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

916

KA 15-00785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRAVON CARTER, DEFENDANT-APPELLANT.

MARY R. HUMPHREY, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered April 2, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). Defendant's valid waiver of the right to appeal forecloses our review of his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833), and his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1064

KA 13-01182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL KING, DEFENDANT-APPELLANT.

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

MICHAEL KING, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered April 16, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of driving while intoxicated as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]) and sentencing him to an indeterminate term of incarceration of 1⅔ to 5 years. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid and thus does not preclude our review of his challenge to the severity of the sentence (*see People v Davis*, 114 AD3d 1166, 1167, *lv denied* 23 NY3d 1035; *People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159), we nevertheless conclude that the sentence is not unduly harsh or severe.

Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel. That contention does not survive his guilty plea because defendant failed to demonstrate that "the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance" (*People v Lucieer*, 107 AD3d 1611, 1612 [internal quotation marks omitted]; *see People v VanVleet*, 140 AD3d 1633, 1633, *lv denied* 28 NY3d 938). In any event, we conclude that "defendant was afforded meaningful representation inasmuch as he 'receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People*

v Cooper, 136 AD3d 1397, 1398, *lv denied* 27 NY3d 1067; *see People v Ford*, 86 NY2d 397, 404; *People v Parson*, 122 AD3d 1441, 1443).

We have considered defendant's remaining contention, a challenge to the court's jurisdiction that survives the guilty plea and would survive even a valid waiver of the right to appeal (*see People v Hansen*, 95 NY2d 227, 230-231; *see also People v Oliveri*, 49 AD3d 1208, 1209; *People v June*, 30 AD3d 1016, 1017, *lv denied* 7 NY3d 813, *reconsideration denied* 7 NY3d 868), and we conclude that the contention is without merit.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1094

KA 15-01172

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMON SALAS, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 29, 2015. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment that, upon his admission that he violated the terms and conditions of probation, revoked the sentence of probation imposed upon his conviction of burglary in the third degree (Penal Law § 140.20) and sentenced him to an indeterminate term of incarceration of 1 to 3 years. Even assuming, arguendo, that defendant's waiver of the right to appeal was invalid and does not preclude our review of his challenge to the severity of the sentence (*see People v Davis*, 114 AD3d 1166, 1167, *lv denied* 23 NY3d 1035; *People v Theall*, 109 AD3d 1107, 1108, *lv denied* 22 NY3d 1159), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1104

CA 16-00663

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

INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, DISTRICT COUNCIL NO. 4, BY ITS SECRETARY-TREASURER, MARK STEVENS, INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES, FINISHING TRADES INSTITUTE OF WESTERN & CENTRAL NEW YORK, BY ITS TRUSTEES MARK STEVENS, GREGORY STONER, ROBERT SINOPOLI, JEFFREY CARROLL, TODD ROTUNNO, MICHAEL DEMS, DANIEL LAFRANCE, DAN JACKSON, DOMINIC ZIRILLI, TIM MCCLUSKEY, JEFF STURTZ, FRANK HOSEK AND MARVIN PAIGE, FORNO ENTERPRISES, INC., TGR ENTERPRISES, INC., HOGAN GLASS, LLC, AJAY GLASS & MIRROR CO., THOMAS A. JERGE, AS A CITIZEN TAXPAYER, PAUL J. LEONE, AS A CITIZEN TAXPAYER, CHRISTOPHER J. POWERS, AS AN APPRENTICE ENROLLED IN PAINTERS DISTRICT COUNCIL NO. 4 GLAZIER APPRENTICESHIP PROGRAM, AND RACHEL TERHART, AS A FORMER APPRENTICE ENROLLED IN PAINTERS DISTRICT COUNCIL NO. 4 GLAZIER APPRENTICESHIP PROGRAM, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF LABOR, MARIO MUSOLINO, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF LABOR AND CHRISTOPHER ALUND, DIRECTOR, BUREAU OF PUBLIC WORKS, A DIVISION OF NEW YORK STATE DEPARTMENT OF LABOR, DEFENDANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOSEPH L. GUZA OF COUNSEL), ADAMS BELL ADAMS, P.C., ROCHESTER, DUKE HOLZMAN PHOTIADIS & GRESENS, LLP, AND HARRIS BEACH PLLC, PITTSFORD, FOR PLAINTIFFS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme Court, Erie County (James H. Dillon, J.), entered October 22, 2015. The order and judgment, among other things, dismissed plaintiffs' complaint upon defendants' motion.

It is hereby ORDERED that the order and judgment so appealed from is reversed on the law without costs, defendants' motion is denied, the complaint is reinstated, plaintiffs' cross motion is granted and

judgment is granted in favor of plaintiffs as follows:

> It is ADJUDGED and DECLARED that Labor Law § 220 (3) (a), (b) and (3-e) apply to glazier apprentices enrolled in the DC4 Glazier Apprenticeship Program; and it is further
>
> ADJUDGED and DECLARED that glazing contractors may compensate apprentices registered and enrolled in the DC4 Glazier Apprenticeship Program in accordance with the applicable apprentice rates posted by defendant New York State Department of Labor on taxpayer financed projects.

Memorandum: Plaintiffs commenced this action seeking, inter alia, a judgment declaring that Labor Law § 220 (3) (a), (b) and (3-e) apply to glazier apprentices enrolled in the DC4 Glazier Apprenticeship Program and that glazing contractors may compensate apprentices registered and enrolled in the Glazier Apprenticeship Program in accordance with the applicable apprentice rates posted by defendant New York State Department of Labor (DOL) on taxpayer financed projects. Defendants moved for dismissal of the first cause of action and for summary judgment on the remaining causes of action. Plaintiffs cross-moved for summary judgment on the complaint. Supreme Court granted defendants' motion in its entirety, concluding that the determination of the DOL "that the work in question is that of the ironworkers and not of the glaziers is not unreasonable or arbitrary or capricious." We now reverse.

At issue on this appeal is whether defendants' interpretation of Labor Law § 220 (3-e) should be upheld. That section provides, in pertinent part, that "[a]pprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the [DOL]." Plaintiffs contend that this sentence permits glazier apprentices who are registered, individually, under a bona fide apprenticeship program to be paid as apprentices when performing work on a public works project even if they are performing work classified for another trade. Plaintiffs further contend that defendants are erroneously interpreting Labor Law § 220 (3-e) as requiring contractors on public works projects to pay glazier apprentices the wages of ironworker journeymen when the glazier apprentices install curtain walls, store fronts and pre-glazed windows. Although such work remains a work process of glaziers, as defined by the work curriculum promulgated and approved by the DOL, defendant Christopher Alund, Director, Bureau of Public Works, A Division of the DOL, has exercised his authority to classify that work as within the ironworkers' trade when that work is performed on public works projects (*see* § 220 [3-a] [a] [i]; *Matter of Lantry v State of New York*, 6 NY3d 49, 52-59). As a result of that classification and his interpretation of section 220 (3-e), Alund has opined that "a glazier apprentice . . . who performs work classified as ironworker's work must be paid an ironworker's journeyman prevailing rate" because the glazier is not performing work "within the trade that is the subject of the apprenticeship program in which the apprentice is registered."

As a preliminary matter, we agree with plaintiffs that, due to the parties' differences over the interpretation of the statute, declaratory relief will have a practical effect and thus is appropriate (*see Chanos v MADAC, LLC*, 74 AD3d 1007, 1008; *see also* CPLR 3001). We further agree with plaintiffs that, under the plain meaning of Labor Law § 220 (3-e), glazier apprentices may be paid the applicable apprentice rate provided that they are registered, individually, with "a" bona fide apprenticeship program that is itself registered with the DOL.

" 'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature' . . . As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof . . . 'In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning' " (*Majewski v Broadalbin-Perth Cent. Sch. Dist.*, 91 NY2d 577, 583).

Importantly, "[t]he function of the courts is to enforce statutes, not to usurp the power of legislation, and to interpret a statute where there is no need for interpretation, to conjecture about or to add to or to subtract from words having a definite meaning, or to engraft exceptions where none exist are trespasses by a court upon the legislative domain" (McKinney's Cons Laws of NY, Book 1, Statutes § 76, Comment at 168). It is thus axiomatic that "new language cannot be imported into a statute to give it a meaning not otherwise found therein" (§ 94, Comment at 190), and "a court cannot amend a statute by inserting words that are not there" (§ 363, Comment at 525; *see Matter of Chemical Specialties Mfrs. Assn. v Jorling*, 85 NY2d 382, 394, *rearg denied* 85 NY2d 1033; *Gawron v Town of Cheektowaga*, 117 AD3d 1410, 1412).

We of course agree with the dissent that, generally, "[t]he Labor Department's interpretation of a statute it is charged with enforcing is entitled to deference. The construction given statutes and regulations by the agency responsible for their administration, 'if not irrational or unreasonable,' should be upheld" (*Samiento v World Yacht Inc.*, 10 NY3d 70, 79). Here, however, we conclude that no such deference is required because defendants' interpretation "is contrary to the plain meaning of the statutory language" (*Matter of Raritan Dev. Corp. v Silva*, 91 NY2d 98, 100; *see Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459), and "this appeal does not call upon us to interpret a statute where 'specialized knowledge and understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom' is at stake" (*Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 285; *see Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 553, *rearg denied* 99 NY2d 553).

"Section 220 of the Labor Law and article I, section 17 of the

New York Constitution require that laborers, workers and mechanics be paid the statutorily determined prevailing rate of wages. As originally enacted, the prevailing wage law contained no provision regulating the employment of apprentices on public works projects" (*Matter of Monarch Elec. Contr. Corp. v Roberts*, 70 NY2d 91, 95). The language relating to apprentices was first added to section 220 (3) in 1966 and, in 1967, the Legislature added section 220 (3-e) "to expressly prohibit working as an apprentice on a public works project unless a person is individually registered in a State-approved apprenticeship program, and to regulate the allowable ratio of apprentices to journey-level workers" (*id.*). As now written, section 220 requires "classification of workers by status--as either journeymen or apprentices--and by expertise, as carpenters, ironworkers, roofers, etc., and [further requires] that all covered workers be paid a journeyman's prevailing wage for their occupation unless they are apprentices registered in accordance with the statute" (*id.* at 96, citing *Matter of Tap Elec. Contr. Serv. v Roberts*, 104 AD2d 548, and *Matter of G & G Erectors v Levine*, 48 AD2d 960).

Plaintiffs correctly contend that the first sentence of Labor Law § 220 (3-e) does not contain any requirement that apprentices can work and be paid as apprentices only if they are working within the trade classification for the work they are performing. The question is whether the use of the word "a" to qualify the term "bona fide program registered with the [DOL]" means that an apprentice can work as an apprentice if he or she is individually registered with "any" bona fide apprentice program or, rather, with one particular program (*id.*; *see* § 220 [3] [a], [b]). "Although 'a' may mean 'one' where the overall tenor of the statute connotes such meaning, that is neither the usual meaning of the word generally, nor the most reasonable meaning of the word given the particular circumstances and statutory language at issue here. Recognizing that a contrary interpretation of the article 'a,' if adopted generally, would lead to no end of absurd statutory constructions, those courts that have considered the issue have held that the usual and ordinary meaning of 'a' is not 'one and only one,' but rather 'any number of' or 'at least one'—not 'one and no more,' but rather 'one or more' " (*Matter of Cook v Carmen S. Pariso, Inc.*, 287 AD2d 208, 213; *cf. Lewis v Spies*, 43 AD2d 714, 715). According the word "a" its plain and ordinary meaning, we agree with plaintiffs that Labor Law § 220 (3-e) permits an apprentice to work as such if he or she is registered in any bona fide apprentice program.

Defendants would have us limit the application of Labor Law § 220 (3-e) to apprentices who are performing work within the trade that is the subject of the apprenticeship program in which the apprentice is registered. The statute, however, contains no such limitation, and nothing in the remaining sentences of section 220 (3-e) provides any basis to interpret that section any differently. Nevertheless, " '[a] statute or legislative act is to be construed as a whole, and . . . all parts of an act are to be read and construed together to determine the legislative intent' " (*Cook*, 287 AD2d at 215, quoting McKinney's Cons Laws of NY, Book 1, Statutes § 97, Comment at 211).

In reviewing Labor Law § 220 as a whole, we conclude that nothing

in that statute establishes any basis for a different interpretation of section 220 (3-e). Rather, we note that the very limitation defendants seek to impose on section 220 (3-e), i.e., a limitation to work in the same trade or occupation, was added to other subdivisions of Labor Law § 220 (*see* § 220 [3] [a], [b]). When "the Legislature uses unlike terms in different parts of a statute it is reasonable to infer that a dissimilar meaning is intended" (McKinney's Cons Laws of NY, Book 1, Statutes § 236, Comment at 403; *see Matter of Albano v Kirby*, 36 NY2d 526, 530). The fact that the Legislature did not add similar restrictive language to section 220 (3-e) further supports our conclusion that no such restriction was intended, and this Court will not "amend [the] statute by inserting words that are not there" (Statutes § 363, Comment at 525).

Inasmuch as "the language of [the] statute is clear and unambiguous, [we] must give effect to its plain meaning" (*Matter of Tall Trees Constr. Corp. v Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91), and we may not "resort to extrinsic material such as legislative history or memoranda" (*Matter of Rochester Community Sav. Bank v Board of Assessors of City of Rochester*, 248 AD2d 949, 950, *lv denied* 92 NY2d 811; *see Matter of Niagara v Daines*, 96 AD3d 1433, 1434-1435). We thus conclude that Labor Law § 220 (3-e), by its terms, permits glazier apprentices who are registered, individually, under a bona fide glazier apprenticeship program to work and be paid as apprentices even if the work they are performing is not work in the same trade or occupation as their apprenticeship program.

All concur except WHALEN, P.J., who dissents and votes to affirm in accordance with the following memorandum: I respectfully dissent. Contrary to the majority, I conclude that defendants' interpretation of Labor Law § 220 (3-e) is supported by the language of the statute and its underlying purpose, and I would therefore affirm the order and judgment granting defendants' motion seeking, inter alia, a declaratory judgment in their favor and denying plaintiffs' cross motion for summary judgment.

"Labor Law § 220 implements the constitutional mandate that contractors engaged in public projects pay their workers wages and supplements which 'shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work . . . is performed' " (*Matter of Lantry v State of New York*, 6 NY3d 49, 54, quoting § 220 [3]; *see* NY Const, art I, § 17). The provision of the prevailing wage law at issue here, section 220 (3-e), was enacted to regulate the employment of apprentices on public works projects, and it was intended "to prevent subversion of the prevailing wage law" by expressly prohibiting persons from working as apprentices on public works projects unless they were individually registered in a State-approved apprenticeship program (*Matter of Monarch Elec. Contr. Corp. v Roberts*, 70 NY2d 91, 95). The statute specifically provides that "[a]pprentices will be permitted to work *as such* only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor [DOL]" (§ 220 [3-e] [emphasis added]). The

section further provides that "[a]ny employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the [DOL] for the classification of work he [or she] actually performed" (*id*.).

The DOL is charged with implementing and enforcing both the prevailing wage law (*see Lantry*, 6 NY3d at 54), and supervising and maintaining standards for apprenticeship programs (*see Albany Elec. Contrs. Assn. v Angello*, 6 AD3d 920, 921). Consequently, defendants' interpretation of Labor Law § 220 (3-e) is entitled to deference (*see Samiento v World Yacht Inc*., 10 NY3d 70, 79) and "must be upheld absent demonstrated irrationality or unreasonableness" (*Seittelman v Sabol*, 91 NY2d 618, 625).

No such irrationality or unreasonableness has been demonstrated with respect to defendants' interpretation of that section. The DOL reasonably concluded that, pursuant to section 220 (3-e), an employee may be paid at the lower rate for apprentices only for work within the trade classification of his or her apprenticeship program. Any employee who is working outside the trade classification of his or her apprenticeship program is not working "as such," i.e., as an apprentice, under the statute (§ 220 [3-e]). In that circumstance, the employee is entitled to be paid at the rate paid to journey-level workers for "the classification of work . . . actually performed" (*id*.). The DOL's interpretation ensures that workers receive appropriate wages based upon the work they perform, and that they receive appropriate training in their trade classification when they are in fact working as apprentices (*see Matter of Nash v New York State Dept. of Labor*, 34 AD3d 905, 906, *lv denied* 8 NY3d 803).

Nor is the agency's interpretation of the statute contrary to its plain meaning. The language of the statute is ambiguous and lends itself to either of the competing interpretations offered by the parties. Because the agency responsible for implementing section 220 (3-e) gave the statute a rational interpretation that is not inconsistent with its plain language, that interpretation must be upheld (*see James Sq. Assoc. LP v Mullen*, 21 NY3d 233, 250-251).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1116

KA 11-02605

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTAMION J. MOORE, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered December 14, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved, and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

At the close of the People's case, defendant moved for a trial order of dismissal, and County Court denied that motion with respect to the charge of murder in the second degree and reserved decision with respect to the remaining charges. The matter was submitted to the jury, which issued a verdict convicting defendant of the charges. The court never ruled on the remainder of the motion. On appeal, defendant contends that the evidence is not legally sufficient to support the charges and thus that the court erred in denying his motion. We do "not address that contention because, in accordance with *People v Concepcion* (17 NY3d 192, 197-198) and *People v LaFontaine* (92 NY2d 470, 474, *rearg denied* 93 NY2d 849), 'we cannot deem the court's failure to rule on the . . . motion as a denial thereof' " (*People v White*, 134 AD3d 1414, 1415; *see People v Spratley*, 96 AD3d 1420, 1421). We therefore hold the case, reserve decision, and remit the matter to County Court for a ruling on the

remainder of the motion.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1163

KA 14-01677

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL BEASLEY, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

CRYSTAL BEASLEY, 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 (Robert B. Wiggins, J.), rendered June 10, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the fourth degree.

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

Memorandum: On appeal from a judgment convicting her following a jury trial of assault in the first degree (Penal Law § 120.10 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]), defendant contends that County Court violated CPL 300.10 (4) and 300.40 in its instructions to the jury with respect to the order in which the jury should consider the offenses charged in the indictment and the lesser included offense. By failing to object to the court's charge, defendant failed to preserve her contention for our review (*see People v White*, 191 AD2d 604, 604-605, *lv denied* 81 NY2d 1082; *People v Sampson*, 145 AD2d 910, 910, *lv denied* 73 NY2d 982), 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]).

In her pro se supplemental brief, defendant contends that the court erred in refusing to suppress her statements to the police. We reject that contention. Although defendant contends that she requested an attorney before she made oral statements to the police, the only witness to testify at the suppression hearing testified that defendant did not request an attorney until after she made the oral statements and refused to sign a written statement. The court's determination to credit that testimony should not be disturbed (*see People v Smith*, 273 AD2d 896, 897, *lv denied* 95 NY2d 938; *see*

generally People v Prochilo, 41 NY2d 759, 761). With respect to her contention that her statements were not knowingly, voluntarily or intelligently made due to her alleged intoxication, "[w]e note that defendant improperly relies on trial testimony in challenging the court's suppression ruling" (*People v Ojo*, 43 AD3d 1367, 1368, *lv denied* 10 NY3d 769, *reconsideration denied* 11 NY3d 792; *see People v Cooper*, 59 AD3d 1052, 1054, *lv denied* 12 NY3d 852). There was no evidence at the suppression hearing that, at the time defendant spoke to the police, she " 'was intoxicated to the degree of mania, or of being unable to understand the meaning of [her] statements' " (*People v Schompert*, 19 NY2d 300, 305, *cert denied* 389 US 874; *see People v Lake*, 45 AD3d 1409, 1410, *lv denied* 10 NY3d 767).

Defendant further contends in her pro se supplemental brief that the court erred in admitting in evidence recordings of 911 calls made by her on the night of the crimes. Even assuming, arguendo, that the court improperly admitted those recordings in evidence, we conclude that any such error is harmless inasmuch as the proof of defendant's guilt is overwhelming, and there is no significant probability that the jury would have acquitted defendant had that evidence not been introduced (*see People v Spencer*, 96 AD3d 1552, 1553, *lv denied* 19 NY3d 1029, *reconsideration denied* 20 NY3d 989; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Finally, defendant contends in her pro se supplemental brief that the verdict is against the weight of the evidence and that she was denied effective assistance of counsel. 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). With respect to her contention that defense counsel was ineffective for failing to request a jury instruction on intoxication, we note that "[a]n intoxication charge is warranted if, viewing the evidence in the light most favorable to the defendant, 'there is sufficient evidence of intoxication in the record for a reasonable person to entertain a doubt as to the element of intent on that basis' " (*People v Sirico*, 17 NY3d 744, 745; *see People v Gaines*, 83 NY2d 925, 927). We cannot determine on this record whether defendant was intoxicated to a degree such that an intoxication charge was warranted, or whether defense counsel had a "strategic explanation for the failure . . . to request the charge" (*People v Miller*, 122 AD3d 1369, 1370, *lv denied* 25 NY3d 952). We therefore conclude that defendant's claim of ineffective assistance of counsel is based on matters outside the record and must be raised by way of a motion pursuant to CPL 440.10 (*see generally People v Graham*, 125 AD3d 1496, 1496, *lv denied* 26 NY3d 1008).

We have reviewed defendant's remaining claims of ineffective assistance of counsel and conclude that they lack merit.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1207

KA 15-00106

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARRYL JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered March 26, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), attempted robbery in the first degree, and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), arising from the shooting of a drug dealer during a robbery, defendant contends that Supreme Court deprived him of due process and a fair trial by admonishing his trial attorney that it would permit the People to introduce additional evidence if counsel made certain arguments in summation. We reject that contention.

During defendant's first trial, his attorney argued that the jury should not accept the identification testimony of an eyewitness because defendant was the only black male in the front of the courtroom and the perpetrator was also a black male, and thus the identification was not sufficiently certain. The jury at defendant's first trial was unable to reach a verdict. Prior to the start of the second trial, the People moved in limine to preclude defense counsel from making that argument. The prosecutor contended that the witness had actually identified defendant from a photo array prior to trial, but the People were precluded from introducing such evidence on their direct case (*see People v Lindsay*, 42 NY2d 9, 12; *People v Ofield*, 280 AD2d 978, 978, *lv denied* 96 NY2d 832), and defense counsel therefore was creating a misimpression that the witness had not previously identified defendant. In the alternative, the People sought

permission to reopen their case-in-chief if defense counsel reiterated his argument from the first trial. The court denied the motion, stating that it would not, prior to trial, preclude defense counsel from making that argument. The court also stated, however, that it "would entertain a motion by the People to reopen the proof" if defense counsel's summation created a "misleading impression" that the witness "had been unable to identify defendant prior to trial." During summation, defense counsel made a very similar argument to the argument made during the first trial, the People objected and moved to reopen their proof, and the court denied the motion, concluding that defense counsel had not created a misleading impression.

