SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 5, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1143
CA 15-00737
PRESENT: PERADOTTO, J.P., CARNI, WHALEN, AND DEJOSEPH, JJ.

CHAMBERLAIN, D'AMANDA, OPPENHEIMER &
GREENFIELD, LLP, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

REBECCA P. WILSON, DEFENDANT-RESPONDENT-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (TARA J. SCIORTINO OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

M W MOODY LLC, NEW YORK CITY (MARK W. MOODY OF COUNSEL), AND GALLAGHER LAW OFFICES PLLC, PELHAM, FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended order of the Supreme Court, Monroe County (John J. Ark, J.), entered August 5, 2014. The amended order denied the motion of defendant for summary judgment dismissing the complaint and for partial summary judgment on her counterclaim, and denied the cross motions of plaintiff for summary judgment on the complaint and for summary judgment dismissing the counterclaim.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting the cross motion for summary judgment dismissing the counterclaim, and dismissing the counterclaim, and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover unpaid legal fees, and defendant interposed a counterclaim for legal malpractice alleging, inter alia, that plaintiff was negligent in representing her in the negotiation and settlement of her underlying matrimonial action. Defendant and her former husband settled the matrimonial action by a written separation agreement filed July 21, 2009, they were divorced by a judgment entered November 30, 2009, and the separation agreement was incorporated into the judgment of divorce. The findings of fact and conclusions of law underlying the judgment of divorce recited that the separation agreement was "fair and reasonable when made and is not unconscionable." The separation agreement deferred resolution of any personal property issues, but afforded defendant and her former husband the opportunity to settle the issues on their own in "good faith." They were unable to resolve the personal property issues on their own and therefore made an application to Supreme Court to determine the issues. In addition to resolving the personal property issues, the court denied defendant's

request for counsel fees, expert fees, and moving and storage costs. We affirmed that order on appeal (*Wilson v Wilson*, 128 AD3d 1326).

Following the completion of discovery, defendant moved for summary judgment dismissing the complaint, as well as for summary judgment on that part of her counterclaim asserting that plaintiff is liable to her for failing to have her former husband pay all of her counsel fees in the underlying matrimonial action. Plaintiff cross-moved for summary judgment dismissing defendant's legal malpractice counterclaim in its entirety. The court, inter alia, denied the motion and the cross motion. We conclude that the court erred in denying plaintiff's cross motion for summary judgment dismissing the counterclaim, and we therefore modify the amended order accordingly.

Defendant contends, inter alia, that but for plaintiff's alleged negligence she would have received a more favorable result had she proceeded to trial. Generally, "to recover damages for legal malpractice, a [client] must prove (1) that the [law firm] failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community, (2) proximate cause, (3) damages, and (4) that the [client] would have been successful in the underlying action had the [law firm] exercised due care" (*Iannarone v Gramer*, 256 AD2d 443, 444; *see Blank v Harry Katz, P.C.*, 3 AD3d 512, 513). In a legal malpractice action in which there was no settlement of the underlying action, it is well settled that, "[t]o obtain summary judgment dismissing [the] complaint . . . , a [law firm] must demonstrate that the [client] is unable to prove at least one of the essential elements of its legal malpractice cause of action" (*Boglia v Greenberg*, 63 AD3d 973, 974; *Ehlinger v Ruberti, Girvin & Ferlazzo*, 304 AD2d 925, 926). A settlement of the underlying action does not, per se, preclude a legal malpractice action (*see Schiff v Sallah Law Firm, P.C.*, 128 AD3d 668, 669). Where, as here, however, the underlying action has been settled, the focus becomes whether "settlement of the action was effectively compelled by the mistakes of counsel" (*Bernstein v Oppenheim & Co.*, 160 AD2d 428, 430; *see Tortura v Sullivan Papain Block McGrath & Cannavo, P.C.*, 21 AD3d 1082, 1083, *lv denied* 6 NY3d 701). Where the law firm meets its burden under this test, the client must then provide proof raising triable issues of fact whether the settlement was compelled by mistakes of counsel, and "[m]ere speculation about a loss resulting from an attorney's [alleged] poor performance is insufficient" (*Antokol & Coffin v Myers*, 30 AD3d 843, 845). Conclusory allegations that merely reflect a subsequent dissatisfaction with the settlement, or that the client would be in a better position but for the settlement, without more, do not make out a claim of legal malpractice (*see Boone v Bender*, 74 AD3d 1111, 1113, *lv denied* 16 NY3d 710).

Here, we conclude that plaintiff met its burden by establishing that it did not fail to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession, and that the separation agreement was not the product of any mistakes of counsel (*see Schiff*, 128 AD3d at 669; *Boone*, 74 AD3d at 1113; *cf. Steven L. Levitt & Assoc., P.C. v Balkin*, 54 AD3d 403, 406). The separation agreement recited, inter alia, that defendant understood

the terms and conditions of the agreement, freely and voluntarily accepted such terms, and believed it to be fair, adequate, and reasonable. Plaintiff further established that the separation agreement was in many respects financially favorable to defendant. Thus, we conclude that plaintiff thereby shifted the burden to defendant to raise a triable issue of fact (*see Schiff*, 128 AD3d at 669-670).

We conclude that, on this record, defendant's contentions that after a trial the court would have, inter alia: required her former husband to pay all of her counsel fees; awarded her a share of the alleged increased value of her former husband's business; and awarded her lifetime maintenance, are speculative and conclusory (*see Sevey v Friedlander*, 83 AD3d 1226, 1227, *lv denied* 17 NY3d 707; *Boone*, 74 AD3d at 1113), and are insufficient to raise a triable issue of fact.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1194
CA 15-00530
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND WHALEN, JJ.

IN THE MATTER OF ARBITRATION BETWEEN COUNTY OF ERIE AND ERIE COMMUNITY COLLEGE, PETITIONERS-RESPONDENTS,

AND — ORDER

FACULTY FEDERATION OF ERIE COMMUNITY COLLEGE, RESPONDENT-APPELLANT.

RICHARD E. CASAGRANDE, BUFFALO (TIMOTHY CONNICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

KRISTIN KLEIN WHEATON, ORCHARD PARK, FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 6, 2014 in a proceeding pursuant to CPLR article 75. The order granted the petition and vacated the award of an arbitrator.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 4, 2016,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1244
CA 15-00562
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, VALENTINO, AND DEJOSEPH, JJ.

KEITH CONRAD AND SHERYL CONRAD,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V ORDER

LOCKPORT CITY SCHOOL DISTRICT, MIHPIER
COMPANY, INC., AND LOCKPORT CITY SCHOOL
DISTRICT BOARD OF EDUCATION,
DEFENDANTS-APPELLANTS-RESPONDENTS.

SUGARMAN LAW FIRM, LLP, BUFFALO (BRIAN SUTTER OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT MIHPIER COMPANY, INC.

HANLON & VELOCE, LATHAM (CHRISTINE D'ADDIO HANLON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS LOCKPORT CITY SCHOOL DISTRICT AND LOCKPORT CITY SCHOOL DISTRICT BOARD OF EDUCATION.

BROWN CHIARI LLP, LANCASTER (BRADLEY D. MARBLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeals and cross appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered October 30, 2014. The order, among other things, denied in part defendants' motions for summary judgment and denied plaintiffs' cross motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on September 16, 2015, and filed in the Niagara County Clerk's Office on December 9, 2015,

It is hereby ORDERED that said appeals and cross appeal are unanimously dismissed without costs upon stipulation.

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

1301
KA 12-00569
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GUILLERMO TORRES, III, DEFENDANT-APPELLANT.

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

GUILLERMO TORRES, III, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered November 21, 2011. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and 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 following a jury trial of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), defendant contends that the evidence is legally insufficient to support the conviction of attempted murder because the People failed to prove the element of intent. Defendant failed to preserve that contention for our review, however, "because his motion for a trial order of dismissal was not specifically directed at the ground[] advanced on appeal and because he failed to renew his motion after presenting evidence" (*People v Wright*, 107 AD3d 1398, 1401, *lv denied* 23 NY3d 1026; *see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Gray*, 86 NY2d 10, 19). In any event, the contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well established that "[i]ntent to kill may be inferred from defendant's conduct as well as the circumstances surrounding the crime" (*People v Lopez*, 96 AD3d 1621, 1622 [internal quotation marks omitted], *lv denied* 19 NY3d 998; *see People v Price*, 35 AD3d 1230, 1231, *lv denied* 8 NY3d 926). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that it is legally sufficient to establish defendant's intent to kill. "The People presented evidence that defendant and the victim quarreled immediately before the shooting . . . , and that defendant

was only a few feet away from the victim when defendant pointed a gun at him and then fired that weapon" (*Lopez*, 96 AD3d at 1622). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

We reject defendant's further contention that Supreme Court erred in failing sua sponte to order a competency hearing to determine whether defendant was fit to proceed at the time of sentencing (*see People v Tortorici*, 92 NY2d 757, 765-766, *cert denied* 528 US 834; *People v Morgan*, 87 NY2d 878, 879-880; *People v Garrasi*, 302 AD2d 981, 982-983, *lv denied* 100 NY2d 538). The court " 'had the opportunity to interact with and observe defendant . . . , [and thus] the court had adequate opportunity to properly assess defendant's competency' " (*People v Chicherchia*, 86 AD3d 953, 954, *lv denied* 17 NY3d 952; *see People v Cipollina*, 94 AD3d 1549, 1550, *lv denied* 19 NY3d 971). "Moreover, [we] note[ ] that defense counsel did not request a hearing and, as it has been observed, [defense] counsel was in the best position to assess defendant's capacity" (*Cipollina*, 94 AD3d at 1549-1550 [internal quotation marks omitted]). "On the contrary, defense counsel . . . made clear that defendant was competent" to proceed on the day of sentencing (*Tortorici*, 92 NY2d at 767).

We conclude that defendant's contention in his pro se supplemental brief that "he was denied a preliminary hearing is of no moment" (*People v Kirk*, 96 AD3d 1354, 1358, *lv denied* 20 NY3d 1012). It is well established that "[t]here is no constitutional or statutory right to a preliminary hearing . . . , nor is it a jurisdictional predicate to indictment" (*id*. [internal quotation marks omitted]; *see People v Caswell*, 56 AD3d 1300, 1302, *lv denied* 11 NY3d 923, *reconsideration denied* 12 NY3d 781). "[E]ven assuming, arguendo, that defendant was denied a preliminary hearing, we conclude that the failure to hold such a hearing does not require dismissal of the indictment or a new trial" (*Kirk*, 96 AD3d at 1358; *see People v Bensching*, 117 AD2d 971, 972, *lv denied* 67 NY2d 939; *see also People v Russ*, 292 AD2d 862, 862, *lv denied* 98 NY2d 713, *reconsideration denied* 99 NY2d 539). To the extent that the contentions in defendant's pro se supplemental brief involve matters outside the record on appeal, those contentions must be raised by way of a motion pursuant to CPL article 440 (*see People v Kreutter*, 121 AD3d 1534, 1535, *lv denied* 25 NY3d 990; *People v Brown*, 120 AD3d 1545, 1546, *lv denied* 24 NY3d 1082). Further, to the extent that we are able to review defendant's contention that he was denied effective assistance of counsel based on the record before us, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that they are without merit. Finally, the sentence is not unduly harsh or severe.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1302
KA 14-00841
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MYLES D. TAYLOR, DEFENDANT-APPELLANT.

