
*SUPREME COURT OF THE STATE OF NEW YORK*

*APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT*

DECISIONS FILED

MAY 1, 2020

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED MAY 1, 2020

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

**926**

**CA 18-01772**

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

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VIOLET REALTY, INC.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

AMIGONE, SANCHEZ & MATTREY, LLP,
DEFENDANT-RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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PHILLIPS LYTLE LLP, BUFFALO (JOHN G. SCHMIDT, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

HODGSON RUSS LLP, BUFFALO (STEVEN W. WELLS OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

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Appeal and cross appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Henry J. Nowak, J.), entered September 4, 2018. The order and judgment, insofar as appealed from, granted in part and denied in part the motion of plaintiff for summary judgment and granted in part and denied in part the cross motion of defendant for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by granting that part of the motion seeking reasonable attorneys' fees and denying the cross motion insofar as it seeks a determination that defendant's accounts receivable are not tangible assets under the lease, and as modified the order and judgment is affirmed without costs and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff commenced this action against defendant seeking, inter alia, money damages and attorneys' fees arising from defendant's breach of a commercial lease. Defendant does not dispute that it abandoned the leased premises on March 31, 2017 and ceased paying rent to plaintiff, thereby defaulting under the lease, the term of which did not expire until July 31, 2019. Plaintiff moved for, among other things, partial summary judgment on the complaint insofar as it seeks damages for past due rent with interest, undiscounted accelerated future rent, and costs and attorneys' fees. Defendant cross-moved for, inter alia, summary judgment on its second counterclaim, seeking a determination that the phrase "tangible assets," as used in the lease, is "limited to the furniture, fixtures and equipment of [defendant], and not its accounts receivable, work in progress, contingent fees, goodwill, or other intangible property that does not have a physical presence." Insofar

as relevant here, Supreme Court, in the order and judgment in appeal No. 1, denied plaintiff's motion to the extent that it seeks undiscounted accelerated future rent and granted the cross motion only insofar as it seeks a determination that the term "tangible assets" in the lease did not include defendant's accounts receivable and work in progress. Plaintiff appeals and defendant cross-appeals from the order and judgment in appeal No. 1, and plaintiff also appeals from the subsequently entered statement for judgment in appeal No. 2.

As an initial matter, the statement for judgment at issue in appeal No. 2 is limited to the court's award to plaintiff of past due rent and a calculation of interest thereon. Under these circumstances, plaintiff is not aggrieved by the statement for judgment in appeal No. 2, and we therefore dismiss the appeal therefrom (*see generally Hyman v Burgess* [appeal No. 1], 155 AD3d 1677, 1677 [4th Dept 2017]). With respect to the cross appeal from the order and judgment in appeal No. 1, this Court does not have jurisdiction to consider defendant's sole contention on its cross appeal that the court erred in denying the cross motion insofar as it seeks a determination that bank deposits do not constitute tangible assets under the lease because defendant did not cross-appeal from that part of the order and judgment (*see* CPLR 5515 [1]; *State Farm Mut. Auto. Ins. Cos. v Jaenecke*, 81 AD3d 1474, 1474 [4th Dept 2011], *lv denied* 17 NY3d 701 [2011]; *City of Mount Vernon v Mount Vernon Hous. Auth.*, 235 AD2d 516, 517 [2d Dept 1997]).

With respect to the appeal in appeal No. 1, plaintiff contends that the court erred in denying that part of its motion seeking undiscounted accelerated future rent under the terms of the lease. Initially, we conclude that plaintiff was not entitled to accelerate the rent because the lease acceleration clause did not apply unless plaintiff terminated the lease, which plaintiff elected not to do. Thus, plaintiff was entitled to rent payments only as they became due (*see generally Barr v Country Motor Car Group, Inc.*, 15 AD3d 985, 986 [4th Dept 2005], *lv denied* 6 NY3d 704 [2006]). In light of that determination and the expiration of the term of the lease, plaintiff's contention that the court erred in determining that any claim for accelerated future rent must be discounted is academic.

We agree with plaintiff, however, that the court erred in granting defendant's cross motion insofar as it seeks a determination that defendant's accounts receivable are not "tangible assets" under the lease, and we modify the order and judgment in appeal No. 1 accordingly. "A written agreement that is clear, complete and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties" (*Paramax Corp. v VoIP Supply, LLC*, 175 AD3d 939, 941 [4th Dept 2019]). Additionally, it is a common practice of New York courts to refer to dictionaries to determine the plain and ordinary meaning of the words in a contract (*see Ragins v Hospitals Ins. Co., Inc.*, 22 NY3d 1019, 1022 [2013]; *see also Lend Lease [US] Constr. LMB Inc. v Zurich Am. Ins. Co.*, 136 AD3d 52, 56-57 [1st Dept 2015], *affd* 28 NY3d 675 [2017]; *2619 Realty v Fidelity & Guar. Ins. Co.*, 303 AD2d 299, 300-301 [1st

Dept 2003], *lv denied* 100 NY2d 508 [2003]). "Tangible assets," as defined in the sixth edition of Black's Law Dictionary, which was current when the lease was executed (*see generally Ellington v EMI Music, Inc.*, 24 NY3d 239, 246-247 [2014]), expressly includes accounts receivable in the definition (*see* Black's Law Dictionary [6th ed 1990]). We conclude that the court's determination that accounts receivable are not tangible assets under the lease does not "comport with [the] plain meaning" of tangible assets (*Paramax Corp.*, 175 AD3d at 942).

We further agree with plaintiff that the court erred in failing to award it reasonable attorneys' fees pursuant to the lease. Although it did not expressly deny plaintiff's motion with respect to attorneys' fees, the court's failure to rule on that part of plaintiff's motion is deemed to be a denial (*see Griffin v MWF Dev. Corp.*, 273 AD2d 907, 908 [4th Dept 2000]). The lease provided that, in the case of a default, the defaulting party is liable for the payment of, among other things, the other party's reasonable attorneys' fees. Defendant does not dispute that it defaulted under the lease, and we conclude that the court should have granted that part of plaintiff's motion seeking an award of attorneys' fees. We therefore further modify the order and judgment in appeal No. 1 accordingly, and we remit the matter to Supreme Court to determine, following a hearing if necessary, the amount of attorneys' fees to be awarded to plaintiff pursuant to the lease (*see Mathew v Slocum-Dickson Med. Group, PLLC*, 160 AD3d 1500, 1504 [4th Dept 2018]; *Dance Magic, Inc. v Pike Realty, Inc.*, 85 AD3d 1083, 1089 [2d Dept 2011]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**927**

**CA 19-00439**

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

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VIOLET REALTY, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

AMIGONE, SANCHEZ & MATTREY, LLP,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

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PHILLIPS LYTLE LLP, BUFFALO (JOHN G. SCHMIDT, JR., OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HODGSON RUSS LLP, BUFFALO (STEVEN W. WELLS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Henry J. Nowak, J.), entered September 6, 2018. The judgment awarded plaintiff money damages.

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

Same memorandum as in *Violet Realty, Inc. v Amigone, Sanchez & Mattrey, LLP* ([appeal No. 1] — AD3d — [May 1, 2020] [4th Dept 2020]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**1059**

**KA 19-01107**

PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND WINSLOW, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

SADIE L. HARWOOD, DEFENDANT-RESPONDENT.

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

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

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Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), dated December 19, 2018. The order, insofar as appealed from, granted in part the omnibus motion of defendant by reducing counts one and two of the indictment from assault in the first degree to attempted assault in the first degree.

It is hereby ORDERED that the order insofar as appealed from is reversed on the law, that part of defendant's omnibus motion seeking to dismiss or reduce the indictment is denied, counts one and two of the indictment are reinstated, and the matter is remitted to Livingston County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order that, inter alia, granted that part of defendant's omnibus motion seeking to dismiss or reduce counts one and two of the indictment based on the alleged legal insufficiency of the evidence before the grand jury by reducing those counts from assault in the first degree (Penal Law § 120.10 [1], [2]) to attempted assault in the first degree (§§ 110.00, 120.10 [1], [2]) on the ground that there was insufficient evidence that the eight-year-old victim suffered serious disfigurement. We agree with the People that the evidence before the grand jury was legally sufficient to demonstrate that the victim had suffered serious disfigurement, and we therefore reverse.

The grand jury "must have before it evidence legally sufficient to establish a prima facie case, including all the elements of the crime, and reasonable cause to believe that the accused committed the offense to be charged" (*People v Jensen*, 86 NY2d 248, 251-252 [1995]). Legally sufficient evidence is defined as " 'competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof' " (*People v Swamp*, 84 NY2d 725, 730 [1995], quoting CPL 70.10 [1]). The court "must

consider whether the evidence, viewed most favorably to the People, if unexplained and uncontradicted . . . would warrant conviction" (*id.*; *see Jensen*, 86 NY2d at 251).

Under Penal Law § 120.10 (1), the offense charged under count one of the indictment, a person is guilty of assault in the first degree when, "[w]ith intent to cause serious physical injury to another person, he [or she] causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument." " 'Serious physical injury' means 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]). Under Penal Law § 120.10 (2), the offense charged under count two of the indictment, a person is guilty of assault in the first degree when, "[w]ith intent to disfigure another person seriously and permanently . . . , he [or she] causes such injury to such person."

Here, the evidence before the grand jury included the testimony of the victim, the victim's medical records, and photographs of the victim taken on the day of the incident. The evidence established that, as a result of the assault, the victim sustained "two significant lacerations to her anterior neck," which were 3-4 and 5-6 centimeters long, respectively, with soft tissue defects and exposure of underlying subcutaneous fat. The lacerations required at least 10 sutures to close. We conclude that the grand jury could reasonably infer from the evidence that the sutured wounds resulted in permanent scars (*see People v Irwin*, 5 AD3d 1122, 1122 [4th Dept 2004], *lv denied* 3 NY3d 642 [2004]; *see generally People v Gagliardo*, 283 AD2d 964, 964 [4th Dept 2001], *lv denied* 96 NY2d 901 [2001]). We further conclude that, when "viewed in context, considering [their] location on the body" (*People v McKinnon*, 15 NY3d 311, 315 [2010]), the grand jury could reasonably infer that the scars would "make the victim's appearance distressing or objectionable to a reasonable person observing her" (*id.* at 316; *cf. People v Stewart*, 18 NY3d 831, 832 [2011]).

All concur except DEJOSEPH and NEMOYER, JJ., who dissent and vote to affirm in the following memorandum: We disagree with the majority's conclusion that the evidence before the grand jury was legally sufficient to demonstrate that the eight-year-old victim had suffered serious disfigurement. Instead, we conclude that County Court correctly reduced counts one and two of the indictment from assault in the first degree (Penal Law § 120.10 [1], [2]) to attempted assault in the first degree (§§ 110.00, 120.10 [1], [2]). We therefore dissent, and would affirm the order.

The underlying incident occurred on October 4, 2017. The victim testified before the grand jury over eight months later, on June 27, 2018. The grand jury, however, was not shown any contemporaneous photograph of the victim's neck, and there is no indication in the grand jury transcript that the grand jury had the opportunity to observe her exposed neck. The medical records referenced by the

majority include only records from the victim's initial emergency room visit, i.e., records dated between October 4, 2017 and October 6, 2017. Those records do not include any prognosis for the victim or, specifically, any indication that the victim would have future scarring. Similarly, the photographs of the victim that were shown to the grand jury were taken on the day of the incident.

As noted by our colleagues in the majority, a victim "is 'seriously' disfigured when a reasonable observer would find [his or] her altered appearance distressing or objectionable" (*People v McKinnon*, 15 NY3d 311, 315 [2010]). We further note, however, that, while "[a] contemporaneous photograph or description is not necessary in every case where a victim's wound is shown to a jury[,] . . . it is necessary where . . . there is no other evidence in the record supporting an inference that what the jury saw amounted to serious disfigurement" (*id.* at 316).

In view of the foregoing, we conclude that "[t]his limited record is not sufficient to support a finding of serious disfigurement" (*id.*), inasmuch as the evidence presented to the grand jury, viewed in the light most favorable to the People, if unexplained and uncontradicted, would not warrant a conviction (*see generally People v Jensen*, 86 NY2d 248, 251-252 [1995]). In reaching that conclusion, we are not minimizing the nature of the victim's injuries, but instead are simply constrained by the lack of proof to support any inference that what the grand jurors saw or heard amounted to a serious disfigurement.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**1223**

**KA 19-01199**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE ALLEN, DEFENDANT-APPELLANT.

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MEYERS BUTH LAW GROUP PLLC, ORCHARD PARK (CHERYL MEYERS BUTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered October 16, 2018. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of manslaughter in the second degree (Penal Law § 125.15 [1]), arising out of an incident in which she stabbed her boyfriend with a kitchen knife, causing his death. Defendant contends that County Court erred in admitting evidence seized from her home, including the knife she used to stab the victim, under the plain view doctrine because, she contends, the emergency ended when she was removed from the scene and the victim was determined to be deceased. We reject that contention. Defendant does not dispute that an emergency existed when police officers initially entered the home in response to her 911 call, and we see no basis to disturb the court's determination that the evidence at issue was in plain view when the officers lawfully entered the home to render assistance. In addition, we conclude that the subsequent seizure of the evidence observed in plain view "did not exceed the scope and duration of the emergency" (*People v Desmarat*, 38 AD3d 913, 915 [2d Dept 2007], *lv denied* 9 NY3d 842 [2007]; *see People v Daniels*, 97 AD3d 845, 849 [3d Dept 2012], *lv denied* 20 NY3d 931 [2012]).

We also reject defendant's contention that the court erred in refusing to suppress statements she made to the police at the hospital. Defendant was transported to the hospital by ambulance to receive medical treatment for an injury to her hand. While at the hospital, defendant cooperated with the investigators and answered questions asked of her. It is well settled that questioning in a

hospital setting alone is not determinative of whether the questioning is custodial in nature (*see generally People v Drouin*, 115 AD3d 1153, 1155-1156 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]; *People v Bowen*, 229 AD2d 954, 955 [4th Dept 1996], *lv denied* 88 NY2d 1019 [1996]). The test is "what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position" (*People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Furthermore, in determining whether a defendant was in custody for *Miranda* purposes, the court should consider: (1) the amount of time the defendant spent with the police; (2) whether the defendant's freedom of action was restricted in any significant manner; (3) the location and atmosphere in which the defendant was questioned; (4) the degree of cooperation exhibited by the defendant; (5) whether the defendant was apprised of his or her constitutional rights; and (6) whether the questioning was investigatory or accusatory in nature (*see People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]).