We reject defendant's contention that the court's initial ruling and additional statement had a chilling effect on defense counsel's summation. Counsel made virtually the same argument in the second trial as he made in the first trial, which belies defendant's contention that there was a chilling effect. Contrary to defendant's further contention, the court's statements regarding reopening the proof were correct. Although it is well settled that "evidence of a witness's pretrial photographic identification of an accused is not admissible in the prosecution's case-in-chief" (*People v Grajales*, 8 NY3d 861, 862), a defendant may open the door to evidence of such an identification (*see People v Lago*, 60 AD3d 784, 784, *lv denied* 13 NY3d 746; *People v Carvalho*, 60 AD3d 1394, 1395, *lv denied* 13 NY3d 742; *People v Davenport*, 35 AD3d 1277, 1278, *lv denied* 9 NY3d 842, *reconsideration denied* 9 NY3d 922; *see also People v Perkins*, 15 NY3d 200, 205-206). Thus, a court will properly conclude that a defendant has opened the door to the admission of evidence that a witness has identified defendant from a photo array where, inter alia, the defendant "sought to create the false impression that a prosecution witness was unable to identify him from photographs" (*People v Francis*, 123 AD2d 714, 714; *see People v Sherrod*, 240 AD2d 273, 274, *lv denied* 90 NY2d 1014), and "[t]he prejudice to the People caused by this misimpression [would be] of sufficient magnitude to warrant reopening the case during summation" (*People v De Los Angeles*, 270 AD2d 196, 199, *lv denied* 95 NY2d 889; *see People v Loney*, 43 AD3d 726, 727, *lv denied* 9 NY3d 991; *see generally People v Philips*, 120 AD3d 1266, 1268, *lv denied* 24 NY3d 1122). Consequently, the court did not err in explaining to defense counsel that it would entertain the People's motion to reopen their case if defendant created the misimpression that the witness was unable to identify defendant before trial.

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence because "his motion for a trial order of dismissal was not specifically directed at the grounds advanced on appeal" (*People v Wright*, 107 AD3d 1398, 1401, *lv denied* 23 NY3d 1026; *see People v Gray*, 86 NY2d 10, 19). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that the evidence is legally sufficient to support the conviction with respect to all of the charges (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 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, [we note that] 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506, *lv denied* 24 NY3d 1218, *reconsideration denied* 25 NY3d 1070; *see People v Clark*, 142 AD3d 1339, 1341).

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

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1261

CA 16-00545

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

THE PIKE COMPANY, INC., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JERSEN CONSTRUCTION GROUP, LLC, AND WESTERN SURETY COMPANY, DEFENDANTS-APPELLANTS.
(ACTION NO. 1.)

JERSEN CONSTRUCTION GROUP, LLC,
PLAINTIFF-APPELLANT,

V

THE PIKE COMPANY, INC. AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
DEFENDANTS-RESPONDENTS.
(ACTION NO. 2.)

JERSEN CONSTRUCTION GROUP, LLC,
PLAINTIFF-APPELLANT,

V

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.
(ACTION NO. 3.)

MASTROPIETRO LAW GROUP, PLLC, SARATOGA SPRINGS (ERIC W. GENTINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND PLAINTIFF-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (MARK J. MORETTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 27, 2015. The order granted the motion of The Pike Company, Inc. and Fidelity and Deposit Company of Maryland to dismiss the counterclaim for fraud against The Pike Company, Inc. in action No. 1.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied and the fifth counterclaim of Jersen Construction Group, LLC in action No. 1 is reinstated.

Memorandum: In these three consolidated actions, Jersen Construction Group, LLC (Jersen), a defendant in action No. 1 and the plaintiff in action Nos. 2 and 3, and Western Surety Company (Western), a defendant in action No. 1, appeal from an order that granted the CPLR 3211 motion of The Pike Company, Inc. (Pike), the plaintiff in action No. 1 and a defendant in action No. 2, and Fidelity and Deposit Company of Maryland (Fidelity), a defendant in action Nos. 2 and 3, seeking dismissal of Jersen's counterclaim for fraud against Pike in action No. 1. We agree with Jersen and Western that Supreme Court erred in granting the motion, and we therefore reverse the order, deny the motion, and reinstate that counterclaim.

Pursuant to a contract with the State University Construction Fund, Pike was the general contractor for a construction project at the State University College at Plattsburgh. In its second amended complaint in action No. 3, Jersen alleged that Pike entered into a subcontract with Jersen pursuant to which Jersen would perform masonry work after the "concrete foundations were installed, structural steel was in place, metal framing was erected and the concrete floors had been poured."

After the actions were consolidated by stipulation, Jersen filed a third amended answer with counterclaims in action No. 1, which realleged its four original causes of action from action Nos. 2 and 3 as counterclaims and added a fifth counterclaim, for fraud. The fraud counterclaim is the sole focus of this appeal. In that counterclaim, Jersen alleged that, before it began work on the project, Pike was informed by at least one of its other subcontractors that its substrate work was not "accurate, flat or level," i.e., was deficient. Nevertheless, Pike represented to Jersen that the substrate work "had been erected in accordance with the contract requirements and was plumb, level, and true and that [Pike] had performed a professional survey of the structural steel to confirm the same." Jersen alleged that Pike's representations to Jersen "were false," and that Pike "concealed and recklessly withheld from Jersen knowledge that the substrate was not dimensionally accurate, flat or level." Additionally, Jersen alleged that Pike made those false representations "in order to deceive Jersen and induce Jersen to commence installation upon the substrate." Jersen further alleged that it relied on Pike's representations and would not have commenced installation of the masonry work had Pike not misrepresented to Jersen that the substrate had been installed in accordance with the contract requirements. According to Jersen, it suffered damages as a result of its reliance on Pike's false representations.

We agree with Jersen and Western that the court erred in relying on the disclaimer clause found in section 1.8 of the subcontract in granting the motion to dismiss the fraud counterclaim pursuant to CPLR 3211 (a) (1). Section 1.8 of the subcontract discusses site inspection visits, and provides that "[Jersen] accepts responsibility for the inspection of conditions that could affect the Subcontract Work at the Project site, and based on that inspection, and not in reliance upon any opinions or representations of [Pike], its officers, agents or employees, acknowledges its responsibility to satisfactorily

perform the Subcontract Work without additional expense to [Pike].” Jersen and Western contend that section 1.8 is a typical site investigation disclaimer, which “attempts to place the risk of changed conditions on the [sub]contractor by requiring it to investigate the site before bidding and to familiarize itself with all conditions under which the job will be performed” (Biser, Rubin & Brown, New York Construction Law Manual § 5.8 [2d ed 33 West’s NY Prac Series 2016]). Thus, they contend that the disclaimer applies only to site inspections and representations that occurred before execution of the subcontract, and not to any representations occurring after execution of the subcontract. That contention is buttressed by the fact that the remainder of section 1.8 is written in the past tense and concerns conditions of the site, rather than referring to conditions of the work performed by others.

Generally, “[a] claim for fraud is barred by the existence of a specific disclaimer and failure to exercise reasonable diligence” (*Steinhardt Group v Citicorp*, 272 AD2d 255, 256), and a disclaimer clause will preclude a fraud claim only where the clause “specifically disclaims representations concerning the very matter to which the fraud claim relates” (*Agristor Leasing-II v Pangburn*, 162 AD2d 960, 961; *see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137; *see generally Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321).

We conclude that the subcontract is ambiguous whether the disclaimer clause in section 1.8 precludes Jersen from relying on any opinions or representations concerning work performed by others after Jersen executed the subcontract, and thus that section 1.8 does not “conclusively establish[ ] a defense” to the counterclaim for fraud (*Leon v Martinez*, 84 NY2d 83, 88). Although Pike and Fidelity contend that various other contractual provisions required Jersen to inspect the site and work of other trades, those provisions do not contain disclaimer clauses that would bar the fraud counterclaim (*see generally Steinhardt Group*, 272 AD2d at 256).

We also agree with Jersen and Western that Jersen’s fraud counterclaim is not duplicative of its counterclaim for breach of contract. Construing the fraud counterclaim liberally and affording every favorable inference to the facts alleged in that counterclaim (*see Held v Kaufman*, 91 NY2d 425, 432), we conclude that it is “based upon representations that [Pike] made that are separate and distinct from [Pike’s] obligations under the [subcontract]” (*Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 492; *cf. Niagara Foods, Inc. v Ferguson Elec. Serv. Co., Inc.*, 86 AD3d 919, 919; *see generally Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956). Pike’s denial of the allegations in the fraud counterclaim merely raises issues of fact that cannot be resolved on the instant motion (*see Basis Yield Alpha Fund [Master]*, 115 AD3d at 139).

Finally, we agree with Jersen and Western that the fraud counterclaim was pleaded with sufficient particularity (*see* CPLR 3016 [b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491-492). Upon considering the affidavits submitted in opposition to the motion

"to remedy pleading problems" (*Sargiss v Magarelli*, 12 NY3d 527, 531), we conclude that Jersen alleged therein that Pike "(1) made a representation to a material fact; (2) the representation was false; (3) [Pike] intended to deceive [Jersen]; (4) [Jersen] believed and justifiably relied on the statement and in accordance with the statement engaged in a certain course of conduct; and (5) as a result of the reliance, [Jersen] sustained damages" (*Heckl v Walsh* [appeal No. 2], 122 AD3d 1252, 1255; *see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559). Based on our resolution of this issue, we do not reach the alternative request of Jersen and Western for leave to amend the counterclaim.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1273

KA 14-01338

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL C. KRAATZ, ALSO KNOWN AS MICHAEL KRAATZ,
DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered July 24, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [a]), defendant contends that the conviction is not supported by legally sufficient evidence that the victim sustained a physical injury. We reject that contention. The victim testified that defendant grabbed her arm during the robbery and kept "squeezing and squeezing" while threatening to kill her. She further testified that she felt like the bones in her arm were going to break, that the resulting pain was "excruciating" and "like 9 to 10 to 11" on a scale of one to ten, and that her arm was bruised afterward. We conclude that her testimony is legally sufficient to establish that her pain was substantial, i.e., "more than slight or trivial," and thus that she sustained a physical injury (*People v Chiddick*, 8 NY3d 445, 447; *see* Penal Law § 10.00 [9]; *People v Henderson*, 77 AD3d 1311, 1311, *lv denied* 17 NY3d 953; *cf. People v Lunetta*, 38 AD3d 1303, 1304, *lv denied* 8 NY3d 987). 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 also reject defendant's further contention that the verdict is against the weight of the evidence on the issue of physical injury (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the victim did not seek any medical treatment as a result of the incident or miss any time from work, the jury was entitled to credit her testimony concerning the extent of the pain she experienced (*see People v Guidice*, 83 NY2d 630, 636; *People v Smith*, 45 AD3d 1483, 1483, *lv denied* 10 NY3d 771; *see*

also People v Spratley, 96 AD3d 1420, 1421).

We reject defendant's contention that he was denied effective assistance of counsel by his attorney's failure to make certain objections at trial (*see generally People v Taylor*, 1 NY3d 174, 176-177; *People v Benevento*, 91 NY2d 708, 712-714), and we conclude that the sentence is not unduly harsh or severe.

All concur except CURRAN, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent. In my view, the People failed to establish beyond a reasonable doubt that the victim suffered a physical injury, i.e., either "impairment of physical condition or substantial pain" (Penal Law § 10.00 [9]), as is required for a conviction of robbery in the second degree under Penal Law § 160.10 (2) (a). I would therefore modify the judgment by reducing the conviction to robbery in the third degree (§ 160.05; *see* CPL 470.15 [2] [a]) and vacating the sentence, and I would remit the matter to County Court for sentencing on the conviction of robbery in the third degree (*see* CPL 470.20 [4]).

In my view, the majority's decision conflicts with the decisions reached by this Court in *People v Coleman* (134 AD3d 1555, 1556, *lv denied* 27 NY3d 963), *People v Haynes* (104 AD3d 1142, 1143, *lv denied* 22 NY3d 1156), and *People v Lunetta* (38 AD3d 1303, 1304, *lv denied* 8 NY3d 987). The majority relies on *People v Chiddick* (8 NY3d 445, 447-448), but that reliance is misplaced. That case is distinguishable inasmuch as the defendant in *Chiddick* bit and broke the victim's finger, thereby causing the victim to bleed. Thus, although the Court of Appeals considered the victim's subjective pain as an important factor, the injury defendant inflicted, viewed objectively, was "[p]erhaps [the] most important [factor]" (*Chiddick*, 8 NY3d at 447). Moreover, unlike here, the victim in *Chiddick* "sought medical treatment for the wound defendant inflicted—an indication that his pain was significant" (*id.*). Finally, the Court in *Chiddick* noted that "the whole point of the bite was to inflict as much pain as [defendant] could" (*id.* at 448). I have no doubt that this was a frightening event for the victim, but to the extent that the majority's decision endorses an entirely subjective standard for determining whether a victim suffered a physical injury, I cannot agree with it.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

1283

CA 16-01136

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

RONALD J. PAPA AND THERESA M. PAPA, DOING BUSINESS AS MUIR LAKE ASSOCIATES, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ASSOCIATED INDEMNITY CORPORATION AND D&D POWER, INC., DEFENDANTS-APPELLANTS. (ACTION NO. 1.)

NATIONAL FIRE ADJUSTMENT CO., INC., PLAINTIFF-RESPONDENT,

V

D&D POWER, INC., DEFENDANT-APPELLANT. (ACTION NO. 2.)

HURWITZ & FINE, P.C., BUFFALO (STEVEN E. PEIPER OF COUNSEL), FOR DEFENDANT-APPELLANT ASSOCIATED INDEMNITY CORPORATION.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (SEAN W. COSTELLO OF COUNSEL), FOR DEFENDANT-APPELLANT D&D POWER, INC.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (ELIZABETH A. KRAENGEL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order and judgment (one paper) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered February 23, 2016. The order and judgment denied the motions of defendant D&D Power, Inc. for summary judgment dismissing the complaints against it, denied the motion of defendant Associated Indemnity Corporation for summary judgment dismissing the complaint against it, and granted the cross motion of plaintiffs Ronald J. Papa and Theresa M. Papa, doing business as Muir Lake Associates for partial summary judgment against defendant Associated Indemnity Corporation.

It is hereby ORDERED that the order and judgment so appealed from is modified on the law by granting the motion of defendant Associated Indemnity Corporation and dismissing the complaint against it, and denying the cross motion, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiffs Ronald J. Papa and Theresa M. Papa, doing

business as Muir Lake Associates (Muir Lake), commenced action No. 1 against, inter alia, defendant D&D Power, Inc. (D&D) seeking to recover for water damage they experienced in the basement of their commercial property. Plaintiff National Fire Adjustment Co., Inc. (NFAC), a company that leased space within that commercial property, commenced a separate action against D&D (action No. 2). Muir Lake and NFAC alleged in their complaints that D&D was negligent in its replacement of a utility pole outside of the building, causing an underground conduit leading from the pole to the basement to break. During a heavy rain three weeks later, the broken conduit flooded with groundwater and channeled the water into the basement.

Muir Lake had an all-risk insurance policy with defendant Associated Indemnity Corporation (AIC), which contained an exclusion for water damage caused by "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces . . . [or] [d]oors, windows or other openings." Muir Lake and AIC also executed a water damage endorsement, which reinstated liability for such damages, but limited coverage to $25,000. Following the flooding, AIC issued a check to Muir Lake for $25,000 based on the water damage endorsement. Muir Lake thereafter commenced action No. 1, contending that the damage to their property is not covered by the water damage exclusion and endorsement and, as a result, that they are entitled to full coverage. Muir Lake asserts, inter alia, a cause of action for breach of contract against AIC, and a claim of negligence against D&D. In action No. 2, NFAC asserts a single cause of action for negligence against D&D.

Following discovery, D&D moved for summary judgment dismissing the complaints against it, arguing that the damage to the conduit was the result of long-term corrosion and not the result of its allegedly improper installation of the utility pole. AIC also moved for summary judgment dismissing the complaint against it in action No. 1, arguing that the plain terms of the insurance contract limit Muir Lake's coverage to $25,000, which AIC had already paid. Muir Lake cross-moved for summary judgment on their second cause of action, for AIC's alleged breach of contract, arguing that the ambiguous language of the insurance policy requires AIC to cover their full loss. Supreme Court denied D&D's motions, denied AIC's motion, and granted Muir Lake's cross motion.

We reject D&D's contention that the court erred in denying its motions. In support of its motions, D&D tendered the affidavit of an expert metallurgist, who opined that soil conditions and environmental factors caused severe corrosion to the conduit at issue. As a preliminary matter, we note that D&D's expert did not aver that he has any expertise in mechanical engineering, dynamics, or a related field that would qualify him to give an opinion with respect to the effect of mechanical forces operating on the conduit (*see Hileman v Schmitt's Garage*, 58 AD2d 1029, 1029-1030). His opinion with respect to such mechanical forces is therefore of no probative value. In any event, we conclude that the affidavit is too speculative to meet D&D's initial burden on its motions (*see generally Van Ostberg v Crane*, 273 AD2d 895, 896). Notably, the metallurgist did not test the soil

around the conduit, and he did not establish any factual basis for his opinion that road de-icing salt contributed to the corroded condition of the conduit. Thus, D&D failed to establish as a matter of law that only environmental factors were at the root of the damage to the property, and that its own conduct in replacing the utility pole was not a contributing cause thereof (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Contrary to D&D's further contention, we conclude that it is not entitled to summary judgment on the ground that the damage to the property was unforeseeable as a matter of law (*see generally Di Ponzio v Riordan*, 89 NY2d 578, 583).

We agree with AIC, however, that the court erred in denying its motion and granting Muir Lake's cross motion, and we therefore modify the order and judgment accordingly. It is well-settled that insurance contracts are construed "in light of 'common speech' and the reasonable expectations of a businessperson" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383). "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267). We conclude that the contract language at issue here is not ambiguous. By its plain terms, the contract limits coverage to $25,000 for damage caused when ground water enters the basement through a gap, hole, or opening in the wall, and the conduit clearly falls within the water damage exclusion and endorsement (*see Commerce Ctr. Partnership v Cincinnati Ins. Co.*, 2006 WL 1236745, *3 [Mich Ct App 2006]).

All concur except WHALEN, P.J., and SMITH, J., who dissent in part and vote to affirm in accordance with the following memorandum: We respectfully dissent in part. We agree with the majority that Supreme Court properly denied the motions of defendant D&D Power, Inc. seeking summary judgment dismissing the complaints against it. Contrary to the majority, however, we conclude that the exclusion on which defendant American Indemnity Corporation (AIC) relies to limit coverage does not apply to the loss of plaintiffs Ronald J. Papa and Theresa M. Papa, doing business as Muir Lake Associates (Muir Lake). In our view, therefore, the court properly denied the motion of AIC seeking summary judgment against Muir Lake and granted Muir Lake's cross motion for partial summary judgment on liability against AIC on its second cause of action for breach of the commercial property insurance policy issued to Muir Lake by AIC. We would therefore affirm the order and judgment.

"Where an insurer relies on an exclusion to avoid coverage, it has the burden of demonstrating 'that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case' " (*Pichel v Dryden Mut. Ins. Co.*, 117 AD3d 1267, 1268, quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652). AIC failed to meet that burden with respect to the exclusion for water damage caused by "[w]ater under the ground surface pressing on, or flowing or seeping through . . . [f]oundations, walls, floors or paved surfaces . . . [or] [d]oors, windows or other openings." Giving the language of the exclusion "the meaning that an ordinary reader would assign to [it]" (*Pioneer Tower Owners Assn. v State Farm Fire & Cas. Co.*, 12 NY3d 302,

307), we conclude that the loss, which is undisputedly the result of water entering the premises through a broken electrical conduit, was not within the exclusion for damage caused by water pressing on, or flowing or seeping through foundations, walls, floors or paved surfaces.

With respect to the exclusion for damage caused by water flowing through "[d]oors, windows or other openings," we agree with Muir Lake that the electrical conduit does not unambiguously constitute an "other opening." Under ejusdem generis, a rule of construction applicable to, inter alia, exclusions like the one at issue here, "the meaning of a word in a series of words is determined 'by the company it keeps' " (*242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 103-104, quoting *People v Ilardo*, 48 NY2d 408, 416; *see Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 57). Pursuant to that rule, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series" (*Matter of Riefberg*, 58 NY2d 134, 141). Application of the rule of ejusdem generis here leads to the conclusion that "other openings" should be construed as openings that are akin to doors and windows, such as a portal or a vent, not a broken electrical conduit. Inasmuch as "other openings" is undefined and ambiguous, and Muir Lake's interpretation of that term is not unreasonable, we are bound to adopt Muir Lake's interpretation, inasmuch as that interpretation narrows the exclusion and results in coverage (*see Pioneer Tower Owners Assn.*, 12 NY3d at 308).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

9

KA 16-00242

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY B. NEWTON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Thomas R. Morse, A.J.), rendered January 20, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, criminal sexual act in the first degree, aggravated sexual abuse in the first degree, aggravated sexual abuse in the second degree and sexual abuse in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]) and criminal sexual act in the first degree (§ 130.50 [1]). 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 contentions that County Court erred in its handling of jury notes Nos. 2 and 3 (*see People v Nealon*, 26 NY3d 152, 158). We reject defendant's contention that the court's handling of the jury notes constituted mode of proceedings errors and thus preservation is not required (*see generally People v O'Rama*, 78 NY2d 270, 279). Defendant also failed to preserve for our review his contention that the court did not provide a meaningful response to the jury's request in note No. 3 for a readback of "all the testimony" of the victim (*see People v Morris*, 27 NY3d 1096, 1097). Contrary to defendant's contention, the court's alleged failure to provide a meaningful response to jury note No. 3 does not constitute a mode of proceedings error for which preservation is not required (*see People v Mack*, 27 NY3d 534, 540-541, *rearg denied* 28 NY3d 944). We decline to exercise our power to review defendant's contentions with respect to the jury notes as a matter of discretion

in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant's claim of ineffective assistance of counsel with respect to jury note No. 3 lacks merit.

Although we agree with defendant that the procedure in CPL 270.15 (2) with respect to the sequence for exercising challenges for cause to prospective jurors was violated during jury selection, we conclude that defendant waived any challenge thereto by failing to object (*see generally People v Boylan*, 190 AD2d 1043, 1043, *lv dismissed* 81 NY2d 882, *lv denied* 81 NY2d 967).

Defendant further contends that the court erred in admitting in evidence the testimony of a sexual assault nurse practitioner who examined the victim because it was based entirely on inadmissible hearsay that constituted improper bolstering of the victim's testimony. Defendant failed to preserve that contention for our review (*see People v Erle*, 83 AD3d 1442, 1443, *lv denied* 17 NY3d 794), 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]).

We reject defendant's contention that he was denied due process because the sentence imposed was based upon the Judge's personal religious beliefs. The statements of the Judge "do not, [per se], indicate that the Judge's imposition of sentence herein was in any way based upon his personal religious beliefs" (*People v Berrios*, 176 AD2d 547, 549, *lv denied* 79 NY2d 824), and the court properly considered the appropriate factors in sentencing defendant (*see generally People v Farrar*, 52 NY2d 302, 305-306). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

16

CA 16-00858

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

MALLORY C. EHLERS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WILLIAM A. BYRNES, ALL ERECTION AND CRANE RENTAL CORP., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA POCH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

CARTAFALSA, SLATTERY, TURPIN & LENOFF, LLP, BUFFALO (BRIAN P. MINEHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Matthew J. Murphy, III, A.J.), entered July 14, 2015. The order granted the motion of defendants William A. Byrnes and All Erection and Crane Rental Corp. for summary judgment dismissing the complaint against them.

