARDSON, DEFENDANT,
HEATHER M. GRIFFITH AND WILLIAM M. GRIFFITH,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (MARTHA E. DONOVAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered October 27, 2015. The order denied the motion of defendants Heather M. Griffith and William M. Griffith for summary judgment.

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 insofar as asserted on behalf of Cassidy Koch against defendants Heather M. Griffith and William M. Griffith is dismissed.

Memorandum: Plaintiff, individually and on behalf of her daughter, commenced this action seeking damages for injuries she and her daughter allegedly sustained when the motor vehicle in which they were traveling was struck by a vehicle owned and operated by Heather M. Griffith and William M. Griffith (defendants). Defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint on behalf of plaintiff's daughter against them on the ground that plaintiff's daughter did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). We agree.

Defendants met their initial burden of establishing as a matter of law that plaintiff's daughter did not sustain a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories by submitting her medical records and the report of a physician who reviewed them, which indicated that her symptoms of neck and back pain had resolved (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff

failed to raise a triable issue of fact inasmuch as she did not submit any evidence in opposition to defendants' motion with respect to those issues (*see generally id.*).

Defendants also met their initial burden on the motion with respect to the significant disfigurement category by submitting photographs of the daughter's cheek wherein the alleged scars were imperceptible (*see Heller v Jansma*, 103 AD3d 1160, 1161). In opposition to the motion, plaintiff did not raise an issue of fact inasmuch as she did not present evidence that " 'a reasonable person viewing [her daughter's cheek] in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn' " (*Smyth v McDonald*, 101 AD3d 1789, 1791; *see Heller*, 103 AD3d at 1161; *Doty v McInerny*, 77 AD3d 1264, 1265, *lv denied* 16 NY3d 703). Furthermore, plaintiff's assertion that the scars make her daughter "feel uncomfortable" does not raise a triable issue of fact whether the injury constitutes a significant disfigurement under the statute (*see Heller*, 103 AD3d at 1161).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

961

KA 14-01548

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD J. COLSRUD, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered December 9, 2013. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of endangering the welfare of a child (Penal Law § 260.10 [1]). Defendant contends that the verdict is legally repugnant inasmuch as the jury acquitted him of five counts of rape in the third degree (§ 130.25 [2]), one count of criminal sexual act in the third degree (§ 130.40 [2]), and three counts of unlawfully dealing with a child in the first degree (§ 260.20 [2]). We reject that contention. When viewed in light of the elements of each crime as charged to the jury without regard to the accuracy of those instructions (*see People v Tucker*, 55 NY2d 1, 4, 7-8, *rearg denied* 55 NY2d 1039), none of the acquittals negates an essential element of the crime of endangering the welfare of a child (*see People v Strickland*, 78 AD3d 1210, 1211; *see generally People v Muhammad*, 17 NY3d 532, 538-539).

Defendant also contends that, as instructed by the court, the jury was precluded from finding that he endangered the welfare of the victim under count two by any conduct beyond that which was alleged in the indictment with respect to rape in the third degree and criminal sexual act in the third degree. We reject that contention. Although the People concede defendant's interpretation of the court's instructions, such concession "does not . . . relieve us from the performance of our judicial function and does not require us to adopt the [interpretation] urged upon us" (*People v Berrios*, 28 NY2d 361, 366-367). We construe the instruction at issue to be permissive

rather than restrictive, and we therefore conclude that the instruction did not preclude the jury from considering evidence of other acts "likely to be injurious to the physical, mental or moral welfare" of the victim beyond the specific acts alleged in the other counts of the indictment (Penal Law § 260.10 [1]; *see generally Strickland*, 78 AD3d at 1211-1212).

We reject defendant's further contention that he was convicted on a theory different from that set forth in the indictment. We recognize the general rule that where a court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory (*see People v Grega*, 72 NY2d 489, 496). Here, count two of the indictment alleged that defendant endangered the child by subjecting her to "sexual contact" (*see* Penal Law § 130.00 [3]). The People's bill of particulars did not narrow the specific type of "sexual contact" alleged in count two (*cf. People v Duell*, 124 AD3d 1225, 1227, *lv denied* 26 NY3d 967), and the indictment did not limit the People to a particular act of "sexual contact" at trial (*see generally People v McGrew*, 103 AD3d 1170, 1174). The court instructed the jury under count two that the People were required to prove that defendant endangered the child by subjecting her to "sexual conduct," which the court defined in accordance with Penal Law § 130.00 (10). Inasmuch as the term "sexual contact" is broad enough to include all forms of "sexual conduct," we conclude that defendant received the requisite " 'fair notice of the accusations against him' " (*Grega*, 72 NY2d at 495; *see People v Abeel*, 67 AD3d 1408, 1410), and that there is no possibility that the jury could have convicted the defendant upon an uncharged theory.

Viewing the evidence in light of the elements of the crime of endangering the welfare of a child as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

962

KA 15-01774

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER W. BARTO, DEFENDANT-APPELLANT.

MULDOON, GETZ & RESTON, ROCHESTER (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered October 13, 2015. The judgment convicted defendant, upon a jury verdict, of insurance fraud in the third degree, falsifying business records in the first degree, defrauding the government and falsely reporting an incident in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of insurance fraud in the third degree (Penal Law § 176.20), falsifying business records in the first degree (§ 175.10), defrauding the government (§ 195.20), and falsely reporting an incident in the third degree (§ 240.50 [3]). The charges arose from allegations that defendant, while serving as an acting Village Justice in Waterloo, falsely reported to the police that he had been assaulted outside the courthouse after conducting an evening arraignment. According to defendant, he had been approached from behind by an unknown assailant and strangled with a ligature for approximately 30 seconds before he was able to break free. The assailant then struck defendant over the head with a hard object that broke into pieces upon impact, causing defendant to fall to the ground and lose consciousness. When he regained consciousness, defendant called the police from his cell phone. The police arrived within minutes to find defendant slumped on the ground outside the courthouse door, leaning against a railing. Broken pieces of a porcelain toilet tank lid were on the ground next to defendant. Although defendant had no visible injuries, he was taken to the hospital, where he complained of severe pain. While in the hospital, defendant underwent extensive testing to determine the cause of his pain, but those tests—including multiple CT scans, MRIs and X rays—showed nothing abnormal.

Upon defendant's discharge from the hospital, he was charged by a sealed indictment with falsely reporting an incident in the third degree, defrauding the government, falsifying business records in the first degree, and insurance fraud in the third degree, among other offenses. Those charges were based on the People's theory that defendant lied to the police about being attacked so that he could obtain prescription pain medication. The matter proceeded to trial, where the jury rendered a guilty verdict on all submitted counts. County Court sentenced defendant to six months in jail and five years of probation. At sentencing, defendant paid restitution of $41,477.20 to Seneca County for the costs of his medical treatment.

With respect to all counts, defendant contends generally that the evidence is legally insufficient and that the verdict is against the weight of the evidence because the People failed to prove beyond a reasonable doubt that he lied to the police about being attacked. We reject that contention. In our view, the medical evidence provides compelling proof that defendant was not attacked as he had claimed, and his varying accounts of the incident to the police further undermined his credibility. As the People's expert witnesses testified, and as common sense dictates, a person who is struck over the head with a porcelain toilet tank lid will sustain a discernible injury, however minimal. Defendant, however, had no cuts or bruises on his head, and extensive testing showed no internal injuries. Moreover, although defendant claimed to have been strangled with a ligature for approximately 30 seconds, there were no ligature marks on his neck and no petechial hemorrhage, which, according to the People's expert, one would expect to see on a person who had been attacked in that manner.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495), we conclude that there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*id.*), i.e., that defendant falsely reported to the police that he had been attacked, which is the underlying factual basis of all of the charges. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, "the jury was in the best position to assess the credibility of the witnesses," including defendant, who took the stand at trial, and it cannot be said that the jury failed to give the evidence the weight it should be accorded (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801; *see People v Kalinowski*, 118 AD3d 1434, 1436, *lv denied* 23 NY3d 1064).

We also reject defendant's more specific contention that the evidence is legally insufficient to support the charge of falsifying business records in the first degree. A person commits that crime when, with the intent to defraud, he or she "*[m]akes or causes* a false

entry in the business records of an enterprise" (Penal Law § 175.05 [1] [emphasis added]), and where the intent to defraud "includes an intent to commit another crime or to aid or conceal the commission thereof" (§ 175.10). Here, the false business record at issue is a C-2 workers' compensation form filed with Seneca County by an administrator employed by the Village of Waterloo. As defendant correctly contends, he did not file the form himself, and there is no evidence that he asked anyone to file it on his behalf. Nevertheless, we conclude that it was reasonably foreseeable that a workers' compensation form would be filed on defendant's behalf as a result of his claim that he had been injured during the course of his employment (*see generally People v DaCosta*, 6 NY3d 181, 184), and the evidence is therefore sufficient to establish that defendant caused the false filing. Indeed, we conclude that the jury could reasonably find that the filing of the false workers' compensation form was integral to defendant's intent to defraud.

Defendant's remaining sufficiency challenge relates to the charge of falsely reporting an incident in the third degree, which is committed when one knowingly and "[g]ratuitously" reports to the police an "alleged occurrence of an offense or incident which did not in fact occur" (Penal Law § 240.50 [3] [a]). Defendant contends that he did not *gratuitously* report the assault because the police officers, upon arriving at the courthouse, asked him what happened, and he did not therefore volunteer any information. It is undisputed, however, that defendant initiated the police contact by calling 911 and asking that an officer be sent right away to the courthouse, and that, upon the officers' arrival, defendant answered their inevitable questions about what happened. Under the circumstances, we conclude that defendant gratuitously offered the false information to the police, albeit in two stages.

Defendant further contends that his sentence should be reduced in the interest of justice because of inappropriate statements made by the prosecutor at sentencing. Although we find the prosecutor's statements to be highly improper, it does not appear that they influenced the court, which denied the prosecutor's request to impose the maximum sentence of 2⅓ to 7 years in prison and instead sentenced defendant to shock probation. Based on our review of the entire record, we perceive no reason to exercise our discretion to modify that sentence in the interest of justice (*see* CPL 470.15 [6] [b]).

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

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

966

CA 15-00867

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DEREK GOODING, CONSECUTIVE NO. 195871, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, NEW YORK STATE OFFICE OF
MENTAL HEALTH, AND NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY SUPERVISION,
RESPONDENTS-RESPONDENTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered April 29, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order denied the motion of petitioner to vacate an order for continued confinement.

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

Memorandum: Petitioner appeals from an order denying his motion pursuant to CPLR 5015 (a) seeking to vacate an order entered pursuant to Mental Hygiene Law § 10.09 (d), which sets forth that petitioner currently suffers from a mental abnormality as defined by section 10.03 (i) and directs that petitioner continue to be confined to a secure treatment facility (*see* § 10.09 [h]).

We reject petitioner's contention that Supreme Court erred in denying the motion. Petitioner sought vacatur of the order on the ground that the evidence is not legally sufficient to show "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense" (Mental Hygiene Law § 10.03 [i]). Although it is well established that a diagnosis of antisocial personality disorder (ASPD) is, by itself, "insufficient, as a matter of law, to support a 'mental abnormality' finding" (*Matter of Groves v State of New York*, 124 AD3d

1213, 1214), here, the court's determination that petitioner suffered from a mental abnormality was not based solely on a diagnosis of ASPD. Contrary to petitioner's contention, the court based its determination upon the opinion of respondents' expert that petitioner had diagnoses of personality disorder, not otherwise specified (NOS), with antisocial traits, alcohol and cocaine dependency, and a history of sexual preoccupation. Moreover, respondents' expert indicated that petitioner exhibited two "behavioral indicators" of sexual sadism. Considering the evidence in the light most favorable to respondents (*see Matter of State of New York v John S.*, 23 NY3d 326, 348, *rearg denied* 24 NY3d 933), we conclude that there is sufficient evidence of petitioner's diagnosis of personality disorder NOS with antisocial traits, along with sufficient evidence of other diagnoses and/or conditions, to sustain a finding of mental abnormality (*see* § 10.03 [i]; *Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609; *Matter of State of New York v Williams*, 139 AD3d 1375, 1377-1378).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

970

CA 16-01043

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

IN THE MATTER OF DALE BARHITE, PETER HOOSER, SALVATORE STASSI, DANA VINCH AND PATRICK TOUSLEY, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF DEWITT, TOWN BOARD OF TOWN OF DEWITT, POLICE COMMISSION OF TOWN OF DEWITT, EDWARD M. MICHALENKO, TOWN SUPERVISOR OF TOWN OF DEWITT AND JAMES C. HILDMANN, CHIEF OF POLICE OF TOWN OF DEWITT, RESPONDENTS-APPELLANTS.

CERIO LAW OFFICES, SYRACUSE (DAVID W. HERKALA OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

MARILYN D. BERSON, NEWBURGH, FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), dated September 9, 2015 in a proceeding pursuant to CPLR article 78. The judgment, inter alia, directed respondents to give petitioners full seniority credit for services rendered as police officers in the Village of East Syracuse.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by deleting the words “arbitrary and capricious, without a rational basis, in violation of lawful procedure, affected by errors of fact and law and” from the second decretal paragraph and, as modified, the judgment is affirmed without costs.