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

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

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

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that he did not knowingly and intelligently waive his right to be present at sidebar conferences during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250, *rearg denied* 81 NY2d 759). Defendant's *Antommarchi* waiver was made explicitly by and through his attorney (*see People v Velasquez*, 1 NY3d 44, 47-50; *People v Keen*, 94 NY2d 533, 538-539), in open court while defendant was present, and after the court "had articulated the substance of the *Antommarchi* right" (*Keen*, 94 NY2d at 538-539). To the extent that defendant contends that defense counsel failed to adequately explain the waiver to him or to obtain his consent to the waiver, we conclude that those contentions are based on matters outside of the record on appeal and are therefore not reviewable on direct appeal (*see People v Balenger*, 70 AD3d 1318, 1318, *lv denied* 14 NY3d 885).

Inasmuch as defendant made only a general motion for a trial order of dismissal, he failed to preserve for our review his challenge to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's challenge lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see*

generally Bleakley, 69 NY2d at 495). We reject defendant's further contention that the sentence imposed by the court constitutes cruel and unusual punishment. "Regardless of its severity, a sentence of imprisonment which is within the limits of a valid statute ordinarily is not a cruel and unusual punishment in the constitutional sense" (*People v Jones*, 39 NY2d 694, 697). Here, the sentence imposed by the court, i.e., an indeterminate term of imprisonment of 13 years to life, is less than the maximum possible sentence (*see* Penal Law § 70.05 [1], [2] [a]; [3] [a]). Moreover, although defendant was a juvenile at the time he committed the crime, we conclude that the sentence is not "grossly disproportionate" to the crime, and it therefore does not violate the prohibitions against cruel and unusual punishment under the State and Federal Constitutions (*People v Thompson*, 83 NY2d 477, 479; *see People v Broadie*, 37 NY2d 100, 111, *cert denied* 423 US 950). Finally, the sentence is not unduly harsh or severe (*see* CPL 470.15 [6] [b]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1305
CA 15-00978
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

MARK A. LEO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY,
DEFENDANT-RESPONDENT.

BRINDISI, MURAD, BRINDISI & PEARLMAN, LLP, UTICA (ANTHONY A. MURAD OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BOEGGEMAN, GEORGE & CORDE, P.C., ALBANY (PAUL A. HURLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered November 4, 2014 in a declaratory judgment action. The judgment granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for partial summary judgment.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reinstating the complaint to the extent that it seeks a declaration and granting judgment in favor of defendant as follows:

> It is ADJUDGED and DECLARED that plaintiff is not entitled to indemnification from defendant with respect to the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: We conclude, for reasons stated in the decision at Supreme Court, that the court properly granted defendant’s motion for summary judgment and properly denied plaintiff’s cross motion for partial summary judgment. The court erred, however, in dismissing the complaint and in failing to declare the rights of the parties in this declaratory judgment action (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954; *Ward v County of Allegany*, 34 AD3d 1288, 1289). We therefore modify the judgment accordingly.

All concur except WHALEN, J., who dissents and votes to modify in accordance with the following memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that defendant must indemnify him in an underlying personal injury action, *Sciortino v*

Leo. The complaint in the underlying action seeks damages for the wrongful death and conscious pain and suffering of Anthony J. Sciortino (decedent), who was killed in a violent altercation with plaintiff. The administrator of decedent's estate alleges that the injuries to decedent were caused by plaintiff's intentional, reckless, or negligent conduct. Plaintiff was charged with manslaughter in the second degree (Penal Law § 125.15 [1]) as a result of the incident and, following the commencement of the wrongful death action, he was acquitted by a jury.

At the time of the incident, plaintiff was insured under a homeowner's policy issued by defendant. Although defendant provided a defense to plaintiff in the *Sciortino* action, it disclaimed any obligation to indemnify him on the grounds that the incident was not a covered occurrence, defined in the policy as an "accident," and that the policy excluded coverage for bodily injury that was "expected or intended" by plaintiff.

Supreme Court granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross motion for partial summary judgment on the issue of defendant's obligation to indemnify plaintiff in the *Sciortino* action. I agree with the majority that the court properly denied plaintiff's cross motion. In my view, however, the court erred in granting defendant's motion. Whether an occurrence constitutes an accident is generally for the trier of fact to determine (*see Lachter v Insurance Co. of N. Am.*, 145 AD2d 540, 541), and I cannot agree with the majority that, based upon the parties' submissions, defendant's obligation to indemnify plaintiff may be resolved as a matter of law (*see generally Prashker v United States Guar. Co.*, 1 NY2d 584, 590).

"In deciding whether a loss is the result of an accident, it must be determined, from the point of view of the insured, whether the loss was unexpected, unusual and unforeseen" (*Allegany Co-op Ins. Co. v Kohorst*, 254 AD2d 744, 744). It is well established, moreover, that accidental results may flow from intentional causes (*see Slayko v Security Mut. Ins. Co.*, 98 NY2d 289, 293; *Kemper Independence Ins. Co. v Ellis*, 128 AD3d 1529, 1530). In determining whether the result herein, i.e., decedent's death, was intended or accidental, the " 'transaction as a whole' test should be applied" (*McGroarty v Great Am. Ins. Co.*, 36 NY2d 358, 364, *rearg denied* 36 NY2d 874). Considered from that perspective, "regardless of the initial intent or lack thereof as it relates to causation, or the period of time involved, if the resulting damage could be viewed as unintended by the [factfinder,] the total situation could be found to constitute an accident" (*id.* at 364-365).

Viewing the evidence in the light most favorable to plaintiff, and granting plaintiff every favorable inference (*see Pearson v Dix McBride, LLC*, 63 AD3d 895, 895; *Hartford Ins. Co. v General Acc. Group Ins. Co.*, 177 AD2d 1046, 1047), I conclude that there are triable issues of fact whether decedent's death could be viewed as unintended. Here, it is undisputed that plaintiff caused decedent's death by striking him in the head with a baseball bat. Plaintiff presented

evidence, however, that for a number of years his relationship with decedent had been acrimonious and at times volatile. Plaintiff also presented evidence that, on the day of the incident, decedent advanced toward him menacingly with a metal pipe, swung the pipe at him and grazed the top of plaintiff's head. Plaintiff further testified that he did not intend to injure decedent, but rather swung the baseball bat in reaction to the aggressive acts of decedent.

Viewing the transaction as a whole, I conclude that there is a triable issue of fact whether, despite the evidence of intentional behavior on plaintiff's part, decedent's death was an accident. As the Court of Appeals stated in *Automobile Ins. Co. of Hartford v Cook* (7 NY3d 131), where a policyholder sought insurance coverage under a homeowner's policy for fatally shooting an aggressor in the abdomen in self-defense, the term "accident" applies "not only to an unintentional or unexpected event which, if it occurs, will foreseeably bring on death, but equally to an intentional or expected event which unintentionally or unexpectedly had that result" (*id.* at 138 [internal quotation marks omitted]).

With respect to the exclusion, I conclude that there are triable issues of fact whether plaintiff "expected or intended" the harm to decedent (*see id.*; *Merchants Ins. of N.H., Inc. v Weaver*, 31 AD3d 945, 946). Contrary to defendant's contention, this case does not fall within the "narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent" (*Slayko*, 98 NY2d at 293, citing *Allstate Ins. Co. v Mugavero*, 79 NY2d 153, 161). Thus, inasmuch as defendant failed to meet its burden of establishing that it has no obligation to indemnify plaintiff, I would modify the judgment by denying defendant's motion.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1312
CA 14-02054
PRESENT: SMITH, J.P., PERADOTTO, CARNI, LINDLEY, AND WHALEN, JJ.

JAMES L. WAGNER, PLAINTIFF-RESPONDENT,

V   MEMORANDUM AND ORDER

ELIZABETH A. WAGNER, DEFENDANT-APPELLANT.

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

BOUVIER PARTNERSHIP, LLP, BUFFALO (MELISSA THORE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Livingston County (Robert B. Wiggins, A.J.), entered January 17, 2014 in a divorce action. The judgment, inter alia, equitably distributed the marital property.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the 22nd decretal paragraph to the extent that it establishes the offset amount between plaintiff's maintenance arrears and defendant's marital debt arrears, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Livingston County, for further proceedings in accordance with the following memorandum: Defendant wife appeals from a judgment of divorce that, inter alia, equitably distributed marital property and liabilities, and directed certain spousal maintenance payments and offset amounts. We reject defendant's contention that Supreme Court abused its discretion in determining that the parties' credit card debt was a marital liability. "It is well settled that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion" (*Oliver v Oliver*, 70 AD3d 1428, 1428-1429 [internal quotation marks omitted]). "It is also well settled that trial courts are granted substantial discretion in determining what distribution of marital property[—including debt—]will be equitable under all the circumstances" (*id.* at 1429 [internal quotation marks omitted]; *see McKeever v McKeever*, 8 AD3d 702, 702-703). "[E]xpenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally shared by the parties" (*Malachowski v Daly*, 87 AD3d 1321, 1322 [internal quotation marks omitted]). "Where, however, the indebtedness is incurred by one party for his or her exclusive benefit or in pursuit of his or her separate interests, the obligation should remain that party's separate liability" (*Jonas v Jonas*, 241 AD2d 839, 840; *see*

Oliver, 70 AD3d at 1429; *McKeever*, 8 AD3d at 703).

Here, although defendant asserted that plaintiff husband incurred significant credit card debt without her knowledge, the record establishes that the debt was not incurred for plaintiff's exclusive benefit or in pursuit of his separate interests but, instead, was incurred for various marital expenditures of which defendant was aware, including the financing of expenses associated with the construction of a "dream home" that became the marital residence prior to the parties' separation (*see McCaffrey v McCaffrey*, 107 AD3d 1106, 1108; *Evans v Evans*, 55 AD3d 1079, 1081; *see also Cornish v Eraca-Cornish*, 107 AD3d 1322, 1323-1324). The Matrimonial Referee (Referee), whose decision and order was incorporated by the court in the judgment, determined that defendant was "fully invested" in the credit card expenditures, and that she had "acquiesce[d] to the web of convoluted credit card obligations created by [plaintiff]." The Referee also determined that, even assuming that plaintiff had engaged in misconduct in handling the family finances, defendant had actively or passively participated in such financial mismanagement and therefore could not be absolved from responsibility for the credit card debt (*see Oliver*, 70 AD3d at 1429). We conclude that the Referee's "credibility determinations in this regard must be accorded great deference" (*Evans*, 55 AD3d at 1081; *see generally Wilkins v Wilkins*, 129 AD3d 1617, 1618). Contrary to defendant's further contention, "[t]he court properly considered the factors set forth in Domestic Relations Law § 236 (B) (5) (d)" and, given the nature of the credit card debt and defendant's acquiescence in the expenditures, we conclude that the court did not abuse its broad discretion in distributing the debt equally between the parties (*Burns v Burns*, 70 AD3d 1501, 1503; *see Cornish*, 107 AD3d at 1324; *Evans*, 55 AD3d at 1081).

We reject defendant's contention that the court abused its discretion in awarding her durational maintenance of $1,500 per month for a period of 10 years from the date of her answer. The record establishes that the court considered the requisite statutory factors, including defendant's education, employment history, and ability to increase her earnings in the future, and properly determined that defendant was capable of future self-support (*see Schmitt v Schmitt*, 107 AD3d 1529, 1529; *Burns*, 70 AD3d at 1503; *see also Reed v Reed*, 55 AD3d 1249, 1251).