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

Memorandum: In this action to recover damages for injuries allegedly sustained by plaintiff in an automobile accident, plaintiff appeals from an order granting the motion of William A. Byrnes and All Erection and Crane Rental Corp. (defendants) for summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) under the categories alleged by plaintiff, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. We affirm.

Contrary to plaintiff's contention, we conclude that defendants met their initial burden with respect to the permanent consequential limitation and significant limitation of use categories by submitting the affirmed report of a physician who, upon examining plaintiff at defendants' request, opined, inter alia, that plaintiff sustained a self-limiting cervicothoracic strain from which she would have recovered in a few weeks after the accident and that plaintiff's other symptoms and complaints were related to a preexisting degenerative condition not caused by the accident (*see Roll v Gavitt*, 77 AD3d 1412, 1412). We agree with plaintiff that Supreme Court erred in declining to consider unsworn medical reports submitted in opposition to

defendants' motion, inasmuch as they were referenced and relied upon by defendants' examining physician and thus were properly before the court (*see Brown v Achy*, 9 AD3d 30, 32). Nonetheless, upon our review and consideration of those reports and the entire record, we conclude that none of plaintiff's submissions raises a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). To the extent that the opinion of plaintiff's primary care physician that the accident triggered, aggravated, and/or exacerbated certain preexisting conditions is responsive to defendants' prima facie showing of entitlement to judgment on these two categories, we conclude that the primary care physician's opinion, even when read in combination with other records and reports, "failed to provide any basis for determining the extent of any exacerbation of plaintiff's prior injuries" (*Brand v Evangelista*, 103 AD3d 539, 540; *see Howard v Espinosa*, 70 AD3d 1091, 1093-1094; *Nowak v Breen*, 55 AD3d 1186, 1188).

Defendants also made a prima facie showing of the lack of a viable 90/180-day claim by relying on the aforementioned report of their examining physician and plaintiff's deposition testimony that she returned to work after missing one day following the accident, missed about eight weeks from work after returning, and was not directed by her physicians to restrict her activities for the requisite period of time (*see Reyes v Se Park*, 127 AD3d 459, 461). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman*, 49 NY2d at 562).

In light of the acknowledgment in plaintiff's reply brief that prior to the accident she had received treatment for upper-back and neck pain, we need not address plaintiff's contention that the court engaged in improper credibility assessment in the context of a summary judgment motion by comparing her deposition testimony to her chiropractic treatment records.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

26

KA 14-00823

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KARL KARLSEN, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 December 16, 2013. The judgment convicted defendant, upon his plea of guilty, 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 his plea of guilty, of murder in the second degree (Penal Law § 125.25 [2]). Defendant contends that his statements to his wife should have been ruled inadmissible pursuant to the statutory privilege for marital communications (*see* CPLR 4502 [b]; *see also* CPL 60.10). We conclude that defendant's challenge to County Court's pretrial evidentiary ruling does not survive but rather was forfeited by his plea of guilty (*see People v Alvarado*, 103 AD3d 1101, 1101, *lv denied* 21 NY3d 910; *People v Davis*, 99 AD3d 1228, 1229, *lv denied* 20 NY3d 1010; *see also People v Hutter*, 143 AD3d 574, 575, *lv denied* 28 NY3d 1125; *see generally People v Campbell*, 73 NY2d 481, 486).

We reject defendant's further contentions that his statements to the police should have been suppressed on the grounds that he did not validly waive his *Miranda* rights at the outset of the interrogation, that he requested counsel during the interview, and that his statements were involuntarily made in violation of his due process rights, on account of the 9½-hour length and other circumstances of the interrogation. The suppression hearing testimony supports the court's determination that, until near the end of the interrogation session, the situation was such that "a reasonable man, innocent of any crime," who was "in the defendant's position," would have believed that he was free to leave the police station (*People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *see People v Vargas*, 109 AD3d 1143, 1143, *lv denied* 22 NY3d 1044). In any event, the record supports the court's determination that defendant was read his *Miranda* warnings at

the outset of the interrogation and waived his rights, agreeing to speak with investigators in the absence of counsel (*see People v Pierce*, 142 AD3d 1341, 1341-1342; *People v Carbonaro*, 135 AD3d 1543, 1547-1548, *lv denied* 27 NY3d 994, *reconsideration denied* 27 NY3d 1149). We further conclude that the record supports the court's determination that defendant did not, at any time during the interrogation, unequivocally request the assistance of counsel (*see People v Schluter*, 136 AD3d 1363, 1364, *lv denied* 27 NY3d 1138; *People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795; *People v Ashraf*, 186 AD2d 1057, 1057-1058, *lv denied* 80 NY2d 1025).

Based on the record of the suppression hearing, which includes a videotape of the interrogation, we conclude that defendant's statements were not elicited by the police in violation of defendant's due process rights (*see generally Colorado v Connelly*, 479 US 157, 167; *People v Mateo*, 2 NY3d 383, 413, *cert denied* 542 US 946). "It is axiomatic that the length of the interrogation period 'does not, by itself, render the statement[s] involuntary' " (*People v Clark*, 139 AD3d 1368, 1369, *lv denied* 28 NY3d 928; *see People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892). In any event, taking into account that defendant was not in custody for nearly all of the interrogation, we conclude that the length of the interrogation in this case was not such that it deprived defendant of due process (*see Clark*, 139 AD3d at 1369; *People v Gega*, 74 AD3d 1229, 1231, *lv denied* 15 NY3d 851, *reconsideration denied* 15 NY3d 920; *see also People v Guilford*, 21 NY3d 205, 212-215; *see generally People v Anderson*, 42 NY2d 35, 39). Nothing in the record before us supports defendant's contention that the police employed physical or psychological tactics that were "so fundamentally unfair as to deny [him] due process" and "induce a false confession" (*People v Bradberry*, 131 AD3d 800, 802 [internal quotation marks omitted]; *see People v Tarsia*, 50 NY2d 1, 11). Based on the totality of the circumstances, we conclude that defendant's will was not overborne and that his statements to the police were voluntarily made (*see Clark*, 139 AD3d at 1369; *People v Sylvester*, 15 AD3d 934, 935, *lv denied* 4 NY3d 836; *see generally Mateo*, 2 NY3d at 413).

Defendant's contention that the court erred in accepting his guilty plea is unpreserved for our review, inasmuch as defendant did not move to withdraw the plea or vacate the judgment of conviction (*see* CPL 220.60 [3]; *see also* CPL 440.10), and nothing on the face of the record calls into question the voluntariness of the plea or casts significant doubt upon defendant's guilt (*see People v Mobley*, 118 AD3d 1336, 1337, *lv denied* 24 NY3d 1121; *People v Robinson*, 112 AD3d 1349, 1349, *lv denied* 23 NY3d 1042). In any event, there is no merit to the contention. Defendant was not entitled to assurances at the time of the plea that California would not prosecute him for an unrelated homicide, and defendant's plea of guilty was not induced by the contemporaneous expressions of irresolution or uncertainty whether California might do so. Further, the court did not fail to discharge any duty that it might have been under to inquire into defendant's mental capacity to plead guilty (*see generally People v Taylor*, 13 AD3d 1168, 1169-1170, *lv denied* 4 NY3d 836). Nothing on the face of the record demonstrates that defendant lacked a rational understanding

of the nature and consequences of his plea (*see People v Young*, 66 AD3d 1445, 1446, *lv denied* 13 NY3d 912; *People v Lear*, 19 AD3d 1002, 1002, *lv denied* 5 NY3d 807).

To the extent that defendant's claims of ineffective assistance of counsel survive his guilty plea (*see generally People v VanVleet*, 140 AD3d 1633, 1633, *lv denied* 28 NY3d 938; *People v Lucieer*, 107 AD3d 1611, 1612), we conclude that those claims lack merit. Defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

30

KA 14-00580

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. PANDAJIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JAMES D. PANDAJIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered January 30, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: These consolidated appeals arise from an incident in which a man wearing a mask took money from a convenience store. Defendant appeals, in appeal No. 1, from a judgment convicting him upon a jury verdict of robbery in the second degree (Penal Law § 160.10 [2] [b]). In appeal No. 2, he appeals from an amended order denying his CPL 440.30 (1-a) motion seeking DNA testing of certain evidence that was introduced at the trial that led to the conviction in appeal No. 1. In appeal No. 1, defendant contends in his main brief that he was deprived of effective assistance of counsel because defense counsel had a conflict of interest. We conclude that County Court did not abuse its discretion in permitting defense counsel, an assistant public defender, to represent defendant at trial after the court learned that two other assistant public defenders, who left the public defender's office prior to trial, had previously represented a prosecution witness who testified at defendant's trial.

Contrary to defendant's contention, the above situation does not present "an *actual* conflict—the simultaneous representation of clients whose interests were opposed" (*People v Solomon*, 20 NY3d 91, 97). Furthermore, although there was a potential conflict of interest arising from the prior representation of the prosecution witness by other, former members of trial counsel's office (*see People v Davis*,

83 AD3d 1492, 1492, *lv denied* 17 NY3d 815, *reconsideration denied* 17 NY3d 903; *People v Taylor*, 52 AD3d 1327, 1328, *lv denied* 11 NY3d 835), the record establishes that the court, upon learning of the potential conflict of interest, conducted an inquiry "to ascertain, on the record, [that defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation" (*People v Lombardo*, 61 NY2d 97, 102; *see generally Solomon*, 20 NY3d at 95; *People v McDonald*, 68 NY2d 1, 8, *rearg dismissed* 69 NY2d 724; *People v Gomberg*, 38 NY2d 307, 313-314). In addition, defendant has not established that the potential conflict of interest bore "a substantial relation to the conduct of the defense" (*People v Harris*, 99 NY2d 202, 211 [internal quotation marks omitted]), and thus "defendant failed to meet his burden of establishing that 'the conduct of his defense was in fact affected by the operation of the conflict of interest' " (*People v Smart*, 96 NY2d 793, 795, quoting *People v Alicea*, 61 NY2d 23, 31; *see People v Konstantinides*, 14 NY3d 1, 10). Indeed, defense counsel vigorously cross-examined the prosecution witness at issue and attacked her credibility on several bases, including the convictions that defendant contends were the basis for a conflict of interest.

Also with respect to appeal No. 1, defendant failed to preserve for our review his contention in his main brief that the evidence is legally insufficient to support the conviction inasmuch as his motion to dismiss was not specifically directed at the ground advanced on appeal (*see People v Gray*, 86 NY2d 10, 19; *People v King*, 136 AD3d 1313, 1313, *lv denied* 27 NY3d 1000; *see also People v Hawkins*, 11 NY3d 484, 492). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495) and, contrary to defendant's contention in his pro se supplemental brief, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The record establishes that a DNA sample obtained from saliva recovered from a mask found near the crime scene was compared to a DNA sample provided by defendant. The People's expert testified that the DNA sample recovered from the mask was consistent with defendant's DNA, and that the chance that the DNA sample came from a person unrelated to defendant was one in 1.27 quintillion. In addition, the mask was distinctive, was identical to the mask depicted in the store's surveillance video of the crime, was found shortly after the crime, was generally located between the crime scene and defendant's residence, and appeared from its condition to have been left at that location recently. Although the eyewitness did not identify defendant as the masked person who robbed the store, the evidence at trial established that defendant generally fit the eyewitness's initial description of the perpetrator in terms of age, race, height, weight and build, and his appearance was generally consistent with the appearance of the perpetrator on the surveillance video.

Contrary to defendant's contention in his main brief with respect to appeal No. 2, the court properly denied his CPL 440.30 (1-a) motion seeking DNA testing of other parts of the mask and a hair fragment found in it. Here, in support of his motion, "[d]efendant failed to establish that if DNA tests had been conducted on [the mask] and the results had been admitted at his trial that 'there exists a reasonable probability that the verdict would have been more favorable to' him" (*People v Mixon*, 129 AD3d 1509, 1509, *lv denied* 26 NY3d 1090, *cert denied* ___ US ___, 136 S Ct 2016; *see People v Workman*, 72 AD3d 1640, 1640, *lv denied* 15 NY3d 925, *reconsideration denied* 16 NY3d 838).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

31

KA 15-01449

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES D. PANDAJIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES D. PANDAJIS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an amended order of the Monroe County Court (Vincent M. Dinolfo, J.), entered August 27, 2015. The amended order, insofar as appealed from, denied the motion for DNA testing pursuant to CPL 440.30 (1-a).

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

Same memorandum as in *People v Pandajis* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2017]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

32

KA 14-00996

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROMMEL BURDINE, ALSO KNOWN AS ROMELL BURDINE,
DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN N. MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered April 4, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree (two counts) and criminally using drug paraphernalia in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a jury trial, of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]) and criminally using drug paraphernalia in the second degree (§ 220.50 [3]). At the outset, we agree with defendant that the court erred in denying his motion to suppress certain text messages collected from his cell phones (*see People v Marinez*, 121 AD3d 423, 423-424). It is undisputed that, after the defendant was pulled over, the responding police officers recovered two cell phones from the vehicle's glove box and one of them looked through certain text messages on those phones. In our view, that police action constituted an illegal warrantless search of defendant's cell phones, thereby mandating suppression of the text messages (*see id*.). The fact that the officers subsequently applied for a search warrant covering the cell phones is of no moment inasmuch as they "used the [illegal] search to assure themselves that there [was] cause to obtain a warrant" in the first instance (*People v Burr*, 70 NY2d 354, 362, *cert denied* 485 US 989; *see People v Perez*, 266 AD2d 242, 243, *lv dismissed* 94 NY2d 923).

We conclude, however, that the error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no

significant probability that defendant would have been acquitted if the court had not admitted the text messages in evidence (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Defendant was discovered driving a vehicle that contained a wholesale brick of crack, seven individually bagged ecstasy-analogue tabs, a scale, and empty baggies. Furthermore, defendant demonstrated consciousness of guilt by initially fleeing from police; over $600 in cash was recovered from defendant's person; and defendant's passenger testified that defendant was a drug dealer who was dealing out of his car. Thus, in our view, there is no significant probability that defendant would have been acquitted but for the erroneously-admitted text messages (*see People v Solano*, 138 AD3d 525, 526, *lv denied* 27 NY3d 1155). 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 reject defendant's further contention that the verdict is contrary to the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495).

Contrary to defendant's further contention, the court did not abuse its discretion in refusing to assign him new counsel. The record establishes that the court made "the requisite minimal inquiry into defendant's reasons for requesting new counsel . . . and defendant did not establish a serious complaint concerning defense counsel's representation and thus did not suggest a serious possibility of good cause for substitution [of counsel]" (*People v Jones*, 114 AD3d 1239, 1240, *lv denied* 23 NY3d 1038 [internal quotation marks omitted]). "[T]he fact that defendant and his attorney may have disagreed with respect to . . . strategy is not sufficient to warrant a substitution" (*People v Tenace*, 256 AD2d 928, 930, *lv denied* 93 NY2d 902, *cert denied* 530 US 1217, *reh denied* 530 US 1290).

Contrary to defendant's contention, the court did not abuse its discretion in denying his motion for a missing witness charge with respect to one of the responding police officers who testified at the suppression hearing (*see generally People v Macana*, 84 NY2d 173, 180). Even assuming, arguendo, that the officer's testimony would not have been cumulative, we conclude that a missing witness charge was not warranted given the officer's unavailability (*see People v Gonzalez*, 68 NY2d 424, 428).

We reject defendant's contention that he was denied effective assistance of counsel. To the extent that defendant is calling counsel's effectiveness into question by virtue of his alleged failure to seek a spoliation sanction at the suppression hearing, that contention involves matters outside the record on appeal and must be raised by way of a motion pursuant to CPL article 440. With respect to defendant's remaining claims of ineffective assistance of counsel, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of representation, establish that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

The sentence is neither unduly harsh nor severe. Defendant's remaining contentions are not preserved for our review, and we decline

to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

42

CA 16-00987

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

FRED J. NICOTERA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF VIRGINIA EANNACE, DECEASED, PAULINE NICOTERA, GIOIA L. NICOTERA AND MARISA L. NICOTERA, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY, MICHAEL GARCIA AND GARCIA INSURANCE COMPANY, INC., DEFENDANTS-RESPONDENTS.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (ROBERT P. CAHALAN OF COUNSEL), FOR DEFENDANT-RESPONDENT ALLSTATE INSURANCE COMPANY.

MILBER MAKRIS PLOUSADIS & SEIDEN, LLP, WOODBURY (RICHARD LILLING OF COUNSEL), FOR DEFENDANTS-RESPONDENTS MICHAEL GARCIA AND GARCIA INSURANCE COMPANY, INC.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (David A. Murad, J.), entered January 14, 2016. The order and judgment, among other things, granted the motions of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Virginia Eannace (decedent) owned a two-family home in Utica, New York. In 2003, ownership of the property was transferred to an irrevocable family trust, with plaintiffs Fred J. Nicotera and Pauline Nicotera as trustees and plaintiffs Gioia L. Nicotera and Marisa L. Nicotera, decedent's nieces, as beneficiaries. Decedent resided at the property until 2010, when she moved to a nursing home. At that time, the property was insured by a homeowner's policy with defendant Allstate Insurance Company (Allstate) in the name of decedent only. On August 8, 2012, while decedent was still alive, but residing in a nursing home, the residence was damaged by fire. At the time of the fire, two tenants occupied the second floor of the residence, and Gioia occupied the first floor. Allstate disclaimed coverage on the ground that the named insured did not live in the residence. Plaintiffs commenced this action asserting causes of action against Allstate for breach of contract and reformation of

the insurance contract and against Michael Garcia and the Garcia Insurance Company, Inc. (Garcia defendants), for negligence. Allstate and the Garcia defendants made separate motions for summary judgment dismissing the amended complaint insofar as asserted against them, and Supreme Court granted the motions. We affirm.

Initially, we note that the Garcia defendants correctly contend that plaintiffs' notice of appeal is premature because it was filed prior to the service of a copy of the order and judgment from which the appeal was taken with notice of entry (*see Matter of Danial R.B. v Ledyard M.*, 35 AD3d 1232, 1232; *see generally* CPLR 5513 [a]). Nevertheless, in the exercise of our discretion and in the interest of judicial economy, we will address the merits of the appeal (*see Danial R.B.*, 35 AD3d at 1232).

Plaintiffs do not challenge the basis for Allstate's denial of coverage. Instead, plaintiffs contend that Gioia is an insured under the policy and that Pauline is an additional insured under the policy. We reject those contentions. The policy covered as an insured person any member of decedent's household if such person was a relative of decedent or a dependent person in decedent's care. Although Gioia is decedent's niece and was residing at the property at the time of the loss, she was not a resident of decedent's "household" inasmuch as decedent was not living at the subject property, but in a nursing home, at the time of the loss. " 'The term household has been characterized as ambiguous or devoid of any fixed meaning . . . and, as such, its interpretation requires an inquiry into the intent of the parties . . . The interpretation must reflect the reasonable expectation and purpose of the ordinary business [person] when making an insurance contract . . . and the meaning which would be given it by the average [person]' " (*Farm Family Cas. Ins. Co. v Nason*, 89 AD3d 1401, 1402). Although that term " 'should . . . be interpreted in a manner favoring coverage, as should any ambiguous language in an insurance policy' " (*id.*), we cannot interpret the policy to provide coverage when the named insured and the relative do not live in the same "household" at the time of the loss. Furthermore, although Pauline was listed as an additional insured on the 2009 Allstate application, she is not listed as an additional insured on the declarations page of the 2012 Allstate policy. In view of the foregoing, we conclude that the court properly granted Allstate's motion insofar as it sought dismissal of the breach of contract cause of action.

Contrary to plaintiffs' contention, the court properly granted that part of Allstate's motion seeking dismissal of the cause of action for reformation of the policy. Although we have reformed insurance policies to properly reflect the ownership of the insured property when "ownership of the property is misdescribed [in the policy, but] the policy correctly identifies the building [or residence] that [the] defendant agreed to insure" (*DeSantis v Dryden Mut. Ins. Co.*, 241 AD2d 916, 916; *see Fahrenholz v Security Mut. Ins. Co.* [appeal No. 2], 32 AD3d 1326, 1327; *Crivella v Transit Cas. Co.*, 116 AD2d 1007, 1008), "ownership is not the only issue here" (*Kyong Jae Lee v Lancer Ins. Co.*, 104 AD3d 612, 612). As noted by the court,

"[p]laintiffs are seeking not merely to correct the name of the named insured on the declarations page, but are seeking to change the homeowner policy to a policy that does not require the homeowner to reside at the insured premises." Stated differently, by issuing a homeowner's policy Allstate "did not intend to cover the risk for which plaintiffs now seek coverage," and therefore reformation of the insurance policy is not permissible here (*Kyong Jae Lee*, 104 AD3d at 612).

We further conclude that the court properly granted the Garcia defendants' motion for summary judgment dismissing the amended complaint insofar as asserted against them. "As a general principle, insurance brokers 'have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so' " (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734). Nonetheless, " 'they have no continuing duty to advise, guide or direct a client to obtain additional coverage' " (*Sawyer v Rutecki*, 92 AD3d 1237, 1237, *lv denied* 19 NY3d 804). "Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" (*Murphy v Kuhn*, 90 NY2d 266, 272). "For instance, where a 'special relationship' develops between an agent and the insured, the agent may be held to have assumed duties in addition to merely 'obtain[ing] requested coverage' " (*Sawyer*, 92 AD3d at 1237). "Such a special relationship may arise where '(1) the agent receives compensation for consultation apart from payment of the premiums . . . [;] (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent . . . ; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on' " (*id.* at 1237-1238).

As noted in *Voss*, "in the ordinary broker-client setting, the client may prevail in a negligence action only where it can establish that it made a particular request to the broker and the requested coverage was not procured" (*id*. at 734). Here, as in *Voss*, plaintiffs are not pursuing this theory of liability; rather, their "claim[s] hinge[] on the existence of a special relationship" (*id*. at 735).