Here, defendant was at the hospital for approximately eight hours. During that time, she was examined by medical personnel, her wound was cleaned and wrapped, and she received a CAT scan and stitches. Medical staff circulated in and out of defendant's room regularly, and although the police were present most of the time, their questioning of defendant was not continuous. Defendant was not handcuffed, and her movement was not restricted in any way. She was free to use the restroom as desired, there was no force or threat of force, and the questions asked of defendant by the police were investigatory in nature. Defendant remained fully cooperative and never refused to answer any questions. Indeed, defendant invited the questioning by stating, "I feel free to answer any questions, honestly." We thus conclude that, contrary to defendant's contention, she was not in custody for *Miranda* purposes when she spoke to the police at the hospital (*see Drouin*, 115 AD3d at 1155-1156; *see generally People v Forbes*, 182 AD2d 829, 829-830 [2d Dept 1992], *lv denied* 80 NY2d 895 [1992]).

Defendant further contends that the court abused its discretion by allowing uniformed police officers to be present in the courtroom during summations, thereby depriving her of a fair trial. We reject that contention. A trial judge has the general "obligation to preserve order and decorum in the courtroom" (*People v Nelson*, 27 NY3d 361, 370 [2016], *cert denied* — US —, 137 S Ct 175 [2016]), and the nature of our review is to determine "whether an unacceptable risk is presented of impermissible factors coming into play" (*Carey v Musladin*, 549 US 70, 75 [2006] [internal quotation marks omitted]; *see Estelle v Williams*, 425 US 501, 505 [1976]; *Nelson*, 27 NY3d at 368). Inasmuch as the record is devoid of any facts establishing where the uniformed officers were located or how many of them were seated together, there is no basis for us to conclude that their presence in the courtroom presented such a risk (*see People v Grant*, 160 AD3d 1406, 1407 [4th Dept 2018], *lv denied* 31 NY3d 1148 [2018]; *cf. People v Nguyen*, 156 AD3d 1461, 1462 [4th Dept 2017], *lv denied* 31 NY3d 1016 [2018]; *see generally Carey*, 549 US at 75).

Contrary to defendant's additional contention, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to disprove defendant's justification defense, and to establish that defendant recklessly caused the victim's death (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). The jury was entitled to credit the testimony of the People's witnesses and to consider the many inconsistencies between defendant's grand jury testimony, which was admitted in evidence at trial, and her statements to, inter alia, the 911 operator, emergency responders, and the police, and we perceive no reason to disturb the jury's credibility determinations in that regard (*see People v Tetro*, 175 AD3d 1784, 1788 [4th Dept 2019]). The jury was also entitled to conclude that the physical evidence failed to support defendant's versions of the events preceding the fatal stabbing, and we are satisfied that the jury's rejection of the justification defense was not contrary to the weight of the evidence (*see generally People v Goley*, 113 AD3d 1083, 1084 [4th Dept 2014]).

All concur except BANNISTER, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. The burden upon the People was to prove defendant's guilt beyond a reasonable doubt (*see* CPL 70.20), and to disprove defendant's justification defense by the same degree (*see* Penal Law § 25.00 [1]; *People v McManus*, 67 NY2d 541, 546-547 [1986]). In my view, the People failed to meet their burden of disproving the justification defense beyond a reasonable doubt, and I would therefore reverse the judgment, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

The evidence presented by the People at trial established that, on the night of the incident, defendant called 911 and began by telling the operator, "[He t]ried to kill me." When police officers arrived at her apartment, they found defendant with a large amount of blood on her body and found her boyfriend (decedent) slumped over in front of a couch in the living room. He had died from a single stab wound to the chest. Defendant, who had bruising and scratches on her neck and face and was bleeding from her hand, was taken by ambulance to the hospital. En route to the hospital, she told a paramedic that decedent tried three times to kill her. Apparently not knowing that he was dead, defendant said that she was still afraid that he might kill her. When police officers asked her what happened, defendant, who was intoxicated at the time, initially stated that she did not remember but, later, she stated that she and decedent had been drinking and that he had tried to kill her. Specifically, she said, decedent had tried choking her. According to defendant's grand jury testimony, which was read into evidence, she and decedent were drinking heavily at her home and began arguing. At some point, decedent threw her up against the kitchen wall and hit her with his right fist across her left eye. Defendant "broke free" and ran away from him, while grabbing a kitchen knife because she "just wanted him

to stay away from [her]." Decedent ran after defendant, grabbed her, and threw her onto the couch in the living room. Defendant testified that she was yelling, "Please, don't kill me. Why are you doing this? Please don't kill me." Decedent pinned defendant's arms down with his knees, and he grabbed defendant's throat. Defendant started not being able to breathe. After rocking back and forth, her arm released and she stabbed decedent once. The photographs admitted in evidence revealed that defendant had a black eye and bruising on her throat after the incident.

In order to meet their burden of proof with respect to the defense of justification, the People were required to establish beyond a reasonable doubt that "defendant lacked a subjective belief that her use of deadly physical force was necessary to protect herself against decedent's use or imminent use of deadly physical force, or that 'a reasonable person in the same situation would not have perceived that deadly force was necessary' " (*People v Marchant*, 152 AD3d 1243, 1245 [4th Dept 2017]). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), I conclude that the People failed to present legally sufficient evidence to disprove the justification defense beyond a reasonable doubt (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

First, while defendant made some inconsistent statements after the incident, those statements were made while defendant was highly intoxicated on alcohol and/or drugs. Moreover, defendant's statements were consistent with respect to her subjective belief that decedent was harming her to the point that she needed to defend herself by stabbing him. Indeed, as noted above, defendant told the 911 operator that decedent tried "to kill [her]"; while en route to the hospital, she told a paramedic that decedent tried multiple times to kill her; and at the hospital, while apparently not knowing that decedent was dead, she said that she was still afraid he might kill her. In addition, she told the police at the hospital that decedent choked her to the point that she could not breathe. None of defendant's inconsistent statements was legally sufficient to raise a reasonable doubt with respect to her consistent statements establishing her subjective belief that decedent was using deadly force against her, i.e., choking her to the point where she could not breathe, and that she needed to protect herself. Indeed, defendant's statements concerning her belief that decedent was trying to kill her were consistent from the time of her 911 call to the time she was talking with the police investigators at the hospital.

With respect to whether a reasonable person in defendant's situation would have perceived that deadly force was necessary, the evidence established that defendant had a black eye indicating an assault, bruises and scratches on her neck from decedent's attempts to choke her, and severe lacerations on her left hand from fumbling with the knife. Additionally, a neighbor testified that he heard "a thumping going on," and that he thought he also heard someone say, "Don't kill me." Defendant's home was also in obvious disarray, and there was blood throughout the house. In my view, that evidence was also consistent with defendant's claim of self-defense.

While the People did present some evidence tending to disprove the justification defense, I conclude that, even considering the evidence in the light most favorable to the People, the evidence did not establish beyond a reasonable doubt either that defendant lacked a subjective belief that her use of deadly physical force was necessary, or that a reasonable person in defendant's situation would not have believed that deadly force was necessary (*see generally Bleakley*, 69 NY2d at 495).

Furthermore, even assuming, arguendo, that the evidence is legally sufficient to support the conviction, I further conclude, upon independently assessing the proof (*see People v Delamota*, 18 NY3d 107, 116-117 [2011]; *People v Danielson*, 9 NY3d 342, 348-349 [2007]), that the verdict is against the weight of the evidence insofar as the jury rejected defendant's justification defense (*see Marchant*, 152 AD3d at 1244-1246; *see generally Bleakley*, 69 NY2d at 495). To be sure, defendant offered no cogent explanation for decedent's defensive wounds, but it was not defendant's burden to do so. In any event, those defensive wounds, sustained during an undeniable struggle between decedent and defendant, do not establish beyond a reasonable doubt that decedent was not an aggressor or that defendant was not in fear for her own life, particularly given the presence of scratches on her face and neck, several lacerations on her own hand, and her testimony that the two wrestled over the knife. Moreover, the People's expert was unable to give a definitive opinion regarding the positions that defendant and decedent were in at the time of the stabbing.

In view of my conclusion, it is not necessary to address defendant's remaining contentions. Nevertheless, I note my agreement with defendant that reversal of the judgment and remittal for a new trial would be required on two independent grounds. First, I agree with defendant that her statements made at the hospital to the police should have been suppressed as the product of custodial interrogation conducted without *Miranda* warnings. The recordings of the police interviews with defendant reveal that there was no time when defendant was unaccompanied by either one of the investigators or another officer. The recordings also establish that the questioning turned from investigatory to accusatory. In my view, under the circumstances presented in this case, a reasonable person, innocent of any crime, would not have believed that he or she was free to leave at the time of questioning (*see generally People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

Second, I agree with defendant that the court erred in permitting several members of the Livingston County Sheriff's Office—approximately "a dozen members," according to defense counsel, most of them in uniform—to sit in the courtroom during summations. The court erred when it did not intervene in any way despite defense counsel's request that those officers be asked to leave (*see generally People v Nelson*, 27 NY3d 361, 370 [2016], *cert denied* — US —, 137 S Ct

175 [2016]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**21**

**KA 17-00131**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL K. YOUNGS, DEFENDANT-APPELLANT.

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

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (ROBERT R. CALLI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Herkimer County Court (Donald E. Todd, A.J.), rendered January 6, 2017. The judgment convicted defendant upon a plea of guilty of rape in the first degree, criminal sexual act in the first degree and attempted 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 his plea of guilty of rape in the first degree (Penal Law § 130.35 [3]), criminal sexual act in the first degree (§ 130.50 [1]), and attempted sexual abuse in the first degree (§§ 110.00, 130.65 [1]).

We conclude that defendant's purported waiver of the right to appeal is not enforceable inasmuch as the totality of the circumstances fails to reveal that defendant "understood the nature of the appellate rights being waived" (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *4 [2019]). County Court's oral explanation of the waiver suggested that defendant was entirely ceding any ability to challenge his guilty plea on appeal, but such an "improper description of the scope of the appellate rights relinquished by the waiver is refuted by . . . precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea" (*id.* at —, 2019 NY Slip Op 08545, *7). In addition, by further explaining that the cost of the plea bargain was that defendant would no longer have the right ordinarily afforded to other defendants to appeal to a higher court any decision the court had made, the court "mischaracterized the waiver of the right to appeal, portraying it in effect as an 'absolute bar' to the taking of an appeal" (*People v Cole*, 181 AD3d 1329, — [4th Dept 2020]; *see Thomas*, — NY3d at —, 2019 NY Slip Op 08545, *6). The written waiver

executed by defendant did not contain clarifying language; instead, it perpetuated the mischaracterization that the appeal waiver constituted an absolute bar to the taking of a first-tier direct appeal and even stated that the rights defendant was waiving included the "right to have an attorney appointed" if he could not afford one and the "right to submit a brief and argue before an appellate court issues relating to [his] sentence and conviction" (*see Thomas*, — NY3d at —, —, 2019 NY Slip Op 08545, *2, *6-7). Where, as here, the "trial court has utterly 'mischaracterized the nature of the right a defendant was being asked to cede,' [this] '[C]ourt cannot be certain that the defendant comprehended the nature of the waiver of appellate rights' " (*id.* at —, 2019 NY Slip Op 08545, *6).

Although the purported waiver of the right to appeal is not enforceable and thus does not preclude our review of defendant's challenge to the severity of his sentence, we nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**75**

**CAF 18-02298**

PRESENT: WHALEN, P.J., CARNI, BANNISTER, AND DEJOSEPH, JJ.

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IN THE MATTER OF LISA DRISCOLL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY MACK, RESPONDENT-RESPONDENT,
AND SARAH DRISCOLL, RESPONDENT-APPELLANT.

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D.J. & J.A. CIRANDO, PLLC, SYRACUSE (REBECCA L. KONST OF COUNSEL), FOR RESPONDENT-APPELLANT.

NORMAN J. CHIRCO, AUBURN, FOR PETITIONER-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, ATTORNEY FOR THE CHILD.

CHARLES M. THOMAS, AUBURN, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered December 5, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded physical custody of the subject children to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner maternal grandmother (grandmother) filed a petition, dated April 11, 2016, seeking to modify a prior custody order, pursuant to which respondent mother would have obtained primary physical custody of the subject children on July 1, 2016. Respondent mother appeals from an order that, inter alia, modified the prior order, to which the parties had stipulated, by awarding physical custody of the children to the grandmother.

We reject the mother's contention that the record does not support a finding of extraordinary circumstances necessary to justify an award of custody to a nonparent. The grandmother had the burden of establishing that extraordinary circumstances exist even though the prior order, which awarded her primary physical custody of the children for a period of time, was made upon consent of the parties (*see Matter of Katherine D. v Lawrence D.*, 32 AD3d 1350, 1351 [4th Dept 2006], *lv denied* 7 NY3d 717 [2006]). Here, the grandmother met that burden. It is undisputed that the children have lived in the grandmother's home for approximately seven years or more. In

addition, the record reflects that, despite the mother having scheduled visitation with the children, she has failed to resume her parental role in their lives (*see Matter of Suarez v Williams*, 26 NY3d 440, 448 [2015]; *Matter of Orlowski v Zwack*, 147 AD3d 1445, 1446 [4th Dept 2017]).

Once the grandmother established that extraordinary circumstances existed, she had the burden, as petitioner, of establishing that a change in circumstances had occurred since entry of the prior order (*see Matter of McNeil v Deering*, 120 AD3d 1581, 1582-1583 [4th Dept 2014], *lv denied* 24 NY3d 911 [2014]; *Matter of Howard v McLoughlin*, 64 AD3d 1147, 1147-1148 [4th Dept 2009]). To the extent that our prior cases suggest that a change in circumstances analysis is not required here, those cases should no longer be followed (*see e.g. Matter of Tamika C.P. v Denise M.*, 39 AD3d 1213, 1214 [4th Dept 2007]; *Katherine D.*, 32 AD3d at 1351; *Matter of Ruggieri v Bryan*, 23 AD3d 991, 992 [4th Dept 2005]). We reject the mother's contention that the grandmother failed to make the requisite showing of a change in circumstances sufficient to warrant an inquiry into whether modification of the prior order is in the best interests of the children. "[A]n existing [custody] arrangement that is based upon a stipulation between the parties is entitled to less weight than a disposition after a plenary trial" (*Matter of Alexandra H. v Raymond B.H.*, 37 AD3d 1125, 1126 [4th Dept 2007] [internal quotation marks omitted]). Here, the parties' stipulation required the mother to assume additional and greater parental responsibilities during a period of approximately five months, at the conclusion of which the mother was to obtain primary physical custody of the children. However, the record establishes that the mother increasingly failed to attend scheduled visitation with her children during that period and, instead, often chose to spend time with her boyfriend. She also often exhibited poor judgment as evidenced by, inter alia, her acknowledgment of violence in her home with the children present (*see Matter of Fountain v Fountain*, 130 AD3d 1107, 1108 [3d Dept 2015]). Moreover, Family Court observed firsthand her deteriorating mental condition (*see Matter of Andrew L. v Michelle M.*, 140 AD3d 1240, 1241-1242 [3d Dept 2016]).