Memorandum: Petitioners are police officers who were formerly employed by the Village of East Syracuse, which dissolved its police department. The Village entered into an amended intermunicipal contract with respondent Town of Dewitt, wherein the two municipalities agreed that the functions of the Village Police Department would be transferred to the Town, and that the Village would transfer five police officers from its police department to the Town police department “at the salary step and grade based upon their years of service with the Village.” The Town assigned each petitioner a salary step that was at a lower seniority level than warranted by that petitioner’s length of service. The DeWitt Police Benevolent Association filed a grievance pursuant to the Town’s collective bargaining agreement and demanded arbitration thereon. That grievance

remained pending arbitration throughout this proceeding. Petitioners commenced this CPLR article 78 proceeding seeking to compel respondents to place them in the seniority level that corresponds with their years of service, with credit for the time they were employed by the Village. Respondents appeal from a judgment, denominated a decision and order, in which Supreme Court granted the petition, concluded that respondents acted arbitrarily and capriciously, and directed them to award each petitioner seniority credit for each year of service as a Village police officer.

Contrary to the contention of respondents, the court properly concluded that Civil Service Law § 70 (2) requires respondents to award petitioners full seniority credit for the time that they served as police officers in the Village. Initially, we note that respondents have abandoned on appeal their contention that section 70 does not apply to the transfers herein (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). They contend only that the statute does not require them to grant petitioners year-for-year credit for their prior service in the Village. We reject that contention. In pertinent part, the statute mandates that "[o]fficers and employees transferred to another governmental jurisdiction pursuant to the provisions of this subdivision shall be entitled to full seniority credit for all purposes for service rendered prior to such transfer in the governmental jurisdiction from which transfer is made" (§ 70 [2]). When interpreting a statute, the statute's "[w]ords . . . are to be given their plain meaning without resort to forced or unnatural interpretations" (*Castro v United Container Mach. Group*, 96 NY2d 398, 401; *see Matter of Orchard Glen Residences & Carriage Homes v Erie County Indus. Dev. Agency*, 303 AD2d 49, 51, *lv denied* 100 NY2d 511) and, therefore, in general, "unambiguous language of a statute is alone determinative" (*Riley v County of Broome*, 95 NY2d 455, 463; *see Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 565). In addition, in reviewing a related statute, the Court of Appeals has noted that the purpose of Town Law § 153 is "to place the transferee squarely in the shoes of the officer who has served all such time in the town to which the transfer is made" (*Matter of Town of Mamaroneck PBA v New York State Pub. Empl. Relations Bd.*, 66 NY2d 722, 725), and the legislative history and wording of section 70 (2) demonstrates that the Legislature intended the same result to occur in this situation.

We reject respondents' further contention that the approval of petitioners' salary and benefits by the Onondaga County Civil Service Department is an interpretation of its own governing statute by an administrative agency, to which we must defer. Although "deference is generally given to an agency's interpretation of a statute that the agency is responsible for administering, courts need not give any deference to the agency's interpretation where no specialized expertise is involved and the question is simply a matter of reading and analyzing the statute to determine its intent" (*Matter of United Univ. Professions v State of New York*, 36 AD3d 297, 299; *see Matter of Gruber [New York City Dept. of Personnel-Sweeney]*, 89 NY2d 225, 231-232). Where, as here, the issue "is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative

intent" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459), "judicial review is less restricted as statutory construction is the function of the courts" (*Matter of Rosen v Public Empl. Relations Bd.*, 72 NY2d 42, 48 [internal quotation marks omitted]).

We reject respondents' contention that this proceeding should be dismissed because petitioners failed to exhaust their administrative remedies. "[P]etitioner[s] had every right to seek redress for the alleged violation of [their] statutory rights in this proceeding, even after having begun a grievance procedure which related exclusively to an alleged violation of [their collective bargaining agreement]. 'The issues presented and the remedies sought in each forum were separate and distinct' " (*Matter of Marino v Board of Educ. of Hauppauge Union Free Sch. Dist.*, 262 AD2d 321, 322; *see Matter of Kaufmann v Board of Educ.*, 275 AD2d 890, 890; *Matter of Barrera v Frontier Cent. Sch. Dist.*, 227 AD2d 890, 891).

Consequently, respondents' further contention that petitioners are not entitled to mandamus relief is without merit. "It is well settled that the remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion . . . A party seeking mandamus must show a 'clear legal right' to relief . . . The availability of the remedy depends 'not on the [petitioner's] substantive entitlement to prevail, but on the nature of the duty sought to be commanded—i.e., mandatory, nondiscretionary action' " (*Matter of Brusco v Braun*, 84 NY2d 674, 679). Here, as discussed above, Civil Service Law § 70 (2) states that transferees such as petitioners "shall be entitled to full seniority credit for all purposes." Consequently, they have a " 'clear legal right' " under CPLR 7803 (1) to the relief sought (*Brusco*, 84 NY2d at 679).

We agree with respondents' further contention, however, that the court erred insofar as it declared, inter alia, that respondents acted arbitrarily and capriciously in failing to comply with the statute. That standard of review is set forth in CPLR 7803 (3), which applies to proceedings "in the nature of mandamus to review, which differs from mandamus to compel in that a petitioner seeking the latter must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief . . . [, whereas in] a proceeding in the nature of mandamus to review . . . , a court examines an administrative action involving the exercise of discretion" (*Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757). Respondents had no discretion under the statute to determine the seniority level to which petitioners should be assigned, and they therefore cannot have acted arbitrarily or capriciously. We therefore modify the judgment accordingly.

Respondents' contention that petitioners are not entitled to mandamus relief because they did not demand that respondents comply with the statute is without merit because, inter alia, petitioners commenced this proceeding by the "filing of the petition, which 'may

be construed as the demand' " (*Matter of Speis v Penfield Cent. Schs.*, 114 AD3d 1181, 1182; *see Matter of Thomas v Stone*, 284 AD2d 627, 628, *appeal dismissed* 96 NY2d 935, *lv denied* 97 NY2d 608, *cert denied* 536 US 960).

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

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

971

CA 16-00464

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

MELINA CRVELIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CITY SCHOOL DISTRICT OF CITY OF NIAGARA FALLS, RUSSELL PETROZZI, CARMELETTE ROTELLA, ARTHUR JOCOY, JR., CHRISTOPHER H. BROWN, JAMES CANCEMI, KEVIN DOBBS, ROBERT KAZAENGIN, JR., DON J. KING, NICHOLAS VILARDO, CYNTHIA A. BIANCO, ANGELO MASSARO AND PHILIP MOHR, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JOHN P. BARTOLOMEI & ASSOCIATES, NIAGARA FALLS (MATTHEW J. BIRD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (MICHAEL F. PERLEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered January 4, 2016. The order and judgment granted defendants' motion for summary judgment and dismissed plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, defamation and intentional infliction of emotional distress. According to plaintiff, defendants engaged in a process to wrongfully terminate her employment as a teacher in the City of Niagara Falls School District (District) based upon her alleged violation of the District's residency policy. During that process, defendant Board of Education of City School District of City of Niagara Falls (Board of Education) undertook an investigation and ultimately passed a resolution concluding that plaintiff had violated the residency policy and directed that the process to terminate plaintiff's employment be commenced. Plaintiff commenced a CPLR article 78 proceeding to challenge that process, but retired before the District terminated her employment. During the litigation of the proceeding, defendant Angelo Massaro, legal counsel for the District, made written statements in a memorandum of law submitted to the court that, according to plaintiff, were defamatory. Defendants, asserting various absolute privileges and immunities, moved for summary judgment seeking dismissal of the complaint in its entirety, and Supreme Court

granted the motion. We affirm.

Initially, we reject plaintiff's contention that defendants' conduct and potential liability in this civil action is subject to review under the arbitrary and capricious standard applicable to article 78 proceedings. We conclude that the immunities asserted by defendants in support of their motion are applicable to this civil action regardless of whether defendants pursued an erroneous course of action in enforcing the residency policy that resulted, or may have resulted, in a judgment favorable to plaintiff as petitioner in the article 78 proceeding (*see Lloyd v Town of Wheatfield*, 109 AD2d 1084, 1084, *affd* 67 NY2d 809).

Turning to the merits, we note that it is well settled that government officials are absolutely immune for discretionary acts carried out in the course of official duties and that immunity attaches "however erroneous or wrong [such conduct] may be, or however malicious even the motive which produced it" (*East Riv. Gas-Light Co. v Donnelly*, 93 NY 557, 559; *see Rottkamp v Young*, 21 AD2d 373, 375, *affd* 15 NY2d 831; *Santangelo v State of New York*, 101 AD2d 20, 21; *see also Della Villa v Constantino*, 246 AD2d 867, 868-869). Moreover, statements made by government officials in the context of a quasi-judicial proceeding such as that at issue here are absolutely privileged and immunize the communicants from liability in a defamation action (*see Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365-366). In addition, it is well settled that public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity (*see Lauer v City of New York*, 240 AD2d 543, 544, *lv denied* 91 NY2d 807; *Wheeler v State of New York*, 104 AD2d 496, 498; *La Belle v County of St. Lawrence*, 85 AD2d 759, 761). Thus, we conclude that the court properly granted the motion.

Lastly, inasmuch as the alleged defamatory statements made by Massaro were contained in a writing submitted to a court on behalf of respondents in the context of plaintiff's article 78 proceeding, we conclude that they are absolutely privileged (*see Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209; *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382, *lv denied* 93 NY2d 808).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

984

KA 13-00893

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAAZIM F. FREEMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, PLLC, WASHINGTON, D.C. (THOMAS B. BENNETT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered March 12, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress drugs and statements obtained by the police after defendant was stopped for riding a bicycle at night without a light in violation of Vehicle and Traffic Law § 1236 (a). We agree with defendant that, following the permissible stop of defendant on his bicycle, the officers improperly escalated the encounter to a level two common-law inquiry by asking defendant why he was so nervous and whether he was carrying drugs. The officers' inquiries, which involved "invasive questioning" that was "focuse[d] on the possible criminality" of defendant (*People v Hollman*, 79 NY2d 181, 191), were not supported by the requisite founded suspicion of criminality (*see People v Garcia*, 20 NY3d 317, 324; *People v Hightower*, 136 AD3d 1396, 1397; *see generally People v Dealmeida*, 124 AD3d 1405, 1407). The testimony at the suppression hearing establishes that the officers observed nothing indicative of criminality, and we conclude that defendant's nervousness upon being confronted by the police did not give rise to a founded suspicion that

criminal activity was afoot (*see Garcia*, 20 NY3d at 324; *Hightower*, 136 AD3d at 1397; *see generally Dealmeida*, 124 AD3d at 1407). Because defendant's inculpatory oral response to the impermissible accusatory questioning resulted in the seizure of the drugs from defendant's pocket and a postarrest written statement from defendant, the drugs and the oral and written statements must be suppressed (*see generally Hightower*, 136 AD3d at 1397)

In light of our determination that the court should have granted those parts of defendant's omnibus motion seeking to suppress the drugs and statements, defendant's guilty plea must be vacated (*see id.*). In addition, because our determination results in the suppression of all evidence in support of the crimes charged, we conclude that the indictment must be dismissed (*see id*.).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

985

KA 14-01622

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYWAN HOWINGTON, DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, DEWITT, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (ROMANA A. LAVALAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 23, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] 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 Garcia-Cruz*, 138 AD3d 1414, 1414, *lv denied* 28 NY3d 929; *People v Dudden*, 138 AD3d 1452, 1453, *lv denied* 28 NY3d 929). Here, the court failed to ensure that defendant "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256).

Nevertheless, by failing to move to withdraw the plea or to vacate the judgment of conviction, defendant has failed to preserve for our review his challenge to the factual sufficiency of the plea allocution (*see People v Lopez*, 71 NY2d 662, 665; *People v Bertollini* [appeal No. 2], 141 AD3d 1163, 1164; *People v Allen*, 137 AD3d 1719, 1719, *lv denied* 27 NY3d 1127). In any event, we conclude that "the allocution shows that the defendant understood the charges and made an intelligent decision to enter a plea" (*People v Goldstein*, 12 NY3d 295, 301).

Defendant's challenge to the legal sufficiency of the evidence before the grand jury does not survive the guilty plea (*see People v Gillett*, 105 AD3d 1444, 1445; *People v Lawrence*, 273 AD2d 805, 805, *lv denied* 95 NY2d 867; *see generally People v Iannone*, 45 NY2d 589, 600-601). Defendant's challenge to the sufficiency of the factual allegations in the indictment likewise does not survive the guilty plea (*see People v Sims*, 129 AD3d 1509, 1510, *lv denied* 26 NY3d 935; *People v Holt*, 173 AD2d 644, 645; *see generally Iannone*, 45 NY2d at 600-601).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

989

CA 16-00139

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

JEAN GREFRATH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL A. DEFELICE, INDIVIDUALLY, AND DOING BUSINESS AS MICHAEL ANTHONY'S SALON, EVELYN MAGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF LEO S. MAGER, DECEASED, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

SHAW & SHAW P.C., HAMBURG (BLAKE ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RODGERS LAW FIRM, BUFFALO (MARK C. RODGERS OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL A. DEFELICE, INDIVIDUALLY, AND DOING BUSINESS AS MICHAEL ANTHONY'S SALON.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT EVELYN MAGER, INDIVIDUALLY, AND AS EXECUTRIX OF THE ESTATE OF LEO S. MAGER, DECEASED.