We conclude that the Garcia defendants met their initial burden of establishing that they did not have a special relationship with decedent or plaintiffs, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). First, there is no dispute that the Garcia defendants did not receive compensation from decedent or plaintiffs over and above the commissions they received for the Allstate insurance policy they had provided. Second, plaintiffs failed to establish that there was any question concerning coverage of decedent's property, and that decedent or plaintiffs relied on Garcia's expertise in resolving that question; indeed, the record establishes that decedent and plaintiffs were not so much concerned with drawing on Garcia's expertise as with providing some business to Garcia, whom they considered a good friend (*see*

Sawyer, 92 AD3d at 1238; *Chase's Cigar Store v Stam Agency*, 281 AD2d 911, 912). Lastly, the Garcia defendants established that the third and final special relationship category does not apply inasmuch as the parties clearly did not have "a course of dealing" that lasted "an extended period of time." As the court pointed out, "[t]here is no question that the [decedent and plaintiffs] had no prior insurance client-broker/agent relationship with the Garcia [d]efendants before the subject transaction with respect to insuring the [subject property]." Moreover, the parties' entire "course of dealing" at the time of the fire was less than 3 years (*see generally Murphy*, 90 NY2d at 272). Even accepting as true plaintiffs' contentions that Garcia knew of decedent's failing health and that Pauline "trusted . . . Garcia with [her] life," we conclude that the interactions between the parties "would [not] have put [an] objectively reasonable insurance agent[] on notice that [his or her] advice was being sought and specially relied on" (*Sawyer*, 92 AD3d at 1238; *see Majtan v Urbanke Assoc., Inc.*, 118 AD3d 1453, 1453-1454, *lv denied* 24 NY3d 903).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

43

CA 16-01297

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

DIANE CHOROMANSKIS AND JOHN CHOROMANSKIS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

CHESTNUT HOMEOWNERS ASSOCIATION, INC., BOARD OF DIRECTORS OF CHESTNUT HOMEOWNERS ASSOCIATION, INC., JOE MONTAGNA, DAVID PULTORAK AND THOMAS MYERS,
DEFENDANTS-APPELLANTS.

PANZARELLA & COIA, P.C., ROCHESTER (RICHARD COIA OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LECLAIR KORONA VAHEY COLE LLP, ROCHESTER (LAURIE A. VAHEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered September 28, 2015. The order denied defendants' motion to dismiss the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the fifth cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are owners of an individual lot within a townhouse complex, and also members of defendant Chestnut Homeowners Association, Inc. (HOA). They commenced this action seeking, inter alia, monetary damages after defendants made alterations to and/or performed work on a protective berm located in the complex's common area near plaintiffs' lot. In their amended complaint, plaintiffs allege that the alterations to the berm resulted in a loss of seclusion and privacy for their lot, thus lowering its value. Plaintiffs asserted six causes of action, for breach of contract, breach of fiduciary duty, intentional damage of property, negligence, trespass pursuant to RPAPL 861, and an accounting, respectively.

As limited by their brief, defendants contend that Supreme Court erred in denying their motion to dismiss the first through fifth causes of action for failure to state a claim because plaintiffs failed to allege that they suffered damages or an injury (*see* CPLR 3211 [a] [7]). We reject that contention. In the amended complaint, plaintiffs allege that defendants "negligently, recklessly and/or intentionally razed" the protective berm in violation of the HOA by-

laws as well as its "Declaration of Protective Covenants, Conditions, Restrictions, Easements, Charges and Liens" (Declaration). Plaintiffs further allege that, as a result of the destruction of the berm, their property "is no longer secluded and protected" and has "decreased in value." Additionally, plaintiffs allege that their "use and enjoyment of their property has been reduced due to the lack of privacy and seclusion."

"It is axiomatic that plaintiff[s'] [amended] complaint is to be afforded a liberal construction, that the facts alleged therein are accepted as true, and that plaintiff[s] [are] to be afforded every possible favorable inference in order to determine whether the facts alleged in the complaint 'fit within any cognizable legal theory' " (*Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451, quoting *Leon v Martinez*, 84 NY2d 83, 87-88). The allegations in a complaint, however, "cannot be vague and conclusory . . . , and [b]are legal conclusions will not suffice" (*McFadden v Schneiderman*, 137 AD3d 1618, 1619 [internal quotation marks omitted]). We conclude the factual allegations in the amended complaint as to the damages and/or injury suffered by plaintiffs are sufficient to avoid dismissal of the first five causes of action pursuant to CPLR 3211 (a) (7). We note that whether plaintiffs can "ultimately establish [their] allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19).

We reject defendants' further contention that they are entitled to dismissal of the first five causes of action because they acted within the authority afforded to them pursuant to the by-laws and the Declaration. To the contrary, plaintiffs allege that defendants violated various provisions of the by-laws and the Declaration, and those allegations are not flatly contradicted by the evidence in the record (*see Matter of Niagara County v Power Auth. of State of N.Y.*, 82 AD3d 1597, 1599, *lv dismissed in part and denied in part* 17 NY3d 838), vague and conclusory, or bare legal conclusions (*see Rios v Tiny Giants Daycare, Inc.*, 135 AD3d 845, 845). Plaintiffs' allegations are thus deemed to be true for purposes of defendants' motion to dismiss (*see Leon*, 84 NY2d at 87-88).

Notwithstanding the above conclusions, we agree with defendants that the court erred in denying the motion to dismiss with respect to the fifth cause of action, which alleges a claim for trespass pursuant to RPAPL 861, and we therefore modify the order accordingly. That section "applies to any person who[,] without the consent of the owner thereof, cuts, removes, injures or destroys, or causes to be cut, removed, injured or destroyed, any underwood, tree or timber on the land of another . . . or damages the land in the course thereof" (*Vanderwerken v Bellinger*, 72 AD3d 1473, 1474 [internal quotation marks omitted]; *see Matter of Svenson [Swegan]*, 133 AD3d 1279, 1281). Although plaintiffs' allegations of damages and/or injury to their own lot are sufficient to avoid the dismissal of the first four causes of action, their RPAPL 861 cause of action is distinguishable because it is necessarily premised on the damage to the complex's common area itself, which is owned by the HOA. The " 'remedy created by RPAPL 861 extends only to the actual owner of the property allegedly harmed' "

(*Shute v McLusky* [appeal No. 2], 96 AD3d 1360, 1362; *see Cornick v Forever Wild Dev. Corp.*, 240 AD2d 980, 980). Although plaintiffs are members of the HOA, they nevertheless lack standing to sue in their individual capacities for damage to the complex's common areas (*see Davis v Prestige Mgt. Inc.*, 98 AD3d 909, 910).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

46

KA 14-00297

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIZABETH A. WHITE, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered January 27, 2014. The appeal was held by this Court by order entered December 23, 2015, decision was reserved and the matter was remitted to Chautauqua County Court for further proceedings (134 AD3d 1414). The proceedings were held and completed (Michael M. Mohun, A.J.).

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Chautauqua County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her, following a nonjury trial, of two counts of driving while intoxicated as class D felonies (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [ii]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]). At the close of the People's case, defense counsel moved for a trial order of dismissal on the ground that the arresting officers, who were employed by the Town of Ellicott (Town), exceeded their jurisdictional authority when they arrested defendant in the City of Jamestown (City). Defendant also requested that County Court (Ward, J.) take judicial notice of the location of the arrest and the boundaries of the City and Town. The court reserved decision on the motion to allow the parties to make written submissions. The court never ruled on the motion but, before defendant rested and the proof was closed, it issued a written verdict finding defendant guilty of the charges and noting that it had reviewed the parties' submissions.

When the appeal was previously before us, we held the case, reserved decision, and remitted the matter to County Court for a ruling on the motion for a trial order of dismissal "following such further proceedings as may be necessary" (*People v White*, 134 AD3d 1414, 1415). Upon remittal, the court (Mohun, A.J.) denied the motion

and concluded that there was no need to take judicial notice of the location of the arrest or the boundaries of the City and Town. Following those rulings, however, the court did not afford defendant the opportunity to present a defense, notwithstanding that defendant had not rested and the proof was not closed. Contrary to the court's conclusion, the fact that we did not set aside its premature verdict when the appeal was previously before us did not preclude it from considering further proof or making new factual determinations (*cf. People v Cunningham*, 95 NY2d 909, 910; *see generally People v Mitchell*, 144 AD3d 1598, 1600). We therefore hold the case, reserve decision, and remit the matter to County Court to afford defendant the opportunity to present a defense.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

51

KA 16-01026

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JOYCE LEWIS, DEFENDANT-RESPONDENT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR APPELLANT.

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

Appeal from an oral order of the Ontario County Court (Stephen D. Aronson, A.J.), rendered August 13, 2015. The oral order granted that part of defendant's omnibus motion seeking to suppress evidence and dismissed the charges in the superior court information.

It is hereby ORDERED that the oral order so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress evidence is denied, the superior court information is reinstated and the matter is remitted to Ontario County Court for further proceedings thereon.

Memorandum: The People appeal from an oral order (*see generally People v Elmer*, 19 NY3d 501, 507-508) granting that part of defendant's omnibus motion to suppress evidence seized as the fruit of the unlawful stop of defendant's vehicle, and dismissing the superior court information charging defendant with, inter alia, felony aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [a]; 1193 [1] [c] [i] [A]). We agree with the People that the stop was based on probable cause and thus that County Court erred in granting that part of defendant's motion seeking suppression. The arresting deputy testified at the *Dunaway* hearing that he personally observed defendant's vehicle cross the center line and proceed into the lane for oncoming traffic. The vehicle remained in that lane for approximately two-tenths of a mile, in violation of Vehicle and Traffic Law § 1120 (a). Thus, the deputy, having personally observed the violation, had probable cause to stop the vehicle (*see People v Pealer*, 89 AD3d 1504, 1506, *affd* 20 NY3d 447, *cert denied* ___ US ___, 134 S Ct 105, *rearg denied* 24 NY3d 993; *People v Robinson*, 97 NY2d 341, 349; *People v Walker*, 128 AD3d 1499, 1500-1501, *lv denied* 26 NY3d 936). Once the deputy effectuated the stop, he noticed that defendant's eyes were watery and bloodshot, and he smelled the strong odor of alcohol on her breath. He conducted a series of field sobriety tests, all of which defendant failed. Thus, the deputy had

probable cause to arrest defendant for driving while intoxicated (*see People v Lewis*, 124 AD3d 1389, 1390-1391, *lv denied* 26 NY3d 931).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

59

CA 16-01265

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

IN THE MATTER OF DARCELL MCDONALD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT,
AND NEW YORK STATE OFFICE OF TEMPORARY AND
DISABILITY ASSISTANCE, RESPONDENT-APPELLANT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 21, 2015 in a proceeding pursuant to CPLR article 78. The judgment granted the petition to annul a determination of respondent New York State Division of Human Rights.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the petition is dismissed, and the determination of respondent New York State Division of Human Rights is reinstated.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) that there was no probable cause to believe that petitioner's employer, the New York State Office of Temporary and Disability Assistance (respondent), discriminated and retaliated against her. We agree with respondent that Supreme Court erred in granting the petition.

"Where, as here, SDHR 'renders a determination of no probable cause without holding a hearing, the appropriate standard of review is whether the probable cause determination was arbitrary and capricious or lacked a rational basis' " (*Matter of Napierala v New York State Div. of Human Rights*, 140 AD3d 1746, 1747). We agree with respondent that the court erred in disturbing SDHR's determination based upon, inter alia, its failure to conduct a hearing. "Courts give deference to SDHR due to its experience and expertise in evaluating allegations of discrimination" (*Matter of Curtis v New York State Div. of Human*

Rights, 124 AD3d 1117, 1118), and "such deference extends to [SDHR's] decision whether to conduct a hearing" (*Matter of Smith v New York State Div. of Human Rights*, 142 AD3d 1362, 1363). SDHR has the discretion to determine the method to be used in investigating a claim, and "a hearing is not required in all cases" (*Smith*, 142 AD3d at 1363). Inasmuch as "the parties made extensive submissions to [SDHR], 'petitioner was given an opportunity to present [her] case, and the record shows that the submissions were in fact considered, the determination cannot be arbitrary and capricious merely because no hearing was held' " (*id.*).

We further agree with respondent that the court erred in disturbing SDHR's determination of no probable cause on the ground that the submissions raised issues of fact that warranted a hearing. "Probable cause exists only when, after giving full credence to [petitioner's] version of the events, there is some evidence of unlawful discrimination . . . There must be a *factual* basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" (*Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725; *see Smith*, 142 AD3d at 1363). While petitioner's "factual showing must be accepted as true on a probable cause determination" (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697, *lv denied* 26 NY3d 909), "full credence need not be given to petitioner's allegation in [her] complaint that [she] was discriminated against on the basis of [her] disability, for this is the ultimate conclusion, which must be determined solely by [SDHR] based upon all of the facts and circumstances" (*Matter of Vadney v State Human Rights Appeal Bd.*, 93 AD2d 935, 936; *see Smith*, 142 AD3d at 1363-1364).

Here, we conclude that "the conflicting evidence before SDHR did not create a material issue of fact that warranted a formal hearing" (*Matter of Hall v New York State Div. of Human Rights*, 137 AD3d 1583, 1584). Rather, we agree with respondent that a rational basis supports SDHR's determination that, based upon all of the facts and circumstances, there is no factual basis in the evidence sufficient to warrant a cautious person to believe that respondent unlawfully discriminated against petitioner based on her disability (*see Smith*, 142 AD3d at 1364). In addition, SDHR rationally determined that the evidence did not support petitioner's allegation that respondent subjected her to a hostile work environment (*see Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881-882, *lv denied* 22 NY3d 851; *Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431; *see generally Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381, *lv denied* 16 NY3d 709). Finally, we conclude that SDHR's determination that there was no probable cause to believe that respondent retaliated against petitioner is not arbitrary or capricious, and it has a rational basis in the record (*see Napierala*, 140 AD3d at 1747-1748; *see generally Burlington N. & Santa Fe Ry. Co. v White*, 548 US 53, 67-68).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

65

CA 16-01212

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

ERINN BARSKI, DAVID BARSKI AND BARSKI'S XTREME LAZER TAG, LLC, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF AURELIUS, DEFENDANT-RESPONDENT.

CAMARDO LAW FIRM, P.C., AUBURN (JUSTIN T. HUFFMAN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MACKENZIE HUGHES LLP, SYRACUSE (W. BRADLEY HUNT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered September 9, 2015. The order granted defendant's motion to dismiss plaintiffs' amended complaint.

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

Memorandum: The individual plaintiffs, the owners of plaintiff Barski's Xtreme Lazer Tag, LLC, entered into a lease with the Finger Lakes Mall, located in defendant, Town of Aurelius. Plaintiffs applied for a building permit to enable them to renovate the leased premises, submitting the necessary documentation and plans. Defendant issued the building permit to plaintiffs and, upon completion of the renovations, plaintiffs received a certificate of occupancy. They opened the business in December 2013, but defendant revoked the certificate of occupancy the following month, alleging that a different fire protection system than had been previously approved was required. The new fire protection system was cost-prohibitive, and plaintiffs had to close the business. Plaintiffs commenced this action alleging, inter alia, causes of action for negligent misrepresentation and violation of their procedural due process rights. Supreme Court granted defendant's motion to dismiss the amended complaint pursuant to CPLR 3211, and plaintiffs appeal. We note at the outset that plaintiffs on appeal do not challenge the dismissal of their second cause of action and are therefore deemed to have abandoned that cause of action (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiffs that the court erred in granting that part of the motion with respect to one of the two remaining causes of action, and we therefore modify the order

accordingly.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction . . . We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88). The "criterion [on a CPLR 3211 motion] is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Ramos v Hughes*, 109 AD3d 1121, 1122 [internal quotation marks omitted]). Affording the allegations in the amended complaint every possible favorable inference (*see Palladino v CNY Centro, Inc.*, 70 AD3d 1450, 1451), we conclude that plaintiffs have alleged a cause of action for negligent misrepresentation, and they correctly acknowledged that liability may not be imposed without the existence of a special relationship (*see generally Okie v Village of Hamburg*, 196 AD2d 228, 232). We further agree with plaintiffs that the doctrine of exhaustion of administrative remedies has no application here inasmuch as plaintiffs are seeking money damages in this action based on defendant's alleged negligent misrepresentation (*see Matter of Stein v Board of Educ. of City of N.Y.*, 87 AD2d 514, 514).

Finally, we reject plaintiffs' contention that the court erred in dismissing their remaining cause of action inasmuch as plaintiffs failed to state a viable procedural due process cause of action (*see Fike v Town of Webster*, 11 AD3d 888, 889-890).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

77

CAF 15-01210

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

IN THE MATTER OF SANDRA L. COUGHLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KELLY J. COUGHLIN, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

HOPPE & ASSOCIATES, INC., BUFFALO (BERNADETTE M. HOPPE OF COUNSEL), FOR PETITIONER-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered July 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of an unspecified order with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the petition is dismissed without prejudice, and as modified the order is affirmed without costs.

Memorandum: Petitioner mother appeals from three orders of Family Court that, respectively, dismissed a petition seeking modification of the custody provisions in the judgment of divorce (appeal No. 2), dismissed a petition alleging a violation of an unspecified order (appeal No. 1), and dismissed a petition alleging a violation of an order that is not contained in the record on appeal (appeal No. 3). As limited by her brief, the mother contends that Family Court erred in dismissing each of those petitions with prejudice. We agree.

Respondent father correctly concedes that the orders in appeal Nos. 1 and 3 conflict with Family Court's decision, which expressly provides that the violation petitions were dismissed without prejudice. Because the decision controls where, as here, it conflicts with the order, we modify the orders in appeal Nos. 1 and 3 to conform to the decision (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773, *lv denied* 28 NY3d 904).

With respect to appeal No. 2, the court determined that the

petition was facially insufficient to allege a change of circumstances warranting a change of custody. Thus, because petitioner has not had a full and fair opportunity to litigate her allegations that the custody provisions in the judgment of divorce should be modified, the court erred in dismissing the petition with prejudice (*cf. Stiles v Graves*, 143 AD3d 1215, 1216-1217; *see generally Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13). We therefore modify the order in appeal No. 2 accordingly.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

78

CAF 15-01211

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

IN THE MATTER OF SANDRA L. COUGHLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KELLY J. COUGHLIN, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

HOPPE & ASSOCIATES, INC., BUFFALO (BERNADETTE M. HOPPE OF COUNSEL), FOR PETITIONER-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered July 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking modification of the custody provisions in the judgment of divorce with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the petition is dismissed without prejudice, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Coughlin v Coughlin* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2017]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

79

CAF 15-01212

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

IN THE MATTER OF SANDRA L. COUGHLIN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

KELLY J. COUGHLIN, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

HOPPE & ASSOCIATES, INC., BUFFALO (BERNADETTE M. HOPPE OF COUNSEL), FOR PETITIONER-APPELLANT.

DEBORAH J. SCINTA, ORCHARD PARK, FOR RESPONDENT-RESPONDENT.

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered July 2, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition alleging a violation of an order with prejudice.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by providing that the petition is dismissed without prejudice, and as modified the order is affirmed without costs.

Same memorandum as in *Matter of Coughlin v Coughlin* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2017]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

82

CA 16-00832

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

MICHAEL P. CICCO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRED S. DUROLEK AND ELAINE A. DUROLEK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROE & ASSOCIATES, WILLIAMSVILLE (ROBERT E. GALLAGHER, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 7, 2016. The order granted the motion of defendants for leave to serve and file a late demand for a jury trial.

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

Memorandum: Plaintiff appeals from an order granting defendants' motion for leave to serve and file a late demand for a jury trial pursuant to CPLR 4102 (e). Contrary to plaintiff's contention, Supreme Court did not err in granting the motion. The decision "whether to relieve a party from failing to timely comply with CPLR 4102 (a) lies within the sound discretion of the trial court" (*Roosa v Roosa*, 248 AD2d 858, 858; *see Calabro v Calabro*, 133 AD2d 604, 604). "The only limitation on the court's discretion appears to be that any decision to forgive such a waiver should not unduly prejudice the other party or parties" (*Roosa*, 248 AD2d at 858; *see Leone v Greek Peak*, 81 AD2d 751, 751). Here, plaintiff did not demonstrate that he would be prejudiced by a delay in the trial caused by the granting of the motion. Rather, the record establishes that the delay of the trial was attributable to the need for additional disclosure after plaintiff submitted a supplemental bill of particulars that included new or expanded claims for economic loss. Indeed, plaintiff requested a further delay of the trial in order to prosecute this appeal. We have considered plaintiff's other claims of prejudice and conclude that they are without merit.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

87

CA 16-00831

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

MICHAEL P. CICCO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRED S. DUROLEK AND ELAINE A. DUROLEK,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF ERIC B. GROSSMAN, WILLIAMSVILLE (ERIC B. GROSSMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ROE & ASSOCIATES, WILLIAMSVILLE (ROBERT E. GALLAGHER, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered March 16, 2016. The order, inter alia, denied those parts of the motion of plaintiff for partial summary judgment on the issues of whether he sustained a serious injury and whether he incurred economic loss in excess of basic economic loss.

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

Memorandum: In this action to recover damages for personal injuries, plaintiff appeals from an order that, inter alia, denied those parts of his motion for partial summary judgment on the issues of whether he sustained a serious injury as a result of the motor vehicle accident and whether he incurred economic loss in excess of basic economic loss. We affirm. With respect to the issue of serious injury, and even assuming, arguendo, that plaintiff met his initial burden of demonstrating his entitlement to judgment as a matter of law (*see DeAngelis v Martens Farms, LLC*, 104 AD3d 1125, 1126-1127; *Monette v Trummer* [appeal No. 2], 96 AD3d 1547, 1549), we conclude that defendants raised a triable issue of fact concerning whether plaintiff's injuries were causally related to the accident or the result of a preexisting injury to his lumbar spine (*see DeAngelis*, 104 AD3d at 1126-1127; *Monette*, 96 AD3d at 1549). On this record, it is not possible to determine as a matter of law whether the injuries of plaintiff that were objectively ascertained after the accident were the same injuries that were objectively ascertained before the accident. To the contrary, the conflicting opinions of the parties' respective experts warrant a trial on the issue of serious injury (*see Cooper v City of Rochester*, 16 AD3d 1117, 1118; *see generally Selmensberger v Kaleida Health*, 45 AD3d 1435, 1436).

We likewise conclude that there are triable issues of fact concerning whether plaintiff sustained economic losses in excess of basic economic loss as a result of the accident (*see Colvin v Slawoniewski*, 15 AD3d 900, 900; *cf. Wilson v Colosimo*, 101 AD3d 1765, 1767; *Hartman-Jweid v Overbaugh*, 70 AD3d 1399, 1400-1401; *see generally* Insurance Law §§ 5102 [a]; 5104 [a]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

88

CA 16-00414

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

RICHARD WILLIAMSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ANNE J. HODSON, AS EXECUTRIX OF THE ESTATE OF ROBERT P. HODSON, D.D.S., DEFENDANT-RESPONDENT.

TRONOLONE & SURGALLA, P.C., BUFFALO (RICHARD P. VALENTINE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

ANSPACH MEEKS ELLENBERGER LLP, BUFFALO (DAVID M. STILLWELL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered December 14, 2015. The judgment was entered upon a jury verdict in defendant's favor.

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

Memorandum: Plaintiff commenced this action to recover for damages for injuries that he allegedly sustained as a result of decedent's dental malpractice. On appeal from a judgment entered upon a jury verdict in defendant's favor, plaintiff contends that Supreme Court erred in denying his motion for judgment as a matter of law pursuant to CPLR 4401. We reject that contention. Given the conflicting testimony of the parties' experts, we conclude that it cannot be said that there is " 'no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion [advocated by the nonmovant] on the basis of the evidence presented at trial' " (*Szczerbiak v Pilat*, 90 NY2d 553, 556, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499).