Finally, we conclude that the court properly determined that it is in the children's best interests for the grandmother to have physical custody (*see generally Prall v Prall*, 156 AD3d 1351, 1352 [4th Dept 2017]; *Matter of Walker v Cameron*, 88 AD3d 1307, 1308 [4th Dept 2011]). The grandmother has provided a stable living situation for the children, and the children wish to remain in her home.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**149**

**KA 17-01960**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BERNARD A. BROOKS, JR., DEFENDANT-APPELLANT.

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

BERNARD A. BROOKS, JR., DEFENDANT-APPELLANT PRO SE.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered March 23, 2017. 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 affirmed.

Memorandum: Defendant appeals from a judgment that convicted him after a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Defendant failed to preserve his contention that, during jury deliberations, County Court erred in failing to remove the jury foreperson as unavailable or grossly unqualified due to a possible scheduling conflict (*see People v Sanderson*, 68 AD3d 1716, 1717 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010]; *see generally People v Payne*, 68 AD3d 1800, 1800 [4th Dept 2009], *lv denied* 14 NY3d 843 [2010], *reconsideration denied* 15 NY3d 755 [2010]; *People v Clark*, 28 AD3d 1190, 1190 [4th Dept 2006]). In any event, defendant's contention lacks merit. The record does not establish that the foreperson was unavailable because of illness, incapacity, or any other reason (*see* CPL 270.35 [1]), the court conducted the requisite "reasonably thorough inquiry" regarding the foreperson's possible scheduling conflict with respect to the next day of scheduled deliberations (CPL 270.35 [2] [a]; *see People v Newton*, 144 AD3d 1617, 1617 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]), and the foreperson informed the court that she wished to continue deliberations. The record also does not establish that the foreperson was grossly unqualified based on an alleged state of mind that would

prevent her from rendering an impartial verdict (*see People v Buford*, 69 NY2d 290, 298 [1987]). The court conducted a "probing and tactful inquiry" into the matter (*People v Rodriguez*, 71 NY2d 214, 219 [1988] [internal quotation marks omitted]), and the foreperson stated that she would be "sad" if she could not be with her children for a scheduled medical procedure and that it would be "tough" if she had to postpone the procedure. The foreperson did not indicate that she would be unable to focus on the deliberations or that her "sad" state of mind would prevent her from rendering an impartial verdict (*cf. People v Spencer*, 29 NY3d 302, 311 [2017], *rearg denied* 31 NY3d 1074 [2018]).

Defendant also failed to preserve his contention that the court's response to the jury regarding the jury foreperson's scheduling conflict was coercive and implicitly urged the jury to rush its verdict (*see People v Morales*, 36 AD3d 631, 632 [2d Dept 2007], *lv denied* 8 NY3d 925 [2007]; *People v Robertson*, 217 AD2d 989, 990-991 [4th Dept 1995], *lv denied* 86 NY2d 846 [1995]). In any event, defendant's contention lacks merit inasmuch as the court's instructions to the jury did not attempt to compel, urge, or shame the jury into reaching a verdict (*see generally People v Anderson*, 149 AD3d 1407, 1415 [3d Dept 2017], *lv denied* 30 NY3d 947 [2017]). Rather, the instructions were open ended and encouraging (*see People v Langevin*, 164 AD3d 1597, 1597 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *Morales*, 36 AD3d at 632).

Defendant correctly concedes that he failed to preserve his contention that he was denied a fair trial due to the prosecutor's alleged misconduct on summation (*see People v Laurent*, 156 AD3d 1489, 1489 [4th Dept 2017], *lv denied* 31 NY3d 985 [2018]; *People v Wellsby*, 30 AD3d 1092, 1093 [4th Dept 2006], *lv denied* 7 NY3d 796 [2006]). In any event, the allegedly improper comments during the prosecutor's summation were "fair response[s] to defense counsel's summation" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]).

Inasmuch as the prosecutor's comments on summation were not improper, defense counsel's failure to object to them did not deprive defendant of effective assistance of counsel (*see People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). To the extent that defendant contends that defense counsel was ineffective for mentioning uncharged crimes during the trial and on summation, defendant "failed to demonstrate that those alleged errors were not strategic in nature" (*People v Henry*, 74 AD3d 1860, 1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]) and, in any event, "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [his] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

We conclude that the sentence is not unduly harsh or severe. We note that the certificate of conviction incorrectly states that defendant was sentenced upon a guilty plea, rather than upon a jury

verdict, and does not reflect that defendant was sentenced as a second felony offender. The certificate of conviction must therefore be amended to correct those clerical errors (*see People v Baldwin*, 173 AD3d 1748, 1749-1750 [4th Dept 2019], *lv denied* 34 NY3d 928 [2019]).

Finally, we have considered the contentions in defendant's pro se supplemental brief and conclude that they do not require reversal or modification of the judgment.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**188**

**KA 14-00747**

PRESENT: WHALEN, P.J., CENTRA, CURRAN, WINSLOW, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY R. TAGLIANETTI, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN C. ZUROSKI OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered February 24, 2014. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that County Court abused its discretion in precluding him from offering psychiatric evidence in support of an affirmative defense of extreme emotional disturbance (EED). We reject that contention. Defendant did not move for permission to file a late notice of his intent to introduce psychiatric evidence until more than six months after the 30-day statutory deadline, and the court determined that defendant failed to show good cause to allow the late filing (*see* CPL 250.10 [2]; *People v Silburn*, 31 NY3d 144, 160 [2018]; *People v Crawford*, 163 AD3d 986, 987 [2d Dept 2018], *lv denied* 32 NY3d 1063 [2018]). Among other things, defendant failed to demonstrate that the defense had any merit (*see generally Silburn*, 31 NY3d at 161; *People v Smith*, 1 NY3d 610, 612 [2004]; *People v Rizzo*, 267 AD2d 1041, 1042 [4th Dept 1999], *lv denied* 95 NY2d 838 [2000]).

Even assuming, arguendo, that the court abused its discretion in precluding the evidence, we conclude that the error was harmless inasmuch as the evidence of defendant's guilt was overwhelming and there was no significant probability that preclusion of the psychiatric evidence impacted the verdict (*see People v Foti*, 33 AD3d 403, 403 [1st Dept 2006], *lv denied* 7 NY3d 901 [2006]; *see also Silburn*, 31 NY3d at 161 n 11; *People v Muller*, 72 AD3d 1329, 1334 [3d Dept 2010], *lv denied* 15 NY3d 776 [2010]; *People v Brown*, 4 AD3d 886, 889 [4th Dept 2004], *lv denied* 3 NY3d 637 [2004]). Defendant did not

establish that any "relevant connection existed between his claimed mental infirmity and his decision to deliberately shoot and kill" the victim (*Muller*, 72 AD3d at 1334; *see generally Brown*, 4 AD3d at 889). Further, the People presented overwhelming evidence of defendant's intent to kill the victim and his planning with respect thereto both before and after the incident. Indeed, the evidence presented was entirely inconsistent with the elements of an EED affirmative defense (*see Muller*, 72 AD3d at 1334; *see also People v Pavone*, 26 NY3d 629, 644-645 [2015]). The subjective element of an EED defense " 'focuses on the defendant's state of mind at the time of the crime and requires sufficient evidence that the defendant's conduct was actually influenced by an extreme emotional disturbance. This element is generally associated with a loss of control' " (*Pavone*, 26 NY3d at 643; *see People v McKenzie*, 19 NY3d 463, 467 [2012]; *People v Diaz*, 15 NY3d 40, 45 [2010]). Here, the evidence demonstrated that defendant engaged in a planned and calculated murder of a man who had sexually explicit email conversations with defendant's wife. Defendant sent threatening emails to the victim twice in the month before the murder. On the day of the murder, defendant left his Virginia home in the early morning hours and arrived at the victim's workplace in Western New York in the afternoon, but the victim was not there. Defendant then proceeded to the victim's home nearby and awaited the victim, who arrived home that evening and was fatally shot once in the chest and twice in the back at close range. Defendant then drove back to Virginia, throwing away the victim's cell phone along the way. The People therefore presented overwhelming evidence that defendant never lost control over his actions and thus was not acting under an EED (*see People v Mohamud*, 115 AD3d 1227, 1228 [4th Dept 2014], *lv denied* 23 NY3d 965 [2014]; *People v Zamora*, 309 AD2d 957, 958 [2d Dept 2003], *lv denied* 1 NY3d 583 [2003]; *cf. People v Moye*, 66 NY2d 887, 890 [1985]).

We agree with defendant that the court erred in determining prior to trial that it would not charge the jury on the affirmative defense of EED. A defendant may be entitled to a jury charge on the affirmative defense of EED based solely on the People's proof (*see People v Gonzalez*, 22 NY3d 539, 545 [2014]), and thus it was error for the court to make that ruling without any consideration of the People's evidence. We agree with the People, however, that the error was harmless. Defendant was not entitled to such a charge here because the evidence, viewed in the light most favorable to defendant, was not sufficient for the jury to find by a preponderance of the evidence that the elements of the affirmative defense of EED were satisfied (*see generally id.*; *People v Walker*, 64 NY2d 741, 743 [1984], *rearg dismissed* 65 NY2d 924 [1985]; *People v Coello*, 129 AD3d 442, 442-443 [1st Dept 2015], *lv denied* 26 NY3d 927 [2015]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**259**

**KA 11-01662**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARRY BROWN, ALSO KNOWN AS "HAWK,"
DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered November 29, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the first degree (two counts) and assault in the first degree.

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]) to assault in the second degree (§ 120.05 [2]) and vacating the sentence imposed on count three of the indictment and as modified the judgment is affirmed, and the matter is remitted to Monroe County Court for sentencing on the conviction of assault in the second degree.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of murder in the first degree (Penal Law § 125.27 [1] [a] [viii]; [b]) and one count of assault in the first degree (§ 120.10 [1]). The conviction arises from an incident in which defendant shot three people; two of the victims died and the third—a bystander—was injured.

Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to his identity as the shooter (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in the light most favorable to the People, we reject defendant's further contention that the evidence is legally insufficient to establish the element of intent with respect to the murder counts (*see generally id.*). Additionally, the sentences imposed on the murder counts are not unduly harsh or severe.

Inasmuch as the bystander victim suffered only a superficial bullet wound that did not penetrate her abdomen, we agree with defendant that the evidence is legally insufficient to establish that such victim sustained the "serious physical injury" necessary to support a conviction of assault in the first degree under Penal Law § 120.10 (1) (*see* § 10.00 [10]; *People v Madera*, 103 AD3d 1197, 1198 [4th Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Nimmons*, 95 AD3d 1360, 1360-1361 [2d Dept 2012], *lv denied* 19 NY3d 1028 [2012]; *see generally Bleakley*, 69 NY2d at 495). The evidence, however, is legally sufficient to support a conviction of the lesser included offense of assault in the second degree under section 120.05 (2) (*see generally* § 10.00 [9]). We therefore modify the judgment accordingly. Defendant's remaining contention is academic in light of our determination.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**285**

**KA 16-02221**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARTIN DELGADO, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 20, 2016. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We note at the outset that the notice of appeal does not state the complete date of the judgment from which the appeal is taken. The notice of appeal is otherwise accurate, however, and we therefore "exercise our discretion, in the interest of justice, and treat the notice of appeal as valid" (*People v Mitchell*, 93 AD3d 1173, 1173 [4th Dept 2012], *lv denied* 19 NY3d 999 [2012]; *see* CPL 460.10 [6]; *People v Rounds*, 140 AD3d 1657, 1658 [4th Dept 2016], *lv denied* 28 NY3d 1031 [2016]).

Defendant contends that his plea was not voluntary because it was induced by Supreme Court's promise to grant him a "violent felony override" so that defendant could participate in certain programs of the Department of Corrections and Community Supervision, such as temporary release, a promise that he argues the court lacked the power to make (*see People v Ballato*, 128 AD3d 846, 847 [2d Dept 2015]). Initially, we agree with defendant that his contention "is not subject to the preservation requirement, since he could not be expected to object to the . . . [c]ourt's [purported illusory] promise under the circumstances" (*id.*; *cf. People v Turner*, 24 NY3d 254, 258 [2014]). We reject defendant's contention, however, because the record establishes that "neither [his] eligibility for [the temporary release program] . . . nor his ultimate" admission to such a program "was a

condition of the plea" (*People v Williams*, 84 AD3d 1417, 1418 [2d Dept 2011], *lv denied* 17 NY3d 863 [2011]; *see also People v Demick*, 138 AD3d 1486, 1486 [4th Dept 2016], *lv denied* 27 NY3d 1150 [2016]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**322**

**KA 19-00584**

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JUSTIN DUKELOW, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered February 4, 2019. 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 revoking the sentence of probation previously imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a determinate term of imprisonment, followed by a period of postrelease supervision. Even assuming, arguendo, that defendant's waiver of the right to appeal during the underlying plea proceeding was valid, we conclude that the waiver does not encompass his challenge to the severity of the sentence imposed following his violation of probation (*see People v Giuliano*, 151 AD3d 1958, 1959 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]; *People v Tedesco*, 143 AD3d 1279, 1279 [4th Dept 2016], *lv denied* 28 NY3d 1075 [2016]). We further conclude, however, that the sentence imposed upon defendant's violation of probation is not unduly harsh or severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**326**

**KA 16-02340**

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALI T. RUSS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered September 7, 2016. The judgment convicted defendant upon a plea of guilty of aggravated vehicular homicide and aggravated driving while intoxicated (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 aggravated vehicular homicide (Penal Law § 125.14 [7]) and three counts of aggravated driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2-a] [b]; 1193 [1] [c] [i] [B]). We reject defendant's contention that the police did not, at the time of his arrest, have probable cause to believe that he had operated his vehicle while intoxicated and thus that his statements and any other evidence seized as a result of the arrest, including the results of a chemical blood test, should have been suppressed. The first officer to the scene testified at the suppression hearing that defendant was the driver of a vehicle that had violently crashed into a telephone pole, killing one minor passenger and injuring two others. The officer further testified that it was a clear morning, that the road appeared to be free from obstructions, and that defendant smelled of alcohol and had bloodshot eyes. Defendant's girlfriend, also a passenger in the vehicle, told the officer at the scene that defendant had consumed alcohol at a party several hours before he began driving. The arresting officer, who spoke to defendant at the hospital several hours after the crash, testified that defendant still smelled of alcohol at that time and spoke with slow and deliberate speech. We therefore conclude from the totality of the circumstances, including the violent crash, defendant's appearance and manner of speech, and the odor of alcohol detected by the officers, that there was probable cause to believe that defendant was driving in violation of Vehicle and Traffic Law § 1192 (*see People v Lewis*, 124 AD3d 1389, 1390-1391

[4th Dept 2015], *lv denied* 26 NY3d 931 [2015]; *People v LeRow*, 70 AD3d 66, 71 [4th Dept 2009]; *People v Mojica*, 62 AD3d 100, 114 [2d Dept 2009], *lv denied* 12 NY3d 856 [2009]).