Appeal from an order of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), dated May 20, 2015. The order granted the motion of defendant Michael A. DeFelice, individually and doing business as Michael Anthony's Salon, and the cross motion of defendant Evelyn Mager, individually and as executrix of the Estate of Leo S. Mager, deceased, for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion and cross motion are denied, and the complaint and cross claims are reinstated against defendants-respondents.

Memorandum: Plaintiff commenced this action to recover damages for injuries she allegedly sustained when she tripped and fell from a step near the front entrance to commercial premises rented by defendant Michael A. DeFelice, individually and doing business as Michael Anthony's Salon, and owned by Leo S. Mager, who is now deceased. Plaintiff contends that Supreme Court erred in granting the motion of DeFelice and the cross motion of defendant Evelyn Mager (Mager), individually and as the executrix of Leo Mager's estate, for summary judgment dismissing the complaint and any cross claims against them. We agree. "[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the

particular facts and circumstances of each case and is generally a question of fact for the jury" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [internal quotation marks omitted]; *see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77). In view of the pertinent "factors that may render a physically small defect actionable" (*Hutchinson*, 26 NY3d at 78; *see Trincere*, 90 NY2d at 977-978), we conclude that DeFelice and Mager (defendants) failed to sustain their burden of establishing as a matter of law the absence of any defect with the step (*see Lupa v City of Oswego*, 117 AD3d 1418, 1419; *Belsinger v M&M Bowling & Trophy Supplies, Inc.*, 108 AD3d 1041, 1042; *Powers v St. Bernadette's R.C. Church*, 309 AD2d 1219, 1219). In any event, we conclude that, in opposition to the motion and cross motion, plaintiff raised a triable issue of fact concerning the existence of a defect by submitting evidence that there were no markings on the step or differences in color between the step and the sidewalk (*see Saretsky v 85 Kenmore Realty Corp.*, 85 AD3d 89, 92-93; *see generally Belsinger*, 108 AD3d at 1043; *Rachlin v 34th St. Partnership, Inc.*, 96 AD3d 690, 691). Furthermore, the step was located in or very near a doorway, "where a person's attention would be drawn to the door, not to the [step]" (*Tesak v Marine Midland Bank*, 254 AD2d 717, 718; *see generally Belsinger*, 108 AD3d at 1043; *Powers*, 309 AD2d at 1219).

We further conclude that the court erred in determining that plaintiff's inattention to the step upon exiting the premises was the sole proximate cause of her injuries as a matter of law inasmuch as defendants "failed to establish that plaintiff's fall was unrelated to the alleged defect" (*Powers*, 309 AD2d at 1219; *cf. Geloso v Castle Enters.*, 266 AD2d 849, 849). Thus, "while plaintiff may have been comparatively negligent in failing to observe the step or in failing to remember that the step was there, any such comparative negligence would not serve to 'negate the liability of the . . . landowner[,] who has a duty to keep the premises safe' " (*Powers*, 309 AD2d at 1219-1220; *see Vereerstraeten v Cook*, 266 AD2d 901, 901).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

993

CA 15-01714

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

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

V MEMORANDUM AND ORDER

SCOTT PETERS, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Cattaraugus County (John L. Michalski, A.J.), entered April 3, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement pursuant to Mental Hygiene Law article 10. Respondent contends that the evidence is legally insufficient to support a finding that he suffers from a mental abnormality within the meaning of the statute because the testimony at the jury trial did not establish that he has "serious difficulty in controlling" his sex-offending behavior (§ 10.03 [i]). Even assuming, arguendo, that respondent preserved that contention for our review (*cf. Matter of Vega v State of New York*, 140 AD3d 1608, 1609), we conclude that it is without merit. Petitioner presented the testimony of two psychologists who opined that respondent suffers from, among other things, pedophilic disorder and antisocial personality disorder, and that, as a result of those mental abnormalities, respondent has serious difficulty controlling his sex-offending behavior. One of the psychologists testified that her opinion was based upon respondent's pattern of sexual misconduct, his failure to show improvement in controlling his behavior after sex offender treatment, and his poor prison disciplinary record, which included multiple instances of misbehavior of a sexual nature. Viewing the evidence in the light most favorable to petitioner, we conclude that petitioner "provided '[a] detailed psychological portrait' of respondent that met [its] burden of demonstrating by clear and convincing evidence that he had 'serious difficulty' in

controlling his sex-offending conduct" (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 751; *see Matter of State of New York v Williams*, 139 AD3d 1375, 1378).

We also reject respondent's contention that the verdict with respect to mental abnormality is against the weight of the evidence. Although respondent's psychologist testified that respondent suffered from posttraumatic stress disorder stemming from his own sexual abuse as a child and that his sex offenses did not support a diagnosis of pedophilic disorder or a conclusion that he suffers from a mental abnormality, the jury's verdict is entitled to deference, and we conclude that the evidence does not "preponderate[] so greatly in [respondent's] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence" (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474, *lv denied* 17 NY3d 702 [internal quotation marks omitted]). Contrary to respondent's contention, any failure by petitioner's experts to adhere strictly to each criterion listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) does not render their diagnosis of pedophilic disorder against the weight of the evidence. Here, petitioner's experts testified that the DSM-V cannot be employed rigidly and expressly provides for the use of clinical judgment in the forensic setting, and the experts opined that the diagnosis was appropriate based upon their full assessments of respondent's pattern of behavior (*see Matter of State of New York v Pierce*, 79 AD3d 1779, 1779-1780, *lv denied* 16 NY3d 712; *Matter of State of New York v Shawn X.*, 69 AD3d 165, 169-171, *lv denied* 14 NY3d 702; *see generally Matter of State of New York v Shannon S.*, 20 NY3d 99, 106, *cert denied* ___ US ___, 130 S Ct 1500).

We reject respondent's further contention that the evidence presented at the dispositional hearing is not legally sufficient to establish that he requires confinement. Petitioner established by the requisite clear and convincing evidence that respondent "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see Matter of Billinger v State of New York*, 137 AD3d 1757, 1758, *lv denied* 27 NY3d 911). Contrary to respondent's contention, Supreme Court's determination that he required confinement is not against the weight of the evidence. The court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony presented . . . , and we see no reason to disturb the court's decision to credit the testimony of petitioner's experts" (*Matter of State of New York v Parrott*, 125 AD3d 1438, 1439, *lv denied* 25 NY3d 911 [internal quotation marks omitted]).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

994

CA 16-00178

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

MICHELE MOORE-HAARR, INDIVIDUALLY, AND DOING BUSINESS AS PROPEL TECHNOLOGY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

Z-AXIS, INC., DEFENDANT-APPELLANT, AND MICHAEL ALLEN, DEFENDANT.

BARCLAY DAMON LLP, ROCHESTER (SCOTT P. ROGOFF OF COUNSEL), FOR DEFENDANT-APPELLANT.

GALLO & IACOVANGELO, LLP, ROCHESTER (JOSEPH B. RIZZO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered August 17, 2015. The order, insofar as appealed from, denied that part of the motion of defendants seeking summary judgment dismissing the complaint against defendant Z-AXIS, Inc. and granted that part of the cross motion of plaintiff seeking to compel responses to her notice to admit.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied in its entirety, the motion is granted in its entirety, and the complaint against defendant Z-AXIS, Inc. is dismissed.

Memorandum: In this action for breach of contract, plaintiff seeks to recover sales commissions totaling over $89,000 from Z-AXIS, Inc. (defendant). The sales for which plaintiff seeks the commissions were made by defendant, and the goods were shipped to and paid for by defendant's customers, after defendant terminated its relationship with plaintiff. According to plaintiff, however, she earned the commissions before her termination, because they were brought about by sales quotes or solicitations prepared before such termination. Supreme Court granted defendants' motion for summary judgment only in part, dismissing the complaint against defendant Michael Allen, and we agree with defendants that the court should have granted their motion in its entirety. An at-will sales representative, agent, or employee is not entitled to posttermination commissions absent an agreement expressly providing for such commissions (*see Devany v Brockway Dev., LLC*, 72 AD3d 1008, 1009; *Gordon v Wilson*, 68 AD3d 1058, 1060; *UWC, Inc. v Eagle Indus.*, 213 AD2d 1009, 1011, *lv denied* 85 NY2d 812). On their motion, defendants established as a matter of law that there was

no such express agreement between the parties and indeed that the subject of posttermination commissions was never discussed during the parties' relationship, and plaintiff failed to raise a triable question of fact in opposition to the motion (*see Devany*, 72 AD3d at 1009; *UWC, Inc.*, 213 AD2d at 1011). Moreover, the record establishes that, during the course of dealing between the parties, at no time was plaintiff paid a sales commission prior to defendant's shipment of the goods to its customer and receipt of that customer's payment for such goods (*see Linder v Innovative Commercial Sys. LLC*, 127 AD3d 670, 670). Thus, there is no support in the record for plaintiff's claim that she earned the commissions in question before her termination.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1000

KA 14-02131

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL ANDERSON, 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 (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered October 21, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [3]). We reject defendant's contention that his waiver of the right to appeal is invalid. "[T]he record demonstrates that County 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 Burt*, 101 AD3d 1729, 1730, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal encompasses his contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 256; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1006

KA 13-00493

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON T. FONTAINE, DEFENDANT-APPELLANT.

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

JON T. FONTAINE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered November 1, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the amount of restitution ordered 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: On appeal from a judgment convicting him, upon his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends in his main and pro se supplemental briefs that his waiver of the right to appeal was not valid. We reject that contention. The plea colloquy, together with the written waiver of the right to appeal executed by defendant, establishes that defendant's waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*see People v Johnson*, 122 AD3d 1324, 1324; *People v Guantero*, 100 AD3d 1386, 1386-1387, *lv denied* 21 NY3d 1004; *People v Jones*, 96 AD3d 1637, 1637, *lv denied* 19 NY3d 1103). Defendant's contention in his main and pro se supplemental briefs that the indictment was facially defective because it failed to specify the precise date on which the offenses were committed and instead gave a 13-month time span was forfeited by defendant's guilty plea and, in any event, the waiver of the right to appeal encompasses that contention (*see People v Turley*, 130 AD3d 1578, 1578, *lv denied* 26 NY3d 972, *reconsideration denied* 26 NY3d 1093; *People v Slingerland*, 101 AD3d 1265, 1265-1266, *lv denied* 20 NY3d 1104; *see generally People v Iannone*, 45 NY2d 589, 600-601). The waiver of the right to appeal also encompasses defendant's contention in his main brief that County Court erred in issuing orders of

protection in favor of his father, brother, and stepsister inasmuch as the orders of protection were disclosed as part of defendant's plea prior to both the plea colloquy and defendant's waiver of the right to appeal (*cf. People v Nicometo*, 137 AD3d 1619, 1620; *People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860).

Defendant's contention in his main brief that the court erred in directing him to pay a specified amount of restitution without conducting a hearing " 'is not foreclosed by his waiver of the right to appeal because the amount of restitution was not included in the terms of the plea agreement' " (*People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104; *see People v Burns*, 111 AD3d 1293, 1293). We agree with defendant that "the record 'does not contain sufficient evidence to establish the amount [of restitution to be imposed]' " (*People v Lawson* [appeal No. 7], 124 AD3d 1249, 1250). We thus conclude that the court " 'erred in determining the amount of restitution without holding a hearing' " (*id.*). We therefore modify the judgment by vacating the amount of restitution ordered, and we remit the matter to County Court for a hearing to determine the amount of restitution to be paid by defendant.

We have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1008

CAF 15-01015

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

IN THE MATTER OF JOHN F. LEWIS,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

STEFANY V. LEWIS,
RESPONDENT-APPELLANT-RESPONDENT.

LAW OFFICES OF RANDEL A. SCHARF, COOPERSTOWN (RANDEL A. SCHARF OF COUNSEL), FOR RESPONDENT-APPELLANT-RESPONDENT.

DONALD J. MURPHY, UTICA, FOR PETITIONER-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 17, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied the respective objections of the parties to the order of a Support Magistrate.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting petitioner's fourth and seventh objections and respondent's second objection in part and vacating the third, fourth, seventh and eighth ordering paragraphs of the order of the Support Magistrate, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Petitioner father previously appealed from a judgment of divorce, and we remitted the matter to Supreme Court for further proceedings (*Lewis v Lewis*, 70 AD3d 1432). Upon remittal, the parties entered into a stipulation that was reduced to an order in April 2010. In June 2012, the parties consented to a modification of the judgment and April 2010 order. In 2014, the father filed petitions to modify, and respondent mother filed an enforcement petition. A hearing was held before a Support Magistrate, who issued an order granting one petition by the father and denying the other petition, and granting in part the mother's petition. The parties filed objections, which Family Court denied and dismissed. The mother appeals and the father cross-appeals. We agree in part with the mother on her appeal and with the father on his cross appeal.

The primary issue raised at the hearing concerned the parties' obligation to pay for the college expenses of two of their children. Paragraph 40 of the judgment of divorce provided that the parties "shall pay for that portion of the children's college tuition charges

which are not covered by the college tuition benefit program through the [mother's] employment, including tuition, room and board for a maximum of four years, in proportion to their respective incomes, regardless of which college the children attend." This paragraph was not stipulated to by the parties but rather was ordered by Supreme Court, and no issue was raised regarding it by the father on his prior appeal from the judgment. Although the father contends that Supreme Court erred in ordering him to pay college expenses for the children, we conclude that, having failed to raise the issue on the appeal from the judgment, the father is precluded from raising that contention now (*see generally* CPLR 5513 [a]).