Plaintiff further contends that the court erred in failing to grant his posttrial motion pursuant to CPLR 4404 (a) to set aside the verdict as against the weight of the evidence and for a new trial. We conclude that plaintiff's contention is not properly before us inasmuch as he abandoned that contention at oral argument of his motion (*see Webb v Salvation Army*, 83 AD3d 1453, 1453; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985). Here, the record establishes that plaintiff's counsel responded in the affirmative when the court at oral argument asked whether plaintiff was requesting that the court direct entry of judgment in his favor on the issue of negligence and was "not asking for a new trial on the question of

negligence," i.e., the appropriate relief when a jury verdict is set aside as against the weight of the evidence (*see Rogers v DiChristina*, 195 AD2d 1061, 1062, *lv denied* 82 NY2d 852). In any event, plaintiff's contention lacks merit inasmuch as " 'the trial was a prototypical battle of the experts, and the jury's acceptance of [defendant's] case was a rational and fair interpretation of the evidence' " (*Schultz v Excelsior Orthopaedics, LLP* [appeal No. 2], 129 AD3d 1606, 1607).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

89

CA 16-00985

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

JOSEPH T. GRABAR AND CAROL A. GRABAR,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

NICHOLS, LONG & MOORE CONSTRUCTION CORP.,
DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (TYSON R. PRINCE OF COUNSEL), FOR DEFENDANT-APPELLANT.

MAXWELL MURPHY, LLC, BUFFALO (ALAN D. VOOS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered January 20, 2016. The order, insofar as appealed from, denied that part of the cross motion of defendant for summary judgment dismissing the complaint with respect to the Labor Law § 240 (1) claim.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendant's cross motion is granted in its entirety, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Joseph T. Grabar (plaintiff) when the trailer on which plaintiff was standing tipped, and he fell. Plaintiff was on the bed of the trailer in order to place fuel in a welder that was located on the trailer, and it is undisputed that the trailer bed was approximately 20 inches from the ground. We agree with defendant that Supreme Court erred in denying that part of its cross motion for summary judgment dismissing the complaint with respect to the section 240 (1) claim, and we therefore reverse the order insofar as appealed from, grant the cross motion in its entirety, and dismiss the complaint.

We conclude that the trailer "did not present the kind of elevation-related risk that the statute contemplates" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 408; *see Amantia v Barden & Robeson Corp.*, 38 AD3d 1167, 1168). Indeed, the injured plaintiff in *Tillman v Triou's Custom Homes* (253 AD2d 254, 257) fell from the truck bed on which he was working after it tipped due to flat tires, and we held that the Labor Law § 240 (1) cause of action should have been dismissed.

We reject plaintiffs' contention that our determination in *Doyle v Niagara Mohawk Power Corp.* (2 AD3d 1404) compels a different result. We take judicial notice of our records in that appeal and note that we agreed with Supreme Court that the plaintiff should have been provided with a ladder in order to tighten a coupling located above a tar kettle, rather than standing on the top of the tar kettle onto which tar had leaked, causing him to slip and fall. Here, however, plaintiff was not engaged in a task that entailed "a significant risk inherent in [it] because of the relative elevation at which the task must be performed" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514). Labor Law § 240 (1) is applicable when "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*Rocovich*, 78 NY2d at 514; *cf. Hyatt v Young*, 117 AD3d 1420, 1420; *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1566-1567), neither of which is present here.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

94

KA 15-00332

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PEDRO ROMERO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 27, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of assault in the first degree (Penal Law § 120.10 [1]) under count three of the indictment to assault in the second degree (§ 120.05 [2]), and the matter is remitted to Onondaga County Court for sentencing on that crime.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), attempted murder in the second degree (§§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). This case arose from an incident in which three men ambushed two victims on a residential street in the City of Syracuse. One victim suffered gunshot wounds to the leg and survived. The other victim suffered a gunshot wound to the head and died. Eyewitnesses initially identified Efrain Santos, Maximino Alvarez, and a third suspect as the assailants, but the third suspect had an alibi. Eyewitnesses later identified defendant as the third assailant. A grand jury indicted Santos, Alvarez, and defendant on an acting-in-concert theory, and Alvarez eventually pleaded guilty and agreed to testify against defendant.

We agree with defendant that his conviction of assault in the first degree as charged in count three of the indictment is based on legally insufficient evidence because there is insufficient evidence that the surviving victim suffered serious physical injury (*see* Penal

Law § 120.10 [1]), i.e., "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 10.00 [10]). Although the victim displayed to the jury scars on his leg caused by his gunshot wounds, "the record does not contain any pictures or descriptions of what the jury saw so as to prove that these scars constitute serious or protracted disfigurement" (*People v Tucker*, 91 AD3d 1030, 1032, *lv denied* 19 NY3d 1002; *see generally People v McKinnon*, 15 NY3d 311, 315-316). Furthermore, although the victim testified that he "feel[s] pain in [his] leg" in cold weather, we conclude that such testimony does not constitute evidence of persistent pain so severe as to cause "protracted impairment of health" (§ 10.00 [10]; *see generally People v Stewart*, 18 NY3d 831, 832-833). We further conclude, however, that the evidence is legally sufficient to support a conviction of the lesser included offense of assault in the second degree (Penal Law § 120.05 [2]), and we therefore modify the judgment accordingly. Contrary to defendant's further contention, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict with respect to those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). "The jury's resolution of credibility and identification issues is entitled to great weight" (*People v Houston*, 142 AD3d 1397, 1398 [internal quotation marks omitted]), and we decline to disturb the jury's determination of those issues.

Defendant failed to preserve for our review his challenge to the admission in evidence of a purported threatening letter that Alvarez received in prison. Defendant did not object to the admission of the letter on the specific ground he now raises on appeal (*see People v Clark*, 90 AD3d 1576, 1577, *lv denied* 18 NY3d 992), 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]). Defendant also failed to preserve for our review his challenge to County Court's preclusion ruling relating to the CPL 710.30 notice (*see People v Robinson*, 28 AD3d 1126, 1129, *lv denied* 7 NY3d 794). In any event, we conclude that the court's ruling was proper (*see generally People v Lopez*, 84 NY2d 425, 428).

Contrary to defendant's further contention, we conclude that the court properly denied his request for a missing witness charge because he "failed to meet his initial burden of establishing that [the] witness would provide testimony favorable to the prosecution" (*People v Butler*, 140 AD3d 1610, 1611, *lv denied* 28 NY3d 969). Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

97

KA 13-01880

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAROD P. WHITE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered September 4, 2013. The judgment convicted defendant, upon a nonjury verdict, of robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, and the indictment against defendant is dismissed without prejudice to the People to re-present any appropriate charges to another grand jury.

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [1]). Defendant contends that he was deprived of his right to testify before the grand jury and that County Court thus erred in denying his motion to dismiss the indictment pursuant to CPL 190.50 (5) (c) and CPL 210.35 (4) (*see* CPL 210.20 [1] [c]). We agree. CPL 190.50 (5) (a) provides that a defendant's request to testify is timely as long as it is made prior to the filing of the indictment (*see People v Evans*, 79 NY2d 407, 412; *People v Moss*, 143 AD3d 1269, 1270). Here, defendant's January 15, 2013 letter, which "satisfied the statutory requirements for notifying the People of a request to appear before the grand jury" (*Moss*, 143 AD3d at 1270), was received by the District Attorney on January 17, 2013, prior to the filing of the indictment on January 25, 2013. Contrary to the contention of the People and the rationale of the court, it is of no moment under the statute that defendant's request to testify was not received until the day after the grand jury had voted to issue an indictment and several days after the deadlines set forth in the two grand jury notices given by the People to defendant. As the Court of Appeals has noted, a defendant has a right "under CPL 190.50 (5) (a) to provide notice and, therefore, the concomitant right to give testimony even perhaps after an indictment

has been voted but before it is filed" (*Evans*, 79 NY2d at 414). Where, as here, defendant's request to testify is received after the grand jury has voted, but before the filing of the indictment, defendant is entitled to a reopening of the proceeding to enable the grand jury to hear defendant's testimony and to revote the case, if the grand jury be so advised (*see People v Dillard*, 160 AD2d 472, 473, *lv denied* 76 NY2d 847; *People v Young*, 138 AD2d 764, 765, *lv denied* 72 NY2d 868; *see generally Evans*, 79 NY2d at 414-415; *People v Cade*, 74 NY2d 410, 415, 417).

We reject defendant's contention that the evidence is legally insufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). In addition, viewing the evidence in light of the elements of the crimes in this bench trial (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

98

KA 15-00176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AKEEM WALLACE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 8, 2014. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree, a class C felony (Penal Law § 265.03 [3]). The evidence established that defendant brought a loaded, operable, unlicensed handgun to work with him as a swing manager at McDonald's and that he accidentally shot himself in the leg while in the lobby area of the restaurant. Defendant argues that he should fall within the exception set forth in the subdivision, which provides that possession constitutes only a misdemeanor if it takes place in a person's "place of business" (*id.*; *see* 265.01 [1]).

Although defendant's motion for a trial order of dismissal was not specifically directed at the legal sufficiency of the evidence based upon the "place of business" exception, inasmuch as he unsuccessfully argued that issue before trial, defendant need not "repeat the argument in a trial motion to dismiss in order to preserve the point for appeal" (*People v Finch*, 23 NY3d 408, 410). Nevertheless, the contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Although the "place of business" exception is not statutorily defined, it has been "construed narrowly by the courts in an effort to balance 'the State's strong policy to severely restrict possession of any firearm' . . . with its policy to treat with leniency persons attempting to protect certain areas in which they have a possessory interest and to which members of the

public have limited access" (*People v Buckmire*, 237 AD2d 151, 151, *lv denied* 90 NY2d 902; *see People v Francis*, 45 AD2d 431, 434, *affd on other grounds* 38 NY2d 150; *People v Fearon*, 58 AD2d 1041, 1041, *cert denied* 434 US 1036). Inasmuch as the evidence at trial established that defendant was prohibited from bringing a gun to work, we conclude that to permit defendant to be subjected only to a misdemeanor "would certainly controvert the meaning and intent of the statute" (*Fearon*, 58 AD2d at 1041).

All concur except LINDLEY, J., who dissents and votes to modify in accordance with the following memorandum: I respectfully dissent. Defendant was convicted of criminal possession of a weapon in the second degree under Penal Law § 265.03 (3), which makes it a class C felony to possess a loaded firearm. The statute provides an exception, however, for possession of a loaded firearm in one's "home or place of business" (*id.*). Here, defendant was charged with possessing a loaded firearm at a McDonald's restaurant in Buffalo where he was employed as a manager. I agree with defendant that he possessed the weapon at his "place of business" inasmuch as he undisputedly worked at the restaurant in question and, thus, that the evidence is legally insufficient to establish that he violated section 265.03 (3). I would therefore reduce defendant's conviction to criminal possession of a weapon in the fourth degree (§ 265.01 [1]), a class A misdemeanor.

As cited by the People, there are several decades-old Appellate Division decisions that narrowly construe the home or place of business exception to apply only to persons "attempting to protect certain areas in which they have a possessory interest and to which members of the public have limited access" (*People v Buckmire*, 237 AD2d 151, 151, *lv denied* 90 NY2d 902; *see People v Francis*, 45 AD2d 431, 434, *affd on other grounds* 38 NY2d 150; *People v Fearon*, 58 AD2d 1041, 1041, *cert denied* 434 US 1036). The Courts in those cases determined, in essence, that the Legislature could not possibly have meant that "place of business" literally means "place of business," and they therefore adopted a limited definition of that phrase, which is not defined in the statute. In my view, the statute is clear and unambiguous on its face, and there is thus no need to discern the Legislature's intent. In any event, if the Legislature had wanted to limit the places of business to which the exception of section 265.03 (3) applies, it could easily have done so.

Finally, although McDonald's employees may have been prohibited by their employer from bringing firearms to work, that would merely be grounds for terminating defendant's employment or otherwise disciplining him; it would not make his conduct illegal. The legality of an employee's conduct cannot and should not be determined by reference to an employee handbook.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

102

CA 15-01768

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

CHRISTINA J. BROYLES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF EVANS, OFFICER THOMAS J. CRUPE,
LIEUTENANT MICHAEL MASULLO, DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HOGANWILLIG, PLLC, AMHERST (LINDA LALLI STARK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM LLP, BUFFALO (BRENNA C. GUBALA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 28, 2015. The order granted the motion of defendants Town of Evans, Officer Thomas J. Crupe, and Lieutenant Michael Masullo to dismiss plaintiff's complaint and any cross claims against them and denied the cross motion of plaintiff for leave to amend the complaint.

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

Memorandum: Plaintiff commenced this action for, inter alia, malicious prosecution after she was charged with criminal trespass in the third degree. The Town of Evans and two of its police officers (collectively, defendants) moved for dismissal of the complaint and any cross claims against them, and plaintiff cross-moved for leave to amend the complaint. Supreme Court granted the motion and denied the cross motion. We affirm. We note at the outset that only two causes of action are at issue on this appeal, i.e., the first cause of action and the fifth cause of action.

We conclude that the court properly granted the motion with respect to the first cause of action, asserting malicious prosecution on the part of defendants, for failure to state a cause of action (*see* CPLR 3211 [a] [7]). In particular, we conclude that plaintiff failed adequately to plead the requisite elements of lack of probable cause and malice on the part of the officers, and likewise failed to submit affidavits or other evidentiary material remedying that defect of her complaint (*see Leon v Martinez*, 84 NY2d 83, 88). " 'Probable cause to believe that a person committed a crime is a complete defense to claims of . . . malicious prosecution' " (*Batten v City of New York*,

133 AD3d 803, 805; *see Fortunato v City of New York*, 63 AD3d 880, 880; *see also Britt v Monachino*, 73 AD3d 1462, 1462). "In the context of a malicious prosecution cause of action, probable cause consists of such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe plaintiff guilty" (*Zetes v Stephens*, 108 AD3d 1014, 1015-1016 [internal quotation marks omitted]; *see Colon v City of New York*, 60 NY2d 78, 82, *rearg denied* 61 NY2d 670; *Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1470). It is well established that "information provided by an identified citizen accusing another of a crime is legally sufficient to provide the police with probable cause to arrest" (*Lyman v Town of Amherst*, 74 AD3d 1842, 1843 [internal quotation marks omitted]; *see Zetes*, 108 AD3d at 1016). Here, the record, including the complaint itself, establishes as a matter of law that the officers, upon hearing the complaint of plaintiff's neighbors, had probable cause to believe that plaintiff had committed criminal trespass in the third degree (*see Zetes*, 108 AD3d at 1015-1016; *see also Lyman*, 74 AD3d at 1843).

The court also properly granted the motion with respect to the fifth cause of action, alleging negligent hiring, training, and supervision of the officers on the part of the Town, on the ground that the cause of action is time-barred (*see* CPLR 3211 [a] [5]). Plaintiff's action was not commenced until more than one year and 90 days "after the happening of the event upon which the claim is based" (General Municipal Law § 50-i [1]; *see Cardiff v Carrier*, 79 AD3d 1626, 1626-1627, *lv denied* 16 NY3d 710; *Ruggiero v Phillips*, 292 AD2d 41, 43; *see also Klein v City of Yonkers*, 53 NY2d 1011, 1012-1013).

Finally, we conclude that the court did not abuse its discretion in denying plaintiff's cross motion for leave to amend her complaint with regard to the cause of action for malicious prosecution. Although leave to amend is freely granted (*see* CPLR 3025 [b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959), it should be denied where the proposed amendment is patently lacking in merit (*see ARG Trucking Corp. v Amerimart Dev. Co.*, 302 AD2d 876, 877; *Nahrebeski v Molnar*, 286 AD2d 891, 891-892). Here, the proposed amended complaint did not rectify the deficiencies in the original complaint, especially with regard to the allegations of lack of probable cause and malice.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

113

KA 13-01883

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK E. SCERBO, II, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered July 15, 2013. The judgment convicted defendant, inter alia, upon a jury verdict, of reckless driving (three counts), driving while intoxicated, as a class D felony (two counts), aggravated driving while intoxicated, as a class D felony, and manslaughter in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on counts 4, 6 through 8, 10 and 11 of the indictment, and counts one through three of the indictment are dismissed without prejudice to the People to re-present any appropriate charges under those counts to another grand jury.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, three counts of reckless driving (Vehicle and Traffic Law § 1212), and one count each of manslaughter in the second degree (Penal Law § 125.15 [1]) and aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]), defendant contends that County Court erred in refusing to consider his belated peremptory challenge. We agree.

A trial court has broad discretion over the jury selection process (*see People v Wilson*, 106 AD2d 146, 149, citing *People v Pepper*, 59 NY2d 353). Where a defendant seeks to exercise a peremptory challenge after the time in which to do so has passed, the court has discretion whether to allow the challenge (*see People v Jabot*, 93 AD3d 1079, 1081). Here, defense counsel momentarily lost count of the number of jurors who had been selected. As a result, defense counsel declined to exercise a peremptory challenge to prospective juror 21. When informed that prospective juror 21 was the 12th juror seated, defense counsel immediately asked the court to

allow defendant to exercise his last peremptory challenge to that juror. The jury had not yet been sworn, the panel from which the alternates would be selected had not yet been called, and prospective juror 21 had not yet been informed that he had been selected. Furthermore, the People expressly declined to object to the request. Under the circumstances of this case, we conclude that the court abused its discretion in denying defendant's request. Indeed, " 'we can detect no discernable interference or undue delay caused by [defense counsel's] momentary oversight . . . that would justify [the court's] hasty refusal to entertain [the] challenge' " (*People v McGrew*, 103 AD3d 1170, 1173; *see People v Rosario-Boria*, 110 AD3d 1486, 1486-1487; *People v Parrales*, 105 AD3d 871, 872). Such an error cannot be deemed harmless (*see People v Hecker*, 15 NY3d 625, 661-662; *People v Marshall*, 131 AD3d 1074, 1075, *lv denied* 26 NY3d 1041), and thus reversal is required.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

114

KA 14-01509

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC CLAY, DEFENDANT-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (KELLY CHRISTINE WOLFORD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 18, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking preclusion of the identification evidence is granted, and a new trial is granted on count two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), arising from his possession of a gun located in the left rear seat of a vehicle where he was allegedly seated. Contrary to defendant's contention, 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). Even assuming, arguendo, that a different verdict would not have been unreasonable based upon defense alibi testimony, we note that the jury was entitled to credit the testimony of the police witness that defendant was the person seated in the vehicle over that of the defense witnesses who testified that defendant was either on the sidewalk or inside a nearby house at the time (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that Supreme Court erred in refusing to suppress the gun. The evidence at the suppression hearing established that the police were patrolling a high crime area with a high incidence of gun violence and, while driving at a low rate of speed, passed a parked vehicle with four occupants. There were several people standing on the sidewalk by the vehicle and one person was standing in the street by the vehicle. One officer testified that

the passenger in the left rear seat of the vehicle made eye contact with him and then leaned forward as though placing something under the seat. The officer and his partner then approached the vehicle, and the officer observed the other rear seat passenger with a bottle of liquor and a cup of liquid. The officer directed the four occupants to place their hands where they could be seen and, when the driver exited the vehicle in order to retrieve his driver's license, the front seat passenger exited the vehicle and ran. While the officer chased that person and the other officer was engaged with the other rear seat passenger, defendant exited the vehicle and ran. A knife, determined to be a gravity knife, was observed on the seat where the other rear seat passenger was seated and, upon his arrest, the vehicle was searched and two guns were located, one under the front passenger seat and the other under the left rear seat.

The officer testified that, because of the high crime rate in the area and defendant's movements after defendant made eye contact with him, he directed the occupants to place their hands where they could be seen, for officer safety. Although defendant correctly contends that the officer's actions constituted a restraint over the occupants, as opposed to the vehicle, requiring reasonable suspicion that they posed some danger to the officers (*see People v Harrison*, 57 NY2d 470, 476), we conclude that the officer had reasonable suspicion to believe that the group may have posed a risk to officer safety (*see People v Mack*, 49 AD3d 1291, 1292, *lv denied* 10 NY3d 866; *cf. People v May*, 81 NY2d 725, 727-728; *People v Porter*, 136 AD3d 1344, 1345). Indeed, although defendant may have had an innocuous reason for leaning forward after making eye contact with the officer, we conclude that, under these circumstances, "the officer had a reasonable basis for fearing for [the officers'] safety and was not required to await the glint of steel" (*People v Bracy*, 91 AD3d 1296, 1298, *lv denied* 20 NY3d 1060 [internal quotation marks omitted]). Thus, we conclude that the court properly implicitly determined that the police action in requiring defendant to place his hands on the headrest in front of him was "a 'constitutionally justified intrusion designed to protect the safety of the officer[s]' " (*id.*).

We agree with defendant, however, that the court erred in permitting the officer to identify defendant as the person in the left rear seat of the vehicle in the absence of a notice pursuant to CPL 710.30 (1) (b). We therefore reverse the judgment and grant that part of the omnibus motion seeking preclusion of that testimony on the ground that the People failed to serve a notice pursuant to CPL 710.30 (1) (b). The prosecutor advised the court and defense counsel after jury selection that the officer would identify defendant as the left rear passenger. Defendant objected and the court conducted a hearing, over defendant's objection, and determined that the officer's identification of defendant by means of a single photo approximately two hours after the incident was merely confirmatory and thus that no notice was required pursuant to CPL 710.30 (1) (b).

The exception to the requirement to provide notice pursuant to CPL 710.30 "carries significant consequences" (*People v Boyer*, 6 NY3d 427, 431), and the Court of Appeals has "consistently held that police

identifications do not enjoy any exemption from the statutory notice and hearing requirements" (*id.* at 433). Unlike the buy-and-bust scenario, where the police participant is focused on the face-to-face contact with defendant with the goal of identifying him or her when he or she is picked up by a back up unit (*see People v Wharton*, 74 NY2d 921, 922-923), here, the officer was standing by the vehicle for approximately three minutes while he was engaged with all of the occupants of the vehicle. Thus, "we cannot conclude that the circumstances of [the officer's] initial viewing were such that, as a matter of law, the subsequent identification could not have been the product of undue suggestiveness" (*Boyer*, 6 NY3d at 433; *see People v Pacquette*, 25 NY3d 575, 580). Indeed, "the statute contemplates '*pretrial* resolution of the admissibility of identification testimony' " (*Pacquette*, 25 NY3d at 579), and "[t]o conclude otherwise directly contravenes the simple procedure that has been mandated by the Legislature and would permit the People to avoid their statutory obligation merely because a police officer's initial viewing of a suspect and a subsequent identification might be temporally related" (*Boyer*, 6 NY3d at 433).