Defendant further contends that the results of the chemical test should have been suppressed because his limited right to counsel was violated (*see People v Smith*, 18 NY3d 544, 549-550 [2012]). Defendant failed to raise that specific contention in his motion papers or at the suppression hearing as a ground for suppressing the results of the chemical test, and thus he failed to preserve that contention for our review (*see People v Brown*, 120 AD3d 954, 955 [4th Dept 2014], *lv denied* 24 NY3d 1118 [2015]; *People v Curkendall*, 12 AD3d 710, 714 [3d Dept 2004], *lv denied* 4 NY3d 743 [2004]; *see generally People v Heidgen*, 22 NY3d 259, 280 [2013]). Even assuming, arguendo, that defendant's challenge is preserved for our review on the ground that County Court, in response to the broad contentions raised in defendant's motion papers, expressly decided that defendant had not unequivocally invoked his right to counsel (*see* CPL 470.05 [2]), we conclude that it lacks merit inasmuch as defendant "did not unequivocally inform the police of his intention to retain counsel, or that he wanted the opportunity to consult with an attorney before . . . undertaking the [blood draw]" (*People v Hart*, 191 AD2d 991, 992 [4th Dept 1993], *lv denied* 81 NY2d 1014 [1993]).

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

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**327**

**CAF 18-01863**

PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

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IN THE MATTER OF RICHARD PANEBIANCO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

TARYN PANEBIANCO, RESPONDENT-APPELLANT.

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

ELIZABETH C. FRANI, SYRACUSE, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered August 15, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioner visitation with the subject child.

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

Memorandum: Petitioner, the maternal grandfather of the subject child, commenced this proceeding seeking visitation with him, and respondent mother appeals from an order that, inter alia, granted the petition and awarded the grandfather visitation with the child. The mother contends that Family Court erred in concluding that the grandfather had standing to seek visitation pursuant to Domestic Relations Law § 72 (1). We reject that contention inasmuch as the grandfather established that "conditions exist [in] which equity would see fit to intervene" (*id.*; *see Matter of Richardson v Ludwig*, 126 AD3d 1546, 1547 [4th Dept 2015]; *see generally Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 182-183 [1991]). In particular, it is undisputed that the grandfather had a long-standing and loving relationship with the child (*see Matter of Hilgenberg v Hertel*, 100 AD3d 1432, 1433 [4th Dept 2012]; *see generally Emanuel S.*, 78 NY2d at 182) and, contrary to the mother's contention, the record supports the court's determination that the mother's proffered objections to visitation lacked a sound basis and were primarily pretextual (*see Matter of Kenyon v Kenyon*, 251 AD2d 763, 764 [3d Dept 1998]). Finally, contrary to the mother's implicit contention, we conclude that the record supports the court's determination that visitation is in the best interests of the child (*see Richardson*, 126 AD3d at 1547).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**381**

**KA 17-00203**

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS A. NORMAN, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (MARILYN FIORE-LEHMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Chautauqua County Court (Michael M. Mohun, A.J.), rendered September 29, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]). We reject defendant's contention that County Court erred in refusing to suppress identification testimony arising from a showup procedure during which defendant was identified by a resident of the apartment where the burglary was committed. We conclude that the showup procedure, which was conducted within two hours of the burglary, was " 'reasonable under the circumstances' " (*People v Cedeno*, 27 NY3d 110, 123 [2016], *cert denied* — US — , 137 S Ct 205 [2016]; *see People v Brisco*, 99 NY2d 596, 597 [2003]; *People v Duuvon*, 77 NY2d 541, 543 [1991]). The showup procedure was "part of a continuous, ongoing police investigation . . . , which spanned two [municipalities] and involved multiple law enforcement agencies, due in large part to the flight of defendant" (*People v Johnson*, 167 AD3d 1512, 1513 [4th Dept 2018], *lv denied* 33 NY3d 949 [2019]), and was conducted "as soon as practicable following defendant's apprehension" (*People v August*, 33 AD3d 1046, 1048 [3d Dept 2006], *lv denied* 8 NY3d 878 [2007]). Moreover, the showup procedure was not rendered unduly suggestive by the fact that defendant was handcuffed (*see People v Stanley*, 108 AD3d 1129, 1130 [4th Dept 2013], *lv denied* 22 NY3d 959 [2013]), or by a police officer's comments to the witness inasmuch as those comments " 'merely conveyed what a witness of ordinary intelligence would have expected under the circumstances' " (*August*, 33 AD3d at 1049; *see People v Williams*, 15 AD3d 244, 246 [1st Dept 2005], *lv denied* 5 NY3d 771 [2005]).

Defendant contends that the court erred in rejecting his *Batson* challenge with respect to the People's exercise of a peremptory strike on a prospective juror. We reject that contention. The court's determination whether a proffered race-neutral reason for striking a prospective juror is pretextual is accorded great deference on appeal (*see People v Linder*, 170 AD3d 1555, 1558 [4th Dept 2019], *lv denied* 33 NY3d 1071 [2019]; *People v Larkins*, 128 AD3d 1436, 1441-1442 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016]). Here, the People's proffered reason was that the prospective juror stated during voir dire that she had been the victim of a burglary and that she was dissatisfied with the non-resolution of her case. We conclude that the proffered reason was sufficient to satisfy "the People's 'quite minimal' burden of providing a race-neutral reason" for exercising a peremptory strike (*People v Herrod*, 174 AD3d 1322, 1323 [4th Dept 2019], *lv denied* 34 NY3d 951 [2019]; *see generally Linder*, 170 AD3d at 1558).

We also reject the contention of defendant that the court erred in denying his challenges for cause with respect to three prospective jurors. "CPL 270.20 (1) (b) provides that a party may challenge a potential juror for cause if the juror 'has a state of mind that is likely to preclude him [or her] from rendering an impartial verdict based upon the evidence adduced at the trial' " (*People v Harris*, 19 NY3d 679, 685 [2012]). Here, the three prospective jurors did not discuss any experiences or express any opinions that revealed any potential for bias or cast any serious doubt on their ability to render an impartial verdict, and thus they did not evince a state of mind that was "likely to preclude [them] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]; *cf. People v Rice* [appeal No. 1], 199 AD2d 1054, 1054 [4th Dept 1993]).

We also reject defendant's contention that the court's refusal to discharge two sworn jurors deprived defendant of his right to a fair and impartial jury. In order to discharge a sworn juror, the court "must be convinced that the juror's knowledge will prevent [him or] her from rendering an impartial verdict" (*People v Buford*, 69 NY2d 290, 299 [1987]). Here, upon learning of potential issues with the two sworn jurors, the court and defense counsel questioned those two jurors and elicited responses that they would be fair and impartial. On this record, we are unable to conclude that the court "could have been 'convinced' . . . , based on any unequivocal responses of the juror[s], that the juror[s] [were] 'grossly unqualified to serve in the case' " (*People v Telehany*, 302 AD2d 927, 928 [4th Dept 2003]; *see* CPL 270.35 [1]).

Defendant correctly concedes that he failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as he presented evidence after the court denied his motion for a trial order of dismissal at the close of the People's case, and he failed to renew his motion at the close of the proof (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Swail*, 19 AD3d 1013, 1013 [4th Dept 2005],

*lv denied* 6 NY3d 759 [2005], *reconsideration denied* 6 NY3d 853 [2006]). In any event, that contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject the further contention of defendant that he was denied effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]). " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]). Defendant failed to meet that burden. The alleged instances of ineffective assistance concerning defense counsel's failure to make various objections or to seek curative instructions are "based largely on [defendant's] hindsight disagreements with . . . trial strategies, and defendant failed to meet his burden of establishing the absence of any legitimate explanations for those strategies" (*People v Rogers*, 70 AD3d 1340, 1341 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010] [internal quotation marks omitted]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**385**

**KA 16-01315**

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERMES A. ALMODOVAR, DEFENDANT-APPELLANT.

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TULLY RINCKEY PLLC, ROCHESTER (ZACHARY T. RUETZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered June 15, 2016. The judgment convicted defendant upon a jury verdict of attempted criminal possession of a weapon in the second degree and menacing 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 attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and menacing in the second degree (§ 120.14 [1]), arising from his possession of a firearm and his confrontation with the father of a child regarding a prior incident that occurred less than a week before in which defendant purportedly tried to remove the child from her preschool when he had no authorization to do so. We affirm.

Defendant contends that Supreme Court erred in refusing to sever the counts of the indictment relating to the confrontation from a count charging him with attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20)—of which he was ultimately acquitted—relating to the prior incident. We reject that contention. Where counts of an indictment are properly joined because "either proof of the first offense would be material and admissible as evidence in chief upon a trial of the second, or proof of the second would be material and admissible as evidence in chief upon a trial of the first" (CPL 200.20 [2] [b]), the trial court has no discretion to sever counts pursuant to CPL 200.20 (3) (*see People v Bongarzone*, 69 NY2d 892, 895 [1987]; *People v Lane*, 56 NY2d 1, 7 [1982]). Here, we conclude that the counts were properly joined pursuant to CPL 200.20 (2) (b), and thus the court "lacked statutory authority to grant

defendant's [severance] motion" (*People v Murphy*, 28 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]).

Defendant further contends that the court erred in refusing to suppress his inculpatory statements to the police because those statements were not voluntarily made. We conclude that defendant's contention lacks merit. Here, in light of the totality of the circumstances, the People proved beyond a reasonable doubt that the statements "were not products of coercion but rather were the result of a free and unconstrained choice by defendant" (*People v Buchanan*, 136 AD3d 1293, 1294 [4th Dept 2016], *lv denied* 27 NY3d 1129 [2016] [internal quotation marks omitted]; *see People v Thomas*, 22 NY3d 629, 641 [2014]; *People v Clyburn-Dawson*, 128 AD3d 1350, 1351 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]).

We reject defendant's additional contention that the identification procedures used by the police, i.e., photo arrays and a showup by which he was identified as the perpetrator, were unduly suggestive. Contrary to defendant's contention with respect to the photo array procedures, the court properly determined that "the subtle differences in the photographs . . . were not 'sufficient to create a substantial likelihood that the defendant would be singled out for identification' " (*People v Lee*, 96 NY2d 157, 163 [2001], quoting *People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). With respect to the showup identification procedure, the court properly determined that the People met their initial burden of establishing "the reasonableness of the police conduct and the lack of any undue suggestiveness" and that defendant failed to meet his ultimate burden of establishing that the showup identification procedure was unduly suggestive (*Chipp*, 75 NY2d at 335).

Finally, we reject defendant's challenge to the legal sufficiency of the evidence supporting the conviction of attempted criminal possession of a weapon in the second degree. Although there is no dispute that the firearm at issue was not operable, "it is well settled that a defendant may be convicted of attempted criminal possession of a weapon when he or she believes that the firearm is operable" (*People v Boyd*, 153 AD3d 1608, 1609 [4th Dept 2017], *lv denied* 30 NY3d 1103 [2018]; *see Matter of Lavar D.*, 90 NY2d 963, 965 [1997]; *People v Saunders*, 85 NY2d 339, 342 [1995]). Here, defendant's statements to the police established that he was aware that the father of the child was looking for him as a result of the prior incident at the preschool, which made defendant scared and galvanized him to purchase a firearm from a man on a dead-end street; that the firearm was loaded with a bullet; and that defendant did not examine the firearm and determine its inoperability until after subsequently returning home. Moreover, the firearms examiner testified that the firearm was inoperable due to a missing firing pin, which was not readily apparent from merely looking at the firearm. Contrary to defendant's contention, we conclude that such evidence is sufficient " 'to support the inference that [defendant] believed and intended the firearm to be operable' " when he purchased and possessed it before returning home (*Boyd*, 153 AD3d at 1609; *see Lavar D.*, 90

NY2d at 965).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**388**

**CAF 18-02326**

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

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IN THE MATTER OF ASHLEY M. WANDERSEE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID E. PRETTO, RESPONDENT-APPELLANT.

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

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Appeal from an order of the Family Court, Monroe County (Kristin F. Splain, R.), entered October 25, 2018 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

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

Memorandum: Respondent appeals from an order of protection issued upon a finding that he committed the family offense of harassment in the second degree under Penal Law § 240.26 (3). We affirm.

Contrary to respondent's contention, the record supports Family Court's determination that petitioner met her burden of establishing by a fair preponderance of the evidence that respondent committed the family offense of harassment in the second degree (*see* Family Ct Act §§ 812 [1]; 832; Penal Law § 240.26 [3]). A person commits harassment in the second degree under Penal Law § 240.26 (3) when he or she, "with intent to harass, annoy or alarm another person[,] engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose" (*see Matter of Rohrback v Monaco*, 173 AD3d 1774, 1775 [4th Dept 2019]). Although one "isolated incident" is insufficient to establish such a course of conduct (*People v Chasserot*, 30 NY2d 898, 899 [1972]; *see People v Valerio*, 60 NY2d 669, 670 [1983]), "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose can support such a finding" (*Matter of Amber JJ. v Michael KK.*, 82 AD3d 1558, 1560 [3d Dept 2011] [internal quotation marks omitted]).

Petitioner included two incidents in her family offense petition. In the first, she alleged that she found respondent hiding in her bedroom closet while she was getting dressed in that room. In the

second, petitioner alleged that respondent secretly placed a cell phone in petitioner's bedroom with the camera aimed at her bed, and monitored petitioner from his laptop in a nearby room. We conclude that the evidence at the hearing established that respondent committed the conduct alleged in the petition, and that respondent's course of conduct in doing so evidenced a continuity of purpose to harass, annoy or alarm petitioner (*see generally Amber JJ.*, 82 AD3d at 1560). Although respondent contends that the incident where he hid in petitioner's closet was a joke or that he merely intended to startle petitioner, based on respondent's "conduct as well as the surrounding circumstances," the court had a reasonable basis to infer that respondent's intent was to harass, annoy or alarm petitioner (*People v Kelly*, 79 AD3d 1642, 1642 [4th Dept 2010], *lv denied* 16 NY3d 832 [2011] [internal quotation marks omitted]; *see generally Matter of Kristine Z. v Anthony C.*, 21 AD3d 1319, 1320 [4th Dept 2005], *lv dismissed* 6 NY3d 772 [2006]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**390**

**CA 19-02050**

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

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IN THE MATTER OF AARON LOWN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION AND TINA STANFORD, CHAIRPERSON, NEW YORK STATE BOARD OF PAROLE, RESPONDENTS-RESPONDENTS.