We agree with the mother that Family Court erred in denying her objection to the Support Magistrate's determination to reduce the college expenses by the college tuition benefit program (CTBP) benefit. The CTBP benefit entitled the children to free tuition if they attended Hamilton College, or half off the tuition of any other school, up to a maximum of 50% of Hamilton's tuition. The mother, however, left her full-time employment at Hamilton College before her children enrolled in college, and her children were therefore no longer eligible to receive the CTBP benefit. Thus, the children's college expenses "are not covered by" the CTBP benefit, and the Support Magistrate therefore erred in reducing the college expenses by the CTBP benefit. Contrary to the mother's further contention, however, the court properly denied her objection to the Support Magistrate's further reduction of the college expenses by the amount contributed by the grandparents as a gift to the children (*see Regan v Regan*, 254 AD2d 402, 403).

We reject the mother's contention that the court erred in denying her objection to the determination of the Support Magistrate that the father did not willfully violate paragraph 40 of the judgment of divorce, particularly considering the uncertainty regarding the actual amount of college expenses the parties were obligated to pay. We reject the father's contention, however, that the court erred in denying his objection to the determination of the Support Magistrate that he willfully failed to disclose his income for the years 2012 and 2013 to the mother. The June 2012 order provided that the parties were to report their annual incomes to each other by February 15th of each year, by providing a copy of their form W-2. The mother testified that, despite requesting the father's W-2's, she did not receive the father's 2012 or 2013 W-2's by the deadlines.

We agree with the father that the court erred in denying his fourth objection to the determination of the Support Magistrate that obligated him to pay college expenses for one of the children incurred after his 21st birthday. "Absent an agreement, a court may not direct a parent to pay support in the form of college expenses on behalf of a child who has attained the age of 21 years" (*Schonour v Johnson*, 27 AD3d 1059, 1060; *see Attea v Attea*, 30 AD3d 971, 972, *affd* 7 NY3d 879). We also agree with the father that the court erred in denying his seventh objection to the determination of the Support Magistrate. The June 2012 order provided that the father would continue the children on his health insurance plan and be responsible for 100% of

the health insurance premiums, and the mother would be responsible for all uncovered medical expenses. No issue was raised by the parties in their respective petitions regarding health insurance or unreimbursed medical expenses, and the Support Magistrate erred in sua sponte modifying the June 2012 order by ordering the father to pay his pro rata share of the unreimbursed medical expenses. We therefore modify the order by granting the mother's second objection in part and the father's fourth and seventh objections and vacating the third, fourth, seventh and eighth ordering paragraphs of the Support Magistrate's order, and we remit the matter to Family Court for a new calculation of college expenses.

We have considered the parties' remaining contentions and conclude that they are without merit.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1010

CA 15-01022

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

DEBORAH DRAKE, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD MUNDRICK, DEFENDANT-RESPONDENT-APPELLANT.

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

ALLEN & O'BRIEN, ROCHESTER (STUART L. LEVISON OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Elma A. Bellini, J.), entered April 27, 2015. The order and judgment, inter alia, distributed certain marital property.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On September 12, 2011, plaintiff commenced this action for equitable distribution following the issuance of an amended foreign judgment of divorce. Before the nonjury trial commenced, Supreme Court informed the parties that the court would use the date of commencement of the foreign action of divorce, i.e., May 1, 2007, as the date for valuation of the marital property. We agree with defendant that the court erred in using the 2007 date instead of the 2011 date as the valuation date.

Domestic Relations Law § 236 (B) (4) (b) provides that, "[a]s soon as practicable after a *matrimonial action* has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial" (emphasis added). Both the action for dissolution of the marriage in 2007 and this action "to obtain . . . distribution of marital property following a foreign judgment of divorce" are included in the statutory section entitled "[m]atrimonial actions" (§ 236 [B] [2] [a]). Nevertheless, we conclude that the date of commencement of the foreign action could not serve as the valuation date for equitable distribution of the marital property because the foreign action for divorce was not "an action in which equitable distribution [was] available," and the foreign court in this case thus lacked jurisdiction over any of the parties' marital assets (*Anglin v Anglin*, 80 NY2d 553, 557; *see Sullivan v Sullivan*, 201 AD2d 417, 417; *see also*

Matter of Nicit v Nicit, 217 AD2d 1006, 1006, *appeal dismissed and lv denied* 86 NY2d 883, *rearg denied* 87 NY2d 918, *cert denied* 517 US 1120). As counsel for defendant conceded at oral argument, a new trial on equitable distribution is required where, as here, we have determined that the court used an incorrect valuation date.

Based on our resolution of the issue concerning the proper valuation date, we do not address the parties' remaining contentions, including defendant's contention that the court erred in admitting, as a business record, a summary benefit statement that had no "independent business function" (*R & I Elecs. v Neuman*, 81 AD2d 832, 833, *lv denied* 54 NY2d 605) and "was not prepared in the regular course of business so as to qualify for admission as a business record" (*National States Elec. Corp. v LFO Constr. Corp.*, 203 AD2d 49, 50; *see Equidyne Corp. v Vogel*, 160 AD2d 389, 390; *cf. Flour City Architectural Metals Corp. v Gallin & Son*, 127 AD2d 559, 559).

We therefore reverse the order and judgment and remit the matter to Supreme Court for a new trial and determination on equitable distribution using the 2011 date as the valuation date.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1011

CA 16-00356

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

MEHMET CANAL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ABDULAZIZ MUNASSAR, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.

PIRRELLO, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAFAY, BYRNE & LAFAY, P.C., ROCHESTER (ANTHONY P. LAFAY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John M. Owens, A.J.), entered July 29, 2015. The order denied the motion of plaintiff for partial summary judgment and granted the cross motion of defendant Abdulaziz Munassar for summary judgment dismissing the amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion, reinstating the amended complaint against defendant Abdulaziz Munassar, granting the motion in part and dismissing the defense and counterclaim of that defendant for usury, and as modified the order is affirmed without costs.

Memorandum: Abdulaziz Munassar (defendant) borrowed $127,000 from plaintiff for the purchase of a residence in the Town of Greece. The loan was secured by a mortgage on the property, and the total on both the note and the mortgage was $170,000. The note states that the interest rate during the term of the note would be "zero (0.00%) because of the religious beliefs and requirements of Borrower." The difference of $43,000 between the principal set forth in the note and mortgage of $170,000 and the amount disbursed at closing of $127,000 was stipulated by the parties to be "in the nature of interest." In June 2013, approximately one year later, defendant defaulted on the loan by failing to make the required monthly and balloon payments, and plaintiff commenced this foreclosure action. In his answer to the amended complaint, defendant asserted a defense and counterclaim for usury. Plaintiff moved for partial summary judgment seeking, inter alia, dismissal of the usury defense and counterclaim, and defendant cross-moved for summary judgment dismissing the amended complaint against him based upon the defense of usury. The matter was referred to a judicial hearing officer (JHO) for a hearing on the issue of

usury only. Following the hearing, the JHO issued a bench decision finding that the interest rate was 50.5% and that the loan was therefore usurious, and Supreme Court granted defendant's cross motion for summary judgment dismissing the amended complaint against him. We conclude that the court erred in granting the cross motion and instead should have granted that part of plaintiff's motion for partial summary judgment dismissing defendant's usury defense and counterclaim. We therefore modify the order accordingly.

In determining whether the interest charged exceeded the usury limit, courts must apply the traditional method for calculating the effective interest rate as set forth in *Band Realty Co. v North Brewster, Inc.* (37 NY2d 460, 462, *rearg denied* 37 NY2d 937; *see Oliveto Holdings, Inc. v Rattenni*, 110 AD3d 969, 972). According to that method, "[s]o long as all payments on account of interest did not aggregate a sum greater than the aggregate of interest that could lawfully have been earned had the debt continued to the earliest maturity date, there would be no usury" (*Band Realty Co.*, 37 NY2d at 464 [internal quotation marks omitted]). In applying the traditional formula, "[t]he discount, divided by the number of years in the term of the mortgage, should be added to the amount of interest due in one year, and this sum is compared to the difference between the principal and the discount in order to determine the true interest rate" (*Hammelburger v Foursome Inn Corp.*, 76 AD2d 646, 648, *mod on other grounds* 54 NY2d 580).

Applying that formula to the case at bar, which involves a five-year mortgage of $170,000 with a $43,000 "discount" with no additional interest, we add $8,600, which is one-fifth of the discount, to the interest over the first year (0%), arriving at a sum of $8,600. Comparing the $8,600 figure to the difference between the principal and the discount retained by plaintiff, i.e., $127,000, the interest rate was 6.77% per annum. That interest rate is well below the civil usury rate of 16% per annum (*see* General Obligations Law § 5-501 [1]; Banking Law § 14-a [1]).

Defendant attempts to base his claim of usury on his advanced interest payment, asserting that the annual interest rate should be calculated by dividing the total interest to be received over the five-year period, $43,000, by the total received at closing, $127,000, resulting in an annual interest rate of 33.8%. Defendant's argument is unavailing, however, inasmuch as "the Court of Appeals has held that 'interest on the whole amount of principal agreed to be paid at maturity, not exceeding the legal rate, may be taken in advance' " (*Martell v Drake*, 124 AD3d 1200, 1201, quoting *Band Realty Co.*, 37 NY2d at 463-464). Moreover, defendant's argument fails to account for the fact that the loan here, unlike the one-year term at issue in *Band Realty Co.*, *Martell* and *Oliveto*, is for a term of five years.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1014

CA 16-00226

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

JOHN M. LACEY, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF SYRACUSE, CITY OF SYRACUSE POLICE DEPARTMENT AND EDWARD S. BOLES, DEFENDANTS-RESPONDENTS-APPELLANTS.

SIDNEY P. COMINSKY, LLC, SYRACUSE (SIDNEY P. COMINSKY OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (JOSEPH R. H. DOYLE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an amended order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered July 22, 2015. The amended order denied the motion of defendants and the cross motion of plaintiff for summary judgment and ordered a bifurcated trial.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting defendants' motion and dismissing the complaint and by vacating the second and third ordering paragraphs and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he allegedly sustained when the bicycle he was riding collided with a police vehicle driven by defendant Edward S. Boles (defendant officer). Shortly before the collision, defendant officer observed a motorist commit a traffic violation and followed the motorist with the intention of giving the driver a verbal warning. The motorist brought the vehicle to a stop at a red light and, after defendant officer stopped his vehicle behind the motorist, he intermittently moved the vehicle forward into the intersection in an attempt to get the attention of the driver and to speak with her about what he had observed. Plaintiff entered the intersection on his bicycle with the green light and collided with the police vehicle. According to defendant officer, the police vehicle was stopped at the time of the collision. According to plaintiff, defendant officer was moving the police vehicle into plaintiff's path of travel at the time of the collision.

Defendants moved for, inter alia, summary judgment dismissing the complaint on the ground that defendant officer's conduct was measured

by the "reckless disregard" standard under Vehicle and Traffic Law § 1104 and that his operation of the police vehicle was not reckless as a matter of law. Plaintiff cross-moved for summary judgment. Supreme Court determined, inter alia, that there were questions of fact that precluded summary judgment for either party, and the court granted the alternative request for bifurcation in defendants' motion. We modify the amended order by granting defendants' motion and dismissing the complaint, and by vacating the ordering paragraphs concerning bifurcation.

Initially, we note that there is no dispute that defendant officer was operating an "authorized emergency vehicle" (Vehicle and Traffic Law § 101). We reject plaintiff's contention that, in determining whether defendant officer's operation of the police vehicle qualifies as an "emergency operation" within the meaning of Vehicle and Traffic Law § 114-b, we should adopt the definition of "pursuit" contained in the operations manual of defendant City of Syracuse Police Department (*see Criscione v City of New York*, 97 NY2d 152, 157-158). Likewise, it is irrelevant whether defendant officer believed he was involved in an emergency operation (*see id.* at 158). Contrary to plaintiff's further contentions, we conclude that defendant officer's actions constituted an "emergency operation" as contemplated by Vehicle and Traffic Law § 114-b (*see Connelly v City of Syracuse*, 103 AD3d 1242, 1242); the applicable standard of liability is reckless disregard for the safety of others rather than ordinary negligence (*see* § 1104 [e]; *Criscione*, 97 NY2d at 154); and defendants established as a matter of law that defendant officer's conduct did not constitute the type of recklessness necessary for liability to attach (*see Szczerbiak v Pilat*, 90 NY2d 553, 556-557). Plaintiff failed to raise a triable issue of fact to defeat defendants' entitlement to summary judgment dismissing the complaint (*see Nikolov v Town of Cheektowaga*, 96 AD3d 1372, 1373; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

In light of our determination, we do not reach the parties' remaining contentions.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1025

KA 14-01504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYSHAWN BETHANY, DEFENDANT-APPELLANT.