We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

115

KA 14-01373

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANGEL HILL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered May 12, 2014. The judgment convicted defendant, upon a nonjury verdict, of assault in the third degree and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her following a nonjury trial of, inter alia, assault in the third degree (Penal Law § 120.00 [1]). Defendant's general motion for a trial order of dismissal did not preserve for our review her contentions that the evidence is legally insufficient to establish that the victim sustained a physical injury (*see People v Lewis*, 129 AD3d 1546, 1547, *lv denied* 26 NY3d 969), and that she is liable for the conduct of friends and family members based upon a theory of accessorial liability (*see People v Crawford*, 199 AD2d 406, 406). In any event, the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to establish that the victim sustained a physical injury within the meaning of Penal Law § 10.00 (9) (*see People v Smith*, 45 AD3d 1483, 1483, *lv denied* 10 NY3d 771), and that defendant is liable for the assaultive conduct of others under Penal Law § 20.00 (*see People v Torres*, 108 AD3d 474, 475, *lv denied* 22 NY3d 998).

Inasmuch as the conviction is supported by legally sufficient evidence, defense counsel was not ineffective in failing to preserve defendant's legal sufficiency challenge for our review (*see People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024). With respect to the further alleged instances of ineffectiveness, we conclude that the record as a whole establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147; *People*

v Carrasquillo, 142 AD3d 1359, 1359).

Finally, the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

118

KA 14-00875

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKEYMO A. HODGE, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered March 21, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of one count each of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal sale of a controlled substance in the third degree (§ 220.39 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of one count each of those crimes.

Defendant contends in appeal No. 1 that County Court failed to make a sufficient inquiry into juror misconduct when informed that several jurors had been discussing defendant's guilt or innocence before deliberations had begun (*see generally People v Buford*, 69 NY2d 290, 299). Defendant failed to preserve that contention for our review, inasmuch as he failed to object to the scope of the court's inquiry when the court individually examined all 14 jurors in response to that allegation (*see People v Hicks*, 6 NY3d 737, 739; *People v Viera*, 75 AD3d 926, 927). 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]). We reject defendant's contention that the court abused its discretion in denying his motion for a mistrial based upon the alleged juror misconduct inasmuch as the court conducted a probing and tactful inquiry sufficient under *Buford* (69 NY2d at 299).

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 further contention in appeal No. 1 that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). The evidence at trial established that defendant possessed cocaine and sold it to a confidential informant in a controlled buy transaction. The fact that the only eyewitness to the sale, i.e., the confidential informant, was cooperating with law enforcement in exchange for a lenient sentence on charges of driving while intoxicated does not render his testimony unworthy of belief, and we accord deference to the credibility determinations of the jury (*see People v Tuszynski*, 120 AD3d 1568, 1568-1569, *lv denied* 25 NY3d 954; *see also People v Bausano*, 122 AD3d 1341, 1342, *lv denied* 25 NY3d 1069).

Finally, we reject defendant's challenge in each appeal to the severity of the sentence.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

119

KA 14-00874

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKEYMO A. HODGE, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CARA A. WALDMAN, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered March 21, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Same memorandum as in *People v Hodge* ([appeal No. 1] ___ AD3d ___ [Feb. 10, 2017]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

122

CA 15-01336

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

JOSEPH W. SLATTERY, AS EXECUTOR OF THE ESTATE OF JOAN M. SLATTERY, DECEASED, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

KENNEY, SHELTON, LIPTAK, NOWAK, LLP, BUFFALO (MELISSA A. FOTI OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI LLP, BUFFALO (BRIAN HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered July 1, 2015 in a personal injury action. The order denied defendant's motion for summary judgment dismissing the complaint.

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

Memorandum: In this action, plaintiff seeks damages for injuries sustained by Joan M. Slattery (decedent) when she allegedly tripped and fell on a rug entering defendant's store. We agree with defendant that Supreme Court erred in denying its motion seeking summary judgment dismissing the complaint.

Although the issue "whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide . . . , summary judgment in favor of a defendant is appropriate where a plaintiff fails to submit any evidence that a particular condition is actually defective or dangerous" (*Przybyszewski v Wonder Works Constr.*, 303 AD2d 482, 483; *see Bishop v Marsh*, 59 AD3d 483, 483; *Mullaney v Koenig*, 21 AD3d 939, 939). Here, defendant established its entitlement to judgment as a matter of law by showing that the rug it placed in the entranceway to the store did not constitute a dangerous or defective condition (*see Jacobsohn v New York Hosp.*, 250 AD2d 553, 553-554). Defendant's submissions, which included the deposition testimony of decedent and photographs of the rug, established that the rug had been laid flat over a "recessed mat system" at the entrance to the store, and decedent did not see anything wrong with the rug before she fell (*see Leib v Silo Rest., Inc.*, 26 AD3d 359, 360; *Londner v Big V Supermarkets*, 309 AD2d 1122,

1123). Those submissions established that decedent simply tripped over the rug, not because of a defect or irregularity in the rug, but because her foot picked up the edge of the rug (*see Jacobsohn*, 250 AD2d at 554).

In opposition, plaintiff failed to raise a triable issue of fact. We agree with defendant that the affidavit of plaintiff's expert is speculative and conclusory (*see e.g. Ciccarelli v Cotira, Inc.*, 24 AD3d 1276, 1277; *Phillips v McClennan St. Assoc.*, 262 AD2d 748, 749-750). In his affidavit, the expert opined that the placement of the rug over the recessed mat system caused a tripping hazard inasmuch as the rug was "not designed to be used over another carpet or the recessed mat system but on a flat, level and flush floor." Although the rug may not have been designed to be placed over another rug or the recessed mat system, the video of the incident, which was submitted in opposition to the motion, shows that decedent tripped over the front edge of the rug. There is no indication that the rug slipped, and there is no record evidence that the rug constituted a defective or dangerous condition at the time of the fall. We conclude that "the mere placement of the [rug] by the front door of the defendant's premises was not an inherently dangerous condition" (*Leib*, 26 AD3d at 360). We note in any event that the affidavit of plaintiff's expert was based on his examination of the area where decedent fell approximately 2½ years after the accident and thus is insufficient to raise a triable issue of fact with respect to the condition of that area at the time of decedent's fall (*see Ferington v Dudkowski*, 49 AD3d 1267, 1268).

In view of our determination, we do not address defendant's alternative contentions.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

127

KA 15-00073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARRY HOLLIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered November 17, 2014. The judgment convicted defendant, upon his plea of guilty, of sexual abuse in the first degree and rape in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by directing that the periods of postrelease supervision shall run concurrently, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of sexual abuse in the first degree (Penal Law § 130.65 [3]) and rape in the second degree (§ 130.30 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). We agree with defendant, however, that County Court erred in imposing consecutive periods of postrelease supervision. "Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are satisfied by the service of the longest unexpired term" (*People v Allard*, 107 AD3d 1379, 1379). "Because we cannot allow an illegal sentence to stand" (*id.*), we modify the judgment accordingly.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

129

KA 15-00333

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENWOOD E. CARR, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered December 15, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [3]), defendant contends that his waiver of the right to appeal is invalid because it was not knowingly, voluntarily, and intelligently entered. We reject that contention. The record establishes that County Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Nicometo*, 137 AD3d 1619, 1619-1620 [internal quotation marks omitted]), and 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; *see Nicometo*, 137 AD3d at 1620). The valid waiver of the right to appeal with respect to both the conviction and sentence forecloses defendant's challenge to the severity of his sentence (*see Lopez*, 6 NY3d at 255-256; *Nicometo*, 137 AD3d at 1620; *cf. People v Maracle*, 19 NY3d 925, 928).

Defendant's further contention that the court abused its discretion in denying his motion to withdraw his guilty plea because it was not knowingly, voluntarily and intelligently entered survives his waiver of the right to appeal (*see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746). Even assuming, arguendo, that defendant preserved his contention for our review by moving to withdraw the plea on the same grounds as those advanced on appeal (*see generally People v Gibson*, 140 AD3d 1786, 1787, *lv denied* 28 NY3d 1072), we conclude that it lacks merit. First, defendant's contention that he mistakenly believed that he faced a maximum term of

incarceration of life without the possibility of parole is supported only by defendant's own self-serving statements (*see People v Green*, 122 AD3d 1342, 1343-1344), and is belied by the transcript of the plea colloquy (*see generally People v Manor*, 121 AD3d 1581, 1582, *affd* 27 NY3d 1012). Second, " 'the fact that defendant was required to accept or reject the plea offer within a short time period does not amount to coercion' " (*People v Green*, 140 AD3d 1660, 1661, *lv denied* 28 NY3d 930). Third, "the court did not coerce defendant into pleading guilty merely by informing him of the range of sentences that he faced if he proceeded to trial and was convicted" (*People v Pitcher*, 126 AD3d 1471, 1472, *lv denied* 25 NY3d 1169). Finally, we conclude that "there is no indication in the record that defendant's ability to understand the plea proceeding was impaired based on his alleged failure to take required medication" (*People v Jackson*, 85 AD3d 1697, 1698, *lv denied* 17 NY3d 817).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

133

KA 14-00579

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM D. GIBSON, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered November 14, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256; *People v Weinstock*, 129 AD3d 1663, 1663, *lv denied* 26 NY3d 1012). The " 'plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Williams*, 132 AD3d 1291, 1291, *lv denied* 26 NY3d 1151). We reject defendant's contention that the written waiver of appeal is unenforceable because it contained certain nonwaivable rights. "Any nonwaivable [rights] purportedly encompassed by the waiver 'are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable' " (*People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761; *see Williams*, 132 AD3d at 1291). Defendant's valid waiver of the right to appeal encompasses his challenge to County Court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833; *Williams*, 132 AD3d at 1291; *Weinstock*, 129 AD3d at 1663).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

134

KA 13-02208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

YOSEF SIMON-PAGE, DEFENDANT-APPELLANT.

EDWARD PEKAREK, WELLSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 10, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that County Court erred in denying his motion to withdraw his *Alford* plea. We reject that contention. Here, the record establishes that "defendant's *Alford* plea was 'the product of a voluntary and rational choice, and the record before the court contains strong evidence of actual guilt' " (*People v Smith*, 26 AD3d 746, 747, *lv denied* 7 NY3d 763). Contrary to defendant's further contention, there is no dispute that the crime occurred in Steuben County, and nothing in the plea colloquy cast doubt on the State's power to prosecute the case (*cf. People v Harvey*, 124 AD3d 1393, 1394).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

137

CA 16-01213

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

KIMBROOK ROUTE 31, L.L.C., KIMBROOK ROUTE 31 DEVELOPMENT LLC AND PHILIP J. SIMAO, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MAUREEN T. BASS, DEFENDANT-RESPONDENT.

CENTOLELLA LYNN D'ELIA & TEMES LLC, SYRACUSE (DAVID C. TEMES OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 25, 2015. The order granted defendant's motion to dismiss plaintiffs' complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiffs commenced this Judiciary Law § 487 action against defendant based on her conduct when representing plaintiffs' adversary in a foreclosure action. We agree with plaintiffs that Supreme Court erred in granting defendant's motion to dismiss the complaint. Although plaintiffs were aware of the alleged misconduct during the pendency of the prior foreclosure action, they are not precluded from bringing a plenary action alleging a violation of Judiciary Law § 487 provided that they are not collaterally attacking the judgment from the prior action (*see Melcher v Greenberg Traurig LLP*, 135 AD3d 547, 554; *Chevron Corp. v Donzinger*, 871 F Supp 2d 229, 261-262; *see generally Stewart v Citimortgage, Inc.*, 122 AD3d 721, 722). Indeed, the language of the statute does not require the claim to be brought in a pending action (*see* § 487; *Melcher*, 135 AD3d at 554). Here, plaintiffs are seeking to recover damages for additional legal fees made necessary by defendant's alleged misconduct in the foreclosure action, and they are not collaterally attacking the judgment of foreclosure (*see generally Amalfitano v Rosenberg*, 12 NY3d 8, 15).

We further agree with plaintiffs that the doctrine of collateral estoppel does not preclude their claim. The doctrine of collateral estoppel has two requirements: (1) "the identical issue necessarily

must have been decided in the prior action and be decisive of the present action," and (2) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *see Ackman v Haberer*, 111 AD3d 1378, 1379). In the foreclosure action, plaintiffs Kimbrook Route 31, L.L.C. (Kimbrook) and Philip J. Simao (Simao) moved before this Court to reduce the amount of the undertaking necessary to stay execution of the judgment of foreclosure pending the outcome of their appeal from that judgment. After we granted the motion in part, Kimbrook and Simao cross-moved for sanctions in this Court based on defendant's conduct in procuring an affidavit from the receiver of the property in opposition to the motion to reduce the amount of the undertaking, and we denied the cross motion. A motion for sanctions for frivolous conduct (*see* 22 NYCRR 130-1.1 [c]) is not the same as a cause of action for attorney misconduct (*see* Judiciary Law § 487). We therefore conclude that collateral estoppel does not apply, inasmuch as the identical issue was not raised in the foreclosure action (*see Melcher*, 135 AD3d at 553-554).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

139

CA 16-00543

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

CITY OF SYRACUSE, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COR DEVELOPMENT COMPANY, LLC, COR INNER HARBOR COMPANY, LLC, COR SOLAR STREET COMPANY IV, LLC, COR VAN RENSSELAER STREET COMPANY, LLC, COR WEST KIRKPATRICK STREET COMPANY, LLC, DEFENDANTS-RESPONDENTS, AND JOHN DOE, DEFENDANT.

ROBERT P. STAMEY, CORPORATION COUNSEL, SYRACUSE (JOHN A. SICKINGER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WHITEMAN, OSTERMAN & HANNA LLP, ALBANY (CHRISTOPHER E. BUCKEY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 25, 2016. The order, among other things, granted in part the motion of defendants to dismiss plaintiff's complaint and cancelled and discharged a notice of pendency.

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

Memorandum: Plaintiff appeals from an order that, inter alia, dismissed its causes of action for breach of the implied covenant of good faith and fair dealing and for rescission of a contract. "The right to appeal from an intermediate order terminates with the entry of a final judgment" (*Matter of Scott v Manilla*, 203 AD2d 972, 973; *see Matter of Aho*, 39 NY2d 241, 248; *see generally* CPLR 5501 [a] [1]). Inasmuch as a final judgment in this action was entered on February 29, 2016, plaintiff's appeal from the intermediate order, which was entered on January 25, 2016, must be dismissed.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

142

CA 16-00031

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

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
HOMEOWNERS AND BRIGHTON EASTBROOKE HOMEOWNERS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ELAINE AINSWORTH, ASSESSOR, AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF BRIGHTON,
RESPONDENTS-RESPONDENTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 1.)

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
UNIT OWNERS, PETITIONER-APPELLANT,

V

ELAINE AINSWORTH, ASSESSOR, AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF BRIGHTON,
RESPONDENTS-RESPONDENTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 2.)

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
UNIT OWNERS, PETITIONER-APPELLANT,

V

TOWN OF BRIGHTON BOARD OF ASSESSMENT REVIEW,
ASSESSOR OF TOWN OF BRIGHTON AND TOWN OF
BRIGHTON, RESPONDENTS-RESPONDENTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 3.)
(APPEAL NO. 1.)

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL),

FOR PETITIONER-APPELLANT.

DAVIDSON FINK, LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered March 27, 2015. The order and judgment, insofar as appealed from, limited the unit owners who are entitled to tax refunds.

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

Memorandum: Eastbrooke Condominium by its Board of Managers, on behalf of all Homeowners and Brighton Eastbrooke Homeowners, and on behalf of all Unit Owners (petitioner) commenced these proceedings pursuant to RPTL article 7 challenging the tax assessments for multiple tax years on the subject condominium property. Pursuant to Real Property Law § 339-y (4), the board of managers of a condominium "may act as an agent of each unit owner who has given his written authorization to seek administrative and judicial review of an assessment." Contrary to petitioner's contention, Supreme Court properly determined that unit owners are required to give an authorization for each tax year for which the assessment is challenged, and a unit owner's authorization for one year did not give the board of managers authorization to act as his or her agent for a different year.

We reject petitioner's further contention that respondents waived any deficiency in the unit owner authorizations. Although an objection that petitioner failed to comply with RPTL 706 (2) may be waived if not asserted in a timely manner (*see Matter of Miller v Board of Assessors*, 91 NY2d 82, 86; *Matter of Ames Dept. Stores v Assessor of Town of Concord*, 102 AD2d 9, 13), here, petitioner complied with that statute by attaching to the petitions the authorization of petitioner's board of managers allowing petitioner's attorney to act as its agent. There was therefore no reason for respondents to object to the petitions as defective. The requirement of Real Property Law § 339-y (4) that unit owners provide written authorizations is a separate requirement, and objections made under that statute are not subject to the waiver rule applicable to objections made pursuant to RPTL 706 (2). In addition, petitioner's reliance on *Matter of Skuse v Town of S. Bristol* (99 AD2d 670, 670) in support of its waiver argument is misplaced because, in that case, the Town of South Bristol was seeking an outright dismissal of the proceedings. Here, respondents' motion in limine did not seek dismissal of the petitions based on any defect, but the motion instead sought an order determining that only unit owners who had signed an authorization for a particular year had a right to receive a refund for that year. We agree with respondents that they did not waive any determination on that matter.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

143

CA 16-00184

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

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
HOMEOWNERS AND BRIGHTON EASTBROOKE HOMEOWNERS,
PETITIONER-RESPONDENT,

V ORDER

ELAINE AINSWORTH, ASSESSOR, AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF BRIGHTON,
RESPONDENTS-APPELLANTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 1.)

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
UNIT OWNERS, PETITIONER-RESPONDENT,

V

ELAINE AINSWORTH, ASSESSOR, AND BOARD OF
ASSESSMENT REVIEW OF TOWN OF BRIGHTON,
RESPONDENTS-APPELLANTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 2.)

IN THE MATTER OF EASTBROOKE CONDOMINIUM
BY ITS BOARD OF MANAGERS ON BEHALF OF ALL
UNIT OWNERS, PETITIONER-RESPONDENT,

V

TOWN OF BRIGHTON BOARD OF ASSESSMENT REVIEW,
ASSESSOR OF TOWN OF BRIGHTON AND TOWN OF
BRIGHTON, RESPONDENTS-APPELLANTS.

FOR REVIEW OF A TAX ASSESSMENT UNDER ARTICLE 7
OF THE REAL PROPERTY TAX LAW
(PROCEEDING NO. 3.)
(APPEAL NO. 2.)

DAVIDSON FINK, LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR

RESPONDENTS-APPELLANTS.

JACOBSON LAW FIRM, P.C., PITTSFORD (ROBERT L. JACOBSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended modified order of the Supreme Court, Monroe County (John J. Ark, J.), entered November 18, 2015. The amended modified order granted in part the motion of petitioner to modify an order and judgment entered March 27, 2015 to the extent of designating owners entitled to refunds.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Villar v Howard*, 126 AD3d 1297, 1300, *affd* 28 NY3d 74).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

147

CA 15-01550

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

JOSHUA P. BOULTER, PLAINTIFF-RESPONDENT,

V ORDER

RACHELLE R. BOULTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

JANE G. LAROCK, WATERTOWN, FOR PLAINTIFF-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from a decision of the Supreme Court, Jefferson County (James P. McClusky, J.), entered December 1, 2014. The decision, among other things, determined that it would be in the best interests of the subject child to relocate to Japan with plaintiff.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Kuhn v Kuhn*, 129 AD2d 967, 967).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

148

CA 15-01938

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

JOSHUA P. BOULTER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RACHELLE R. BOULTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

JANE G. LAROCK, WATERTOWN, FOR PLAINTIFF-RESPONDENT.

KIMBERLY A. WOOD, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from a judgment of the Supreme Court, Jefferson County (James P. McClusky, J.), dated March 13, 2015. The judgment, among other things, adjudged that plaintiff shall have custody of the subject child.

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

Memorandum: Defendant mother appeals from a judgment which, inter alia, granted plaintiff father custody of the parties' child. The mother failed to preserve for our review her contention that North Carolina was a more convenient forum for the action by failing to raise that contention before Supreme Court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985). We reject the mother's contention that the record does not support the court's determination to award custody of the child to the father. Indeed, the court properly considered the totality of the circumstances in determining that the best interests of the child are served by awarding custody to the father (*see Eschbach v Eschbach*, 56 NY2d 167, 174), including the stability of the existing custody arrangement and the relative fitness of the parents, the ability of each parent to provide for the emotional and intellectual development of the child, and the financial status and ability of each parent to provide for the child (*see Fox v Fox*, 177 AD2d 209, 210).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

150

KA 15-01227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ISRAEL RODRIGUEZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), entered April 22, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, Supreme Court did not err in assigning him points under risk factors 3 (number of victims) and 7 (stranger relationship with victim) inasmuch as defendant is a child pornography offender (*see People v Gillotti*, 23 NY3d 841, 854-855; *People v Graziano*, 140 AD3d 1541, 1542, *lv denied* 28 NY3d 909; *People v Wooten*, 136 AD3d 1305, 1306). Defendant did not dispute the proof that he possessed pornographic images depicting three or more children, and he did not dispute that the victimized children portrayed in those images were strangers to him (*see Graziano*, 140 AD3d at 1542).

To the extent that defendant contends that he is entitled to a downward departure from his presumptive risk level, we note that he failed to preserve that contention for our review (*see People v Gilbert*, 78 AD3d 1584, 1585-1586, *lv denied* 16 NY3d 704), and we decline to exercise our own discretion to grant him that relief (*cf. People v Santiago*, 20 AD3d 885, 885-886).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

153

KA 15-01124

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NATHAN HULME, DEFENDANT-APPELLANT.

NORMAN P. EFFMAN, PUBLIC DEFENDER, WARSAW, 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 February 26, 2015. The judgment convicted defendant, upon a jury verdict, of perjury in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of perjury in the first degree (Penal Law § 210.15). Defendant contends that his postverdict waiver of the right to appeal and his withdrawal of his CPL 330.30 motion should be invalidated as a matter of public policy. We reject that contention. We note that defendant is not challenging the fact that his waiver of the right to appeal was knowing and voluntary (*see People v Allick*, 72 AD3d 1615, 1616; *see generally People v Turck*, 305 AD2d 1072, 1072, *lv denied* 100 NY2d 566); instead, he contends that the waiver is invalid on public policy grounds because it insulates from appellate review the ineffective assistance that he allegedly received in a prior reckless endangerment case, i.e., the case in which he committed perjury. Defendant did not take an appeal from that judgment, however, and the waiver of the right to appeal in the instant case does not preclude such an appeal. Thus, defendant's complaints regarding defense counsel's performance in that prior case are not properly before us. In any event, we conclude that defendant's waiver of the right to appeal in the instant case does not violate public policy inasmuch as "[i]t was his choice to accept a lighter sentence rather than risk the delay and outcome of an appeal or a new trial. Having made his choice, there is no reason for [us] to interfere" (*People v Holman*, 89 NY2d 876, 878). Furthermore, because defendant's waiver of the right to appeal is valid, there is no basis to reinstate his CPL 330.30 motion.