We agree with defendant, however, that the court abused its discretion in determining the offset amount between plaintiff's maintenance arrears and the interest paid by plaintiff on the marital debt (*see generally Ouziel v Ouziel*, 285 AD2d 536, 538). Despite the existence of an earlier order finding that defendant owed plaintiff half of the amount of interest he had "actually paid" toward the marital debt, which would be offset against the amount that plaintiff owed in maintenance arrears, the court subsequently accepted an email from plaintiff to his counsel calculating the amount of accrued interest incurred on defendant's share of the marital debt as sufficient proof of the offset amount, which resulted in defendant owing plaintiff money. We conclude that such an "unauthenticated

document[] appended to plaintiff's posthearing submission and not received in evidence at trial [is] not competent proof and, therefore, should not have been relied upon by the court" (*Murphy v Murphy*, 126 AD3d 1443, 1446; *see Higgins v Higgins*, 50 AD3d 852, 853-854). In any event, the email failed to establish the interest actually paid by him (*see Murphy*, 126 AD3d at 1446). We therefore modify the judgment accordingly, and we remit the matter to Supreme Court to recalculate the offset amount by taking into account the amount of interest plaintiff actually paid on the martial debt.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1348
KA 10-02346
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC W. JOHNSON, DEFENDANT-APPELLANT.

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

ERIC W. JOHNSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered November 4, 2010. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree, assault in the first degree (two counts) and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Contrary to defendant's contention, we conclude that Supreme Court did not abuse its discretion in denying his motion for a mistrial, which was based on his untimely claims that a recording of a jailhouse telephone call admitted in evidence was incomplete, and that he received improper advice from defense counsel (*see generally People v De Mauro*, 48 NY2d 892, 893; *People v Flowers*, 102 AD3d 885, 886, *lv denied* 21 NY3d 942, *reconsideration denied* 23 NY3d 692). To the extent that defendant's contention is based upon matters outside the record on appeal, those matters should be addressed by a motion pursuant to CPL article 440 (*see People v Whorley*, 125 AD3d 1484, 1485, *lv denied* 25 NY3d 1173). We reject defendant's further contention that reversal is warranted based on the court's alleged mishandling of defendant's complaints about defense counsel. "Even assuming, arguendo, that defendant's complaints suggest[ed] a serious possibility of good cause for substitution requiring a need for further inquiry . . . , we conclude that the court afforded defendant the opportunity to express his

objections concerning [defense counsel], and the court thereafter reasonably concluded that defendant's . . . objections had no merit or substance" (*People v Singletary*, 63 AD3d 1654, 1654 [internal quotation marks omitted], *lv denied* 13 NY3d 839).

Defendant failed to preserve for our review his contention that the court erred in admitting as demonstrative evidence a pry bar similar to the one used during the commission of the crime (*see* CPL 470.05 [2]), and we decline to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant further contends that he was denied effective assistance of counsel based on defense counsel's failure to object to the admission of the pry bar or the court's limiting instruction with respect thereto. We reject that contention inasmuch as any such objection or argument " '[had] little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152). Contrary to defendant's further contention, he was not denied effective assistance of counsel based on defense counsel's failure to request a justification charge inasmuch as there was no reasonable view of the evidence that would have permitted the jury to find that defendant's use of deadly physical force was justified (*see* Penal Law § 35.15 [2] [a]; *People v Patterson*, 115 AD3d 1174, 1176, *lv denied* 23 NY3d 1066). In any event, we conclude that defendant has failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's failure to request a justification charge (*People v Rivera*, 71 NY2d 705, 709). We reject defendant's further contention that the court erred in failing to instruct the jury, sua sponte, on the defense of justification. Even if such an instruction had been supported by the evidence, we conclude that the " 'court did not err in refraining from delivering such a charge sua sponte, as this would have improperly interfered with defense counsel's strategy' " (*Patterson*, 115 AD3d at 1176-1177).

Defendant failed to preserve for our review his challenges to the legal sufficiency of the evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the sentence is not unduly harsh and severe. We note, however, that the certificate of conviction incorrectly reflects that the sentence imposed on count four is to be served consecutively to count two. The court directed, instead, that count three is to be served consecutively to count two, and that count four is to be served concurrently with count two. The certificate of conviction must therefore be amended accordingly (*see People v Carrasquillo*, 85 AD3d 1618, 1620, *lv denied* 17 NY3d 814). Finally, although not raised by defendant, we conclude that "the court erred in imposing consecutive periods of postrelease supervision" (*People v Allard*, 107 AD3d 1379, 1379). "Penal Law § 70.45 (5) (c) requires that the periods of postrelease supervision merge and are

satisfied by the service of the longest unexpired term" (*Allard*, 107 AD3d at 1379). "Because we cannot allow an illegal sentence to stand" (*id.*), we modify the judgment accordingly.

We have considered the contentions of defendant in his pro se supplemental brief and conclude that, to the extent that they have not been addressed by our decision herein, they either are without merit or involve matters outside the record.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1353
KA 15-00783
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SALVATORE A. STRAUSS, DEFENDANT-APPELLANT.

STEPHEN M. LEONARD, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered February 26, 2014. The judgment convicted defendant, upon a nonjury verdict, of aggravated unlicensed operation of a motor vehicle in the first degree and driving while ability impaired.

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 aggravated unlicensed operation of a motor vehicle (AUO) in the first degree (Vehicle and Traffic Law § 511 [3] [a] [i]) and driving while ability impaired (§ 1192 [1]). Contrary to the contention of defendant, the abstract of his driving record from the New York State Department of Motor Vehicles was properly admitted in evidence pursuant to the business records exception to the hearsay rule (*see* CPLR 4518 [a]; CPL 60.10; *People v Carney*, 41 AD3d 1239, 1240, *lv denied* 9 NY3d 873; *cf. People v Pacer*, 21 AD3d 192, 194, *affd* 6 NY3d 504; *see also People v Maldonado*, 44 AD3d 793, 794, *lv denied* 9 NY3d 1035). Even assuming, arguendo, that defendant is correct that County Court erred in admitting the abstract based on the People's failure to lay a proper foundation for its admission, we conclude that the error is harmless inasmuch as the arresting police officer "testified that defendant had admitted that he knew prior to his arrest that his license had been revoked," and that he had provided a New York State identification card rather than a license as the officer had requested (*Carney*, 41 AD3d at 1240; *see People v Morgan*, 219 AD2d 759, 759, *lv denied* 87 NY2d 849).

Defendant further contends that his admission to the police officer that his license had been revoked is legally insufficient to establish the mens rea element of AUO in the first degree because he

did not admit that he knew that the revocation of his license had resulted from a prior conviction. Even assuming, arguendo, that defendant preserved his contention for our review (*see generally People v Gray*, 86 NY2d 10, 19), we conclude that it lacks merit. The Court of Appeals has held that "[t]he felony offense of first-degree [AUO] has a mens rea element," which derives from the basic definition of AUO pursuant to Vehicle and Traffic Law § 511 (1) (a) (*Pacer*, 6 NY3d at 508). "To be convicted, a defendant must know or have reason to know that his [or her] driving privileges have been revoked, suspended or otherwise withdrawn by the Commissioner of Motor Vehicles" (*id.*). Based on the statutory language and interpretation thereof by the Court of Appeals, and consistent with the pattern Criminal Jury Instructions (*see* CJI2d[NY] Vehicle and Traffic Law § 511 [3] [a] [i]), we conclude that the People were not required to prove that defendant knew or had reason to know that his driving privileges had been revoked, suspended, or otherwise withdrawn as a result of a prior conviction (*cf. People v Cooper*, 78 NY2d 476, 483; *People v Burgess*, 89 AD3d 1100, 1101). Viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we further conclude that the evidence is legally sufficient to support the conviction of AUO in the first degree (*see People v Chappell*, 124 AD3d 1409, 1410, *lv denied* 25 NY3d 1070).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1361
CA 15-00458
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTINA BUSSONE, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

SUSAN J. CIVIC, SARATOGA SPRINGS, FOR DEFENDANT-APPELLANT.

FEIN, SUCH & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 17, 2014. The amended order, among other things, granted plaintiff's motion for summary judgment.

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

Memorandum: Plaintiff commenced this residential foreclosure action after Christina Bussone (defendant) defaulted on her mortgage payments. Defendant contends that Supreme Court erred in failing to acknowledge her opposing affidavit in its order granting plaintiff's motion for summary judgment. We conclude that defendant's contention is moot inasmuch as the court's amended order corrected the error and superseded the original order (*see generally Gorfinkel v First Natl. Bank in Yonkers*, 19 AD2d 903, 904, *affd* 15 NY2d 711). Although this appeal is from the original order, we deem it as taken from the amended order (*see generally* CPLR 5520 [c]; *Matter of Dante P.*, 81 AD3d 1267, 1267). We reject defendant's further contention that plaintiff lacked standing to commence the foreclosure action, and thus that the court erred in granting the motion. We conclude that plaintiff "met [its] initial burden of establishing [its] prima facie entitlement to judgment as a matter of law by submitting the mortgage [issued by defendant to plaintiff], the underlying note, and evidence of a default" (*Lawler v KST Holdings Corp.*, 115 AD3d 1196, 1198, *lv dismissed* 24 NY3d 989 [internal quotation marks omitted]; *see Ekelmann Group, LLC v Stuart* [appeal No. 2], 108 AD3d 1098, 1099). "The burden [thus] shift[ed] to the defendant to demonstrate 'the existence of a triable issue of fact as to a bona fide defense to the action' " (*Rose v Levine*, 52 AD3d 800, 801; *see Ekelmann Group, LLC*, 108 AD3d at

1099), and defendant failed to meet that burden.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1364
CA 15-00057
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

MAURICE MCMILLIAN AND TEARTHA MCMILLIAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MIMEUX M. BURDEN, DEFENDANT-RESPONDENT,
JAMES E. GRANT, DEFENDANT-APPELLANT,
AND BLONDELL BURDEN, DEFENDANT.

MIMEUX M. BURDEN, PLAINTIFF-RESPONDENT,

V

JAMES E. GRANT, DEFENDANT-APPELLANT.

HAGELIN KENT LLC, BUFFALO (SEAN M. SPENCER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL J. VACCA, JR., ROCHESTER, FOR PLAINTIFFS-RESPONDENTS MAURICE MCMILLIAN AND TEARTHA MCMILLIAN.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-RESPONDENT MIMEUX M. BURDEN.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered March 17, 2014. The order, among other things, granted the plaintiffs' motions to set aside the jury verdict.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions are denied, and the jury verdict is reinstated.

Memorandum: Plaintiffs Maurice McMillian and Teartha McMillian commenced this action asserting direct and derivative causes of action based on injuries sustained by Maurice while he was a passenger in a vehicle being operated by Mimeux M. Burden, a defendant in the action commenced by Maurice and Teartha, and the plaintiff in a separate action against James E. Grant (defendant), who was driving the vehicle that rear-ended the vehicle operated by Mimeux. The two actions were joined for trial, and the jury found that neither Maurice nor Mimeux had sustained a serious injury pursuant to Insurance Law § 5102 (d). Supreme Court granted plaintiffs' motions to set aside the verdict as against the weight of the evidence and determined as a matter of law that both Maurice and Mimeux had sustained a serious injury. We

reverse and reinstate the verdict.