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

RAYSHAWN BETHANY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered July 28, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law §§ 20.00, 125.25 [1]). Contrary to the contention of defendant in his main and pro se supplemental briefs, we conclude that County Court did not err in refusing to suppress the inculpatory statements he made to a detective who was investigating the case. With respect to the first statement, even assuming, arguendo, that defendant was in custody at the time he was questioned by the detective, we note that the detective testified that he read defendant his *Miranda* rights from a card that was introduced into evidence, and began discussing the homicide only after defendant indicated that he understood his rights, but nonetheless wished to speak with the detective (*see People v Steiniger*, 142 AD3d 1320, 1320). "Although defendant testified that the [detective] did not read him his . . . *Miranda* rights, the court was entitled to credit the [detective's] testimony over that of defendant" (*id.* at 1320-1321; *see People v Orso*, 270 AD2d 947, 947-948, *lv denied* 95 NY2d 856; *see generally People v Prochilo*, 41 NY2d 759, 761).

Furthermore, the court credited the detective's testimony that he did not employ any coercion or threats of arrest or prosecution to induce defendant to make the first statement (*see People v Briggs*, 124 AD3d 1320, 1321, *lv denied* 25 NY3d 1198). Contrary to the contention

in defendant's pro se supplemental brief, although the detective told defendant that the police were not "going to arrest him that day," such an assurance did not render the circumstances here inherently coercive or overbearing (*see People v Richardson*, 202 AD2d 958, 958-959, *lv denied* 83 NY2d 914). In addition, despite the fact that the recording of the phone call between the detective and defendant's mother may have weighed against the detective's credibility with respect to the nature of any promises that he may have made to defendant, we conclude that his testimony was not " 'unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory' " (*People v Bush*, 107 AD3d 1581, 1582, *lv denied* 22 NY3d 954). Contrary to defendant's contention in his main and pro se supplemental briefs, "[t]he testimony of defendant [and his witnesses] at the suppression hearing that the [first] statement was coerced by [the detective] and thus was not voluntary presented a credibility issue that the suppression court was entitled to resolve against defendant" (*People v McIver*, 76 AD3d 782, 782-783, *lv denied* 15 NY3d 894; *see Briggs*, 124 AD3d at 1321). The remaining grounds raised in defendant's pro se supplemental brief in support of his contention that the first statement was involuntarily made are without merit. Inasmuch as the court properly determined that defendant's first statement was voluntarily made to the detective, his further contention that the second statement should have been suppressed on the ground that it was tainted by the illegality of the first statement is necessarily without merit (*see People v Walker*, 267 AD2d 778, 780, *lv denied* 94 NY2d 926).

We reject the further contention of defendant in his main and pro se supplemental briefs that the evidence is legally insufficient to establish his accessorial liability for the murder, i.e., that he intentionally aided the shooters and "shared a 'community of purpose' " with them (*People v Allah*, 71 NY2d 830, 832; *see* Penal Law § 20.00; *People v Scott*, 25 NY3d 1107, 1109-1110). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences enabling the jury to determine beyond a reasonable doubt that defendant intentionally aided the shooters in committing the crime and shared their intent to cause the death of the victim (*see People v Rossey*, 89 NY2d 970, 972; *People v Pippins*, 107 AD2d 826, 826-827). Contrary to defendant's further contention in his main and pro se supplemental briefs, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

To the extent that the contention of defendant in his pro se supplemental brief that he was denied effective assistance of counsel at trial is based on matters outside the record on appeal, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Riley*, 117 AD3d 1495, 1496, *lv denied* 24 NY3d 1088). We conclude on the record before us that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

We reject the contention in defendant's main brief that the court erred in denying his request at sentencing for an adjournment and new counsel in order to file a written motion to set aside the verdict pursuant to CPL 330.30. Even assuming, arguendo, that defendant's complaints about defense counsel suggested a serious possibility of good cause for a substitution of counsel requiring a need for further inquiry, we conclude that the court afforded defendant the opportunity to express his objections concerning defense counsel, and the court thereafter reasonably concluded that defendant's objections were without merit (*see People v Singletary*, 63 AD3d 1654, 1654, *lv denied* 13 NY3d 839). Contrary to defendant's further contention, upon our review of the record, we conclude that defense counsel did not take a position adverse to defendant at sentencing, and thus defendant was not entitled to new counsel on that basis (*see People v Jones*, 261 AD2d 920, 920, *lv denied* 93 NY2d 972; *see also People v Miller*, 122 AD3d 1369, 1370, *lv denied* 25 NY3d 952; *People v Collins*, 85 AD3d 1678, 1679, *lv denied* 18 NY3d 993). Furthermore, to the extent that defendant contends that he was denied effective assistance of counsel at sentencing, we conclude that his contention lacks merit (*see Collins*, 85 AD3d at 1679; *Jones*, 261 AD2d 920; *see generally Baldi*, 54 NY2d at 147). We reject defendant's contention in his main brief that the sentence is unduly harsh and severe.

Finally, we have reviewed defendant's remaining contentions raised in his pro se supplemental brief and conclude that none warrants reversal or modification of the judgment.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1029

CAF 15-00843

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

IN THE MATTER OF PAULA L. GIBBS, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT LEE GIBBS, RESPONDENT-RESPONDENT.

PAULA L. GIBBS, PETITIONER-APPELLANT PRO SE.

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered April 13, 2015 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objection to the order of the Support Magistrate.

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

Memorandum: On September 19, 1969, petitioner mother was granted an order of support against respondent father for their child, born in 1969. A judgment was awarded on May 5, 1986 for accumulated arrears. The mother commenced this proceeding in February 2014 seeking enforcement of the 1986 judgment and child support arrears from the date of the judgment until the child's 21st birthday.

We agree with the mother that the Support Magistrate erred in determining that the six-year limitations period set forth in CPLR 213 (1) applies to the 1986 judgment. Rather, the judgment is governed by the 20-year period of limitations set forth in CPLR 211 (b) (*see Matter of Dox v Tynon*, 90 NY2d 166, 174; *Tauber v Lebow*, 65 NY2d 596, 598). Even applying that 20-year period, however, we conclude that the proceeding to enforce the judgment is untimely. With respect to the arrears that accumulated after the entry of the judgment, even assuming, arguendo, that the 20-year limitations period for money judgments ran from each date of default—even though the order of support was entered prior to August 7, 1987, the effective date of CPLR 211 (e) (*see* 42 USC § 666 [a] [9] [A]; *see generally Dox*, 90 NY2d at 174)—we note that more than 20 years have passed since 1990, the year in which the last default in payment occurred.

Contrary to the mother's contention, Family Court did not err in confirming the Support Magistrate's finding that the statute of limitations was not tolled pursuant to CPLR 207 (*see Rachlin v Ortiz*, 133 AD2d 76, 76). The findings of the Support Magistrate are entitled

to great deference (*see Matter of Perez v Johnson*, 128 AD3d 1469, 1469), and we conclude that the record supports the disputed finding. Although the mother alleged that the father was absent from the state for periods of time, the father testified and submitted evidence establishing that he resided in New York during the relevant period. We reject the mother's further contention that the court erred in confirming the finding of the Support Magistrate that the father's conduct after the mother commenced this proceeding did not restart the statute of limitations (*see* General Obligations Law § 17-101; *Flynn v Flynn*, 175 AD2d 51, 51-52, *lv denied* 78 NY2d 863; *see generally Fade v Pugliani/Fade*, 8 AD3d 612, 613-614).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1030

CAF 15-00093

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

IN THE MATTER OF KENDALLE K.

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

CORIN K., RESPONDENT-APPELLANT.

DAVID J. PAJAK, ALDEN, FOR RESPONDENT-APPELLANT.

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered November 17, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent mother to the subject child on the ground of permanent neglect and freed the child for adoption.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, among other things, terminated her parental rights to the subject child on the ground of permanent neglect and freed the child for adoption. The child was initially removed from the mother's custody after it was discovered that the child had been sexually abused by the mother's boyfriend. Thereafter, the mother admitted that the child had disclosed the abuse to her and that she had failed to take action to protect the child. Family Court found that the mother had neglected the child, and the mother agreed to a service plan with petitioner. Petitioner subsequently commenced this proceeding.

Contrary to the contention of the mother, we conclude that petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child (*see* Social Services Law § 384-b [7] [a]; *Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1550, *lv denied* 27 NY3d 903). The evidence at the fact-finding hearing established that petitioner, among other things, facilitated visitation between the mother and child, arranged for parenting classes and monitored the

mother's progress therein, conducted service plan reviews, and referred the mother to mental health services (*see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763, *lv denied* 28 NY3d 904; *Jerikkoh W.*, 134 AD3d at 1550-1551; *Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500).

Contrary to the mother's further contention, petitioner established that, despite those efforts, the mother failed to plan substantially and continuously for the future of the child, although able to do so (*see* Social Services Law § 384-b [7] [a]). " '[T]o plan for the future of the child' . . . mean[s] to take such steps as may be necessary to provide an adequate, stable home and parental care for the child" (§ 384-b [7] [c]). Here, although the mother participated in some of the services offered by petitioner, the record establishes, among other things, that she failed to comply with the requirement that she consistently attend mental health counseling as recommended by petitioner (*see Jerikkoh W.*, 134 AD3d at 1551; *Burke H.*, 134 AD3d at 1501; *Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1597, *lv denied* 17 NY3d 705). The court thus properly concluded that the mother refused to engage meaningfully in the treatment necessary to address her failure to place the child's needs before her own, which repeatedly jeopardized the child's safety. Considering the totality of the evidence presented at the fact-finding hearing, we conclude that petitioner demonstrated by clear and convincing evidence that the mother "did not successfully address or gain insight into the problem that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see Jerikkoh W.*, 134 AD3d at 1551; *Burke H.*, 134 AD3d at 1501).

Contrary to the mother's further contention, the record supports the court's determination that termination of her parental rights is in the best interests of the child, and that a suspended judgment was not warranted under the circumstances inasmuch as any progress made by the mother prior to the dispositional determination was insufficient to warrant any further prolongation of the child's unsettled familial status (*see Burke H.*, 134 AD3d at 1502).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1034

CA 15-02041

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

PATRICK KINGSTON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARDINAL O'HARA HIGH SCHOOL, THE DIOCESE OF BUFFALO, N.Y., AND THE BOYS AND GIRLS CLUB OF THE NORTHTOWNS FOUNDATION, INC., DEFENDANTS-RESPONDENTS.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS J. SPEYER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CARDINAL O'HARA HIGH SCHOOL AND THE DIOCESE OF BUFFALO, N.Y.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANT-RESPONDENT THE BOYS AND GIRLS CLUB OF THE NORTHTOWNS FOUNDATION, INC.

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered September 10, 2015. The order denied the motion of plaintiff for partial summary judgment seeking a determination that Arts and Cultural Affairs Law § 37.09 (1) applies to this action, and granted the cross motions of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained during a professional wrestling performance. Supreme Court denied his motion for partial summary judgment seeking a determination that Arts and Cultural Affairs Law § 37.09 (1) applies to this action, and granted the cross motions of defendants for summary judgment dismissing the complaint. Contrary to plaintiff's contention, the court properly granted the cross motions insofar as they sought dismissal of the first cause of action, which asserts a violation of section 37.09 (1). The statute, entitled "[p]rotection of aerial performers from accidental falls" (*id.*), requires that protective devices be supplied to participants in an aerial performance "which creates a substantial risk to [the performer] or others of serious injury from falling" (*id.*). Here, we agree with the court that plaintiff was injured when he executed a maneuver that

included a planned jump with an acrobatic flip onto the wrestling ring's surface from the ropes surrounding the ring, rather than from an accidental fall (*cf. Murach v Island of Bob-Lo Co.*, 290 AD2d 180, 181), and thus the statute is inapplicable.

Contrary to plaintiff's further contention, the court properly granted defendants' cross motions insofar as they sought dismissal of the second cause of action, which asserts negligence on the part of defendants, on the ground that it is barred by the doctrine of primary assumption of the risk. It is well settled that the primary "assumption of [the] risk doctrine applies where a consenting participant in sporting and amusement activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Bukowski v Clarkson Univ.*, 19 NY3d 353, 356). The participant assumes the risks that are inherent in the "sporting or amusement activit[y]" (*id.*), which "commensurately negates any duty on the part of the defendant to safeguard him or her from the risk" (*Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 395). Consequently, a participant in such activity " 'consents to those commonly appreciated risks which are inherent in and arise out of the nature of the [activity] generally and flow from such participation' " (*Martin v Fiutko*, 27 AD3d 1130, 1131). "[F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non" (*Morgan v State of New York*, 90 NY2d 471, 484). Finally, "[t]he primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions . . . 'It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results' " (*Bouck v Skaneateles Aerodrome, LLC*, 129 AD3d 1565, 1566, quoting *Maddox v City of New York*, 66 NY2d 270, 278).

Here, the court properly concluded that the risk of severe neck and back injuries is inherent in the planned and staged activity engaged in by plaintiff, i.e., jumping from a four-foot high rope onto a wrestling ring, landing on one's back, and then being pushed out of the ring by another performer. Thus, "it is indisputable that . . . plaintiff assumed the risk of landing incorrectly when tumbling in the manner he had been trained to do during his [five-year career as a professional wrestling performer]. The fact that the [rope was slightly looser], a circumstance of which . . . plaintiff was plainly aware, does not raise an issue of fact" (*Morgan*, 90 NY2d at 487; *see generally Yedid v Gymnastic Ctr.*, 33 AD3d 911, 911). Therefore, "by participating in the [exhibition], plaintiff consented that the duty of care owed him by defendants was no more than a duty to avoid reckless or intentionally harmful conduct . . . [and] consent[ed] to accept the risk of injuries that are known, apparent or reasonably foreseeable consequences of his participation in" that exhibition (*Turcotte v Fell*, 68 NY2d 432, 437), including the risk of the injuries he sustained.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1036

CA 16-01066

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

RENEE WANTUCK, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF TYLER BOCHENSKI, AN INFANT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO, DEFENDANT-RESPONDENT.