Defendant's remaining contentions, including that the prosecutor's comments during summation deprived him of a fair trial and that his conviction is not supported by legally sufficient evidence, are barred by his valid waiver of the right to appeal (*see generally Allick*, 72 AD3d at 1616; *People v Dickerson*, 309 AD2d 966, 967, *lv denied* 1 NY3d 596).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

156

KA 16-01027

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICK D. CARTER, DEFENDANT-APPELLANT.

JOSEPH P. MILLER, CUBA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered June 22, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75). Defendant contends that the indictment, which charges defendant with predatory sexual assault against a child (§ 130.96), is jurisdictionally defective because it includes a time period during which the child was 13 years old or older.

As a preliminary matter, we agree with defendant that he was not required to preserve the above contention for our review, and we further agree that it is not waived as a result of his guilty plea inasmuch as it concerns a nonwaivable jurisdictional defect (*see People v Holmes*, 101 AD3d 1632, 1633, *lv denied* 21 NY3d 944; *see also People v Iannone*, 45 NY2d 589, 600-601). We conclude, however, that defendant's contention lacks merit because the indictment charged defendant with the crime of predatory sexual assault against a child "by name and by reference to the relevant section[] . . . of the Penal Law" (*People v Quamina*, 207 AD2d 1030, 1030, *lv denied* 84 NY2d 1014). Additionally, this is not a case where the inclusion of a period of time when the victim was 13 years of age or older, in addition to a period of time when the victim was less than 13 years old, serves to negate an allegation that the conduct also occurred when the victim was less than 13 years old (*cf. People v Hurell-Harring*, 66 AD3d 1126, 1127-1128 n 3).

Defendant further contends that the indictment was jurisdictionally defective because the 4½-year time period set forth in the indictment is excessive. We reject defendant's characterization of that contention as a jurisdictional defect and instead conclude that it is an unpreserved challenge to the factual sufficiency of the allegations (*see Iannone*, 45 NY2d at 600-601; *see also People v Carey*, 92 AD3d 1224, 1224-1225, *lv denied* 18 NY3d 992). In any event, the contention is without merit. It is well settled that the crime of predatory sexual assault against a child "is a continuing offense to which the usual requirements of specificity with respect to time do not apply" (*People v Bradberry*, 131 AD3d 800, 801, *lv denied* 26 NY3d 1086 [internal quotation marks omitted]), and "time periods more broad than those alleged in the instant indictment have been deemed specific enough to satisfy the requirements of due process" (*People v Errington*, 121 AD3d 1553, 1554, *lv denied* 25 NY3d 1163; *see People v Devane*, 78 AD3d 1586, 1587, *lv denied* 16 NY3d 858; *People v Furlong*, 4 AD3d 839, 840-841, *lv denied* 2 NY3d 739).

Defendant further contends that his plea allocution was jurisdictionally defective because it failed to establish that he engaged in multiple acts of sexual conduct with a person under the age of 13 and because it included a time period during which the victim was 13 years old or older. That contention is actually a challenge to the factual sufficiency of the plea allocution, which defendant failed to preserve for our review by failing to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Newton*, 143 AD3d 1286, 1286, *lv denied* 28 NY3d 1126) and, in any event, it is without merit. Additionally, although defendant's statements regarding the effects of his medications may have "trigger[ed] [County] [C]ourt's duty to conduct a further inquiry to ensure that defendant's plea was knowingly and voluntarily made" (*People v McNair*, 13 NY3d 821, 822-823), the court's subsequent inquiry and its offering defendant an opportunity to move to withdraw his plea were sufficient to ensure that the plea was voluntary (*see People v Brown*, 305 AD2d 1068, 1069, *lv denied* 100 NY2d 579; *see also People v Larry B.*, 277 AD2d 989, 989, *lv denied* 96 NY2d 864; *People v Greer*, 277 AD2d 1051, 1051, *lv denied* 96 NY2d 829).

Defendant's contention that the court erred in failing to order an examination pursuant to CPL 730.30 is also not preserved for our review (*see People v Rought*, 90 AD3d 1247, 1248, *lv denied* 18 NY3d 962). In any event, that contention is without merit inasmuch as "[t]here is no indication in the record that defendant was mentally incompetent at the time he entered his guilty plea or at sentencing" (*People v Carbonel*, 296 AD2d 858, 858 [internal quotation marks omitted]).

Defendant further contends that his sentence is unduly harsh and severe; however, we perceive no basis in the record to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Finally, defendant's contention that he was denied effective assistance of counsel does not survive his guilty plea as defendant

made only a conclusory contention that he would not have pleaded guilty, but for the alleged errors of defense counsel, for the first time in his reply brief (*see People v McDonald*, 1 NY3d 109, 115; *see also People v Sponburgh*, 61 AD3d 1415, 1416, *lv denied* 12 NY3d 929). Additionally, defendant "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*Brown*, 305 AD2d at 1069). Defendant's remaining contentions are without merit.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

169

CA 16-00117

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

LANCE FERRAND, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TOWN OF NORTH HARMONY AND BRUCE STEVENS,
DEFENDANTS-RESPONDENTS.

BRIAN CHAPIN YORK, JAMESTOWN, FOR PLAINTIFF-APPELLANT.

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

Appeal from an order and judgment (one paper) of the Supreme Court, Chautauqua County (Paul B. Wojtaszek, J.), entered September 24, 2015. The order and judgment granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: In this personal injury action arising from a collision between a pickup truck and a snowplow, plaintiff appeals from an order and judgment that granted the motion of defendants for summary judgment and dismissed the complaint. We affirm.

Pursuant to statute, "the provisions of [the Vehicle and Traffic Law] . . . shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway," although that provision does not exempt the operators of such "vehicles or other equipment from the consequences of their reckless disregard for the safety of others" (Vehicle and Traffic Law § 1103 [b]). The statute applies to, inter alia, vehicles and equipment owned or operated by a town (*see* § 1103 [a]), and it is well settled that the statute applies to the operators of snowplows when they are "actually engaged in work on a highway" (§ 1103 [b]; *see Wilson v State of New York*, 269 AD2d 854, 854-855, *affd sub nom. Riley v County of Broome*, 95 NY2d 455, 461-463). Contrary to plaintiff's contention, Supreme Court properly concluded that defendants met their burden on the motion of establishing that "the snowplow was a vehicle 'actually engaged in work on a highway' that was exempt from the rules of the road except to the extent that those operating the snowplow acted with 'reckless disregard for the safety of others' " (*Roberts v Anderson,* 133 AD3d 1384, 1385; *see Guereschi v Bouchard*, 286 AD2d 997, 998, *lv denied* 97 NY2d 613; *see also Oliveira v City of Mount Vernon*, 209 Fed

Appx 82, 83). Plaintiff failed to raise a triable issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324).

Contrary to plaintiff's further contention, he failed to raise a triable issue of fact whether the snowplow operator acted in reckless disregard for the safety of others. That standard requires evidence that a person has acted "in conscious disregard of a known or obvious risk that [was] so great as to make it highly probable that harm [would] follow" (*Primeau v Town of Amherst*, 17 AD3d 1003, 1003, *affd* 5 NY3d 844; *see Saarinen v Kerr*, 84 NY2d 494, 501; *see generally Bliss v State of New York*, 95 NY2d 911, 913). Here, defendants met their burden of establishing that the snowplow operator did not act with such reckless disregard (*see Curella v Town of Amherst*, 77 AD3d 1301, 1302; *see generally Primeau*, 17 AD3d at 1003-1004), and plaintiff failed to raise a triable issue of fact (*see Catanzaro v Town of Lewiston*, 73 AD3d 1449, 1449; *see also Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 706-707; *Ring v State of New York*, 8 AD3d 1057, 1057).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

174

KA 15-01886

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON J. DIXON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered June 12, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree (two counts), menacing in the second degree and attempted menacing a police officer or peace officer.

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

Memorandum: Defendant appeals from a judgment convicting him upon an *Alford* plea of, inter alia, attempted menacing a police officer or peace officer (Penal Law §§ 110.00, 120.18), and two counts of criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that County Court erred in accepting his *Alford* plea because the record does not contain the requisite strong evidence of guilt or establish that the plea was the product of a voluntary and rational choice (*see generally People v Couser*, 28 NY3d 368, 379). Defendant failed to move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Elliott*, 107 AD3d 1466, 1466, *lv denied* 22 NY3d 996; *People v Cruz*, 89 AD3d 1464, 1465, *lv denied* 18 NY3d 993), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Zimblis*, 23 AD3d 1086, 1087, *lv denied* 6 NY3d 783).

Defendant further contends that the counts of the indictment charging criminal possession of a weapon in the third degree are defective because they expressly allege that he was previously convicted of a crime, in violation of CPL 200.60 (1). That defect, however, is not jurisdictional in nature (*see generally People v Dickinson*, 78 AD3d 1237, 1239, *revd on other grounds* 18 NY3d 835; *People v Smith*, 77 AD3d 990, 990-991, *lv denied* 16 NY3d 746), and thus defendant’s contention was forfeited by his plea (*see People v Cox*,

275 AD2d 924, 925, *lv denied* 95 NY2d 962).

To the extent that defendant's contention that he was denied effective assistance of counsel survives his plea (*see generally People v Robinson*, 39 AD3d 1266, 1267, *lv denied* 9 NY3d 869), we reject that contention. Defendant has not established that defense counsel was ineffective in failing to move to dismiss the counts charging criminal possession of a weapon in the third degree (*see generally People v Campbell*, 17 AD3d 925, 926-927, *lv denied* 5 NY3d 760), and we conclude that "counsel engaged in an active defense prior to [the negotiation of] the *Alford* plea, which was reasonable in its terms" (*People v Preister*, 39 AD3d 1225, 1226). Even assuming, arguendo, that defendant's entry of his plea while represented by his second attorney did not forfeit his right to contend that he was denied effective assistance by his first attorney's failure to advise him of his right to testify before the grand jury (*cf. People v Ortiz*, 104 AD3d 1202, 1203), we conclude that his contention is based on matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Gaston*, 100 AD3d 1463, 1466; *People v Frazier*, 63 AD3d 1633, 1634, *lv denied* 12 NY3d 925). The sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

179

KA 13-01621

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN FRIELLO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE LAW OFFICE OF GUY A. TALIA (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered April 30, 2013. The judgment convicted defendant, upon a jury verdict, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, driving while intoxicated as a class E felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that the verdict is against the weight of the evidence with respect to the element of intoxication. We reject that contention. "Where, as here, witness credibility is of paramount importance to the determination of guilt or innocence," we must afford great deference to the fact-finder's opportunity to view the witnesses, hear their testimony and observe their demeanor (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831). It was for the jury to determine whether to credit the testimony of the arresting officer that defendant exhibited a number of signs of intoxication, or the testimony of defendant's acquaintances that he did not appear to be intoxicated (*see People v Shelton*, 111 AD3d 1334, 1336, *lv denied* 23 NY3d 1025). The jury was also entitled to consider, as evidence of consciousness of guilt, defendant's refusal to participate in field sobriety tests (*see generally People v Berg*, 92 NY2d 701, 706), or to submit to a chemical test (*see People v McGraw*, 57 AD3d 1516, 1517). Thus, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see People v Stevens*, 109 AD3d 1204, 1205, *lv denied* 23 NY3d

1043; *see generally People v Bleakley*, 69 NY2d 490, 495).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

181

KA 16-00783

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYLE SOMERS, 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 Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 15, 2015. The judgment convicted defendant, upon his plea of guilty, of unlawful surveillance 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 unlawful surveillance in the second degree (*see* Penal Law § 250.45 [2]). Contrary to defendant's contention, Supreme Court did not abuse its discretion in determining, after consideration of "the nature and circumstances of the crime and . . . the history and character of the defendant, . . . that [his] registration [as a sex offender] would [not] be unduly harsh and inappropriate" (Correction Law §168-a [2] [e]; *see People v Marke*, 144 AD3d 651, 652; *People v Simmons*, 129 AD3d 520, 521, *lv denied* 26 NY3d 903).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

183

KA 13-00381

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC B. JONES, ALSO KNOWN AS ERICAN JONES,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered August 30, 2012. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the second degree (two counts) and sexual abuse 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 sexual abuse in the second degree (Penal Law § 130.60 [2]) and two counts of course of sexual conduct against a child in the second degree (§ 130.80 [1] [b]). Defendant's conviction arose from his alleged abuse of his girlfriend's daughter and another underage girl.

We reject defendant's contention that he was denied effective assistance of counsel. With respect to defense counsel's failure to obtain an expert witness, defendant failed to show that such testimony was available and that it "would have assisted the jury in its determination or that he was prejudiced by its absence" (*People v Smith*, 126 AD3d 1528, 1530-1531, *lv denied* 26 NY3d 1150 [internal quotation marks omitted]). With respect to defense counsel's failure to make a specific motion for a trial order of dismissal, we conclude that such a motion would have had little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702; *People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859), and we note that defendant has not challenged the legal sufficiency of the evidence on appeal. To the extent that defendant's contention is based upon off-the-record communications between defendant and counsel, it is properly the subject of a CPL article 440 motion (*see People v Weaver*,

118 AD3d 1270, 1272, *lv denied* 24 NY3d 965). With respect to the remaining instances of alleged ineffectiveness, defendant failed " 'to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712; *see People v Bank*, 129 AD3d 1445, 1447, *affd* 28 NY3d 131). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

We reject defendant's further contention that County Court abused its discretion in limiting his cross-examination of his girlfriend's daughter. Contrary to defendant's contention, the record establishes that the court's ruling was not based on the Rape Shield Law (CPL 60.42) but, rather, it was based on the relevance of the proposed testimony. "In determining issues of relevancy of evidence, trial courts possess latitude to admit or preclude evidence based on their analysis of its probative value against the danger that it will confuse the main issues, cause unfair prejudice to the other side or be cumulative" (*People v Halter*, 19 NY3d 1046, 1051). Here, the court allowed defendant to cross-examine his girlfriend's daughter concerning his role in disciplining her and some of her alleged underlying misbehavior, and the court precluded defendant from questioning her about other, more serious, alleged misbehavior, which defendant's trial counsel conceded was irrelevant. Given the slight probative value of the proposed testimony and its potential to confuse the issues at trial, we cannot conclude that the court's ruling constituted an abuse of discretion (*see generally id.*).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

186

CA 16-00761

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

PETER M. HENDRICKSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KRISTINA L. HENDRICKSON, DEFENDANT-APPELLANT.

CAROLYN R. KELLOGG, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., BATH (MICHAELA K. ROSSETTIE AZEMI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLYN R. KELLOGG, ATTORNEY FOR THE CHILD, WELLSVILLE, APPELLANT PRO SE.

PULOS AND ROSELL, LLP, HORNELL (TIMOTHY J. ROSELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Allegany County (Terrence M. Parker, A.J.), entered July 16, 2015. The order, among other things, awarded the parties joint custody of the subject child with primary placement to plaintiff.

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

Memorandum: Defendant mother and the Attorney for the Child (AFC) appeal from an order that awarded plaintiff father and the mother joint custody of the subject child, with primary physical residence to the father and visitation to the mother. Contrary to the contention of the mother and the AFC, there is a sound and substantial basis in the record for Supreme Court's determination that awarding the father primary physical residence is in the child's best interests (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174). "The fact that the mother was the child's primary caretaker prior to the parties' separation is not determinative" (*Matter of Owens v Pound*, 145 AD3d 1643, 1644). The record supports the court's determination that both parents love and care for the child, but "[t]he mother is less willing to truly co-parent [the child]," and "the father is the more stable parent with a higher quality home and is better situated to serve as a primary placement parent" (*see id.*; *Matter of Honsberger v Honsberger*, 144 AD3d 1680, 1680). Furthermore, we reject the AFC's contention that the court gave undue weight to the paternal grandparents' involvement in the child's life inasmuch as "a more fit

parent will not be deprived of custody simply because the parent assigns day-care responsibilities to a relative owing to work obligations" (*Matter of Chyreck v Swift*, 144 AD3d 1517, 1518).

Finally, "[a]lthough the court must consider the effects of domestic violence in determining the best interests of the child[ ]," we conclude that the mother failed to prove her allegations of domestic violence by a preponderance of the evidence (*Matter of Miller v Jantzi*, 118 AD3d 1363, 1363-1364). "The court's 'first-hand assessment of the credibility of the witnesses after an evidentiary hearing . . . is entitled to great weight and will not be set aside unless it lacks an evidentiary basis in the record' " (*Chyreck*, 144 AD3d at 1518). Here, the father denied the mother's allegations of domestic violence, and the court resolved the conflicting testimony in favor of the father. We perceive no reason to disturb the court's credibility determination (*see Pierre-Paul v Boursiquot*, 74 AD3d 935, 936).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

190

TP 16-00820

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

IN THE MATTER OF SHANNON SCHEUNEMAN, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND TOWN OF TONAWANDA, RESPONDENTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (KRISTIN KLEIN WHEATON OF COUNSEL), FOR RESPONDENT TOWN OF TONAWANDA.

CAROLYN J. DOWNEY, GENERAL COUNSEL, BRONX (AARON M. WOSKOFF OF COUNSEL), FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Frederick J. Marshall, J.], entered May 9, 2016) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint against respondent Town of Tonawanda.

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

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (SDHR) dismissing her complaint alleging unlawful discrimination and a hostile work environment. Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, "is limited to consideration of whether substantial evidence supports the agency determination" (*Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331; *see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-180). "Although a contrary decision may be reasonable and also sustainable, a reviewing court may not substitute its judgment for that of the Commissioner [of SDHR] if his [or her determination] is supported by substantial evidence" (*Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417, *rearg denied* 78 NY2d 909). We conclude that there is substantial evidence to support the determination that petitioner was not discriminated against on the basis of her gender. We agree

with SDHR that petitioner met her burden of establishing a prima facie case of discrimination based on her gender when she was not promoted to a position with respondent Town of Tonawanda (Town) (*see generally Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305). We further agree with SDHR, however, that the Town presented a legitimate, independent and nondiscriminatory reason to support its decision to offer the position to another employee (*see generally id.*). Although petitioner contends that her testimony showed that members of the Town Board, who made the hiring decision, have an "anti-female bias," her testimony conflicted with the Town's proof and presented an issue of credibility to be resolved by the ALJ (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444). We further conclude that there is substantial evidence to support the determination that petitioner was not subjected to a hostile work environment (*see generally Matter of Bowler v New York State Div. of Human Rights*, 77 AD3d 1380, 1381, *lv denied* 16 NY3d 709).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

193

CA 16-00917

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

ROSALIE L. PACINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBIN F. LEWIS, DEFENDANT,
DAVE REISDORF, INC., AND MARK C. SHAW,
DEFENDANTS-RESPONDENTS.

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

ROACH, BROWN, MCCARTHY & GRUBER, P.C., BUFFALO (MARK R. AFFRONTI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Genesee County (Mark J. Grisanti, A.J.), entered September 21, 2015. The order and judgment, insofar as appealed from, granted that part of the motion of defendants Dave Reisdorf, Inc., and Mark C. Shaw seeking summary judgment dismissing the complaint against them.

It is hereby ORDERED that the order and judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in part, and the complaint against defendants Dave Reisdorf, Inc. and Mark C. Shaw is reinstated.

Memorandum: Plaintiff commenced this negligence action to recover damages for injuries she sustained in a motor vehicle collision. In March 2011, a tractor-trailer owned by Dave Reisdorf, Inc. and driven by Mark C. Shaw (Shaw) (collectively, defendants) collided with a car driven by defendant Robin F. Lewis (Lewis), after Lewis made a sudden left turn in front of the tractor-trailer. After that initial collision, the tractor-trailer jackknifed, collided with plaintiff's car, and ended up in a ditch on the opposite side of the road, on top of plaintiff's car.

We agree with plaintiff that Supreme Court erred in granting defendants' motion insofar as it sought summary judgment dismissing the complaint against them on the ground that Lewis's conduct was the sole proximate cause of the collision. Even assuming, arguendo, that defendants met their initial burden of establishing their entitlement to judgment as a matter of law, we conclude that plaintiff raised triable issues of fact by submitting the affidavit of an expert forensic examiner (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Plaintiff's expert opined within a reasonable degree of

professional certainty that Shaw's conduct was a proximate cause of the collision with plaintiff's vehicle because he inappropriately and negligently applied the brakes, which caused the tractor-trailer to jackknife after the initial impact with Lewis's vehicle. The expert's opinion was not based on speculation, but was supported by voluminous deposition testimony, police reports, and the New York State Commercial Driver's Manual (*cf. Penda v Duvall*, 141 AD3d 1156, 1157).

Our decision in *Colangelo v Marriott* (120 AD3d 985) does not compel a different result. In that case, we concluded that some of the defendants were free of negligence when a collision with a third party caused the plaintiffs' vehicle to enter their right-of-way and strike their truck (*see id.* at 986). Here, however, Shaw applied the brakes, and then defendants' tractor-trailer jackknifed, entered plaintiff's right-of-way, and struck plaintiff's vehicle. Viewing the evidence in the light most favorable to plaintiff, the nonmoving party, we conclude that "there is an issue of fact whether [Shaw's] negligence was a proximate cause of the collision, which therefore precludes an award of summary judgment to defendants" (*Johnson v Yarussi Constr., Inc.*, 74 AD3d 1772, 1773, *lv denied* 77 AD3d 1458 [internal quotation marks omitted]).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

194

KA 15-00203

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY A. WEATHERBEE, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, as a class E felony, and aggravated unlicensed operation of a motor vehicle in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i] [A]), defendant contends that his waiver of the right to appeal is invalid and does not in any event encompass his challenge to the severity of the sentence. We conclude that " '[t]he written waiver of the right to appeal, together with defendant's responses during the plea proceeding, establish that the waiver was voluntarily, knowingly, and intelligently entered' " (*People v Smith*, 122 AD3d 1420, 1420, *lv denied* 25 NY3d 1172; *see People v Ramos*, 7 NY3d 737, 738). Contrary to defendant's contention, "[a]ny nonwaivable issues purportedly encompassed by the waiver 'are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable' " (*People v Neal*, 56 AD3d 1211, 1211, *lv denied* 12 NY3d 761). Nonetheless, even assuming, arguendo, that defendant's challenge to the severity of his sentence is not encompassed by his valid waiver of the right to appeal (*see e.g. People v Leiser*, 124 AD3d 1349, 1350), we conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

195

KA 15-00969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH A. MARKLE, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered April 29, 2014. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. Although we agree with defendant that the waiver of the right to appeal is invalid inasmuch as he pleaded guilty as charged in the superior court information without a sentencing commitment (*see People v Collins*, 129 AD3d 1676, 1676, *lv denied* 26 NY3d 1038), we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

196

KA 15-01369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WENDELL D. SMITH, DEFENDANT-APPELLANT.