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KAREN MURTAGH, EXECUTIVE DIRECTOR, PRISONERS' LEGAL SERVICES OF NEW YORK, BUFFALO (ANDREW STECKER OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

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Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Dennis Ward, J.), entered November 4, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 in which he sought reinstatement of the determination of the New York State Board of Parole (Board) that granted him a merit time parole release date. We affirm.

Petitioner is serving an indeterminate sentence of imprisonment in the custody of the Department of Corrections and Community Supervision (DOCCS). Based on petitioner's positive institutional record and program performance, DOCCS granted him a merit time allowance, which made him eligible for discretionary parole release by the Board on a date earlier than the expiration of his minimum sentence (*see* Penal Law § 70.40 [1] [a] [i]; 7 NYCRR 280.5 [a]). As a result of the merit time allowance, petitioner was interviewed by the Board, which thereafter granted him parole release scheduled for his merit time eligibility date. Two weeks later, however, a misbehavior report was filed alleging that petitioner had violated the conditions of the temporary work release program in which he was participating. Following a tier II disciplinary hearing, petitioner was found guilty of violating his temporary release conditions (7 NYCRR 270.2 [B] [9] [v]) and absconding (7 NYCRR 270.2 [B] [9] [vi]), and a period of keeplock confinement was imposed as a penalty. After petitioner was released from keeplock confinement, DOCCS informed him that he would

not be released on his merit time eligibility date and would not be eligible for release to parole until the expiration of his minimum sentence.

Additional documents submitted by respondents on appeal, which we will consider inasmuch as they fall within exceptions to the general rule prohibiting consideration of documents outside of the record (*see Crawford v Merrill Lynch, Pierce, Fenner & Smith*, 35 NY2d 291, 299 [1974]; *Matter of Smith v Cashaw*, 129 AD3d 1551, 1551 [4th Dept 2015]; *Matter of Chloe Q. [Dawn Q.—Jason Q.]*, 68 AD3d 1370, 1371 [3d Dept 2009]), establish that, after petitioner commenced this proceeding, DOCCS revoked his merit time allowance (*see* 7 NYCRR 280.4 [b] [4]). DOCCS subsequently issued a notice of temporary suspension of petitioner's merit time parole release date (*see* 9 NYCRR 8002.5 [b] [1]) and a rescission report indicating that petitioner no longer met the criteria for merit time parole release (*see* 9 NYCRR 8002.5 [b] [3]). In addition, after Supreme Court dismissed the petition in this proceeding, the Board issued a disposition rescinding its prior determination to grant petitioner parole release on his merit time eligibility date.

Petitioner contends that DOCCS acted in excess of its jurisdiction by unilaterally rescinding his merit time parole release date. We agree with respondents, however, that petitioner's contention has been rendered moot because the additional documents establish that the Board, not DOCCS, rescinded its previous determination to grant petitioner a merit time parole release date (*see Matter of Alexander v New York State Bd. of Parole*, 175 AD2d 526, 527 [3d Dept 1991], *lv denied* 78 NY2d 863 [1991]; *see generally Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 811 [2003], *cert denied* 540 US 1017 [2003]). We conclude that the exception to the mootness doctrine does not apply here (*see generally Saratoga County Chamber of Commerce*, 100 NY2d at 811-812; *Wisholek v Douglas*, 97 NY2d 740, 742 [2002]).

Petitioner further contends that the Board acted contrary to law and failed to perform a duty enjoined upon it by law, and also violated his right to due process, by rescinding his merit time parole release date without conducting a hearing. We agree with petitioner that, contrary to respondents' contention, this issue is ripe for judicial review (*see generally Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 518-520 [1986], *cert denied* 479 US 985 [1986]). We also note that respondents have not raised any contention that petitioner failed to exhaust his administrative remedies (*see Matter of Galunas v Annucci*, 166 AD3d 1182, 1182 n [3d Dept 2018]) and, in any event, such exhaustion is not required where " 'an administrative challenge would be futile or where the issue to be determined is purely a question of law' " (*Matter of Police Benevolent Assn. of N.Y. State, Inc. v State of New York*, 150 AD3d 1375, 1376 [3d Dept 2017]; *see Coleman v Daines*, 79 AD3d 554, 560 [1st Dept 2010], *affd* 19 NY3d 1087 [2012]; *Matter of Organization to Assure Servs. for Exceptional Students v Ambach*, 56 NY2d 518, 521-522 [1982]), both of which apply here.

On the merits, however, we agree with respondents that neither the statutory and regulatory scheme, nor principles of constitutional due process, required the Board to conduct a rescission hearing under the circumstances herein. "When granted, the effect of [a] merit time allowance is to accelerate [an inmate's] initial parole hearing date . . . [,] which could result in [the inmate's] 'possible release on parole at a date computed by subtracting the merit time allowance from [the] . . . parole eligibility date' " (*Matter of Erdheim v Dillard*, 290 AD2d 642, 643 [3d Dept 2002], *lv denied* 97 NY2d 612 [2002], quoting 7 NYCRR 280.5 [a]). If the Board grants the inmate parole following that hearing, the inmate will be released to parole supervision on the merit time eligibility date (*see* 7 NYCRR 280.5 [a], [b]). An inmate, however, has no right to demand or require a merit time allowance, and the decision of DOCCS "as to the granting, withholding, forfeiture, cancellation or restoration of such allowances shall be final and shall not be reviewable if made in accordance with law" (Correction Law § 803 [4]). Indeed, as relevant here, "[a] merit time allowance may be revoked at any time prior to an inmate's release on parole if the inmate commits a serious disciplinary infraction" (7 NYCRR 280.4 [b] [4]).

Here, after the finding that petitioner committed the serious disciplinary infraction of absconding (7 NYCRR 280.2 [b] [2] [x]; *see* 7 NYCRR 270.2 [B] [9] [vi]), DOCCS revoked his merit time allowance in accordance with law (*see* 7 NYCRR 280.4 [b] [2], [4]; *see also* Correction Law § 803 [4]) thereby rendering him *statutorily ineligible* for discretionary release to parole prior to the expiration of his minimum indeterminate sentence (*see* Penal Law § 70.40 [1] [a] [i]; Correction Law § 803 [1] [d]). In the absence of such eligibility, the statutory predicate for the Board's previous grant of parole release on a date earlier than petitioner's minimum indeterminate sentence was eliminated by operation of law (*see* Penal Law § 70.40 [1] [a] [i]; *see also Matter of Marciano v Goord*, 38 AD3d 217, 218-219 [1st Dept 2007]; *Matter of Carrasco v Travis*, 2002 WL 34340294, *1 [Sup Ct, Oneida County 2002]). Without a merit time allowance, petitioner becomes eligible for parole release on expiration of his minimum indeterminate sentence date only (*see* Penal Law § 70.40 [1] [a] [i]) and the Board lacks discretionary authority to reinstate petitioner's original merit time release date, thereby obviating any need for an evidentiary rescission hearing (*cf.* 9 NYCRR 8002.5).

Finally, inasmuch as a merit time allowance is a statutory and regulatory predicate to petitioner's *eligibility* for early parole release from his indeterminate sentence of imprisonment (*see* Penal Law § 70.40 [1] [a] [i]; Executive Law § 259-i [2] [a] [i]; 7 NYCRR 280.1) and petitioner has no constitutionally-protected liberty interest in a merit time allowance itself (*see Matter of Scarola v Goord*, 266 AD2d 598, 599 [3d Dept 1999], *lv denied* 94 NY2d 760 [2000]), we conclude that the discretionary grant of a *merit time* parole release date by the Board provided petitioner with a legitimate expectation of early release that was contingent upon his remaining eligible for release on the date calculated by reducing his minimum sentence by a *granted*

merit time allowance (Penal Law § 70.40 [1] [a] [i]). Thus, the Board did not violate petitioner's right to due process when it rescinded his merit time parole release date without a hearing on the ground that his merit time allowance had been revoked (*see Carrasco*, 2002 WL 34340294 at *1).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**393**

**CA 19-00719**

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

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IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF DAVID G., CONSECUTIVE NO. 153078, FROM CENTRAL
NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL
HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, RESPONDENT-RESPONDENT.

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SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BENJAMIN D. AGATA OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County (Gerald J. Popeo, A.J.), entered February 19, 2019 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, denied that part of the motion of petitioner seeking a change of venue.

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

Memorandum: In this proceeding pursuant to Mental Hygiene Law article 10, petitioner appeals from an order that, inter alia, denied that part of his motion seeking a change of venue to Suffolk County for the convenience of witnesses (*see generally Matter of Tyrone D. v State of New York*, 24 NY3d 661, 666 [2015]). We affirm.

Petitioner was previously determined to be a dangerous sex offender requiring confinement and was committed to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*), and he is currently confined at the Central New York Psychiatric Center in Oneida County. The court may change the venue of an annual review proceeding " 'to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the [confined sex offender]' " (*Tyrone D.*, 24 NY3d at 666, quoting § 10.08 [e]). "To establish good cause for a change of venue, the party seeking such relief must set forth specific facts sufficient to demonstrate a sound basis for the transfer . . . Conclusory statements unsupported by facts are insufficient to warrant a change of venue" (*Matter of State of New York v Williams*, 92 AD3d 1271, 1271-1272 [4th Dept 2012]). Here, petitioner failed to make a sufficient factual or evidentiary showing that a transfer was necessary for the convenience

of the proposed witnesses (*see id.* at 1272).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**409**

**CAF 18-02176**

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

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IN THE MATTER OF MARIA M.
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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KRISTIN M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 1, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her daughter on the ground of permanent neglect. Contrary to the mother's contention, Family Court properly determined that she failed to plan for the future of the child (*see* Social Services Law § 384-b [7] [a]). Although the mother completed parenting classes and maintained contact with the child, she did not complete her treatment for mental health and substance abuse issues, and she continued to have positive toxicology screens for cocaine. We conclude that the mother "did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Joshua W., Jr. [Joshua W., Sr.]*, 159 AD3d 1589, 1590 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307 [4th Dept 2010], *lv denied* 14 NY3d 709 [2010]).

Contrary to the further contention of the mother, the evidence supports the court's determination that termination of her parental rights is in the best interests of the child, and the court did not abuse its discretion in refusing to issue a suspended judgment (*see generally Matter of Carl B. [Crystale L.]*, 178 AD3d 1456, 1457 [4th

Dept 2019]). The steps taken by the mother to address her mental health and substance abuse issues were "not sufficient to warrant any further prolongation of the child's unsettled familial status" (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525 [4th Dept 2013]; *see also Matter of Kellcie NN. [Sarah NN.]*, 85 AD3d 1251, 1252 [3d Dept 2011]), particularly in light of the mother's continuing criminal conduct. Additionally, although the record established that the child had a bond with the mother, it also established that the child had a bond with her foster parents. Under the totality of the circumstances, we conclude that there is no basis to disturb the court's determination to terminate the mother's parental rights (*see Matter of Michaellica W. [Michael W.]*, 166 AD3d 425, 426 [1st Dept 2018]; *Matter of Noah V.P. [Gino P.]*, 96 AD3d 1472, 1473-1474 [4th Dept 2012]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**410**

**CAF 18-02267**

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

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IN THE MATTER OF MARIA M.
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ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

KRISTIN M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

NATALIE M. STUTZ, BUFFALO, FOR PETITIONER-RESPONDENT.

JESSICA L. VESPER, BUFFALO, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 16, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, approved the permanency goal of adoption.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of April C.*, 31 AD3d 1200, 1201 [4th Dept 2006]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**411**

**CAF 19-00538**

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

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IN THE MATTER OF AARON E. ALWARDT,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIN L. CONNOLLY, RESPONDENT-RESPONDENT.

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MARY S. HAJDU, LAKEWOOD, FOR PETITIONER-APPELLANT.

BRIDGET L. FIELD, ROCHESTER, FOR RESPONDENT-RESPONDENT.

DAVID J. PAJAK, ALDEN, ATTORNEY FOR THE CHILD.

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Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered February 27, 2019 in a proceeding pursuant to Family Court Act article 6. The order, insofar as appealed from, denied the amended petition to modify a prior order of custody and visitation and ordered that respondent have primary residential custody of the subject child.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the amended petition is granted, and the matter is remitted to Family Court, Genesee County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner father, as limited by his brief, appeals from that part of an order that effectively denied his amended petition seeking to modify a prior order of custody and visitation by awarding him primary residential custody of the subject child. Initially, contrary to the father's contention, Family Court determined that the "father has established a sufficient change of circumstances to warrant a review of the [existing] custody provisions," and therefore he is not aggrieved by that determination (*see generally* CPLR 5511; *Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]; *Matter of Toles v Radle*, 172 AD3d 1945, 1946 [4th Dept 2019]). We agree with the father and the Attorney for the Child (AFC), however, that the court erred in denying the amended petition.

It is well settled that "a court's determination regarding custody and visitation issues, based upon a 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" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [4th Dept 2011] [internal quotation marks omitted]).

" 'Such deference is not warranted, however, where the custody determination lacks a sound and substantial basis in the record' " (*Matter of Bryan K.B. v Destiny S.B.*, 43 AD3d 1448, 1449 [4th Dept 2007]). We agree with the father and the AFC that the court's custody determination lacks the requisite sound and substantial basis in the record (*see Matter of Gilman v Gilman*, 128 AD3d 1387, 1388 [4th Dept 2015]; *see generally Fox v Fox*, 177 AD2d 209, 211-212 [4th Dept 1992]).

The court here failed to adequately address the "factors that could impact the best interests of the child, including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of each parent to provide for the child's emotional and intellectual development and the wishes of the child" (*Marino*, 90 AD3d at 1695). Nevertheless, our authority in custody determinations is as broad as that of Family Court (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]), and "where, as here, the record is sufficient for this Court to make a best interests determination . . . , we will do so in the interests of judicial economy and the well-being of the child" (*Bryan K.B.*, 43 AD3d at 1450). Upon our review of the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174 [1982]; *Marino*, 90 AD3d at 1695), we conclude that it is in the best interests of the child to award the father primary residential custody.

Here, the only factor that weighs in favor of respondent mother is the existing custody arrangement, which had been in place for a lengthy period of time (*see generally Obey v Degling*, 37 NY2d 768, 770 [1975]; *Gary D.B. v Elizabeth C.B.*, 281 AD2d 969, 970 [4th Dept 2001]). Although the subject child has a brother at the mother's house, that is not a factor that favors the mother because "both parties have other children, [and thus] an award of [primary residential] custody to either party would necessarily separate the child at issue from some of her siblings" (*Matter of Brown v Marr*, 23 AD3d 1029, 1030 [4th Dept 2005]).

The remaining factors favor awarding primary residential custody to the father. During the time that the mother had primary residential custody, the child performed poorly at school and experienced a significant increase in her depression (*see Matter of McGee v McGee*, 180 AD3d 1342, 1343 [4th Dept 2020]). Additionally, due to the mother's work schedule, the child was required to arise before 5:00 a.m. and to thereafter be taken to a relative's house, where the child stayed for two hours before going to school. Also, the mother is admittedly unable to assist the child with school work, or to schedule or attend the child's medical and mental health counseling appointments. The father, in contrast, is able to provide a more stable home for the child and is currently helping the child with those measures.