LAW OFFICES OF JAMES MORRIS, BUFFALO (JACLYN F. SILVER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered September 3, 2015. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff, individually and as parent and natural guardian of her son, commenced this negligence action seeking damages for injuries sustained by her son when he struck a trash receptacle located on a sidewalk after he lost control and fell off of a bicycle that he had been riding on the street. We conclude that Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint. Defendant met its initial burden of establishing as a matter of law that the trash receptacle constituted an "open and obvious" condition, and that it was not "inherently dangerous" (*Jordan-Parker v City of Buffalo*, 137 AD3d 1751, 1752; *see Jones v City of New York*, 32 AD3d 706, 706-707), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1037

CA 15-01959

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

JAMES R. WITTMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT NICE, ET AL., DEFENDANTS,
AND LANCASTER CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION, DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, BUFFALO (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, BUFFALO (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered September 2, 2015. The order granted the motion of defendant Lancaster Central School District Board of Education for summary judgment dismissing all the "claims and cross[] claims" against it.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries he sustained when he was struck by a vehicle operated by defendant Robert Nice while plaintiff was crossing Pavement Road to go from his mailbox to his residence. Just before the collision, a school bus passed by plaintiff, activating its yellow flashing lights. Nice was approaching from the opposite direction, but the bus continued past Nice without activating its red lights or stopping. Nice then accelerated and continued down the road. Upon seeing the bus activate its yellow flashing lights, plaintiff looked left in the direction from which Nice was approaching, and observed what appeared to be oncoming vehicles slowing down. Plaintiff then looked right, observing vehicles stopping behind the bus. At that point, plaintiff proceeded into the road, where he was struck by Nice. With respect to Lancaster Central School District (defendant), which plaintiff improperly sued under the name Lancaster Central School District Board of Education, plaintiff contended that defendant was liable for the injuries he sustained in the accident because the bus driver operating defendant's school bus was negligent by, inter alia, "flashing the yellow signal and failing to come to a complete stop."

Contrary to plaintiff's contention, we conclude that Supreme

Court properly granted defendant's motion for summary judgment dismissing the "claims and cross[] claims" against it. Defendant "demonstrated [its] prima facie entitlement to judgment as a matter of law by establishing that the bus was operated in a prudent and reasonable manner and [that] the driver acted with due care under the circumstances" (*Clark v Amboy Bus Co.*, 117 AD3d 892, 892). Defendant established that the bus driver was not negligent by submitting evidence that "the bus was traveling within the speed limit, *did not decelerate in an improper manner*, and was otherwise operated in accordance with New York State and School District guidelines, policies and procedures" (*Green v South Colonie Cent. Sch. Dist.*, 81 AD3d 1139, 1141 [emphasis added]; *see generally Karchere v Pioneer Transp. Corp.*, 213 AD2d 700, 701). The burden thus shifted to plaintiff to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Plaintiff's submissions in opposition to the motion consisted mostly of materials already submitted by defendant. The only relevant submission containing any new evidence was an affidavit from an expert in accident reconstruction. We conclude that the expert's averments fail to raise a triable issue of fact sufficient to defeat the motion.

First, the expert averred that "a driver of a school bus has to stop at each and every designated stop," but the expert "cite[d] no industry standard, treatise or other authority in support of his opinion" (*Burton v Sciano*, 110 AD3d 1435, 1437). Neither the Vehicle and Traffic Law nor the New York State Department of Motor Vehicles Commercial Driver's Manual requires a school bus driver to stop at a designated bus stop if no child is waiting there for the bus. The expert's opinion is "speculative or unsuppported by any evidentiary foundation . . . [and] is [thus] insufficient to withstand summary judgment" (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544; *see Romano v Stanley*, 90 NY2d 444, 451-452; *Rost v Stolzman*, 81 AD3d 1401, 1403). It is therefore irrelevant whether the bus eventually activated the red lights and stopped after passing by Nice.

Although plaintiff correctly contends that the technical or scientific basis for an expert's conclusions "ordinarily need not be adduced as part of the proponent's direct case . . . , an expert's affidavit proffered as the *sole* evidence to defeat summary judgment must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor" (*Romano*, 90 NY2d at 451-452 [emphasis added]; *see Ramos v Howard Indus., Inc.*, 10 NY3d 218, 224).

Second, the expert's opinions concerning the bus driver's alleged negligence have no evidentiary basis in the record. The expert recounted that the bus driver had testified that he used the lights "to illuminate the roadway" and "was improperly using the yellow flashing lights of the bus." Again, the expert "cite[d] no industry standard, treatise or other authority in support of his opinion" (*Burton*, 110 AD3d at 1437). In our view, there is "no evidentiary basis for the [expert's] conclusion that [the bus driver improperly

used the yellow lights]" (*Keller v Liberatore*, 134 AD3d 1495, 1496; *see Rost*, 81 AD3d at 1403; *see generally Diaz*, 99 NY2d at 544). "[I]n the absence of any evidence that negligence on the part of [defendant] contributed to the accident, the plaintiff[] ha[s] failed to state a cognizable theory for recovery against [defendant]" (*O'Connor v Mahopec Cent. Sch. Dist.*, 259 AD2d 530, 531). Based on our conclusions that defendant established as a matter of law that it is not liable for the accident and that plaintiff failed to raise a triable issue of fact concerning defendant's liability, we see no need to reach the remaining contentions of the parties.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1041

TP 16-00140

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

IN THE MATTER OF LEROY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

JOHN B. LEMPKE, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LEROY JOHNSON, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Christopher J. Burns, J.], entered January 20, 2016) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 107.10 (7 NYCRR 270.2 [B] [8] [i]), and as modified the determination is confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II disciplinary hearing, that he violated various inmate rules. Respondent correctly concedes that the determination that petitioner violated inmate rule 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) is not supported by substantial evidence. We therefore modify the determination and grant the petition in part by annulling that part of the determination finding that petitioner violated that inmate rule (*see Matter of Vasquez v Goord*, 284 AD2d 903, 903-904), and we direct respondent to expunge from petitioner's institutional record all references to the violation of that inmate rule (*see Matter of Edwards v Fischer*, 87 AD3d 1328, 1330). Inasmuch as the record establishes that petitioner has served his administrative penalty and there is no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Matter of Maybanks v Goord*, 306 AD2d 839, 840).

Contrary to petitioner's further contention, the determination that he violated the remaining inmate rules is supported by substantial evidence, including the misbehavior report and the testimony from the hearing (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139). Petitioner failed to exhaust his administrative remedies with respect to his contentions that the determination was arbitrary and capricious and the Hearing Officer was biased inasmuch as he failed to raise those contentions in his administrative appeal, " 'and this Court has no discretionary authority to reach th[ose] contention[s]' " (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1044

KA 15-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD E. GIFFORD, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Francis A. Affronti, J.), entered March 23, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: 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.*). The Board of Examiners of Sex Offenders (Board) assessed a score of 95 points against defendant, making him a presumptive level two risk, but recommended an upward departure to a level three risk on the ground that the risk assessment instrument did not adequately capture the totality of defendant's prior offending behaviors, which show a clear pattern of sexual offending behaviors toward young adolescent females, and which continued despite prior detection and sanctions. At the SORA hearing, the People requested that Supreme Court assess an additional 20 points under risk factor 7, for defendant's relationship with the victim (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 12 [2006]). The court granted the People's request and, alternatively, agreed with the Board that an upward departure was warranted in any event.

Contrary to defendant's contention, we conclude that the court properly determined that the People established by the requisite clear and convincing evidence that defendant established a relationship with the 14-year-old victim for the primary purpose of victimization (*see People v Washington*, 91 AD3d 1277, 1277, *lv denied* 19 NY3d 801; *cf. People v Izzo*, 26 NY3d 999, 1003), and thus that 20 points should be assessed under risk factor seven, resulting in a score of 115, a

presumptive level three risk (*see* Guidelines, at 3). The People established that the victim was unknown to the 26-year-old defendant until he "revved" the engine of his car while the victim was walking nearby, and the victim then approached defendant, spoke with him, and told him her age. The People further established that defendant and the victim engaged in sexual relations for a period of several months, beginning one week after they met; that those encounters occurred outside; and that defendant was in an age-appropriate relationship with another person during that time period. Thus, "the record supports the determination of the court that defendant's primary purpose in establishing the relationship with the [14]-year-old girl was for the purpose of victimizing her" (*Washington*, 91 AD3d at 1277).

In any event, contrary to defendant's further contention, the court did not abuse its discretion in determining, alternatively, that an upward departure was warranted (*see People v Duryee*, 130 AD3d 1487, 1488). The court properly determined that the alleged aggravating circumstances were not adequately taken into account by the guidelines (*see People v Gillotti*, 23 NY3d 841, 861), and that the People met their burden of "establishing that the alleged aggravating . . . circumstances actually exist" (*id.*). The People established that defendant was previously convicted of endangering the welfare of a child after he engaged in sexual behavior with a child less than 17 years old, and that, while defendant was on probation for that offense, a nude 16-year-old girl was found in the trunk of his car. We also conclude that the court properly determined that, based on the totality of the circumstances, defendant poses a "risk of sexual recidivism" and an upward departure to a level three risk was warranted (*id.*; *see People v Inskeep*, 91 AD3d 1335, 1335).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1051

CAF 15-00987

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

IN THE MATTER OF NICOLE M. HONSBERGER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH R. HONSBERGER, RESPONDENT-RESPONDENT.

SUSAN GRAY JONES, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

SUSAN GRAY JONES, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

MULDOON GETZ & RESTON, ROCHESTER (MARGARET M. RESTON OF COUNSEL), FOR PETITIONER-RESPONDENT.

WHITCOMB LAW FIRM, P.C., CANANDAIGUA (DAVID J. WHITCOMB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered March 9, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded the parties joint custody of the subject child with primary physical placement to respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, the Attorney for the Child (AFC) appeals from an order that awarded petitioner mother and respondent father joint custody of the subject child, with primary physical residence to the father and visitation to the mother. Contrary to the AFC's contention, there is a sound and substantial basis in the record for Family Court's determination that awarding the father primary physical residence of the child is in the child's best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174). Although the court found that both parents were fit and that the mother had been the child's primary caretaker since birth, the record supports the court's determination that the father had the financial resources to support the child, had a stable residence with a room for the child, and had the "convincing edge" in fostering a relationship between the child and the mother (*see Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1726; *Matter of Martin*

J.R. v Kimberli A.K., 45 AD3d 1358, 1359).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1053

CAF 15-00376

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

IN THE MATTER OF TRINITY E.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

ROBERT E., RESPONDENT-APPELLANT.

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

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

PAUL B. WATKINS, ATTORNEY FOR THE CHILD, FAIRPORT.

Appeal from an order of the Family Court, Monroe County (Patricia E. Gallaher, J.), entered February 4, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

It is hereby ORDERED that the order of disposition so appealed from is unanimously vacated on the law without costs, the motion for recusal is granted, and the matter is remitted to Family Court, Monroe County, for a new dispositional hearing in accordance with the following memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order of disposition terminating his parental rights with respect to the subject child. At the conclusion of the fact-finding hearing, Family Court made a finding of permanent neglect and thereafter issued an order finding permanent neglect and scheduling a dispositional hearing. The day after the finding of permanent neglect, the father made a death threat directed toward the court, the Attorney for the Child, the caseworker, and the police. The father was charged with making a terroristic threat (Penal Law § 490.20), and an order of protection was issued against the father in favor of the court. The father now contends that the court abused its discretion in denying his subsequent recusal motion following the finding of permanent neglect and in presiding over the dispositional hearing. We agree. It is well settled that, "[a]bsent a legal disqualification under Judiciary Law § 14, a . . . Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405), and the decision whether to recuse is committed to his or her discretion (*see id.* at 406; *Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316, *rearg denied* 112 AD3d 1385). Under these circumstances, and particularly in view of the order of protection, we

conclude that the court abused its discretion in refusing to recuse itself (*see generally People v Warren*, 100 AD3d 1399, 1400). We therefore vacate the dispositional order, grant the recusal motion (*see generally Matter of James V.*, 302 AD2d 916, 918), and remit the matter to Family Court for a new dispositional hearing before a different judge (*see Matter of Jasmine H.*, 270 AD2d 950, 951).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1061

KA 15-01230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON B. MURCIN, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW (GREGORY A. KILBURN OF COUNSEL), FOR DEFENDANT-APPELLANT.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered December 4, 2014. The judgment convicted defendant, upon his plea of guilty, of driving while ability impaired by drugs.