As a preliminary matter, we note our difficulty in reviewing this case inasmuch as the court failed to set forth its reasoning for setting aside the verdict and determining, as a matter of law, that both Maurice and Mimeux sustained a serious injury. The court essentially disregarded the deference owed to a jury verdict (*see generally McClain v Lockport Mem. Hosp.*, 236 AD2d 864, 865, *lv denied* 89 NY2d 817), and made a determination of serious injury as a matter of law, and yet it failed to specify what category or categories of serious injury Maurice and Mimeux sustained.

It is well established that " '[a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence' " (*Sauter v Calabretta*, 103 AD3d 1220, 1220). "Although [t]hat determination is addressed to the sound discretion of the trial court, . . . if the verdict is one that reasonable persons could have rendered after receiving conflicting evidence, the court should not substitute its judgment for that of the jury" (*id.* [internal quotation marks omitted]). Furthermore, "it is within the province of the jury to determine issues of credibility, and great deference is accorded to the jury given its opportunity to see and hear the witnesses" (*id.* [internal quotation marks omitted]).

Here, we conclude that the court erred in setting aside the jury's verdict inasmuch as the jury was entitled to credit the testimony of defendant's witnesses and reject the testimony of plaintiffs' witnesses (*see Guthrie v Overmeyer*, 19 AD3d 1169, 1170). Even assuming, arguendo, that plaintiffs established a prima facie case of serious injury, we nevertheless conclude that the jury was entitled to reject the opinions of plaintiffs' physicians (*see Sanchez v Dawson*, 120 AD3d 933, 935). The jury's interpretation of the evidence was not " 'palpably irrational' " (*Quigley v Sikora*, 269 AD2d 812, 813), or " 'palpably wrong' " (*Mohamed v Cellino & Barnes*, 300 AD2d 1116, 1117, *lv denied* 99 NY2d 510), and the court therefore erred in granting plaintiffs' motions.

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

1394
KA 11-00289
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC PORTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered January 31, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice, that part of the omnibus motion seeking to suppress defendant’s statements is granted, and a new trial is granted on counts one and two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]). Defendant contends that he was unlawfully detained by the police during a traffic stop of the vehicle in which he was a passenger, and that Supreme Court erred in refusing to suppress his statements to the police as the fruit of that unlawful detention. We agree.

The vehicle in which defendant was a passenger was stopped by the police for having a suspended registration. After the driver of the vehicle was arrested, but before the police could conduct an inventory search of the vehicle in preparation for impounding the vehicle, defendant asked whether he could leave the scene. The police told defendant that he must remain present with them until the inventory search was complete. After the police began the inventory search, defendant twice stated that there was a rifle in the vehicle. One of the officers discovered the rifle wrapped tightly in a pink blanket on the floor of the front passenger seat, and he later testified at the suppression hearing that he had noticed the blanket “directly against

[defendant's] leg" when he first approached the vehicle. At trial, the only evidence presented by the People linking defendant to the rifle consisted of defendant's two statements to the police that there was a rifle in the vehicle.

Although we conclude that the initial traffic stop was valid based on the vehicle's suspended registration, we agree with defendant that the justification for that stop ended once the driver had been arrested for that offense (*see People v Banks*, 85 NY2d 558, 562, *cert denied* 516 US 868; *cf. People v Rainey*, 49 AD3d 1337, 1339, *lv denied* 10 NY3d 963). Contrary to the People's contention, prolonging the detention of defendant was not justified by concern for officer safety. At the suppression hearing, the officers failed to identify any specific basis for a belief that defendant posed a danger. Rather, they testified that defendant was cooperative during the initial traffic stop, and the officers did not testify that they believed that defendant, in departing, would have threatened their safety (*see generally People v Torres*, 74 NY2d 224, 230-231). Indeed, the People did not present any evidence of "articulable facts" from the encounter to establish reasonable suspicion that defendant posed any danger to the officers (*People v Harrison*, 57 NY2d 470, 476; *see generally People v May*, 52 AD3d 147, 151). We therefore agree with defendant that the court erred in denying that part of his omnibus motion seeking to suppress his statements.

We further conclude that the court's error is not harmless inasmuch as there is a "reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237; *see People v Huntsman*, 96 AD3d 1390, 1392; *see generally People v Douglas*, 4 NY3d 777, 779). Indeed, as noted above, defendant's statements to the police were the only evidence at trial establishing the element of knowledge for the possessory crimes against him (*see People v Brown*, 21 NY3d 739, 751). We therefore reverse the judgment, grant that part of defendant's omnibus motion seeking to suppress his statements, and grant a new trial on counts one and two of the indictment.

We further agree with defendant that various instances of prosecutorial misconduct deprived him of his right to a fair trial and that reversal is required on that ground as well. Although defendant failed to preserve his challenges for our review, we exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Scheidelman*, 125 AD3d 1426, 1427). During cross-examination, the prosecutor questioned the driver of the vehicle regarding an out-of-court conversation between them, asking her whether she came to his office and admitted that the defendant "[tried] to get [her] to come and take the blame for the gun." After the witness denied for the second time that such a conversation had taken place, the prosecutor rhetorically asked, "[b]ut you were the one who was convicted of Scheme to Defraud, correct?" By challenging the witness with respect to the out-of-court conversation, the prosecutor both improperly interjected his personal opinion as to the truthfulness of the testimony and suggested to the jury that his own, unsworn version of events should be credited (*see*

People v Bailey, 58 NY2d 272, 277; *People v Ramashwar*, 299 AD2d 496, 497).

In addition, instances of prosecutorial misconduct on summation deprived defendant of his right to a fair trial. The prosecutor improperly denigrated defendant's case by referring to certain contentions as "[a]ll this nonsense," made repeated non sequiturs distinguishing the case from the John F. Kennedy assassination, and asserted that the defense was "twisting things" and employing "tricks" (*see People v Morgan*, 111 AD3d 1254, 1255). The prosecutor compounded those statements by consistently commenting on witness credibility, calling the defense witnesses "a cast of characters," "people com[ing] out of the woodwork," and specifically referring to one witness as "a piece of work." The prosecutor accused the defense witnesses of lying, and also argued that one could not believe a certain witness who had a lawyer advising her while testifying, stating that he "couldn't tell if those were her words or her lawyer's words when she was talking." Not only did the prosecutor state his belief that witnesses had lied, he also alleged that the witnesses must have met secretly in order to plan and collude regarding their testimony. That was patently improper (*see Bailey*, 58 NY2d at 277).

In addition to criticizing defendant's case and witnesses, the prosecutor also engaged in misconduct on summation by suggesting that an acquittal would require the jury to find a conspiracy by law enforcement (*see People v Morgan*, 75 AD3d 1050, 1053-1054, *lv denied* 15 NY3d 894), by improperly suggesting that defendant bore a burden of proof (*see People v Griffin*, 125 AD3d 1509, 1510), and by misstating a key point of law regarding detention incident to a traffic stop (*see generally People v Riback*, 13 NY3d 416, 423). In light of the nature and number of instances of prosecutorial misconduct, we conclude that defendant was deprived of his right to a fair trial.

In view of our determination, we do not address defendant's remaining contention that he was denied effective assistance of counsel.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1396
KA 12-01265
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND GRAVES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered June 26, 2012. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (two counts), criminal sexual act in the second degree (19 counts), rape in the second degree (16 counts) and endangering the welfare of a child (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of two counts of predatory sexual assault against a child, 16 counts of criminal sexual act in the second degree, and two counts of endangering the welfare of a child and vacating the sentence imposed on those counts, and as modified the judgment is affirmed, and a new trial is granted on counts 1, 4, 5, 10 through 13, 17 through 28, and 45 of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of predatory sexual assault against a child (Penal Law § 130.96), 19 counts of criminal sexual act in the second degree (§ 130.45 [1]), 16 counts of rape in the second degree (§ 130.30 [1]) and two counts of endangering the welfare of a child (§ 260.10 [1]). We reject the contention of defendant that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), we conclude that “there is a valid line of reasoning and permissible inferences to support the jury’s finding that defendant committed the crimes of which he was convicted based on the evidence presented at trial” (*People v Spencer*, 119 AD3d 1411, 1413-1414, *lv denied* 24 NY3d 965). Likewise, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not

against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that we must reverse the conviction of predatory sexual assault under counts one and five, criminal sexual act under counts 10 through 13 and 17 through 28, and endangering the welfare of a child under counts four and 45, because County Court's instructions created the possibility that the jury convicted him based on theories different from those set forth in the indictment, as limited by the bill of particulars. We therefore modify the judgment accordingly.

Although defendant did not object to the court's instructions and thus did not preserve his contention for our review, we conclude that "preservation is not required" (*People v Greaves*, 1 AD3d 979, 980), inasmuch as "defendant has a fundamental and nonwaivable right to be tried only on the crimes charged," as limited by either the bill of particulars or the indictment itself (*People v Duell*, 124 AD3d 1225, 1226 [internal quotation marks omitted], *lv denied* 26 NY3d 967; *see Greaves*, 1 AD3d at 980; *People v Burns*, 303 AD2d 1032, 1033). Where the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory (*see People v Martinez*, 83 NY2d 26, 32-35; *People v Grega*, 72 NY2d 489, 496; *Greaves*, 1 AD3d at 980-981; *Burns*, 303 AD2d at 1033-1034). Indeed, such an error cannot be deemed harmless because it is impossible for an appellate court reviewing a general verdict to ascertain on which theory the jury convicted the defendant or whether the jury was unanimous with respect to the theory actually charged in that count (*see Martinez*, 83 NY2d at 34-36; *Burns*, 303 AD2d at 1033-1034).

Here, counts one and five of the indictment, as limited by the bill of particulars, charged defendant with committing predatory sexual assault against a child by engaging in two or more acts of oral sexual "contact" with each victim consisting of "contact between the mouth and the penis" (Penal Law § 130.00 [2] [a]; *see* §§ 130.75 [1] [b]; 130.96). The court's instructions, however, permitted the jury to convict defendant upon a finding that he engaged in two or more acts of sexual conduct with each victim, which included "contact between . . . the mouth and the . . . vagina" (§ 130.00 [2] [a]), as well as sexual contact by touching, either directly or through clothing, the sexual or intimate parts of the victims for the purpose of sexual gratification (*see* § 130.00 [3]). The People adduced evidence at trial that defendant engaged in those additional forms of sexual conduct with the victims during the relevant time frames. Thus, defendant's conviction of predatory sexual assault against a child under counts one and five must be reversed because the jury, or members thereof, could have convicted defendant upon an uncharged theory (*see Greaves*, 1 AD3d at 980-981; *Burns*, 303 AD2d at 1033-1034; *see generally Grega*, 72 NY2d at 496; *People v Gunther*, 67 AD3d 1477,

1477-1478). The People contend that any error was harmless because there is no basis on this record to conclude that the jury convicted defendant of committing instances of uncharged sexual conduct, but not the conduct charged in the indictment, as limited by the bill of particulars. We reject that contention. Where, as here, there is evidence establishing uncharged theories, thus rendering it impossible for us to determine whether the verdict was based on such uncharged theories, we may not employ a harmless error analysis and, "in effect, assume the jury's fact-finding function by concluding that the jury must have reached its result on [the charged theories only]" (*Martinez*, 83 NY2d at 35).