Furthermore, the child expressed a desire to reside with the father. Although the "[c]ourt is . . . not required to abide by the wishes of a child to the exclusion of other factors in the best

interests analysis" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018] [internal quotation marks omitted]), we conclude that "the wishes of the [14]-year-old child are . . . entitled to great weight where, as here, the age and maturity [of the child] would make [her] input particularly meaningful" (*Matter of VanDusen v Riggs*, 77 AD3d 1355, 1356 [4th Dept 2010] [internal quotation marks omitted]; *see Matter of Aronica v Aronica*, 151 AD3d 1605, 1606 [4th Dept 2017]). In addition, although the position of the AFC is not determinative, it is a factor to be considered (*see Matter of Linda AA. v Robert AA.*, 174 AD3d 1082, 1083 [3d Dept 2019], *lv denied* 34 NY3d 904 [2019]; *Matter of Lyons v Sepe*, 163 AD3d 567, 569 [2d Dept 2018]; *Matter of Wright v Dunham*, 13 AD3d 1138, 1138 [4th Dept 2004]), and the AFC here has supported the child's wish to live with the father both in Family Court and on appeal.

Consequently, we reverse the order insofar as appealed from, grant the amended petition by awarding the father primary residential custody of the child and visitation to the mother, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**421**

**KA 16-01617**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MORRIS, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered May 9, 2016. The appeal was held by this Court by order entered October 4, 2019, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (176 AD3d 1635 [4th Dept 2019]). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [viii]; [b]) and assault in the first degree (§ 120.10 [1]). We previously held the case, reserved decision and remitted the matter to County Court for a ruling on that part of defendant's postplea pro se motion seeking substitution of counsel (*People v Morris*, 176 AD3d 1635, 1636 [4th Dept 2019]).

Contrary to defendant's contention, we conclude that the court, upon remittal, properly denied the motion insofar as it sought substitution of counsel and did not err in failing to make a minimal inquiry into defendant's objections with respect to defense counsel. Defendant "failed to proffer specific allegations of a 'seemingly serious request' that would require the court to engage in a minimal inquiry" (*People v Porto*, 16 NY3d 93, 100 [2010]; *see People v Konovalchuk*, 148 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]). Indeed, defendant's allegations that defense counsel "tricked" him into pleading guilty are belied by the record (*see People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

We reject defendant's further contention that the court should have granted his motion to withdraw his plea. It is well settled that

" '[p]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Leach*, 119 AD3d 1429, 1430 [4th Dept 2014], *lv denied* 24 NY3d 962 [2014]). Here, defense counsel's misstatements to defendant regarding his sentence are not, standing alone, " 'dispositive' of the issue whether defendant's plea was knowingly and voluntarily entered" (*People v Johnson*, 24 AD3d 1259, 1259 [4th Dept 2005], *lv denied* 6 NY3d 814 [2006]; *see People v Bryant*, 1 AD3d 966, 966-967 [4th Dept 2003]). The record establishes that the court explained defendant's sentence during the plea colloquy, and defendant acknowledged that he was entering the plea knowingly and voluntarily. Defendant's related claims of coercion and trickery are unsupported by the record (*see Leach*, 119 AD3d at 1430; *People v Campbell*, 62 AD3d 1265, 1266 [4th Dept 2009], *lv denied* 13 NY3d 795 [2009]). Additionally, while the record reflects that defendant had a history of requiring speech and language therapy, as well as behavioral issues, there is nothing in the record to suggest that defendant " 'lacked the capacity to understand the plea proceeding' " (*People v Smith*, 37 AD3d 1141, 1142 [4th Dept 2007], *lv denied* 9 NY3d 851 [2007], *reconsideration denied* 9 NY3d 926 [2007]; *see People v Smith*, 5 AD3d 1095, 1095 [4th Dept 2004], *lv denied* 2 NY3d 807 [2004]; *see also People v Scott*, 144 AD3d 1597, 1598 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]). The record establishes that defendant was "examined and found to be competent prior to the plea proceeding and that the plea colloquy was thorough" (*People v Nudd*, 53 AD3d 1115, 1115 [4th Dept 2008], *lv denied* 11 NY3d 834 [2008]). We therefore conclude that defendant "knowingly and intelligently, with neither confusion nor coercion present . . . , and with a full opportunity to assess the advantages and disadvantages of a plea versus a trial . . . , made his election" (*People v Johnson*, 122 AD3d 1324, 1325 [4th Dept 2014] [internal quotation marks omitted]).

To the extent that defendant's contention that he was denied effective assistance of counsel survives his guilty plea, we conclude that it lacks merit. 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 Oliver* [appeal No. 2], 162 AD3d 1722, 1723 [4th Dept 2018]; *see Campbell*, 62 AD3d at 1266). Contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe. Finally, we have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**426**

**KA 18-01369**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOLIDAY JOHNSON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered May 14, 2018. The judgment convicted defendant upon his plea of guilty of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We agree with the People that the record establishes that defendant validly waived his right to appeal. 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 Kastenhuber*, 180 AD3d 1333, 1334 [4th Dept 2020] [internal quotation marks omitted]; *see generally People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *4-6 [2019]). Contrary to defendant's contention, the court was "not required to engage in any particular litany in order to obtain a valid waiver of the right to appeal . . . , and the waiver is not invalid on the ground that the court did not specifically inform defendant that his general waiver of the right to appeal encompassed the court's suppression ruling[]" (*People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019] [internal quotation marks omitted]). Moreover, we conclude that the court did not conflate defendant's waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see generally People v Bradshaw*, 18 NY3d 257, 264 [2011]; *People v Sallard*, 175 AD3d 1839, 1839 [4th Dept 2019]).

Defendant's "valid waiver of the right to appeal forecloses [his] challenges to the court's suppression ruling" (*Kastenhuber*, 180 AD3d at 1334; *see also People v Kemp*, 94 NY2d 831, 833 [1999]). The valid

waiver also "forecloses his challenge to the severity of the sentence" (*People v Sanders*, 180 AD3d 1327, 1328 [4th Dept 2020]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**427**

**KA 17-00964**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH J. BRADBURY, DEFENDANT-APPELLANT.

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LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered April 7, 2017. The judgment convicted defendant upon a jury verdict of driving while intoxicated, a class E felony (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the facts, the indictment is dismissed, and the matter is remitted to Supreme Court, Ontario County, for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of two counts of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [2], [3]; 1193 [1] [c] [i] [A]). We agree with defendant that the verdict is against the weight of the evidence, and we therefore reverse the judgment and dismiss the indictment.

At approximately 6:00 a.m. on the day in question, a passing motorist observed defendant outside of her car, which was stuck in the brush 20 to 30 feet off the roadway. The motorist stopped to offer assistance, but defendant said that she was all right and did not want the motorist to call 911. She said that another person had been driving the car when the car crashed and had fled the scene. The motorist called 911.

A State Police investigator responded to the scene and spoke with defendant. Defendant stated that she had met an individual named Paul at a nearby bar, where she drank three glasses of wine, and that they left the bar together at approximately 3:00 a.m. She further stated that Paul drove the car and, after crashing the car, he fled the scene on foot. She described Paul only as being approximately 5 feet 10

inches tall. The investigator performed field sobriety tests on defendant and concluded that defendant was intoxicated. A subsequent chemical test measured defendant's blood alcohol content at .10%.

A review of the weight of the evidence requires us to first determine whether an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Where an acquittal would not have been unreasonable, we "must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*id.*). We conclude that an acquittal would not have been unreasonable in this case and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.* at 349), we further conclude that the jury was not justified in finding defendant guilty beyond a reasonable doubt.

Defendant's assertion that the car had been operated by an individual named Paul was not inconsistent with the evidence at trial. Although defendant's request that the passing motorist not call 911 constituted evidence of consciousness of guilt, it is well settled that consciousness of guilt evidence is a "weak" form of evidence (*People v Bennett*, 79 NY2d 464, 470 [1992]). The failure of defendant to provide a more detailed description of Paul did little to disprove defendant's hypothesis of innocence, given the general nature of the questions posed to her and their emphasis on contact information for Paul that defendant reasonably was not in a position to provide. Finally, the testimony of the investigator that the position of the driver's seat in the car was inconsistent with the car being driven by someone who is 5 feet 10 inches tall, as opposed to defendant's height of 5 feet 7 inches, may have been persuasive if there were other such circumstantial evidence, but no other evidence existed here. Giving the evidence the weight it should be accorded, therefore, we find that the People failed to establish, beyond a reasonable doubt, that defendant operated the car that had gone off the roadway (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's remaining contentions are academic in light of our determination.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**430**

**KA 15-00127**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARVIN E. SPENCER, DEFENDANT-APPELLANT.

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KIMBERLY J. CZAPRANSKI, SCOTTSVILLE, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered October 28, 2014. The judgment convicted defendant, upon a nonjury verdict, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him, upon a nonjury verdict, of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that he was denied effective assistance of counsel based on the alleged failure of his attorney to pursue a favorable plea offer. We reject that contention. The record establishes that, although defense counsel sought a plea offer on defendant's behalf, the People refused to extend any offers due to defendant's criminal history. Thus, a favorable plea offer was not an option (*see generally People v Wheeler*, 159 AD3d 1425, 1425 [4th Dept 2018], *lv denied* 31 NY3d 1123 [2018]). The record further demonstrates that defendant indicated in recorded jail calls that he was not willing to accept any plea offers from the People. We thus conclude that defendant failed to meet his "burden to demonstrate that a plea offer was made, that defense counsel failed to inform him of that offer, and that he would have been willing to accept the offer" (*People v Fernandez*, 5 NY3d 813, 814 [2005] [internal quotation marks omitted]).

We also reject defendant's contention that he was deprived of effective assistance of counsel because his attorney objected to the People's request for County Court to consider assault in the second degree (Penal Law § 120.05 [2]) as a lesser included offense of assault in the first degree (§ 120.10 [1]). To prevail on a claim of ineffective assistance of counsel, "it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71

NY2d 705, 709 [1988]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). Here, even assuming, arguendo, that there is a reasonable view of the evidence to support a finding that defendant intentionally caused physical injury but not serious physical injury to the victim, we conclude that defendant failed to meet that burden (*see People v Hicks*, 110 AD3d 1488, 1489 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Defense counsel pursued the affirmative defense of justification, and the record demonstrates that defense counsel's objection to the court's consideration of "any lesser[]" included offenses was part of "an acceptable all-or-nothing defense strategy" (*People v Guarino*, 298 AD2d 937, 938 [4th Dept 2002], *lv denied* 98 NY2d 768 [2002] [internal quotation marks omitted]; *see People v Lane*, 60 NY2d 748, 750 [1983]; *People v McFadden*, 161 AD3d 1570, 1571 [4th Dept 2018], *lv denied* 31 NY3d 1150 [2018]). Defense counsel could have reasonably determined, under the circumstances, that the court's consideration of the lesser included offense of assault in the second degree would have detracted its attention from the central theory of the defense case, i.e., that defendant was legally justified in stabbing the victim, and instead focused the court's attention on the seriousness of the injuries suffered by the victim.

We note, in any event, that the failure "to request a particular lesser included offense is not the type of clear cut and completely dispositive error that rises to the level of ineffective assistance of counsel" (*McFadden*, 161 AD3d at 1572 [internal quotation marks omitted]) and that defense counsel secured defendant's acquittal on three of the four charges in the indictment. Defense counsel also made appropriate pretrial motions, conducted suppression hearings, obtained a favorable *Sandoval* ruling, effectively cross-examined the People's witnesses and vigorously cross-examined and impeached the victim, successfully opposed a motion by the People during trial to impeach defendant, presented a case on behalf of defendant, and delivered a strong closing argument in which he contended that defendant was legally justified in his actions. Viewing defense counsel's representation in its totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]; *McFadden*, 161 AD3d at 1572-1573).

Defendant further contends that, notwithstanding defense counsel's objection to the court's consideration of a lesser included offense, the court erred in refusing to consider the lesser included offense because the evidence supported it. We reject that contention. First, even assuming, arguendo, that a reasonable view of the evidence supported the lesser included offense (*see People v Burnett*, 100 AD3d 1561, 1561 [4th Dept 2012]), defense counsel objected to the court's consideration of assault in the second degree as a component of his reasonable trial strategy, and we conclude that the court did not err in taking that position into account in determining the People's request (*see generally People v Green*, 56 NY2d 427, 429-430 [1982], *rearg denied* 57 NY2d 775 [1982]).

In any event, although it is undisputed that assault in the second degree is a lesser included offense of assault in the first degree (*see generally* Penal Law §§ 120.05 [2]; 120.10 [1]) inasmuch as "it is impossible to commit the greater crime without concomitantly committing the lesser offense by the same conduct" (*Burnett*, 100 AD3d at 1561 [internal quotation marks omitted]; *see Green*, 56 NY2d at 435), we conclude that there is no reasonable view of the evidence to support a finding that defendant intended to cause and did cause physical injury but not serious physical injury to the victim.

The testimony of the physician who treated the victim established that the victim sustained 20 to 30 stab wounds, at least 20 of which were to her chest, and that she was hospitalized for about 15 days. The victim suffered a collapsed lung with a tension pneumothorax, which required the insertion of a chest tube to drain the blood and reinflate the lung. She also suffered a lacerated liver that was bleeding and multiple fractures to her right hand and her left wrist and radius, which necessitated open reduction internal fixation surgery, i.e., the use of a plate and several screws to hold the bones together. There is no reasonable view of the evidence that would support a finding that the victim did not sustain "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" (Penal Law § 10.00 [10]).

We also reject defendant's contention that the court erred in denying his motion to set aside the verdict pursuant to CPL 330.30 on the ground that the alleged errors of defense counsel deprived him of effective assistance of counsel. Defendant was charged by indictment with four violent felony offenses. As discussed above, a favorable plea offer was not available to defendant due to his criminal history, which included prior violent felony convictions. Under the circumstances, the only options available to defendant were either to plead guilty to all four violent felony offenses charged in the indictment or to take the case to trial. If accepted by the court, the defense of justification would have provided a complete defense and defense counsel reasonably presented defendant's justification claim as an "all-or-nothing defense" (*Guarino*, 298 AD2d at 938 [internal quotation marks omitted]).