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 driving while ability impaired by drugs as a class E felony (Vehicle and Traffic Law §§ 1192 [4]; 1193 [1] [c] [i] [A]), defendant contends that his plea was not knowing, voluntary, and intelligent because the no-arrest condition of the plea agreement was ambiguous, and that County Court should have conducted a hearing pursuant to *People v Outley* (80 NY2d 702) before imposing an enhanced sentence based on his violation of that condition. Inasmuch as defendant conceded that his postplea arrests violated the plea agreement, withdrew his motion seeking withdrawal of his plea, and did not move to vacate the judgment of conviction, his contentions are not preserved for our review (*see People v Lorenz*, 120 AD3d 1528, 1529, *lv denied* 24 NY3d 1045; *see also People v Hassett*, 119 AD3d 1443, 1444, *lv denied* 24 NY3d 961; *People v Bouwens*, 90 AD3d 1557, 1558, *lv denied* 18 NY3d 955). We decline to exercise our power to review defendant's contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1063

KA 15-01224

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARC J. DAVIS, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (JOSEPH G. FRAZIER 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 May 28, 2015. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of rape in the third degree (Penal Law § 130.25 [2]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), 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: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1065

KA 12-00433

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTIAN J. FORD, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered May 6, 2011. 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: On appeal from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [3]), defendant contends that County Court abused its discretion in denying his request for youthful offender status. We reject that contention. Although defendant acted merely as a driver for his codefendants, one of whom attacked the victim with a baseball bat and fractured the victim's wrist, he admitted during the plea colloquy to having advanced knowledge of his codefendants' intent to rob the victim. Despite that admission, during his presentence investigation defendant asserted that he was "suffering the consequences of a crime he had no part in." We note, in addition, that defendant's guilty plea also covered an indictment charging him with a similar, unrelated crime that he allegedly committed the next day. For those reasons, the probation officer who compiled the presentence report determined that defendant failed to accept responsibility for the crime herein and concluded that defendant's prognosis for lawful behavior is poor. In light of the above, we conclude that the relevant factors support the court's determination denying defendant's request for youthful offender status (*see People v Gibson*, 89 AD3d 1514, 1516, *lv denied* 18 NY3d 924; *see generally People v Amir W.*, 107 AD3d 1639, 1640).

To the extent that defendant contends that the court erred in failing to address on the record the factors it considered in making its determination, we note that, although CPL 720.20 requires the court to determine on the record whether an eligible youth is a

youthful offender (*see People v Rudolph*, 21 NY3d 497, 499), the statute does not require the court to state on the record the reasons underlying its determination.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1066

KA 15-01282

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMON A. REYES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (John B. Gallagher, Jr., A.J.), rendered July 27, 2015. The judgment convicted defendant, upon a jury verdict, of aggravated criminal contempt, criminal contempt in the first degree, and assault in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of aggravated criminal contempt (Penal Law § 215.52 [1]), criminal contempt in the first degree (§ 215.51 [b] [v]), and assault in the third degree (§ 120.00 [2]). The charges arose from his conduct in punching his ex-wife (hereafter, victim) in the side of the head, in violation of a no-offensive-contact order of protection, after exercising visitation with their two-year-old son. Although section 215.52 (1) also encompasses intentional conduct and the causation of serious physical injury, the People's theory on the aggravated criminal contempt count was that defendant recklessly caused ordinary physical injury to the victim.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we reject defendant's contention that the aggravated criminal contempt and assault counts must be dismissed on the ground that the evidence is legally insufficient to establish that he acted recklessly, rather than intentionally, in causing physical injury. Defendant's act of punching the victim once in the side of the head did not demonstrate a "manifest intent to . . . injure" that would preclude a finding of recklessness (*People v Suarez*, 6 NY3d 202, 212 n 6; *see People v Harris*, 273 AD2d 807, 808, *lv denied* 95 NY2d 964; *People v Cameron*, 123 AD2d 325, 325-326; *cf. People v Russell*, 34 AD3d 850, 852, *lv*

denied 8 NY3d 884). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The jury was entitled to credit the testimony of the victim and reject the testimony of a defense witness who claimed that he saw the incident and that defendant did not make physical contact with the victim (*see People v Webster*, 114 AD3d 1170, 1171, *lv denied* 23 NY3d 1026). The victim's alleged motive to fabricate her allegations likewise presented a mere credibility issue and did not render the verdict against the weight of the evidence (*see People v Burgos*, 90 AD3d 1670, 1671, *lv denied* 19 NY3d 862; *People v Pettengill*, 36 AD3d 1070, 1071, *lv denied* 8 NY3d 948).

Contrary to defendant's further contention, Supreme Court did not abuse its "wide discretion in making evidentiary rulings" when it permitted the victim to testify to statements made by the child after the incident (*People v Carroll*, 95 NY2d 375, 385). There was evidence that the child was still under the influence of the startling event when he made the statements even if they may have been made about 10 to 15 minutes afterward, and the statements were therefore properly admitted as excited utterances (*see People v Knapp*, 139 AD2d 931, 931, *lv denied* 72 NY2d 862; *People v Kulakowski*, 135 AD2d 1119, 1119-1120, *lv denied* 70 NY2d 1007, *reconsideration denied* 72 NY2d 912; *see generally People v Johnson*, 1 NY3d 302, 306). The fact that the child was too young to give sworn testimony (*see* CPL 60.20 [2]) does not preclude the admission of his statements as excited utterances (*see Knapp*, 139 AD2d at 931).

We reject defendant's further contention that he was deprived of a fair trial by the testimony of a police officer that defendant did not mention the defense witness to him after defendant was arrested. While that testimony constituted improper evidence of defendant's pretrial silence (*see People v Williams*, 25 NY3d 185, 190-191), the court struck the testimony in its final charge and specifically directed the jury not to consider it in determining the credibility of the defense witness. The jury is presumed to have followed the court's curative instruction, and we conclude that it was sufficient to eliminate any prejudice to defendant (*see People v Carmel*, 298 AD2d 928, 929, *lv denied* 99 NY2d 556; *People v Shaughnessy*, 286 AD2d 856, 857, *lv denied* 97 NY2d 688; *see also People v Clemmons*, 46 AD3d 1117, 1119, *lv denied* 10 NY3d 763).

By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve for our review his challenge to that ruling (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968). In any event, defendant's prior conviction for violating a restraining order was relevant to his credibility (*see People v Yelle*, 303 AD2d 1043, 1043, *lv denied* 100 NY2d 626), and we conclude that the court was not required to preclude cross-examination about it even though it was from approximately 12 years before trial and involved conduct similar to the charged crimes (*see People v Walker*, 83 NY2d 455, 459; *People v Permant*, 268 AD2d 230, 230, *lv denied* 94 NY2d 905;

People v Kostaras, 255 AD2d 602, 602). In addition, we reject defendant's contention that the court erred in admitting evidence that he engaged in domestic violence against the victim on a previous occasion. That evidence was relevant to establish his motive for committing the charged crimes (*see People v Dorm*, 12 NY3d 16, 19; *People v Wilson*, 55 AD3d 1273, 1273, *lv denied* 11 NY3d 931; *see also People v Cox*, 129 AD3d 1210, 1213, *lv denied* 26 NY3d 966), as well as his intent to harass or annoy the victim as an element of the count charging criminal contempt in the first degree (*see People v Wolff*, 103 AD3d 1264, 1265-1266, *lv denied* 21 NY3d 948), and its probative value outweighed its prejudicial effect (*see generally People v Alvino*, 71 NY2d 233, 241-242).

Defendant failed to object to most of the alleged instances of prosecutorial misconduct on summation, and he thus failed to preserve for our review his contention that those instances denied him a fair trial (*see People v Barnes*, 139 AD3d 1371, 1374, *lv denied* 28 NY3d 926). In any event, we conclude that any improper remarks by the prosecutor were not so pervasive or egregious as to deny defendant a fair trial (*see id.*; *People v Rogers*, 103 AD3d 1150, 1153-1154, *lv denied* 21 NY3d 946).

Defendant contends that Penal Law § 215.52 (1) is unconstitutional, i.e., that it violates his rights to equal protection, due process, and freedom from cruel and unusual punishment under both the State and Federal Constitutions, because it creates a single degree of crime that does not distinguish between reckless and intentional conduct, or between causation of ordinary physical injury and serious physical injury. Although defendant raised this contention in his pretrial omnibus motion, the record does not establish that the court ruled on it, and we conclude that defendant abandoned it by failing to seek a ruling (*see People v Mulligan*, 118 AD3d 1372, 1375-1376, *lv denied* 25 NY3d 1075). Here, similar to the facts of *Mulligan*, defense counsel argued other motions and obtained rulings on other applications at the outset of trial but did not seek to argue this issue; he responded "I don't think so" when asked by the court if there were any motions left to deal with; and he did not argue to the court at any time thereafter that the statute is unconstitutional. In any event, we conclude that defendant's challenge to the constitutionality of the statute is without merit. Because section 215.52 (1) does not implicate a suspect classification or a fundamental right, it must bear only a rational relationship to a legitimate governmental interest to withstand due process and equal protection scrutiny (*see People v Knox*, 12 NY3d 60, 67, *cert denied* 558 US 1011; *People v Walker*, 81 NY2d 661, 668). In our view, the Legislature could reasonably have chosen, in the interest of deterring domestic violence, to classify what would otherwise be misdemeanor assault in the third degree (§ 120.00 [1], [2]) as a class D felony where it is committed in violation of an order of protection, while also determining that the existing class D *violent* felony of assault in the second degree (§§ 70.02 [1] [c]; 120.05 [1]) is a sufficient deterrent that it was not necessary to create a greater degree of crime for the *intentional* causation of *serious* physical injury in violation of an order of protection. We further conclude that the

punishments available under section 215.52 (1) are not " 'grossly disproportionate' " to the conduct at issue, and thus that the statute does not provide for cruel and unusual punishment under either the State or Federal Constitutions (*People v Thompson*, 83 NY2d 477, 479).

Finally, we conclude that defendant was not deprived of a fair trial by the cumulative effect of the alleged errors.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1068

TP 16-00196

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

IN THE MATTER OF LUIS ROSALES, PETITIONER,

V MEMORANDUM AND ORDER

DONALD E. VENETOZZI, DIRECTOR, SPECIAL HOUSING UNIT, DISP. PROGRAM, AND NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

LUIS ROSALES, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Russell P. Buscaglia, A.J.], entered February 2, 2016) to review a determination of respondents. The determination placed petitioner in administrative segregation.

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

Memorandum: In this CPLR article 78 proceeding transferred to this Court pursuant to CPLR 7804 (g), petitioner challenges the determination placing him in administrative segregation (*see* 7 NYCRR 301.4). Petitioner contends that the administrative segregation recommendation was vague and deprived him of the opportunity to present his views at the hearing. We reject that contention. "A petitioner's due process rights with respect to matters of involuntary administrative segregation are 'satisfied by notice to petitioner and an opportunity to present his [or her] views' " (*Matter of Gutierrez v Fischer*, 107 AD3d 1463, 1463, *lv denied* 22 NY3d 855, *rearg denied* 23 NY3d 938; *see Matter of Blake v Coughlin*, 189 AD2d 1016, 1017; *see also Matter of Abdus-Samad v Annucci*, 141 AD3d 1101, 1101; *Matter of Roe v Selsky*, 250 AD2d 935, 936). Here, we conclude that the administrative segregation recommendation could not have included greater detail without compromising confidential information and the person from whom that information was obtained (*see Roe*, 250 AD2d at 936). Moreover, the hearing record, including the documentary evidence submitted by petitioner in connection therewith, supports the fact that petitioner was generally aware of the basis of the administrative segregation recommendation. Thus, given the particular

circumstances presented in this case, we conclude that petitioner was provided sufficient notice and an opportunity to present his views at the hearing.

Contrary to petitioner's further contention, the determination placing him in administrative segregation is supported by substantial evidence, including the confidential information considered by the Hearing Officer (*see Abdus-Samad*, 141 AD3d at 1102; *Matter of H'Shaka v Fischer*, 121 AD3d 1455, 1456, *lv denied* 24 NY3d 913).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1069

TP 16-00256

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

IN THE MATTER OF TOWN OF EDEN, PETITIONER,

V MEMORANDUM AND ORDER

KERRY A. DELANEY, ACTING COMMISSIONER, NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, RESPONDENT.

WILLIAM J. TRASK, SR., BLASDELL, FOR PETITIONER.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Deborah A. Chimes, J.], entered February 18, 2016) to review a determination of respondent. The determination denied petitioner's objection to the proposed siting of a community residential facility in the Town of Eden.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging respondent's determination, made after a hearing, to permit the establishment of a community residential facility for the developmentally disabled within the Town of Eden, and the matter was transferred to this Court pursuant to CPLR 7804 (g). Contrary to petitioner's contention, we conclude that the notice provided to petitioner was neither deficient in content nor prejudicial to petitioner merely because it listed, among the data maintained pursuant to Social Services Law § 463 (*see* Mental Hygiene Law § 41.34 [c] [1]), several facilities that were ultimately determined by respondent not to be sufficiently similar to the proposed community residence to warrant consideration in the siting process (*see* § 41.34 [c] [1] [C]; [5]; *cf. Town of Dewitt v Surles*, 167 AD2d 945, 945-946). We reject petitioner's further contention that respondent violated the statutory scheme by not considering, in determining whether the nature and character of the area would be substantially altered, all of the State-licensed facilities within the Town. Cases construing the statutory scheme hold that, in order for an existing facility within the municipality to be deemed "similar" to the proposed new facility, and thus to be considered as part of the siting process, that existing

facility must be a " '[c]ommunity residential facility for the disabled' " (§ 41.34 [a] [1]; *see Matter of City of Mount Vernon v OMRDD*, 56 AD3d 771, 772; *Matter of City of Newburgh v Webb*, 124 AD2d 371, 372; *see also Matter of Village of Newark v Introne*, 84 AD2d 936, 937; *Matter of Town of Onondaga v Introne*, 81 AD2d 750, 750). We conclude that the additional facilities highlighted by petitioner, a senior assisted-living residence, one or more nursing homes, a drug treatment facility, and a day habilitation center, were not similar to the community residence under consideration and were not among those required to be considered by respondent (*see* § 41.34 [c] [1] [C]; [5]; *see also Town of Onondaga*, 81 AD2d at 750).