We further agree with defendant that the court's instruction with respect to the charges of criminal sexual act under counts 10 through 13 and 17 through 28 permitted the jury to convict him upon a theory not charged in the indictment, as limited by the bill of particulars. The bill of particulars alleged that defendant had engaged in oral sexual conduct with one of the victims consisting of contact between the mouth and the penis, whereas the court's erroneous instruction permitted the jury to convict defendant also upon a finding that he engaged in oral sexual conduct involving contact between the mouth and the vagina (*see* Penal Law §§ 130.00 [2] [a]; 130.45 [1]). The People adduced evidence at trial that defendant's acts against the victim during the relevant time periods included contact between the mouth and the vagina and, thus, we conclude that the jury, or members thereof, could have convicted defendant upon an uncharged theory (*see Greaves*, 1 AD3d at 980-981; *Burns*, 303 AD2d at 1033-1034).

In addition, we conclude that defendant's conviction of endangering the welfare of a child under counts four and 45 must be reversed based on the same rationale. The jury, or members thereof, could have convicted defendant on uncharged theories because the court's instruction permitted the jury to convict defendant upon a finding that he "knowingly act[ed] in a manner likely to be injurious to the physical, mental or moral welfare" of the victims (Penal Law § 260.10 [1]) without limiting the jury's consideration to the particular acts of sexual "contact" alleged in the bill of particulars. Here, the People adduced evidence at trial of additional acts constituting uncharged theories of that crime.

Defendant failed to preserve for our review his further contention that certain counts of the indictment were rendered duplicitous by evidence adduced at trial (*see People v Allen*, 24 NY3d 441, 449-450), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Brown*, 82 AD3d 1698, 1700, *lv denied* 17 NY3d 792). We reject defendant's contention that he was denied effective assistance of counsel based on, among other things, defense counsel's failure to move to dismiss the subject counts of the indictment as duplicitous. "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 failure to [make such a motion]" (*People v Rivera*, 71 NY2d 705, 709). Here, we conclude that "defendant failed to meet that

burden, and thus defense counsel's purported failure, without more, is insufficient to demonstrate ineffective assistance" (*Brown*, 82 AD3d at 1700-1701 [internal quotation marks omitted]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147). Indeed, the record establishes that defense counsel made a clear and cogent opening statement directed at the credibility of the witnesses and the requirement that the People prove defendant's guilt beyond a reasonable doubt, lodged appropriate objections, conducted meaningful cross-examination of the witnesses that raised some inconsistencies in their testimony and attempted to cast doubt on their veracity, and presented a closing argument questioning the credibility of the People's witnesses and arguing that the victims' testimony was too vague to establish defendant's guilt beyond a reasonable doubt (*see generally People v Alexander*, 109 AD3d 1083, 1085).

Defendant failed to preserve for our review his further contention that he was deprived of the right to fair notice of the charges against him because the ranges of dates in the indictment during which the offenses allegedly occurred were overbroad (*see People v Erle*, 83 AD3d 1442, 1443, *lv denied* 17 NY3d 794). In any event, we conclude that, " '[i]n view of the age[s] of the victim[s] and the date on which [they] reported the crimes, . . . the one-month . . . periods specified in the indictment provided defendant with adequate notice of the charges against him to enable him to prepare a defense' " (*People v Coapman*, 90 AD3d 1681, 1682, *lv denied* 18 NY3d 956; *see Spencer*, 119 AD3d at 1413).

By failing to object to any of the alleged instances of prosecutorial misconduct, defendant failed to preserve for our review his contention with respect thereto (*see* CPL 470.05 [2]). In any event, we conclude 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, *lv denied* 22 NY3d 997 [internal quotation marks omitted]).

Finally, we conclude that the sentence imposed on the remaining counts of the indictment is not unduly harsh or severe.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

1399
KA 11-00448
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JANELLE Y. HOGUE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joseph D. Valentino, J.), rendered January 14, 2011. The judgment convicted defendant, upon a jury verdict, of vehicular assault in the second degree, driving while ability impaired by drugs (two counts) and driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of vehicular assault in the second degree (Penal Law § 120.03 [1]), two counts of driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]), and driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs (§ 1192 [4-a]). The charges arose from a single-vehicle accident that occurred when a vehicle operated by defendant and carrying two passengers left the roadway and rolled over multiple times, coming to rest in a nearby field. By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review her contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19). In any event, that contention lacks merit and, 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), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant contends that the warrant application for a court-ordered blood test was insufficient because it failed to identify the source of its information. We reject that contention. "[A]n application for a court-ordered blood test may contain hearsay and

double hearsay" as long as the application "disclose[s] that it is supported by hearsay and identif[ies] the source or sources of the hearsay" (*People v Freeman*, 46 AD3d 1375, 1377, *lv denied* 10 NY3d 840). Here, the warrant application and supporting affidavit both stated that they were based on the observations of the police officer who responded to the scene of the accident. We reject defendant's further contention that the warrant application was insufficient because it failed to provide sufficient facts to support the conclusion that a passenger in defendant's vehicle "suffered serious physical injury" as required by Vehicle and Traffic Law § 1194 (3) (b) (1). The warrant application stated that a passenger in the vehicle had been "seriously injured" inasmuch as he had sustained lacerations to the head, was trapped inside the vehicle, and needed to be "[m]ercy [f]lighted" to a hospital. We conclude that those statements are sufficient to meet the requirements of section 1194 (3) (b) (1).

Defendant contends that the court erred in admitting testimony that she refused to submit to a chemical test and in instructing the jury regarding that refusal. Those contentions are not preserved for our review (*see* CPL 470.05 [2]). In any event, those contentions lack merit. Defendant's refusal to take the test was admissible to show her consciousness of guilt (*see People v Demetsenare*, 243 AD2d 777, 780, *lv denied* 91 NY2d 833).

We reject defendant's further contention that the police lacked probable cause to arrest her. To arrest defendant under Vehicle and Traffic Law § 1192, it was necessary for the arresting officer to have evidence that it was "more probable than not that defendant [was] actually impaired" (*People v Vandover*, 20 NY3d 235, 239). Here, the arresting officer had such evidence. He was informed by witnesses that defendant's vehicle was traveling at a high rate of speed before leaving the roadway and rolling over multiple times. In addition, defendant provided the officer with inconsistent explanations regarding how the accident occurred, and the officer observed that defendant was unsteady on her feet. Finally, defendant admitted to the officer that she had consumed alcohol approximately three hours prior to the accident, and an Alco-Sensor test at the scene returned a positive result (*see People v Kulk*, 103 AD3d 1038, 1040, *lv denied* 22 NY3d 956).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

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TP 15-01229
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF JEFFREY TAMSEN, PETITIONER,

V MEMORANDUM AND ORDER

VILLAGE OF KENMORE, RESPONDENT.

W. JAMES SCHWAN, BUFFALO, FOR PETITIONER.

BOND, SCHOENECK & KING, PLLC, BUFFALO (MARK A. MOLDENHAUER OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [James H. Dillon, J.], entered April 17, 2015) to review a determination of respondent. The determination terminated the employment of petitioner.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination finding him guilty of misconduct and terminating his employment as a firefighter. Contrary to petitioner's contention, we conclude that the determination is supported by substantial evidence, i.e., "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180; *see* CPLR 7803 [4]). We likewise reject petitioner's contention that the Hearing Officer erred in determining that he misrepresented the facts of the 911 call underlying this proceeding. Although petitioner presented evidence to the contrary, "[t]he Hearing Officer was entitled to weigh the parties' conflicting . . . evidence and to assess the credibility of witnesses, and '[w]e may not weigh the evidence or reject [the Hearing Officer's] choice where the evidence is conflicting and room for a choice exists' " (*Matter of Clouse v Allegany County*, 46 AD3d 1381, 1382, quoting *Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75; *see Matter of Childs v City of Little Falls*, 109 AD3d 1148, 1149). We further conclude that the penalty imposed is not " 'so disproportionate to the offense[s] as to be shocking to one's sense of fairness,' " and thus it does not constitute an abuse of discretion

(*Matter of Kelly v Safir*, 96 NY2d 32, 38, *rearg denied* 96 NY2d 854).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 14-00058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN L. ABERNATHY, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KAREN C. RUSSO-MCLAUGHLIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered October 9, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to the contention of defendant, the record establishes that his waiver of the right to appeal was knowingly, intelligently and voluntarily entered (*see People v Lopez*, 6 NY3d 248, 256). County Court thoroughly reviewed the consequences of the waiver with defendant, after which defendant indicated that he understood those consequences and orally waived his right to appeal (*see People v Peterson*, 35 AD3d 1195, 1196, *lv denied* 8 NY3d 926). Defendant's challenge to the factual sufficiency of the plea allocution is encompassed by his valid waiver of the right to appeal (*see People v Rosado*, 70 AD3d 1315, 1316, *lv denied* 14 NY3d 892).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

5
KA 09-00568
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

ANDRE VERNON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

MICHAEL L. D'AMICO, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 23, 2009. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]), in connection with the shooting of two men who were brothers. The surviving victim testified that he and his brother were arguing with defendant on the street. During the argument, defendant's uncle pulled up to the curb near defendant in his vehicle, a large dark SUV, and joined the argument. The victim ran when defendant pulled a gun from his sweatshirt pocket, and the victim heard two gunshots, the second of which struck him in the back. An eyewitness, who was in his vehicle parked on the street, told the police that he heard two shots and saw the SUV back up briefly and "possibly shoot again" before driving off. The eyewitness was deceased at the time of the trial, and his statement was introduced through the testimony of a police detective following defendant's objection that the People had violated their *Brady* obligation by failing to turn over the statement to defendant before trial. According to defendant, the statement of the eyewitness is exculpatory because it implicates his uncle as the shooter. Even assuming, arguendo, that the statement of the eyewitness constitutes *Brady* material, we reject defendant's contention that the failure to turn over the statement prior to trial denied him due process and thus that reversal is required. "Defendant received the remedy he requested

after the People disclosed the [contents of the statement] and he had a reasonable opportunity to use it as part of his defense" (*People v Sanchez*, 21 NY3d 216, 225; *see People v Goodell*, 164 AD2d 321, 327, *affd* 79 NY2d 869; *People v Daniels*, 115 AD3d 1364, 1365, *lv denied* 23 NY3d 1019).

We reject defendant's further contention that Supreme Court erred in determining, following a *Sirois* hearing, that defendant knowingly consented to threats that were made against a witness in the event she appeared to testify for the prosecution, and thus erred in permitting the prosecution to use the grand jury testimony of that witness in their direct case. The witness, who lived in Georgia, testified before the grand jury that defendant contacted her after the shooting and admitted that he shot two people, killing one of them, and requested that she permit him to stay with her. The witness did not appear at trial pursuant to the subpoena served on her. The prosecutor testified at the *Sirois* hearing that he provided defense counsel with the name of the witness on the first day of trial. He also testified regarding his conversations with the witness following the first day of trial, wherein she related the contents of threatening voicemail messages that she had received. One message was from defendant's sister, another was from an unknown male, and additional threatening messages were relayed to her by her mother, who is married to another uncle of defendant's. Telephone records admitted in evidence showed 17 calls from numbers with a Buffalo area code made to the witness's phone on the first day of trial, one of which was identified as belonging to defendant's sister. The People also presented the recorded telephone conversations between defendant and an unidentified female on the evening of the first day of trial, wherein the female stated, inter alia, that "her husband is getting back from Iraq"; "all that you asked has already been done"; and "we are trying to go contact the girl." Defense counsel testified at the *Sirois* hearing that the witness called him and said that her testimony before the grand jury was not true and, when he asked whether she had been threatened, she responded that her mother had relayed a message that she should not testify and that people were calling her on her phone. Defense counsel testified that the witness explained to him that she would not testify because her husband was scheduled to return from a military deployment and she wanted to be home when he arrived. We conclude that the court properly determined that the People proved by the requisite clear and convincing evidence that the witness had been ready to testify; that on the first day of trial a series of telephone calls were made to the witness and there were messages that threatened the witness to such an extent that she changed her mind and refused to testify; and that the totality of the evidence and logical inferences support the conclusion that defendant was responsible for, or acquiesced in, the threats that made the witness unavailable for trial (*see People v Geraci*, 85 NY2d 359, 370; *People v Miller*, 61 AD3d 1429, 1429, *lv denied* 12 NY3d 927; *see generally People v Smart*, 23 NY3d 213, 220-221).