Finally, we have considered defendant's remaining contentions and conclude that they lack merit.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**450**

**KA 19-02097**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEYNONE D. COLE, DEFENDANT-APPELLANT.

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PAUL G. DELL, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 31, 2019. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [12]). Supreme Court properly refused to suppress both the gun recovered from the parked car in which defendant was seated and the drugs recovered from defendant's person. The police received an in-person report from a concerned citizen that two individuals matching the description of defendant and his accomplice were "up to no good" inside a specific car at a local park. Contrary to defendant's contention, such a report was a sufficient basis upon which to conduct the level one inquiry that ultimately resulted in the discovery of the contraband at issue (*see People v Habeeb*, 177 AD3d 1271, 1272-1273 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *see generally People v De Bour*, 40 NY2d 210, 223 [1976]). Defendant's related contention that the police actually conducted a level three inquiry without the requisite reasonable suspicion is unpreserved for appellate review, and we decline to review it as a matter of discretion in the interest of justice (*see People v Smith*, 145 AD3d 1631, 1632 [4th Dept 2016], *lv denied* 29 NY3d 1086 [2017]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**453**

**KA 16-01117**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW STEPHANY, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALLYSON L. KEHL-WIERZBOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered March 29, 2016. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the fifth degree, criminal possession of a controlled substance in the fifth degree and criminal sale of marihuana in the fourth 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 criminal sale of a controlled substance in the fifth degree (Penal Law § 220.31), criminal possession of a controlled substance in the fifth degree (§ 220.06 [1]), and two counts of criminal sale of marihuana in the fourth degree (§ 221.40), arising from his sale of marihuana and hallucinogenic mushrooms to a confidential informant.

We reject defendant's challenge to the legal sufficiency of the evidence. Contrary to defendant's contention, the testimony of the confidential informant was not incredible as a matter of law, i.e., his testimony was not "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Ponzo*, 111 AD3d 1347, 1348 [4th Dept 2013] [internal quotation marks omitted]; *see People v Tuff*, 156 AD3d 1372, 1374 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]). Although the confidential informant's recollection of the sales "was inconsistent in minor respects from other evidence in the record, those discrepancies were explored at trial" and presented an issue of credibility for the jury to resolve (*People v Heaney*, 75 AD3d 836, 837 [3d Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see People v Barr*, 216 AD2d 890, 890 [4th Dept 1995], *lv denied* 86 NY2d 790 [1995]), and we see no basis to disturb its credibility

determination (*see People v Wilcher*, 158 AD3d 1267, 1268 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]). In addition, the People presented the testimony of the police investigators who supervised the controlled purchases and monitored the transactions through an audio device and the testimony of a forensic chemist establishing the weight and identity of the contraband (*see Tuff*, 156 AD3d at 1374). Thus, viewing the evidence in the light most favorable to the People (*see People v Gordon*, 23 NY3d 643, 649 [2014]), we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**456**

**KA 18-01561**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAARON DUNBAR, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 21, 2017. 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: In appeal No. 1, defendant appeals 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]). In appeal No. 2, defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree (§§ 110.00, 265.03 [3]). Defendant committed the crime in appeal No. 2 while released on bail for the charges underlying appeal No. 1. Even assuming, arguendo, that defendant's waivers of the right to appeal were invalid, we nevertheless reject his challenges to the judgment in each appeal.

Contrary to defendant's contention in appeal No. 1, County Court properly refused to suppress the drugs recovered from his bag at the time of his arrest for menacing. The warrantless search of defendant's bag was permissible "because the bag was within defendant's grabbable area at the time of the *arrest* and the police reasonably believed that he was armed" given the contemporaneous reports that he had just menanced someone with a handgun (*People v Jimenez*, 22 NY3d 717, 722 [2014] [emphasis added]; *see People v Johnson*, 59 NY2d 1014, 1016 [1983], *affg* 86 AD2d 165 [1st Dept 1982];

*People v Wylie*, 244 AD2d 247, 250-251 [1st Dept 1997], *lv denied* 91 NY2d 946 [1998]; *see generally People v Gokey*, 60 NY2d 309, 312-314 [1983]). Contrary to defendant's assertion, the fact that the bag was no longer within his immediate reach at the time of the *search* is irrelevant (*see People v Smith*, 59 NY2d 454, 459 [1983]). Contrary to defendant's further assertion, the fact that neither officer testified that he feared for his safety or that of the public does not control the applicability of the search incident to arrest doctrine (*see People v Bowden*, 87 AD3d 402, 405 [1st Dept 2011], *appeal dismissed* 18 NY3d 980 [2012]; *People v Fernandez*, 88 AD2d 536, 536 [1st Dept 1982]). Indeed, it is well established that the "officer need not affirmatively testify to the exigency" when defending the search of a closed container incident to arrest (*People v Harris*, 174 AD3d 185, 189 [1st Dept 2019], *lv granted* — AD3d — [Sept. 3, 2019]).

In appeal No. 2, defendant argues that the court erred in imposing the sentence in that case consecutively to the sentence in appeal No. 1. Under Penal Law § 70.25 (2-b), a court must impose a consecutive sentence for a crime committed while the defendant was released on bail unless certain mitigating circumstances exist, and defendant contends that such mitigating circumstances exist in this case.

Preliminarily, we note that defendant's argument is actually a claim of legal error by the sentencing court in deeming itself bound by Penal Law § 70.25 (2-b) to impose a consecutive sentence in appeal No. 2 (*see People v Diaby*, 172 AD3d 473, 474 [1st Dept 2019], *lv denied* 33 NY3d 1068 [2019]; *see generally People v Garcia*, 84 NY2d 336, 336-344 [1994]). Defendant's argument is not, as he characterizes it, a claim under CPL 470.15 (6) (b) that the sentence in appeal No. 2 is unduly harsh or severe. Defendant's argument is therefore subject to the preservation requirement (*see People v Fernandez*, 251 AD2d 142, 143 [1st Dept 1998], *lv denied* 92 NY2d 924 [1998]; *see also People v Parks*, 309 AD2d 1172, 1173 [4th Dept 2003], *lv denied* 1 NY3d 577 [2003]), and there is no dispute that the argument is unpreserved. Moreover, granting relief on defendant's unpreserved sentencing argument would frustrate the People's statutory right to "an opportunity to present relevant information to assist the [sentencing] court in making th[e] determination" regarding mitigating circumstances (Penal Law § 70.25 [2-b]).

In any event, defendant's claim of legal error is without merit. "[T]he sentencing court does not have an independent obligation, in the first instance, to make findings of the presence or absence of mitigating circumstances [under Penal Law § 70.25 (2-b)], and . . . if the claim is not raised [at sentencing] then the sentences *must* be consecutive" (*People v Hamlet*, 227 AD2d 203, 204 [1st Dept 1996], *lv denied* 88 NY2d 1021 [1996] [emphasis added]).

Finally, we note that the uniform sentence and commitment form in appeal No. 2 incorrectly states that defendant was convicted of criminal possession of a weapon in the second degree, and it must be

amended to reflect defendant's conviction of *attempted* criminal possession of a weapon in the second degree (*see People v Facen*, 71 AD3d 1410, 1411 [4th Dept 2010], *lv denied* 15 NY3d 749 [2010], *reconsideration denied* 15 NY3d 804 [2010]).

Mark W. Bennett

Entered: May 1, 2020

Clerk of the Court

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

**457**

**KA 18-01562**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NAARON DUNBAR, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered July 21, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Dunbar* ([appeal No. 1] — AD3d — [May 1, 2020] [4th Dept 2020]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**458**

**KA 19-00205**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BALTAZAR, DEFENDANT-APPELLANT.

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

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

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Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered December 4, 2018. The judgment convicted defendant upon a jury verdict 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 a jury verdict of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that the conviction is based on legally insufficient evidence. We reject that contention. The People were required to prove beyond a reasonable doubt that defendant acted "[w]ith intent to prevent a peace officer . . . from performing a lawful duty" (*id.*). Here, a correction officer testified that he was returning defendant to his cell when defendant head-butted him. Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is " 'a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crime proved beyond a reasonable doubt' " (*People v Danielson*, 9 NY3d 342, 349 [2007]; *see People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**461**

**CAF 18-01303**

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

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IN THE MATTER OF DOUGLAS B. ANDROSS,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

TIFFANY P. AIELLO,
RESPONDENT-PETITIONER-APPELLANT.

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TIFFANY P. AIELLO, RESPONDENT-PETITIONER-APPELLANT PRO SE.

DUKE LAW FIRM, P.C., LAKEVILLE (SUSAN K. DUKE OF COUNSEL), FOR PETITIONER-RESPONDENT-RESPONDENT.

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Appeal from an order of the Family Court, Monroe County (Julie Anne Gordon, R.), entered May 15, 2018 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted the parties joint custody of the subject child with primary residence and placement to be with petitioner-respondent.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, continued joint custody of the parties' child and granted in part the petition of petitioner-respondent father by modifying the visitation provisions of a prior order of custody and visitation. We affirm.

We conclude that "the mother waived her contention that the father failed to establish the requisite change in circumstances warranting an inquiry into the best interests of the child[ ] inasmuch as she alleged in her [amended] cross petition that there had been such a change in circumstances" (*Matter of Muriel v Muriel*, 179 AD3d 1529, 1529 [4th Dept 2020]; *see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]; *Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]). In any event, we conclude that the father established the requisite change in circumstances (*see Trimarco v Trimarco*, 154 AD3d 792, 794 [2d Dept 2017]; *Matter of Keefe v Adam*, 85 AD3d 1225, 1226 [3d Dept 2011]; *cf. Matter of Bobroff v Farwell*, 57 AD3d 1284, 1285 [3d Dept 2008]).

Contrary to the mother's further contention, we conclude that Family Court properly determined that modifying the visitation schedule was in the best interests of the child. The record

establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record" (*Biernbaum*, 162 AD3d at 1665 [internal quotation marks omitted]; *see Matter of La Scola v Litz*, 258 AD2d 792, 793 [3d Dept 1999], *lv denied* 93 NY2d 809 [1999]; *Matter of Hartman v Hartman*, 214 AD2d 780, 782 [3d Dept 1995]). Moreover, given the parties' past acrimony, the court properly determined "that it was appropriate to divide the decision-making authority with respect to the child[ ]" (*Matter of Wideman v Wideman*, 38 AD3d 1318, 1319 [4th Dept 2007]; *see Matter of Delgado v Frias*, 92 AD3d 1245, 1245 [4th Dept 2012]).

We have reviewed the mother's remaining contentions and conclude that none warrants modification or reversal of the order. Finally, we note that the father's contention that the mother was awarded excessive visitation that should be reduced is not properly before us in the absence of a cross appeal (*see Matter of Mercado v Frye*, 104 AD3d 1340, 1343 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]; *Matter of Kramer v Berardicurti*, 79 AD3d 1794, 1794 [4th Dept 2010], *lv denied* 16 NY3d 712 [2011]; *see also Matter of Briggs v Briggs*, 171 AD3d 741, 744 [2d Dept 2019]; *see generally Hecht v City of New York*, 60 NY2d 57, 60-61 [1983]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**475**

**KA 18-01175**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEFFAN J. MILLER, DEFENDANT-APPELLANT.

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STEVEN A. FELDMAN, MANHASSET, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered January 24, 2018. The judgment convicted defendant upon a nonjury verdict of assault in the second degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of assault in the second degree (Penal Law § 120.05 [9]) and endangering the welfare of a child (§ 260.10 [1]). Defendant "made only a general motion for a trial order of dismissal, and thus failed to preserve for our review his challenge to the legal sufficiency of the evidence" (*People v Alejandro*, 60 AD3d 1381, 1382 [4th Dept 2009], *lv denied* 12 NY3d 850 [2009]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contention lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant contends that County Court lacked jurisdiction to order postjudgment restitution because the People did not state at or before sentencing that they were seeking restitution. Rather, upon a recommendation set forth in the presentence report, the court stated at sentencing that it would impose restitution at a later date. Defendant thereafter waived a hearing and consented to restitution totaling $2,764.08. Although defendant's jurisdictional challenge need not be preserved for our review (*see People v Naumowicz*, 76 AD3d 747, 749 [3d Dept 2010]; *see generally People v Stewart*, 151 AD3d 1860, 1861 [4th Dept 2017]), we conclude that the court's "deferral of restitution issues did not work to deprive it of jurisdiction to

thereafter impose restitution as it had announced it would do at sentencing" (*People v Bauer*, 229 AD2d 502, 502 [2d Dept 1996]; *see People v Jackson*, 180 AD2d 755, 755 [2d Dept 1992]). Insofar as defendant contends that the court erred in deferring the restitution issue absent a request from the People, we conclude that defendant failed to preserve his contention for our review (*see* CPL 470.05 [2]; *cf. People v Kevin C.*, 265 AD2d 828, 828-829 [4th Dept 1999]), and 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]).

Defendant further contends that the court abused its discretion in issuing a no-contact order of protection in favor of the child victim's mother. We reject that contention. The court had the power to issue an order of protection and set the terms thereof, even without the mother's consent (*see People v Walker*, 151 AD3d 1730, 1731 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017], *reconsideration denied* 30 NY3d 984 [2017]; *People v Paul*, 117 AD3d 1499, 1499-1500 [4th Dept 2014]).

Finally, the sentence is not unduly harsh or severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**498**

**KA 17-01892**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW A. MCCRACKEN, DEFENDANT-APPELLANT.

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THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (SHIRLEY A. GORMAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Genesee County Court (Charles N. Zambito, J.), rendered August 15, 2017. The judgment convicted defendant upon his plea of guilty of attempted arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted arson in the second degree (Penal Law §§ 110.00, 150.15). Defendant's contention that his guilty plea was not knowing, voluntary, and intelligent survives the valid waiver of the right to appeal and is preserved for our review by his sentencing letter, which County Court construed as a motion to withdraw the plea (*see People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]). Defendant's assertions on appeal that he was coerced into taking the *Alford* plea are belied by his responses to the court's searching inquiries during the plea colloquy (*see id.*).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**500**

**KA 19-00990**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY S. LITTLE, DEFENDANT-APPELLANT.

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CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Steuben County Court (Philip J. Roche, J.), rendered August 22, 2018. The judgment convicted defendant upon a 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: Defendant appeals 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]). We note at the outset that defendant does not challenge the validity of his waiver of the right to appeal. Although defendant's contention that County Court erred in imposing what he characterizes as an enhanced sentence based on postplea arrests arising from preplea conduct survives even a valid waiver of the right to appeal (*see People v O'Brien*, 98 AD3d 1264, 1264 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]), we nevertheless conclude that his contention is unpreserved for our review because he failed to object to the sentence, move to withdraw his plea, or move to vacate the judgment of conviction on that ground (*see People v Fumia*, 104 AD3d 1281, 1281 [4th Dept 2013], *lv denied* 21 NY3d 1004 [2013]; *O'Brien*, 98 AD3d at 1264). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Even assuming, arguendo, that defendant's contention that he was denied effective assistance of counsel based upon counsel's failure to preserve that contention survives his plea of guilty and waiver of the right to appeal (*see generally People v Pabon*, 173 AD3d 1847, 1847 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *People v Coker*, 133 AD3d 1218, 1218 [4th Dept 2015], *lv denied* 27 NY3d 995 [2016]), we reject that contention. The record reflects that defendant conferred

with defense counsel and, through defense counsel, informed the court that he would agree to the negotiated sentence in exchange for the People's promise not to indict him on the postplea arrests. Thus, defendant failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*People v Young*, 167 AD3d 1448, 1449 [4th Dept 2018], *lv denied* 33 NY3d 1036 [2019] [internal quotation marks omitted]), inasmuch as the record reflects that defense counsel's decision not to object to the sentence or move to withdraw the plea or vacate the judgment of conviction was based on defendant's assent to the negotiated sentence.