GANGULY BROTHERS, PLLC, ROCHESTER (ANJAN K. GANGULY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered July 23, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree, criminal possession of a controlled substance in the third degree (three counts), criminally using drug paraphernalia in the second degree (three counts) and criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of multiple drug offenses and a single charge of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) based on charges arising from two separate criminal incidents, defendant contends that County Court erred in refusing to sever the counts related to the second incident from the counts related to the first incident. We reject that contention. Defendant, in seeking severance, "failed to meet his burden of submitting sufficient evidence of prejudice from the joinder to establish good cause to sever" (*People v Anderson*, 113 AD3d 1102, 1103, *lv denied* 22 NY3d 1196; *see* CPL 200.20 [3]; *People v Sharp*, 104 AD3d 1325, 1325-1326, *lv denied* 21 NY3d 1009). Moreover, the evidence concerning the two separate incidents was presented separately and through different witnesses. We thus conclude that the evidence "was readily capable of being segregated in the minds of the jury" (*People v Ford*, 11 NY3d 875, 879), and defendant failed to establish that there was a "substantial likelihood that the jury would be unable to consider the proof of each offense separately" (*People v Rios*, 107 AD3d 1379, 1380, *lv denied* 22 NY3d 1158 [internal quotation marks omitted]).

Defendant further contends that the court erred in refusing to

suppress evidence that was seized from his residence during the execution of a search warrant. "By failing to seek a ruling on that part of his omnibus motion challenging the [search warrant] and by failing to object to the [admission of the seized evidence] at trial, defendant abandoned his challenge to the [search warrant]" (*People v Linder*, 114 AD3d 1200, 1201, *lv denied* 23 NY3d 1022). Although defendant contends that "the court unequivocally denied" that part of his omnibus motion seeking suppression of evidence seized from his home, the record belies defendant's contention. The only ruling on a suppression issue contained in the record on appeal is the court's ruling denying suppression of the evidence seized from defendant's vehicle during a separate and distinct traffic stop.

The court, in addressing issues related to the search warrant, did conduct a *Darden* hearing and generated a summary report of that hearing. Defendant now contends that the court erred in failing to provide defense counsel with a copy of that summary report. Inasmuch as defendant did not make "a prompt request for [the] summary, [he] may not now complain" that he did not receive it (*People v Lowen*, 100 AD2d 518, 519; *see People v Clark*, 54 NY2d 941, 943).

Defendant further contends that the court erred in ruling that defense counsel could not question the police officer who conducted the traffic stop of defendant concerning statements made by defendant's cousin, who was a passenger in the vehicle. According to defendant, the cousin allegedly claimed that the drugs found under the driver's seat belonged to him. While the statements were certainly against the cousin's penal interest, and were made with both knowledge and awareness that the statements were against his penal interest, defendant failed to establish that the cousin was unavailable to testify (*see generally People v DiPippo*, 27 NY3d 127, 136-137; *People v Brensic*, 70 NY2d 9, 15, *remittitur amended* 70 NY2d 722). Indeed, the cousin actually testified at trial on defendant's behalf. Inasmuch as unavailability of the declarant is a required element for the introduction of a declaration against penal interest (*see DiPippo*, 27 NY3d at 136-137; *Brensic*, 70 NY2d at 15; *People v McFarland*, 108 AD3d 1121, 1122, *lv denied* 24 NY3d 1220), and exclusion of the statement did not "infringe[] on defendant's weighty interest in presenting exculpatory evidence" (*People v Oxley*, 64 AD3d 1078, 1084, *lv denied* 13 NY3d 941), we conclude that, even under the less exacting standard for declarations offered by a defendant to exculpate himself (*see Brensic*, 70 NY2d at 15; *McFarland*, 108 AD3d at 1122), the court properly precluded defense counsel from cross-examining the police officer regarding the cousin's hearsay statements.

For the first time, in his reply brief on appeal, defendant raises other possible avenues for admission of the statements, contending either that they were excited utterances or that they were not being admitted for the truth of the matter asserted. Those contentions are not preserved for our review (*see People v Ludwig*, 104 AD3d 1162, 1163, *affd* 24 NY3d 221; *see also People v Lyons*, 81 NY2d 753, 754), and were improperly raised for the first time in a reply brief (*see generally People v Allen*, 104 AD3d 1170, 1173, *lv denied* 21 NY3d 1001).

Defendant further contends that the denial of an opportunity to cross-examine the police officer on the cousin's statements deprived defendant of his constitutional rights to confront witnesses and to present a defense. Arguably, those contentions are preserved for our review (*cf. Ludwig*, 104 AD3d at 1163), but we conclude that the contentions lack merit.

It is well settled that "[t]he trial court has discretion to determine the scope of the cross-examination of a witness" (*People v Corby*, 6 NY3d 231, 234; *see People v Rivera*, 105 AD3d 1343, 1344, *lv denied* 21 NY3d 1045), and the Court of Appeals has held that "an accused's right to cross-examine witnesses and present a defense is not absolute" (*People v Williams*, 81 NY2d 303, 313). "Evidentiary restrictions are to be voided only if they are 'arbitrary or disproportionate to the purposes they are designed to serve' " (*Williams*, 81 NY2d at 313). " '[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish' " (*People v Esquerdo*, 71 AD3d 1424, 1425, *lv denied* 14 NY3d 887, quoting *Delaware v Fensterer*, 474 US 15, 20). Here, defendant was afforded the opportunity for effective cross-examination of the police officer, as well as the opportunity to present the cousin's testimony to the jury; no more was required in this case.

Defendant also sought to introduce, as a declaration against penal interest, a sworn statement from a third party who was in the house on the night the search warrant was executed. In that statement, the third party allegedly claimed that the drugs and gun found in the residence belonged to him. Defendant now contends that the court erred in refusing to permit defendant to admit that statement in evidence. Defendant failed, however, to include the third party's statement in the record on appeal, and we cannot address the merits of the contention without that statement. Inasmuch as it was "defendant's obligation to prepare a proper record" (*People v Olivo*, 52 NY2d 309, 320, *rearg denied* 53 NY2d 797), we conclude that defendant must bear the consequences of his failure to include the document in the record on appeal (*see People v O'Halloran*, 48 AD3d 978, 979, *lv denied* 10 NY3d 868; *People v Taylor*, 231 AD2d 945, 946, *lv denied* 89 NY2d 930).

With respect to defendant's remaining contentions, we conclude that the court did not abuse or improvidently exercise its discretion in denying defendant's request for a mistrial when the prosecutor inadvertently mentioned the name of a fallen officer after the court had precluded any reference to the officer's name (*see generally People v Duell*, 124 AD3d 1225, 1228, *lv denied* 26 NY3d 967; *People v Covington*, 298 AD2d 966, 966, *lv denied* 99 NY2d 557); "did not improvidently exercise its discretion by denying . . . defendant's oral request, in the midst of the trial, for a material witness order to secure the appearance at trial of a proposed defense witness" (*People v Edwards*, 267 AD2d 246, 246, *lv denied* 94 NY2d 902); and did not err in summarily denying defendant's motion to set aside the verdict inasmuch as it was " 'supported only by hearsay allegations

contained in an affidavit of defense counsel' " (*People v Kerner*, 299 AD2d 913, 913, *lv denied* 99 NY2d 583; *see People v Comfort*, 30 AD3d 1069, 1069-1070, *lv denied* 7 NY3d 787).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

198

KA 15-00401

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KYLE V. SEATON, DEFENDANT-APPELLANT.

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR 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 (Joseph W. Latham, J.), rendered December 22, 2014. The judgment convicted defendant, upon a jury verdict, of assault in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of assault in the second degree (Penal Law § 120.05 [1], [2]), arising from kicking the victim in the head and face with steel-toed boots. The victim sustained a traumatic brain injury and did not remember the details of the incident until after he was released from the hospital. According to the victim, who was 15 years old at the time of the offense, he terminated his long-term friendship with defendant two to three months before this incident after defendant was angry that the victim won a game of Monopoly. Contrary to defendant's contention, County Court did not abuse its discretion in admitting *Molineux* evidence that, when the game concluded, defendant sprayed an aerosol can of body spray in the victim's direction and then lit the spray, thereby burning the victim's arm. The People argued that the evidence was relevant to, inter alia, defendant's motive to harm the victim after he terminated their friendship. In conducting the requisite two-part inquiry to determine whether to permit evidence of alleged prior bad acts, the court must determine whether "the proponent of the evidence [identified] some material issue, other than the defendant's criminal propensity, to which the evidence is directly relevant" and, if that showing is made, the court must then "weigh the evidence's probative value against its potential for undue prejudice to the defendant" (*People v Cass*, 18 NY3d 553, 560). Here, although we note that "the court . . . could have better recited its discretionary balancing of

the probity of such evidence against its potential for prejudice . . . , we conclude that, viewing the record in its entirety, the court conducted the requisite balancing test" (*People v Lawrence*, 141 AD3d 1079, 1081, *lv denied* 28 NY3d 1029 [internal quotation marks omitted]). In any event, the court instructed the jury that the evidence was to be considered solely with respect to the issue of defendant's motive, and "not for the purpose of proving that he had a propensity or predisposition to commit the crimes charged," thereby minimizing any prejudicial effect (*see id.*).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's failure to request DNA testing of defendant's boots, to conduct a further cross-examination of a treating physician with respect to the reliability of memory after a traumatic incident, or to conduct a further cross-examination of the prosecution's rebuttal witness (*see People v Caban*, 5 NY3d 143, 154). Defendant's contention that counsel failed to call additional alibi witnesses involves matters that are outside the record on appeal and must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Kaminski*, 109 AD3d 1186, 1186, *lv denied* 22 NY3d 1088). Contrary to defendant's contention, defense counsel was not ineffective for failing to have defendant testify inasmuch as it is well settled that "[t]he fundamental decision whether to testify at trial is reserved to the defendant, not defense counsel" (*People v Cosby*, 82 AD3d 63, 66, *lv denied* 16 NY3d 857). Finally, although certain comments on the evidence by defense counsel on summation could be construed as unfavorable to defendant, counsel nevertheless emphasized alleged shortcomings in the investigation of the crime, challenged the victim's credibility with respect to whether he remembered the incident, and pointed out inconsistencies in the testimony of prosecution witnesses. We conclude that any error with respect to those comments was not "sufficiently egregious and prejudicial as to deny defendant a fair trial" (*People v Releford*, 126 AD3d 1407, 1407, *lv denied* 25 NY3d 1170).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

200

KA 15-00762

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY SAPP, 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 (JAMES M. MARRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered January 5, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the second degree (Penal Law § 220.18 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress evidence seized during a search of his residence by parole officers. We reject that contention.

A parolee's right to be free from unreasonable searches and seizures is not violated if a parole officer's search of the parolee's person or property "is rationally and reasonably related to the performance of his [or her] duty as a parole officer" (*People v Huntley*, 43 NY2d 175, 179; *see People v Escalera*, 121 AD3d 1519, 1520, *lv denied* 24 NY3d 1083; *People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820). A parole officer's search is unlawful, however, when the parole officer is "merely a conduit for doing what the police could not do otherwise" (*Escalera*, 121 AD3d at 1520 [internal quotation marks omitted]). Thus, "a parolee's status ought not to be exploited to allow a search which is designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation" (*People v Candelaria*, 63 AD2d 85, 90).

Contrary to defendant's contention, we conclude that the record

supports the court's determination that the search was " 'rationally and reasonably related to the performance of the parole officer's duty' and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1532, *lv denied* 19 NY3d 974). The parole officer testified that he searched defendant's apartment for the purpose of determining if defendant was in violation of the conditions of his parole because he "received credible information from law enforcement sources that defendant possessed a large quantity of cocaine in his" residence (*Escalera*, 121 AD3d at 1520). With respect to the credibility of the law enforcement source, the parole officer's testimony, along with the testimony of an agent with the Federal Bureau of Investigation (FBI) and other parole officers, established that the parole officer received credible information, originating from a confidential informant of the FBI agent who had proven to be reliable in the past, that defendant was in possession of a large quantity of cocaine (*see People v Robinson*, 72 AD3d 1277, 1278, *lv denied* 15 NY3d 809). To the extent that defendant challenges that testimony, we "afford deference to the court's determination that the . . . testimony [of the People's witnesses] was credible" (*Johnson*, 94 AD3d at 1532).

We conclude that defendant's further contention that the parole officer was acting as an agent of law enforcement agencies is undermined by the testimony of defendant's parole officer and an FBI agent that the law enforcement agency played no role in the decision to search defendant's residence. The FBI agent further testified that the FBI was not investigating defendant on this matter, did not have an open file on defendant, and did not relay the information in order to have the parole officers search defendant's home on their behalf (*see Escalera*, 121 AD3d at 1520). Thus, we cannot conclude on this record that the search was "designed solely to collect contraband or evidence in aid of the prosecution of an independent criminal investigation" (*Candelaria*, 63 AD2d at 90).

Defendant concedes that his remaining contention regarding the search of his residence is unpreserved 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]).

With respect to defendant's remaining contentions, we note that, " '[b]y pleading guilty, defendant forfeited review of [Supreme] Court's *Molineux* and [*Sandoval*] ruling[s]' " (*People v Pierce*, 142 AD3d 1341, 1341; *see People v Ingram*, 128 AD3d 1404, 1404, *lv denied* 25 NY3d 1202).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

201

KA 15-00476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. DUKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 13, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree and criminal sexual act in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]) and criminal sexual act in the first degree (§ 130.50 [1]). On a prior appeal, we reversed the judgment, vacated the plea, and remitted the matter to Supreme Court on the ground that the court had "erred in accepting [defendant's] plea without ensuring that he was making an informed decision to waive a potential affirmative defense to the robbery charge" (*People v Dukes*, 120 AD3d 1597, 1597). On remittal, defendant entered the same plea and received the same sentence. Defendant now contends that the court erred in failing to make a reasoned determination whether he should be afforded youthful offender status. We agree.

Where, as here, "a defendant has been convicted of an armed felony or an enumerated sex offense pursuant to CPL 720.10 (2) (a) (ii) or (iii), and the only barrier to his or her youthful offender eligibility is that conviction, the court is required to determine on the record whether the defendant is an eligible youth by considering the presence or absence of the factors set forth in CPL 720.10 (3). The court must make such a determination on the record 'even where [the] defendant has failed to ask to be treated as a youthful offender, or has purported to waive his or her right to make such a request' pursuant to a plea bargain . . . If the court determines, in its discretion, that neither of the CPL 720.10 (3) factors exist *and*

states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then 'must determine whether or not the eligible youth is a youthful offender' " (*People v Middlebrooks*, 25 NY3d 516, 527-528 [emphasis added]).

Here, the court did not state on the record its reasons for determining that neither of the CPL 720.10 (3) factors exists, as required by *Middlebrooks*, and it did not otherwise "demonstrat[e] that it implicitly resolved the threshold issue of eligibility in . . . defendant's favor" (*People v Stitt*, 140 AD3d 1783, 1784, *lv denied* 28 NY3d 937). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to state for the record its reasons for determining that neither of the CPL 720.10 (3) factors is present (*see People v Quinones*, 129 AD3d 1699, 1700; *People v Stewart*, 129 AD3d 1700, 1701).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

202

KA 14-01500

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. ROJAS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered June 16, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of three counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Defendant contends that his guilty plea was not knowing, voluntary, and intelligent because he initially denied possessing a controlled substance on one of the dates charged in the indictment, expressed that he may have been treated unfairly by law enforcement, and cast doubt upon his guilt when he asserted that he might be suffering from a mental disability. Defendant did not move to withdraw the plea or to vacate the judgment of conviction, however, and he therefore failed to preserve that contention for our review (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965; *People v Davis*, 45 AD3d 1357, 1357-1358, *lv denied* 9 NY3d 1005; *People v Brown*, 305 AD2d 1068, 1068-1069, *lv denied* 100 NY2d 579). We note in particular that, before entering the guilty plea, defendant indicated that his attorney had raised all issues regarding his alleged mistreatment by law enforcement, and we further note that County Court took the time to explain to defendant that by pleading guilty he would be foreclosed from having such issues determined by a jury.

To the extent that this case falls within the narrow exception to the preservation requirement because defendant denied possessing a controlled substance on one of the dates charged in the indictment, we note that the court immediately conducted the requisite further inquiry to ensure that defendant’s guilty plea was knowing,

intelligent, and voluntary (*see People v Lopez*, 71 NY2d 662, 666; *see also People v Waterman*, 229 AD2d 1013, 1013). Indeed, during that further inquiry, defendant admitted that he possessed the drugs on the date in question (*see Waterman*, 229 AD2d at 1013-1014). Thus, the record establishes that defendant's plea was knowing, voluntary, and intelligent (*see id.* at 1014). We reach the same conclusion with respect to defendant's claim of mental disability. To the extent that the claim falls within the exception to the preservation requirement, the court conducted the requisite further inquiry with respect to it to ensure that the plea was knowing, voluntary, and intelligent (*see Brown*, 305 AD2d at 1069; *see also People v Smith*, 37 AD3d 1141, 1142, *lv denied* 9 NY3d 851, *reconsideration denied* 9 NY3d 926).

Finally, we reject defendant's contention that the bargained-for sentence is unduly harsh and severe.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

203

CAF 15-01632

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

IN THE MATTER OF MEREDITH GORTON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JEREMY V. INMAN, RESPONDENT-APPELLANT.

PAUL A. NORTON, CLINTON, FOR RESPONDENT-APPELLANT.

LEVITT & GORDON, NEW HARTFORD (DEAN L. GORDON OF COUNSEL), FOR PETITIONER-RESPONDENT.

JULIE GIRUZZI-MOSCA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered June 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the third ordering paragraph setting an alternate weekend visitation schedule and reinstating the visitation schedule as set forth in the third ordering paragraph of the amended order entered May 27, 2014, and vacating the eighth ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: Petitioner mother filed a petition alleging that respondent father violated an amended order entered on consent on May 27, 2014, and seeking a modification of that amended order from joint custody to sole custody. The amended order, inter alia, granted the parties joint custody of their child, physical placement with the mother, and visitation to the father, including weekly visits on Thursday evenings, alternate weekends, and various holidays. The amended order specifically provided that the commencement of the weekend visits would alternate between Friday evening and Saturday morning. The amended order further provided that, for the year 2014, the child would be with the mother from 2:00 p.m. on Thanksgiving Day through the weekend, and that holiday visits took precedence over the visitation schedule. The mother's petition alleged that the father failed to exercise several Friday night visits from June through October, 2014, that he refused to return the child at 2:00 p.m. on Thanksgiving Day and instead kept him until 6:00 p.m. on the following Sunday, and that he threatened to disparage the mother to their child.

The mother also alleged that she and the father were unable to communicate regarding the best interests of the child and therefore sought modification of the amended order. The mother sought an award of sole custody and attorney's fees; however, she did not seek a reduced visitation schedule. Following a hearing, Family Court credited the mother's testimony and determined that the father wilfully violated the amended order and that the mother established a change of circumstances warranting a determination that the best interests of the child would be served by an award of sole custody to the mother. The court also reduced the father's visitation by eliminating the Friday night visits and Thursday evening visits and conditioned the father's filing of any future modification petition on his completion of anger management and parenting classes.

We conclude that the father's contention that the court erred in imposing a temporary order of supervised visitation pending the decision "is rendered moot by the court's issuance of a final order of visitation" (*Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696). We agree with the father, however, that the court erred in conditioning his right to petition the court upon the completion of anger management and parenting classes, and we modify the order by vacating that ordering paragraph (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546). We also agree with the father that the record does not support the court's determination that it is in the best interests of the child to eliminate the Thursday evening and Friday night visitation periods (*see Matter of Roody v Charles*, 283 AD2d 945, 946). There was no testimony that there were any problems regarding the Thursday visits. The mother admitted that she and the father disputed which weekend visits were to commence on Friday and which were to commence on Saturday, but it appears from the record that the parties had resolved that issue prior to the hearing. Thus, we conclude that the court abused its discretion in eliminating those periods of visitation (*cf. Matter of VanDusen v Riggs*, 77 AD3d 1355, 1356). We therefore further modify the order by reinstating the schedule set forth in the third ordering paragraph of the amended order entered on May 27, 2014.

We reject the father's contention that the court erred in determining that the mother established a change of circumstances warranting a review of the amended order with respect to custody, and further erred in determining that it was in the best interests of the child to award the mother sole custody (*see Matter of Moore v Moore*, 78 AD3d 1630, 1631, *lv denied* 16 NY3d 704). The court credited the mother's testimony that the father would yell and swear at her on the telephone and that she therefore communicated with him only through text messages, and the text messages admitted in evidence support the court's determination that, in light of the acrimonious relationship between the parties, the existing joint custody arrangement was inappropriate. The court's determination is entitled to great deference (*see Matter of Daila W. [Danielle W.–Daniel P.]*, 133 AD3d 1353, 1354), and we conclude that it is supported by a sound and substantial basis in the record (*see Ingersoll v Platt*, 72 AD3d 1560, 1560-1561).

Finally, the father contends that the court erred in awarding the mother attorney's fees. Although the order directs the mother's attorney to submit an application for attorney's fees by a specific date, there is nothing in the record establishing that the court awarded attorney's fees. Because the father submitted the appeal on an incomplete record, he must suffer the consequences of our inability to review that contention (*see Matter of Christopher D.S. [Richard E.S.]*, 136 AD3d 1285, 1286-1287; *Matter of Santoshia L.*, 202 AD2d 1027, 1028).

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court

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

204

CAF 16-00027

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

IN THE MATTER OF JUSTIN E. KIEFFER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DELEMA DEFRAIN, RESPONDENT-APPELLANT.

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

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (MATTHEW J. PORTER OF COUNSEL), FOR PETITIONER-RESPONDENT.

RUTHANNE G. SANCHEZ, ATTORNEY FOR THE CHILD, WATERTOWN.

Appeal from an order of the Family Court, Jefferson County (Diana D. Trahan, R.), entered August 24, 2015 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted joint custody of the subject child to the parties, with primary physical residence to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the tenth ordering paragraph and as modified the order is affirmed without costs.

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified a prior order entered on stipulation of the parties by awarding petitioner father primary physical residence of the parties' child. Contrary to the mother's contention, we conclude that Family Court properly determined that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change of custody is in the best interests of the child (*see Matter of Murphy v Wells*, 103 AD3d 1092, 1093, *lv denied* 21 NY3d 854; *Matter of Markey v Bederian*, 274 AD2d 816, 817-818; *Matter of Brewer v Whitney*, 245 AD2d 842, 843). Contrary to the mother's further contention, there is a sound and substantial basis in the record for the court's determination that it is in the child's best interests to award the father primary physical residence of the child and to award visitation with the mother (*see Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1726; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174). In addition, we reject the mother's contention that she was denied effective assistance of counsel (*see Matter of Nicholson v Nicholson*, 140 AD3d 1689, 1690, *lv denied* 28

NY3d 903; *Matter of Brown v Gandy*, 125 AD3d 1389, 1390).

We agree with the mother, however, that the court erred in sua sponte ordering that the father shall have the right to relocate the residence of the child anywhere in the continental United States with 30 days' notice to the mother inasmuch as that relief was not requested by the parties or the Attorney for the Child (*see Matter of Irons v Schneller*, 258 AD2d 652, 653; *see generally Matter of Majuk v Carbone*, 129 AD3d 1485, 1485-1486). We therefore modify the order accordingly.

Entered: February 10, 2017

Frances E. Cafarell
Clerk of the Court