Viewing the evidence in light of the elements of the crimes as charged to the jury, we reject defendant's contention that the verdict is against the weight of the evidence (*see People v Danielson*, 9 NY3d

342, 349; *see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that the jury did not fail to give the evidence the weight it should be accorded (*see Bleakley*, 69 NY2d at 495).

We reject defendant's contention in appeal No. 2 that the court erred in denying his motion to vacate the judgment pursuant to CPL 440.10 (1) (g) on the ground that the affidavit of the witness recanting her grand jury testimony does not constitute newly discovered evidence inasmuch as defense counsel testified at the *Sirois* hearing that the witness said that her grand jury testimony was not true, and the prosecutor testified that the witness explained to him why she said that to defense counsel. Thus, the affidavit does not constitute evidence discovered since the entry of the judgment (*see People v Backus*, 129 AD3d 1621, 1625). We note that " '[t]here is no form of proof so unreliable as recanting testimony' " (*People v Lane*, 100 AD3d 1540, 1541, quoting *People v Shilitano*, 218 NY 161, 170, *rearg denied* 218 NY 702). In any event, the affidavit does not constitute newly discovered evidence within the meaning of CPL 440.10 (1) (g), "because the issues raised in the affidavit would merely impeach or contradict the [prior] testimony of the . . . witness, and the new evidence therefore is not 'of such character as to create a probability that . . . the verdict would have been more favorable to the defendant' had the evidence been introduced" (*People v Howington*, 122 AD3d 1289, 1290, *lv denied* 25 NY3d 1165).

Defendant also sought to have the judgment vacated pursuant to CPL 440.10 (1) (c), based upon his allegation that the prosecutor knowingly presented evidence he knew to be false in the form of the grand jury testimony of the witness who refused to testify. The court did not explicitly rule on that part of defendant's motion, and we cannot deem the court's silence on that part of the motion to be a denial thereof (*see People v Jones*, 114 AD3d 1272, 1272; *see generally People v Concepcion*, 17 NY3d 192, 194-196). We therefore hold the case in appeal No. 2, reserve decision and remit the matter to Supreme Court for a determination of that part of the motion.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 15-00472

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANCIS FINSTER, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANCIS FINSTER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered January 20, 2011. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]), defendant contends that his waiver of the right to appeal is invalid and that his sentence is unduly harsh and severe. We agree with defendant that County Court's "single reference to defendant's right to appeal is insufficient to establish that the court 'engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Brown*, 296 AD2d 860, 860, *lv denied* 98 NY2d 767; *see People v Spears*, 106 AD3d 1534, 1535, *affd* 24 NY3d 1057). We reject the People's contention that defendant signed a waiver of the right to appeal. To the contrary, the record establishes that defendant signed a form notice indicating that he had the right to appeal (*see* 22 NYCRR 1022.11 [a]; *see generally People v June*, 242 AD2d 977, 977; *People v Crum*, 197 AD2d 936, 937). Nevertheless, we reject defendant's challenge to the severity of the sentence.

Finally, we reject defendant's contention in his pro se supplemental brief that he did not validly waive the right to be prosecuted by an indictment issued by a grand jury. The record reflects that "the written waiver—bearing the same date as the plea

allocution—was executed in counsel's presence, and . . . the waiver expressly recites that it was 'executed in open court.' Under these circumstances, . . . defendant's waiver of indictment conformed to the requirements of CPL 195.20" (*People v Simmons*, 110 AD3d 1371, 1372).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 12-01345

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HIKEME WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered August 1, 2011. The judgment convicted defendant, upon his plea of guilty, of menacing a police officer or peace officer, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and resisting arrest.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of criminal possession of a weapon in the third degree is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant appeals from a judgment that convicted him, upon his plea of guilty, of menacing a police officer or peace officer (Penal Law § 120.18), criminal possession of a weapon in the second degree (§ 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and resisting arrest (§ 205.30). We agree with defendant that "the waiver of the right to appeal is invalid because the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Jones*, 107 AD3d 1589, 1589, *lv denied* 21 NY3d 1075 [internal quotation marks omitted]). Although the invalid waiver of the right to appeal thus does not encompass defendant's further contention that the court erred in refusing to suppress the weapon and defendant's statements to the police as fruit of the poisonous tree, we nevertheless reject that contention.

The evidence at the suppression hearing established that, on the date of the incident, police officers were dispatched to 322 Hatch Street at 6:12 a.m. based on a 911 call reporting "a suspicious person with a weapon." The suspect was described as a black male, wearing a

black, hooded sweatshirt and a white "do rag," who was in possession of a silver handgun. As the responding officer turned his patrol vehicle onto Hatch Street, he received another dispatch stating that "the suspect was still in possession of the handgun and standing on the front porch of 322 Hatch Street." When the officer arrived at 322 Hatch Street, he observed a black male, later identified as defendant, wearing a black, hooded sweatshirt and a white "do rag." Defendant was the only person in the vicinity, and he was standing only 15 feet away from the porch of 322 Hatch Street. The responding officer exited the patrol vehicle and shielded himself with the door. At that point, defendant was standing at a 45-degree, "bladed" angle toward the officer and, although his left hand was visible, his right hand "was concealed in the waistband of his pants or the front of his sweatshirt." The officer "ordered [defendant] to remove his right hand and show [the officer] his right hand and lay on the ground." When defendant refused, the officer unholstered his firearm, keeping it down at his side, and again ordered defendant to show his hands. Defendant refused to do so and fled, prompting the officer to pursue him. After defendant lost his balance and fell, a struggle ensued, during which defendant removed a handgun from his waistband and pointed it at the officer's midsection. The officer was able to disarm defendant, at which time defendant was arrested. Following his arrest and the issuance of *Miranda* warnings, defendant made inculpatory statements, and the police identified the woman who had called 911.

The court refused to suppress the weapon or the statements, finding that the caller was "[a]n identified citizen informant" and thus provided the responding officer with probable cause to arrest defendant. The court also found that, even if the facts and circumstances did not amount to probable cause, the responding officer was justified in forcibly detaining defendant based on his reasonable suspicion that defendant had a gun and, also, based on the officer's need to "take reasonable self-protective measures to ensure his safety and neutralize the threat of physical harm."

On appeal, defendant contends that the court erred in determining that the caller was an identified citizen informant and that the responding officer was justified in forcibly detaining him when the officer ordered defendant to show his hands and lie down on the ground. The People contend that defendant's challenge to the nature of the caller is not preserved for our review, but we reject that contention inasmuch as the court " 'expressly decided the question raised on appeal,' thus preserving the issue for review" (*People v Smith*, 22 NY3d 462, 465, quoting CPL 470.05 [2]; *see People v Riddick*, 70 AD3d 1421, 1423, *lv denied* 14 NY3d 844). Although we agree with defendant that the 911 caller was an anonymous caller at the time the responding officer forcibly detained defendant (*see Navarette v California*, ___ US___, ___, 134 S Ct 1683, 1687-1689; *cf. People v Van Every*, 1 AD3d 977, 978, *lv denied* 1 NY3d 602), and that "defendant was seized within the meaning of the Fourth Amendment" when the responding officer ordered him to show his hands and lie down on the ground (*People v Gonzales*, 86 AD2d 634, 635), we nevertheless conclude that the officer was justified in forcibly detaining defendant "based on

the contents of a 911 call from an anonymous individual and the confirmatory observations of the police" (*People v Argyris*, 24 NY3d 1138, 1140, *rearg denied* 24 NY3d 1211, *cert denied* ___ US ___ [Jan. 11, 2016]; *see People v Williams*, 126 AD3d 1304, 1305, *lv denied* 25 NY3d 1209; *cf. People v Moore*, 6 NY3d 496, 499-500).

Although "a radioed tip may have almost no legal significance when it stands alone, . . . when considered in conjunction with other supportive facts, it may thus collectively, although not independently, support a reasonable suspicion justifying intrusive police action" (*People v Benjamin*, 51 NY2d 267, 270). Here, as in *Benjamin*, that "additional support can, as well, be provided by factors rapidly developing or observed at the scene" (*id.*). The evidence at the hearing established that " 'the report of the 911 caller was based on the contemporaneous observation of conduct that was not concealed' " (*Williams*, 126 AD3d at 1305; *see Argyris*, 99 AD3d at 810). Upon the officer's arrival, defendant was positioned at a bladed angle toward the officer with his hand in his waistband or sweatshirt pocket, " 'common sanctuar[ies] for weapons' " (*People v Smith*, 134 AD3d 1453, ___, quoting *People v Burnett*, 126 AD3d 1491, 1494). In our view, this case is indistinguishable from *Benjamin*.

"A police officer directed to a location by a general radio call cannot reasonably be instructed to close his eyes to reality--neither the officer nor justice should be that blind. The officer was rightfully and dutifully on the scene and could not ignore possible indications of criminality, nor is there any logical reason for him to reject the natural mental connection between newly encountered facts and the substance of the radio message. More importantly, there certainly is no justification for holding that an officer in such a situation cannot take note of a significant occurrence indicating a possible threat to his life, merely because the call which directed him to the scene was in and of itself an insufficient predicate for intrusive action against a particular person" (*Benjamin*, 51 NY2d at 271). In accordance with Court of Appeals' precedent, we conclude that "it would be unrealistic to require [the responding officer], who had been told that [a] gunm[a]n might be present, to assume the risk that the defendant's conduct was in fact innocuous or innocent. Such an assumption would be at odds with his reasonably acquired belief that he was in danger and his constitutionally authorized action . . . It would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety" (*id.; see People v Allen*, 73 NY2d 378, 380; *cf. Burnett*, 126 AD3d at 1494).

"Given the extremely short period of time between the report of [the man with a gun] and the arrival of the [responding officer] on the scene, defendant's presence [in proximity to the porch] and the absence of any other individual in the vicinity, the [officer was] justified in forcibly detaining defendant in order to quickly confirm or dispel [his] reasonable suspicion of defendant's possible [possession of a weapon]" (*People v Stroman*, 107 AD3d 1023, 1024, *lv denied* 21 NY3d 1046; *see Benjamin*, 51 NY2d at 270). We thus conclude that the court properly refused to suppress the weapon and defendant's

ensuing statements.