Although we agree with defendant that his waiver of the right to appeal does not foreclose our review of the severity of his sentence under these circumstances (*see People v Cannon*, 158 AD3d 1123, 1124 [4th Dept 2018], *lv denied* 31 NY3d 1079 [2018]), we reject his contention that the sentence is unduly harsh and severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**501**

**KA 17-00649**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAVIER VALENTIN, JR., DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (DARIENN P. BALIN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered March 24, 2017. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of burglary in the second degree (Penal Law § 140.25 [2]) and petit larceny (§ 155.25). We affirm.

The trial evidence established that, within 30 minutes and five blocks of the charged burglary, defendant was discovered in possession of the property stolen during the incident. Moreover, defendant's statements to his cousin on the day in question evinced consciousness of guilt. We thus reject defendant's contention that the evidence is legally insufficient with respect to the element of identity (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise conclude that the verdict is not against the weight of the evidence as to identity (*see People v Carmel*, 138 AD3d 1448, 1449 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Hall*, 57 AD3d 1222, 1226 [3d Dept 2008], *lv denied* 12 NY3d 817 [2009]; *People v Mangual*, 13 AD3d 734, 736 [3d Dept 2004], *lv denied* 4 NY3d 800 [2005]; *see generally Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that Supreme Court erred in refusing to suppress the contents of a backpack stolen during the burglary. As a matter of federal constitutional law, a person lacks standing to challenge a warrantless search of stolen property that he

or she knowingly possessed because any subjective expectation of privacy in such property is not legitimate (*see United States v Tropiano*, 50 F3d 157, 161-162 [2d Cir 1995]; *see also United States v Caymen*, 404 F3d 1196, 1200 [9th Cir 2005]). The same rule applies under New York law (*see People v Ladson*, 298 AD2d 314, 315 [1st Dept 2002], *lv denied* 99 NY2d 616 [2003]; *People v Brown*, 244 AD2d 348, 348 [2d Dept 1997], *lv denied* 91 NY2d 870 [1997]; *People v Hernandez*, 218 AD2d 167, 170 [2d Dept 1996], *lv denied* 88 NY2d 936, 1068 [1996]). Here, defendant concedes that the subject backpack was stolen and that he knowingly possessed such stolen property. The court thus properly determined that defendant lacked standing to challenge the search of the stolen backpack.

Contrary to defendant's related contention, the court did not rely impermissibly on evidence outside the record in refusing to suppress the contents of the backpack. As the People correctly note, a police officer testified at the suppression hearing that, shortly after the backpack was searched, the victim identified the backpack and its contents as the property stolen during the burglary. The victim's hearsay identification of the stolen property was admissible at the suppression hearing (*see* CPL 710.60 [4]), and the fact that she identified the stolen property after the backpack was searched is of no moment in evaluating defendant's standing to challenge that search (*see generally People v Gonzalez*, 68 NY2d 950, 951 [1986]). For purposes of standing, what matters is *whether* the searched property was stolen, not *when* the police learned that the searched property was stolen (*see generally id.*).

Defendant's statutory speedy trial argument is unpreserved for appellate review because he never moved to dismiss the indictment on that ground (*see People v Hardy*, 47 NY2d 500, 505 [1979]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see People v Bailey*, 179 AD3d 1518, 1519 [4th Dept 2020]). Moreover, inasmuch as defendant's speedy trial argument is not "clear cut," defense counsel was not ineffective in failing to move to dismiss on that ground (*People v Brunner*, 16 NY3d 820, 821 [2011]).

Defendant's further contention that the court omitted a portion of the juror oath required by CPL 270.15 (2) is unpreserved for appellate review (*see People v Mack*, 135 AD3d 962, 963-964 [2d Dept 2016], *lv denied* 27 NY3d 1002 [2016]), and his contention does not raise a mode of proceedings error (*see generally People v Chancey*, 127 AD3d 1409, 1412 [3d Dept 2015], *lv denied* 25 NY3d 1199 [2015]). Defendant's reliance on *People v Hoffler* (53 AD3d 116 [3d Dept 2008], *lv denied* 11 NY3d 832 [2008]) is unavailing because the oath error in that case was preserved (*see id.* at 121). Moreover, defense counsel was not ineffective in failing to object to the purported technical error with respect to the oath (*see People v Davis*, 106 AD3d 1510, 1511 [4th Dept 2013], *lv denied* 21 NY3d 1073 [2013]).

The sentence is not unduly harsh or severe. We reject

defendant's remaining contentions.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**541**

**KA 18-02296**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK C. JOHNSON, DEFENDANT-APPELLANT.

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DANIELLE C. WILD, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered July 9, 2018. The judgment convicted defendant, upon a plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence obtained from his vehicle following a traffic stop. We agree.

A deputy on patrol observed a vehicle turning left without its turn signal activated. The deputy followed the vehicle and turned on his emergency lights to initiate a traffic stop. A short time later, the vehicle pulled into a residential driveway, and the deputy pulled up behind the vehicle. After the vehicle stopped, defendant, the only occupant of the vehicle, exited through the driver's door. The deputy directed defendant to get back inside the vehicle and approached the vehicle. He then directed defendant to lower the window, but defendant told him that he could not do so because the window was broken. The deputy directed defendant to unlock the driver's door, and defendant again said he could not do so. The deputy observed defendant "blading" his body away from the deputy and making "furtive movements" toward the center console. The deputy did not see any drugs, weapons, "or anything" in plain view while defendant was making

blading gestures in the vehicle. Defendant offered to move to the passenger side of the vehicle, and the deputy directed defendant to stay where he was. Defendant, however, moved to the passenger side of the vehicle, opened the passenger door, and fled.

A foot chase ensued through multiple yards and over fences. The deputy eventually caught up to defendant and took him into custody. Defendant was arrested for obstructing governmental administration and resisting arrest. When asked why he ran, defendant responded that there was a warrant for his arrest. The deputy thereafter returned to defendant's vehicle. He opened the front passenger door and smelled the odor of marihuana, which he recognized from his training and experience. The deputy also observed empty baggies in the center console, which he recognized as the type of baggies commonly used for drugs. Under the armrest in the vehicle, the deputy observed baggies containing a substance that appeared to be crack cocaine. At that time, the deputy stopped searching the vehicle and applied for a search warrant, which was subsequently issued and executed. In addition to cocaine, the deputy seized a semiautomatic handgun from the glove compartment of the vehicle.

Defendant sought to suppress the physical evidence obtained from his vehicle on the ground that the deputy lacked probable cause to open the front passenger door and search the vehicle. The court refused to suppress that evidence, reasoning that defendant's behavior after the traffic stop was sufficient to establish probable cause for a warrantless search of the vehicle under the automobile exception. We agree with defendant that the deputy lacked probable cause to open the door to the vehicle and search the vehicle prior to obtaining a search warrant.

Under the Fourth Amendment of the United States Constitution, "a search conducted without a warrant issued by an impartial Magistrate is per se unreasonable unless one of the established exceptions applies" (*People v Galak*, 81 NY2d 463, 466-467 [1993]). "One such exception is the so-called 'automobile exception', under which State actors may search a vehicle without a warrant when they have probable cause to believe that evidence or contraband will be found there" (*id.* at 467). Applying our State Constitution, the Court of Appeals has held that when police want to search a vehicle at the time they arrest its occupant, "the police must not only have probable cause to search the vehicle but . . . there must also be a nexus between the arrest and the probable cause to search" (*id.*, citing *People v Blasich*, 73 NY2d 673, 680 [1989]). "[T]he requirement of a connection" between "the probable cause to search and the crime for which the arrest is being made" is "flexible" inasmuch as a court need not focus "solely on the crimes for which a defendant was formally arrested" (*id.* at 467 [internal quotation marks omitted]). "[T]he proper inquiry . . . is simply whether *the circumstances* gave the officer probable cause to search the vehicle" (*id.* [internal quotation marks omitted]). When police officers stop a vehicle, they may have probable cause to search the vehicle under the automobile exception based "on grounds other than those that initially prompted [the officers] to stop the vehicle," i.e., the probable cause may come to light after the stop

(*id.* at 467-468; *see Blasich*, 73 NY2d at 681; *People v Ellis*, 62 NY2d 393, 396-397 [1984]).

Here, we cannot say that the overall circumstances—including defendant's blading gestures, furtive movements toward the center console, refusal to comply with the deputy's directives, and actions in running away from the vehicle—provided probable cause to justify a warrantless search for evidence or contraband under the automobile exception. Although defendant engaged in "furtive and suspicious activity" and his "pattern of behavior, viewed as a whole" was suspicious (*People v Parson*, 77 AD3d 524, 524-525 [1st Dept 2010], *lv denied* 16 NY3d 799 [2011]), there was no direct nexus between the initial traffic stop for a traffic violation and the search of defendant's vehicle. Furthermore, there was no direct nexus between the arrest of defendant and the search of his vehicle. Defendant made no statements to suggest that the vehicle contained contraband or evidence of a crime (*cf. Galak*, 81 NY2d at 467-468), the deputy did not observe any contraband in plain view (*cf. Blasich*, 73 NY2d at 681), the deputy did not find any contraband on defendant's person when he took defendant into custody (*cf. Ellis*, 62 NY2d at 396-397), and it cannot be said that defendant's "furtive movements" toward the center console lacked any innocent explanation or occurred under circumstances suggesting that criminal activity was afoot (*see People v Pastore*, 175 AD3d 1827, 1828 [4th Dept 2019]; *People v Guzman*, 153 AD2d 320, 323 [4th Dept 1990]; *cf. People v Nichols*, 175 AD3d 1117, 1118-1119 [4th Dept 2019], *lv denied* 34 NY3d 1018 [2019]). Inasmuch as the deputy did not smell the odor of marihuana until after he opened the door, we conclude that all physical evidence obtained as a result of the illegal search must be suppressed as fruit of the poisonous tree (*cf. People v Cuffie*, 109 AD3d 1200, 1200-1201 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**543**

**KA 18-00243**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORNELL LONG, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MINDY F. VANLEUVAN OF COUNSEL), FOR RESPONDENT.

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Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 17, 2016. The judgment convicted defendant, upon his plea of guilty, of rape in the first degree and burglary 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 one count each of rape in the first degree (Penal Law § 130.35 [1]) and burglary in the first degree (§ 140.30 [3]). Defendant contends that Supreme Court abused its discretion in denying his motion to withdraw his plea of guilty, which was premised on his allegations that he was confused and emotionally distraught during the proceedings and that he was coerced by defense counsel and that, therefore, the plea was not knowing, intelligent, and voluntary. That contention survives defendant's waiver of the right to appeal (*see People v Davis*, 129 AD3d 1613, 1614 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]), and he preserved that contention for our review by moving to withdraw the plea (*see People v Lopez*, 71 NY2d 662, 665 [1988]). We nevertheless reject defendant's contention. " 'Permission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*Davis*, 129 AD3d at 1614). Inasmuch as defendant tendered no such evidence on his motion, we perceive no abuse of discretion (*see People v Ernst*, 144 AD3d 1605, 1606-1607 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *People v Torres*, 117 AD3d 1497, 1497-1498 [4th Dept 2014], *lv denied* 24 NY3d 965 [2014]; *People v Strasser*, 83 AD3d 1411, 1411 [4th Dept

2011]).

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court

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

**544**

**KA 18-00388**

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

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRAIG OWENS, DEFENDANT-APPELLANT.

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FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

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Appeal from a judgment of the Onondaga County Court (Stephen J. Dougherty, J.), rendered October 20, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that the conviction is not supported by legally sufficient evidence. " 'It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017], quoting *People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]). Here, viewing the evidence in the light most favorable to the People, we conclude that the evidence is legally sufficient (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant's contention that reversal is required because County Court failed to comply with the requirements of CPL 310.30 in responding to a jury note (*see generally People v O'Rama*, 78 NY2d 270, 276-278 [1991]). The note indicated that the jury wished to hear a readback of certain very specific parts of the testimony of several witnesses, including that of the Medical Examiner concerning

the cause and time of the victim's death. Defendant contends that the court should have directed the court reporter to read back additional parts of the Medical Examiner's testimony. It is well settled that a trial court has "significant discretion in determining the proper scope and nature of the response" to a jury's request to review part of the evidence (*People v Taylor*, 26 NY3d 217, 224 [2015]). Furthermore, "[a] request for a reading of testimony generally is presumed to include cross-examination [that] impeaches the testimony to be read back, and any such testimony should be read to the jury unless the jury indicates otherwise" (*People v Morris*, 147 AD3d 873, 874 [2d Dept 2017] [internal quotation marks omitted]; *see People v Wilson*, 158 AD3d 1204, 1205 [4th Dept 2018], *lv denied* 31 NY3d 1089 [2018]). Here, however, both the parts of the Medical Examiner's testimony that were included in the readback and the parts that defendant contends should have been included were elicited on cross-examination, and we agree with the court that the additional testimony that defendant sought to include in the readback did not impeach the portion of the Medical Examiner's testimony that the jury requested. Consequently, we conclude that the court "did not abuse its discretion in declining to read back a portion of the . . . cross-examination that was not directly responsive to the jury's request" (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]). We further conclude that, "[e]ven assuming, arguendo, . . . the court erred in refusing to permit the disputed cross-examination testimony to be read back to the jury, . . . reversal is not required inasmuch as 'defendant failed to show that any alleged omission of relevant testimony from the readback caused prejudice' to him" (*Wilson*, 158 AD3d at 1205).

Defendant's further contention that he was denied a fair trial by prosecutorial misconduct during summation is unpreserved for our review inasmuch as defendant did not object to any of the alleged improprieties (*see People v Carrasquillo*, 142 AD3d 1359, 1359 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]). In any event, we conclude that "the prosecutor's attempts to persuade the jurors as to the credibility of the [witnesses] and [their] account[s] constituted fair comment on the evidence . . . and fair response to the summation of defense counsel" (*People v Redfield*, 144 AD3d 1548, 1550 [4th Dept 2016], *lv denied* 28 NY3d 1187 [2017]) and that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]).

The sentence is not unduly harsh or severe.

Entered: May 1, 2020

Mark W. Bennett
Clerk of the Court