Finally, we conclude that substantial evidence supports respondent's determination that the establishment of the proposed new six-bed community residence for the disabled, in addition to those already existing in the Town, would not "result in such a concentration of" such facilities and similar "facilities licensed by other state agencies that the nature and character of areas within the municipality would be substantially altered" (Mental Hygiene Law § 41.34 [c] [5]; *see Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239-241; *Matter of Town of Gates v Commissioner of N.Y. State Off. of Mental Retardation & Dev. Disabilities*, 245 AD2d 1116, 1117).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1070

CAF 15-00167

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

IN THE MATTER OF AMYN C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHELSEA K., RESPONDENT-APPELLANT,
AND ISAAC C., RESPONDENT.

WILLIAM D. BRODERICK, JR., ELMA, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

DAVID C. SCHOPP, ATTORNEY FOR THE CHILD, THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (CHARLES D. HALVORSEN OF COUNSEL).

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered January 5, 2015 in a proceeding pursuant to Family Court Act article 10. The order adjudged that the subject child was neglected by respondents.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order that adjudicated the subject child to be neglected. We affirm. Family Court properly made the determination that the child is derivatively neglected based upon the evidence that the mother's four other children were determined to be neglected children, " 'including the evidence that [the mother] had failed to address the mental health issues that led to those neglect determinations and the placement of the custody of those children with petitioner' " (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1746-1747; *see Matter of Lillianna G. [Orena G.]*, 104 AD3d 1224, 1225). Moreover, the neglect finding with respect to the other four children was entered only two days before the subject child was born, and thus " 'the prior finding . . . was so proximate in time to [the instant] proceeding[] that it can reasonably be concluded that the condition still exist[ed]' " (*Sophia M.G.-K.*, 84 AD3d at 1747; *see also Matter of Alexisana PP. [Beverly PP.]*, 136 AD3d 1170, 1171).

Contrary to the mother's implied contention, we conclude that the court properly took judicial notice of its own prior proceedings (*see Gugino v Tsvasman*, 118 AD3d 1341, 1342; *Matter of Miranda F. [Kevin*

D.], 91 AD3d 1303, 1305).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1071

CAF 14-01933

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

IN THE MATTER OF ANTHONY L., JR.

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

LISA P., RESPONDENT-APPELLANT,
AND ANTHONY L., RESPONDENT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR RESPONDENT-APPELLANT.

JESSICA M. PEASLEE, BATH, FOR PETITIONER-RESPONDENT.

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILD, BATH.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered October 1, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Lisa P. had neglected the subject child.

It is hereby ORDERED that said appeal from the order insofar as it concerns disposition is unanimously dismissed and the order is affirmed without costs.

Memorandum: In this neglect proceeding pursuant to Family Court Act article 10, respondent mother appeals from an order of disposition that continued the placement of the subject child in the care and custody of petitioner, Steuben County Department of Social Services, until the completion of the next permanency hearing in October 2014. Although the mother's challenge to the disposition is moot inasmuch as it is undisputed that superseding permanency orders have since been entered (*see Matter of Alexander M. [Michael M.]*, 83 AD3d 1400, 1401, *lv denied* 17 NY3d 704; *see generally Matter of Kadyn J. [Kelly M.H.]*, 109 AD3d 1158, 1161), her appeal also brings up for review the order of fact-finding determining that she neglected the child (*see Matter of Bradley M.M. [Michael M.—Cindy M.]*, 98 AD3d 1257, 1258).

We reject the mother's contention that the evidence is legally insufficient to establish neglect. Family Court Act § 1046 (a) (iii) provides, with an exception not relevant here, that "proof that a person repeatedly misuses a drug or drugs" to the extent that such misuse "has or would ordinarily have the effect of producing in the user thereof," inter alia, a substantial state of stupor or

intoxication, or a substantial impairment of judgment, is "prima facie evidence that a child of . . . such person is a neglected child." The statute thus creates a presumption of neglect in cases of repeated drug misuse, which eliminates the need for proof that the respondent's conduct resulted in at least an imminent danger of impairment to the child's physical, mental, or emotional condition (*see Matter of Samaj B. [Towanda H.-B.—Wade B.]*, 98 AD3d 1312, 1313; *Matter of Nasiim W. [Keala M.]*, 88 AD3d 452, 453; *cf.* Family Ct Act § 1012 [f] [i]).

Here, we agree with petitioner and the Attorney for the Child that the evidence at the fact-finding hearing established a prima facie case of neglect under Family Court Act § 1046 (a) (iii) based on the mother's misuse of prescription medication (*see Matter of Madison PP. [Tina QQ.]*, 88 AD3d 1102, 1103, *lv denied* 18 NY3d 802; *see generally Samaj B.*, 98 AD3d at 1313). In particular, there was evidence that the mother had been prescribed, among other things, morphine for fibromyalgia; that she admitted to a caseworker that she "had been taking more than prescribed"; that she often slurred her speech as though intoxicated in conversations with petitioner's employees; that she fell asleep during the afternoon at a time when the two-year-old child was awake and she was his sole caretaker; that the child's father did not believe the child to be safe alone with her overnight; and that she once bought and smoked marihuana to deal with the effects of morphine withdrawal. We note that Family Court declined to credit the mother's testimony "to any degree," and that its credibility determinations are entitled to great deference (*see Matter of Holly B. [Scott B.]*, 117 AD3d 1592, 1592).

To the extent that the presumption set forth in Family Court Act § 1046 (a) (iii) may not have been the basis for the court's finding of neglect, we conclude that we are not precluded from affirming the order based on that presumption inasmuch as "the authority of this Court to review the facts is as broad as that of Family Court" (*Matter of David R.*, 39 AD3d 1187, 1188). In view of our determination, we do not address the mother's remaining challenges to the sufficiency of petitioner's proof.

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1072

CAF 15-00375

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

IN THE MATTER OF LATONIA W., NEIGHYA W.,
AND CECELIA M.W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

ANTHONY W., RESPONDENT-APPELLANT.

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

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 23, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated respondent's parental rights.

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

Memorandum: In a proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, revoked a suspended judgment and terminated his parental rights with respect to the subject children. Contrary to the father's contention, Family Court did not abuse its discretion in denying his requests to adjourn the hearing on the petition seeking to revoke the suspended judgment.

It is well settled that "[t]he grant or denial of a motion for 'an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*Matter of Steven B.*, 6 NY3d 888, 889, quoting *Matter of Anthony M.*, 63 NY2d 270, 283). With respect to the father's contention that the court erred in denying his request to adjourn the hearing so he could contact unnamed witnesses, the father "failed to demonstrate that the need for the adjournment to subpoena the witness[es] was not based on a lack of due diligence on the part of [him] or [his] attorney" (*Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747; *see Steven B.*, 6 NY3d at 889).

Contrary to the father's further contention, the court did not

abuse its discretion in denying his repeated requests to adjourn the hearing to permit him to retain counsel or to permit his allegedly retained counsel to appear. It is well settled that "[t]he granting of an adjournment [to obtain new counsel] is addressed to the sound discretion of the court . . . In making such a determination, the court must undertake a balanced consideration of all relevant factors" (*Matter of Sicurella v Embro*, 31 AD3d 651, 651, *lv denied* 7 NY3d 717; *see Matter of Cabral v Cabral*, 61 AD3d 863, 863-864; *see generally Anthony M.*, 63 NY2d at 283). Furthermore, with respect to a criminal proceeding involving a similar right to counsel as the father is afforded in this permanent neglect proceeding (*see generally Matter of Ella B.*, 30 NY2d 352, 356-357), the Court of Appeals has "held that a defendant may not use the right to counsel of choice 'as a means to delay judicial proceedings . . . ' [Thus,] appellate courts must recognize 'a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar' " (*People v O'Daniel*, 24 NY3d 134, 138; *see United States v Gonzalez–Lopez*, 548 US 140, 152). Here, when the father initially sought an adjournment in the midst of the hearing to retain new counsel, the court indicated that the father could hire an attorney but also said that counsel must appear at the next adjourned date. Although the father indicated on the next date that he had retained an attorney, no attorney appeared or contacted the court, and the court then denied the father's request for a further adjournment. Under the circumstances presented, including the six-year period during which the permanent neglect proceeding remained pending and the subject children's status remained unsettled, and in light of the father's repeated groundless requests to adjourn the hearing, we cannot conclude that the court erred in determining that the father's request was merely another delaying tactic, nor do we conclude that it abused its discretion in denying the request when the father's allegedly retained counsel did not appear. Finally, we note that the father was represented by assigned counsel throughout the proceedings, including during the hearing at issue (*cf. Matter of Stephen L. [June L.]*, 2 AD3d 1229, 1231-1232).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1076

CA 15-01813

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

IN THE MATTER OF BRYAN MEDINA,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

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

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

KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (DAVID W. BENTIVEGNA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 7, 2015 in a proceeding pursuant to CPLR article 78. The judgment directed respondent to expunge from petitioner's institutional record all references to the incident underlying this special proceeding.

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

Memorandum: Contrary to respondent's contention, Supreme Court properly determined upon reargument that expungement of all references to the underlying incident from petitioner's institutional record, rather than remittal for a new hearing, was the appropriate remedy for the violation of petitioner's fundamental right to be present at his disciplinary hearing (*see Matter of Brooks v James*, 105 AD3d 1233, 1234; *Matter of Rush v Goord*, 2 AD3d 1185, 1186; *see also Matter of Bowen v Coombe*, 239 AD2d 960, 960-961). This is not a case in which the record is unclear with respect to whether petitioner's right to be present was in fact violated (*cf. Matter of Texeira v Fischer*, 26 NY3d 230, 234-235; *Matter of Shoga v Annucci*, 132 AD3d 1338, 1339).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1079

CA 15-00989

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

DORN ENERGY, LLC, ANDREW W. DORN, IV, MATTHEW J. DORN, AND ANDREW W. DORN, JR., PLAINTIFFS-RESPONDENTS,

V ORDER

NORA B. SULLIVAN, DEFENDANT-APPELLANT. (APPEAL NO. 1.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 15, 2015. The order granted plaintiffs' renewed motion for summary judgment.

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

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court

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

1080

CA 15-00991

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

DORN ENERGY, LLC, ANDREW W. DORN, IV, MATTHEW J. DORN, AND ANDREW W. DORN, JR., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NORA B. SULLIVAN, DEFENDANT-APPELLANT. (APPEAL NO. 2.)

ZDARSKY SAWICKI & AGOSTINELLI LLP, BUFFALO (GUY J. AGOSTINELLI OF COUNSEL), FOR DEFENDANT-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (BRIAN D. GWITT OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered May 12, 2015. The judgment granted plaintiffs' renewed motion for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting judgment in favor of plaintiffs as follows:

> It is ADJUDGED AND DECLARED that defendant has no ownership, membership, equitable, or other interest in plaintiff Dorn Energy LLC (Dorn Energy); that the individual plaintiffs did not and do not owe any fiduciary duties to defendant with respect to the economic opportunity at issue; that Dorn Energy did not and does not owe any fiduciary duties to nonparty, dissolved Great Lakes Energy Partners, LLC, formerly known as Great Lakes Solar Partners, LLC, formerly known as Energy Project Partners, LLC (Great Lakes); and that the individual plaintiffs did not breach any fiduciary duties to Great Lakes,

and as modified the judgment is affirmed without costs.

Memorandum: Plaintiffs commenced this action pursuant to CPLR 3001, seeking various declarations to the effect that they breached no fiduciary duty to defendant or to a now-dissolved Delaware limited liability company, most recently known as Great Lakes Energy Partners, LLC (Great Lakes), of which the individual plaintiffs and the defendant were members. Defendant appeals from a judgment that granted plaintiffs' renewed motion for summary judgment on their

claims and dismissed defendant's counterclaims. Supreme Court properly determined, for reasons stated in its decision, that plaintiffs demonstrated as a matter of law that they have no liability to defendant or to Great Lakes inasmuch as the individual plaintiffs did not usurp an economic opportunity that "in fairness" belonged to Great Lakes (*Broz v Cellular Info. Sys.*, 673 A2d 148, 154-155, citing *Guth v Loft*, 23 Del Ch 255, 267, 5 A2d 503, 509; *see generally Venturetek, L.P. v Rand Publ. Co., Inc.*, 39 AD3d 317, 317-318, *lv denied* 10 NY3d 703). The court also properly determined that defendant, in opposition to the motion, failed to raise any triable issues of fact with respect to the claims or counterclaims. We add only that the judgment must be modified to declare "the rights and other legal relations of the parties" in accordance with plaintiffs' request for relief (CPLR 3001; *see Germeo v Village of Albion*, 306 AD2d 928, 929, *lv denied* 100 NY2d 514; *Northtown, Inc. v Vivacqua*, 272 AD2d 917, 918).

Entered: November 18, 2016

Frances E. Cafarell
Clerk of the Court