In light of defendant's resentencing on the conviction of criminal possession of a weapon in the third degree, we do not consider his challenge to the severity of the original sentence imposed on that count, and we dismiss the appeal from the judgment to that extent (*see People v Richardson*, 128 AD3d 1377, 1379, *lv denied* 25 NY3d 1206; *People v Haywood*, 203 AD2d 966, 966, *lv denied* 83 NY2d 967). Contrary to the final contention of defendant, the bargained-for sentence on the remaining counts is not unduly harsh and severe.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

9

KA 12-01362

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD J. TORTORICE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered April 20, 2012. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (three counts), robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of burglary in the first degree (Penal Law § 140.30 [2] - [4]). Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct inasmuch as he failed to object to any of the allegedly improper conduct (*see People v Bynum*, 125 AD3d 1278, 1278, *lv denied* 26 NY3d 927), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that he was denied effective assistance of counsel. Viewing the evidence, the law, and the circumstances of the case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY3d 137, 147). Contrary to defendant's further contention, he implicitly waived his rights under *People v Antommarchi* (80 NY2d 247, *rearg denied* 81 NY2d 759) during jury selection when, "after hearing the trial judge say that he [had an absolute right to come up and hear everything], he chose not to do so" (*People v Flinn*, 22 NY3d 599, 601, *rearg denied* 23 NY3d 940; *see People v Williams*, 15 NY3d 739, 740). Defendant's related contention that Supreme Court's instruction was too narrow because it was not clear that he could attend all "backroom" conferences with potential jurors concerning

possible bias is belied by the record, inasmuch as the court informed defendant that he "was free to attend . . . conferences if he wanted to do so" (*Flinn*, 22 NY3d at 602).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

10
KA 11-00519
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE VERNON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

MICHAEL L. D'AMICO, BUFFALO, FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Erie County (M. William Boller, A.J.), dated January 24, 2011. The order denied the motion of defendant to vacate a judgment of conviction.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for a determination of that part of defendant's motion pursuant to CPL 440.10 (1) (c).

Same memorandum as in *People v Vernon* ([appeal No. 1] ___ AD3d ___ [Feb. 5, 2016]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

11
CAF 14-01367
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF CHRISTOPHER D.S.,
JASMINE S., MACKENZIE L.S., TIMOTHY A.S.,
AND ZACHARY T.S.
--- MEMORANDUM AND ORDER
ALLEGANY COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

RICHARD E.S., RESPONDENT-APPELLANT.

KELIANN M. ARGY, ORCHARD PARK, FOR RESPONDENT-APPELLANT.

THOMAS A. MINER, COUNTY ATTORNEY, BELMONT (LESLIE J. HAGGSTROM OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOAN MERRY, ATTORNEY FOR THE CHILDREN, HORNELL.

MICHAEL D. BURKE, ATTORNEY FOR THE CHILD, OLEAN.

Appeal from an order of the Family Court, Allegany County (Thomas P. Brown, J.), entered April 15, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, transferred respondent's guardianship and custody rights with respect to 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 Social Services Law § 384-b, respondent father appeals from a decision terminating his parental rights with respect to the five subject children. "Although no appeal lies from a mere decision . . . , we exercise our discretion to treat the notice of appeal as valid and deem the appeal from the decision as . . . taken from the order[] of fact-finding and disposition" (*Matter of Ariel C.W.-H. [Christine W.]*, 89 AD3d 1438, 1438; *see Matter of Kessler v Fancher*, 112 AD3d 1323, 1323; *see generally* CPLR 5520 [c]).

Contrary to the father's contention, Family Court did not abuse its discretion in denying his recusal request. The father's request was based on his allegation that the court presided over the prosecution of the father for the sexual abuse of his daughter that formed the basis for this proceeding, and on the father's contention that the court obtained information in violation of the father's attorney-client privilege. Initially, we note that the father's

appellate brief does not address the alleged violation of his attorney-client privilege, and thus he has abandoned that contention (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

" 'Where, as here, there is no allegation that recusal is statutorily required . . . , the matter of recusal is addressed to the discretion and personal conscience of the [Judge] whose recusal is sought' " (*Matter of Angie M.P.*, 291 AD2d 932, 933, *lv denied* 98 NY2d 602; *see Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316; *see generally Matter of Murphy*, 82 NY2d 491, 495). The fact that the same jurist presided over this proceeding in Family Court as well as the criminal prosecution is not a statutory basis for recusal (*see Matter of Karina U.*, 299 AD2d 772, 773, *lv denied* 100 NY2d 501; *see also Matter of Kelley v VanDee*, 61 AD3d 1281, 1284; *see generally People v Moreno,* 70 NY2d 403, 405-406), and we perceive no abuse of discretion.

The father further contends that the court violated his right to due process by determining, inter alia, that petitioner was not required to make diligent efforts to reunite him with the subject children. Although the father did not appeal from the intermediate order in which the court made that determination, "[a]n appeal from a dispositional order of Family Court brings up for review the propriety of a fact-finding order" (*Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983). Nevertheless, as the father concedes, the record on appeal does not include the evidence on which the court relied in determining that petitioner need not make diligent efforts to reunite him with the subject children, or a record of the proceedings in which the court made that determination. "It is the obligation of the appellant to assemble a proper record on appeal" (*Gaffney v Gaffney*, 29 AD3d 857, 857; *see Matter of Lopez v Lugo*, 115 AD3d 1237, 1237). The father, "as the appellant, submitted this appeal on an incomplete record and must suffer the consequences" of our inability to review his contention concerning the court's determination that petitioner need not make diligent efforts to reunite him with the subject children (*Matter of Santoshia L.*, 202 AD2d 1027, 1028; *see Matter of Caughill v Caughill*, 124 AD3d 1345, 1347).

We have considered the father's remaining contentions regarding the alleged violation of his due process rights and conclude that they are without merit.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

14
CAF 15-00187
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF MICHAEL C. WAITE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MALLORY J. CLANCY, RESPONDENT-APPELLANT.

MICHELLE A. COOKE, CORNING, FOR RESPONDENT-APPELLANT.

CHRISTINE M. VALKENBURGH, ATTORNEY FOR THE CHILD, BATH.

Appeal from an order of the Family Court, Steuben County (Gerard Alonzo, J.H.O.), entered May 16, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, granted sole legal custody and physical placement of the parties' child to petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the conditions imposed with respect to any future application for resumption of visitation and as modified the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that awarded petitioner father sole custody and placement of the parties' child and suspended visitation between the mother and the child "until she engages successfully in mental health and drug and alcohol evaluations, and . . . recommended treatment, and upon successful completion of [the] same is reserved the right to file a [m]odification." Contrary to the mother's contention, Family Court's determination to suspend her visitation is supported by a sound and substantial basis in the record inasmuch as the evidence presented at the hearing established that such visitation was detrimental to the child's welfare (*see Matter of Christina F.F. v Stephen T.C.*, 48 AD3d 1112, 1113, *lv denied* 10 NY3d 710). We agree with the mother, however, that the court lacked authority to condition the resumption of visitation upon her completion of mental health and drug and alcohol evaluations and compliance with all treatment recommendations (*see Matter of Hameed v Alatawaneh*, 19 AD3d 1135, 1136; *Matter of Davenport v Ouweleen*, 5 AD3d 1079, 1079-1080). We therefore modify the order accordingly. Finally, as we similarly concluded in the mother's related appeal (*Matter of VanSkiver v Clancy*, 128 AD3d 1408, 1408-1409), the court did not abuse its discretion in denying her attorney's request for an adjournment and in holding the hearing in

her absence.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

15
CA 15-01045
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

DEBORAH S. VOSS, PROP-CO, LLC, CLASSI PEOPLE, INC.,
DOING BUSINESS AS SERTINO'S CAFÉ, AND DREAM
PEOPLE, INC., DOING BUSINESS AS SHIVER MODEL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

THE NETHERLANDS INSURANCE COMPANY, ET AL.,
DEFENDANTS,
AND CH INSURANCE BROKERAGE SERVICES, CO., INC.,
DEFENDANT-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, ALBANY (THOMAS M. WITZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

DIRK J. OUDEMOOL, SYRACUSE, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 14, 2015. The order denied the motion of defendant CH Insurance Brokerage Services, Co., Inc., for leave to amend its answer and to preclude plaintiffs from seeking consequential damages.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion seeking a determination that plaintiffs are precluded from seeking consequential damages for lost profits and as modified the order is affirmed without costs.

Memorandum: Defendant-appellant (defendant) appeals from an order denying its motion seeking, inter alia, a determination that plaintiffs are precluded from seeking and presenting evidence at trial of consequential damages on the ground that Supreme Court had previously dismissed that claim with respect to the other defendants and that order was affirmed by this Court (*Voss v Netherlands Ins. Co.* [appeal No. 1], 104 AD3d 1228). The court dismissed the claim for consequential damages with respect to the other defendants after the amended complaint had been dismissed against defendant in its entirety, and before it was reinstated by the Court of Appeals (*Voss v Netherlands Ins. Co.*, 96 AD3d 1543, *revd* 22 NY3d 728). In denying the instant motion, the court determined that defendant was required to seek such relief by way of a motion for summary judgment rather than a motion in limine, and thus the court did not address the merits of the motion.

We note at the outset that the court erred in requiring defendant to seek the same relief by way of a motion for summary judgment, and instead should have decided the merits of the motion before it. Although defendant titled that part of the motion as a motion in limine, it is the functional equivalent of a summary judgment motion (*see generally Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224), and an order deciding the merits of such a motion is appealable because it "limits the scope of the issues at trial" (*Dischiavi v Calli*, 125 AD3d 1435, 1436). Contrary to plaintiffs' contention, we conclude that defendant may appeal from the order because the court should have decided the merits of that part of the motion, which in turn "involves some part of the merits" of the controversy inasmuch as the identical claim has been dismissed with respect to the other defendants (*see* CPLR 5701 [a] [2] [iv]). On the merits, we conclude that the court erred in denying that part of the motion because the determination that the claim for consequential damages was too speculative constitutes the law of the case. We therefore modify the order by granting that part of the motion seeking a determination that plaintiffs are precluded from seeking consequential damages for lost profits. It is well settled that " '[o]ur prior decision in [a] case is the law of the case until modified or reversed by [the Court of Appeals], and the trial court is bound by our decision' " (*J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259, 1260).

In light of our determination, we do not address defendant's remaining contention.

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

17
CA 15-00443
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

MARIA A. LEGGO, PLAINTIFF-RESPONDENT,

V ORDER

MARTIN J. LEGGO, DEFENDANT-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Genesee County (Robert C. Noonan, A.J.), entered June 11, 2014 in a divorce action. The judgment, among other things, directed defendant to pay maintenance to plaintiff.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

20
CA 15-00816
PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF ARBITRATION BETWEEN
ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE
EDUCATIONAL SERVICES, PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

ONONDAGA-CORTLAND-MADISON BOCES FEDERATION OF
TEACHERS, ET AL., RESPONDENTS-RESPONDENTS.

FERRARA FIORENZA P.C., EAST SYRACUSE (CRAIG M. ATLAS OF COUNSEL), FOR PETITIONER-APPELLANT.

RICHARD E. CASAGRANDE, LATHAM (MATTHEW E. BERGERON OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 19, 2014. The order denied the petition to stay arbitration and granted the cross application to compel arbitration.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 75 seeking a permanent stay of arbitration. Respondents are labor organizations that represent separate groups of employees, and they filed grievances alleging that petitioner violated a certain provision of each collective bargaining agreement (CBA) by changing the prescription copay benefit for retirees. Supreme Court denied the petition and granted the cross application of respondents to compel arbitration. We affirm.

It is well settled that the court must conduct a two-part analysis in determining whether an issue is subject to arbitration pursuant to a CBA. First, the court must determine "whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance" (*Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232, 1233 [internal quotation marks omitted]). Second, the court must determine "whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA" (*Matter of Board of Educ. of Watertown City Sch. Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143). Petitioner correctly concedes that only the second part of the analysis is at issue here.

We reject petitioner’s contention that the matter is not arbitrable because the CBA provisions apply only to the employees, and not to retirees, and thus that there is no reasonable relationship between the copay benefit for retirees and the general subject matter of the respective CBAs. “Rather, issues concerning [respondents’ respective] relationship[s] to retired employees, issues concerning whether retirees are covered by the grievance procedure, and issues concerning whether the clauses of the contract[s] support the grievance are matters involving the scope of the substantive contractual provisions and, as such, are for the arbitrator” (*Mariano*, 92 AD3d at 1233-1234; *see Matter of Village of Kenmore [Kenmore Club Police Benevolent Assn.]*, 114 AD3d 1185, 1186, *lv denied* 23 NY3d 903).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

21
KA 13-01756
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   MEMORANDUM AND ORDER

SAMUEL J. SAELI, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (THOMAS B. LITSKY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 19, 2013. The judgment convicted defendant, upon his plea of guilty, of offering a false instrument for filing 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 offering a false instrument for filing in the first degree (Penal Law former § 175.35). We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence. "[N]o mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076; *see People v Maracle*, 19 NY3d 925, 928; *People v Peterson*, 111 AD3d 1412, 1412). Although defendant executed a written waiver of the right to appeal in which he waived "any and all sentencing matters," we conclude that the written waiver "does not foreclose our review of the severity of the sentence because [Supreme Court] 'did not inquire of defendant whether he understood the written waiver or whether he had even read the waiver before signing it' " (*People v Donaldson*, 130 AD3d 1486, 1486-1487, quoting *People v Bradshaw*, 18 NY3d 257, 262). We nevertheless conclude that the sentence of 6 months of incarceration and 5 years of probation is not unduly harsh or severe. Defendant has completed serving the term of incarceration, and the period of probation is precisely what defense counsel requested at sentencing. In any event, we conclude that the sentence is appropriate in light of defendant's

criminal history and the favorable nature of the plea bargain.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

22
KA 14-00240
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V   ORDER

HENRY L. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered December 2, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and robbery in the first degree (two counts).

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

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KA 13-01467

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CYNTHIA L. OBERDORF, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (BRADLEY E. KEEM OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 3, 2013. The judgment convicted defendant, upon her plea of guilty, of criminal sale of a controlled substance in the second degree and criminal sale of a controlled substance in the third degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of one count of criminal sale of a controlled substance in the second degree (Penal Law § 220.41 [1]) and three counts of criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Contrary to the contention of defendant, her waiver of the right to appeal was knowingly, intelligently and voluntarily entered inasmuch as County Court's lengthy colloquy about the waiver established that defendant understood the terms and conditions of the plea agreement, and "[t]he record . . . establish[es] that the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256). Any alleged deficiencies in the written waiver of the right to appeal, which was executed at the time of sentencing, are of no moment where, as here, there is an otherwise valid oral waiver of the right to appeal (*see People v Handly*, 122 AD3d 1007, 1008; *People v Irvine*, 42 AD3d 949, 949-950, *lv denied* 9 NY3d 962).

The further contention of defendant that the plea was not knowingly, intelligently and voluntarily entered owing to the manner in which the plea allocution was conducted is, in effect, "a challenge to the factual sufficiency of the plea allocution and thus is encompassed by the valid waiver of the right to appeal" (*People v*

Brown, 66 AD3d 1385, 1385, *lv denied* 14 NY3d 839; *see People v Korber*, 89 AD3d 1543, 1543, *lv denied* 19 NY3d 864). "Moreover, defendant failed to preserve that contention for our review inasmuch as [s]he failed to move to withdraw the plea or to vacate the judgment of conviction" (*Korber*, 89 AD3d at 1543; *see People v Lewis*, 114 AD3d 1310, 1311, *lv denied* 22 NY3d 1200).

Although defendant also contends that the bargained-for sentence is unduly harsh and severe, "[t]he valid waiver of the right to appeal encompasses defendant's challenge to the severity of the bargained-for sentence" (*People v Smith*, 37 AD3d 1141, 1142, *lv denied* 9 NY3d 851, *reconsideration denied* 9 NY3d 926; *see generally Lopez*, 6 NY3d at 255). We note, however, that both the certificate of conviction and the uniform sentence and commitment form should be amended because they incorrectly reflect that defendant was sentenced as a second felony offender when she was actually sentenced as a second felony drug offender (*see People v Labaff*, 127 AD3d 1471, 1472, *lv denied* 26 NY3d 931; *People v Easley*, 124 AD3d 1284, 1285, *lv denied* 25 NY3d 1200).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

26

KA 13-00860

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB C. BUCHANAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 28, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [4]). In appeal No. 2, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (§ 140.25 [2]). In appeal No. 3, defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (§ 160.15 [3]). All of the pleas were entered during one plea proceeding, following the denial of defendant's suppression motion concerning all of the charges. Defendant contends that Supreme Court erred in denying his suppression motion inasmuch as his inculpatory statements to the police were involuntarily made and not attenuated from his unlawful arrest. We reject that contention.

Indeed, "[t]he choice to speak where speech may incriminate is constitutionally that of the individual, not the government, and the government may not effectively eliminate it by any coercive device" (*People v Thomas*, 22 NY3d 629, 642). We note, however, that " '[t]he voluntariness of a confession is to be determined by examining the totality of the circumstances surrounding the confession' " (*People v Peay*, 77 AD3d 1309, 1309-1310, *lv denied* 15 NY3d 955; *see Thomas*, 22 NY3d at 641-642). Here, an officer who interviewed defendant testified at the suppression hearing that defendant was not threatened or promised anything in order for him to waive his *Miranda* rights, and

the officer did not promise defendant that, if he cooperated, the officer would help him gain admission into a Drug Court program. The court did not credit defendant's testimony that the officers who questioned him promised to help him "with the judge and something about Drug Court," and we give deference to the court's resolution of issues of credibility (*see generally People v Prochilo*, 41 NY2d 759, 761; *People v Williams*, 115 AD3d 1344, 1345). In any event, even crediting defendant's testimony, we agree with the People that the statements by the officers were not deceptive or coercive (*see People v Sabines*, 121 AD3d 1409, 1411, *lv denied* 25 NY3d 1171; *see generally Thomas*, 22 NY3d at 641-642). We conclude that the People proved beyond a reasonable doubt that defendant's statements were not products of coercion but rather were the "result of a 'free and unconstrained choice' " by defendant (*Thomas*, 22 NY3d at 641).

We agree with the People that, even assuming that defendant was illegally arrested, "defendant's statements were sufficiently attenuated from the illegal arrest to be purged of the taint created by the illegality" (*People v Russell*, 269 AD2d 771, 772). "[A] confession that is made after an arrest without probable cause is not subject to suppression if the People adequately demonstrate that the inculpatory admission was 'attenuated' from the improper detention; in other words, it was 'acquired by means sufficiently distinguishable from the arrest to be purged of the illegality' " (*People v Bradford*, 15 NY3d 329, 333). In determining whether there has been attenuation, courts must consider "the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct" (*id.* at 333 [internal quotation marks omitted]).

Here, defendant was not interrogated until almost 2½ hours after his arrest (*see id.* at 333-334; *see also People v Rogers*, 52 NY2d 527, 532-534, *rearg denied* 54 NY2d 753, *cert denied* 454 US 898, *reh denied* 459 US 898). He was given *Miranda* warnings prior to the interrogation, which is an "important" attenuation factor (*People v Conyers*, 68 NY2d 982, 983). Before defendant was interrogated, a codefendant implicated defendant in at least one of the crimes, which constituted a significant intervening event and provided the police with probable cause (*see generally Bradford*, 15 NY3d at 333-334; *Russell*, 269 AD2d at 772). Finally, there was no evidence of flagrant misconduct or bad faith on the part of the officers (*see Bradford*, 15 NY3d at 334).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

27

KA 13-00861

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB C. BUCHANAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 28, 2012. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Same memorandum as in *People v Buchanan* ([appeal No. 1] ___ AD3d ___ [Feb. 5, 2016]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

28
KA 13-00862
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACOB C. BUCHANAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered August 28, 2012. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Same memorandum as in *People v Buchanan* ([appeal No. 1] ___ AD3d ___ [Feb. 5, 2016]).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

33

CAF 15-00738

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

IN THE MATTER OF KATHRYN TAYLOR,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH BENEDICT, RESPONDENT-APPELLANT.

ANTHONY J. CERVI, BUFFALO, FOR RESPONDENT-APPELLANT.

BONNIE A. MCLAUGHLIN, BUFFALO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered July 3, 2014 in a proceeding pursuant to Family Court Act article 4. The order denied the objections of respondent to the order of a Support Magistrate.

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

Memorandum: Respondent father appeals from an order denying his objections to the order of the Support Magistrate, who granted petitioner mother's petition seeking an upward modification of the father's child support obligation. We reject the father's contention that the record does not support the Support Magistrate's imputation of income to him. "[I]n determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397 [internal quotation marks omitted]). At the hearing, the father testified that he was currently unemployed, but that he had worked for a company "off and on" for over five years, making $10 per hour, and that he did not have any medical disabilities preventing him from working. Family Court determined that the Support Magistrate imputed income to the father of $20,800 per year, and we conclude that the determination is supported by the record and was based on the relevant factors (*see Lauzonis v Lauzonis*, 105 AD3d 1351, 1351; *Matter of Monroe County Support Collection Unit v Wills*, 21 AD3d 1331, 1331, *lv denied* 6 NY3d 705). The father's remaining contentions are not properly before us because they were not raised in his objections to the Support Magistrate's order (*see Matter of Farruggia v Farruggia*, 125 AD3d 1490, 1490; *Matter of Cattaraugus County Dept.*

of Social Servs. v Roberts, 81 AD3d 1318, 1318).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

35
CAF 14-02119
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF ADDISON S., JR.,
RESPONDENT-APPELLANT.
---------------------------------- ORDER
CATTARAUGUS COUNTY ATTORNEY,
PETITIONER-RESPONDENT.

LYLE T. HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD, FOR RESPONDENT-APPELLANT.

THOMAS C. BRADY, COUNTY ATTORNEY, LITTLE VALLEY (STEPHEN J. RILEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an amended order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered November 14, 2014 in a proceeding pursuant to Family Court Act article 3. The amended order, among other things, adjudged that respondent is a juvenile delinquent and placed him in the custody of the New York State Office of Children and Family Services.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 9 and 11, 2015,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

36

CA 15-01166

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

PETER GUIDO, PLAINTIFF-RESPONDENT,

V ORDER

BENCHMARK ENVIRONMENTAL ENGINEERING AND
SCIENCE, PLLC, ET AL., DEFENDANTS,
AND TECUMSEH REDEVELOPMENT INC.,
DEFENDANT-APPELLANT.

ECKERT SEAMANS CHERIN & MELLOTT, PITTSBURGH, PENNSYLVANIA (ROBERT J. HANNEN, OF THE PENNSYLVANIA, OHIO AND WEST VIRGINIA BARS, ADMITTED PRO HAC VICE, OF COUNSEL), AND PHILLIPS LYTLE, BUFFALO, FOR DEFENDANT-APPELLANT.

FINE, OLIN & ANDERMAN, LLP, NEWBURGH (MARSHALL P. RICHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 19, 2015. The order, insofar as appealed from, denied that part of the motion of, among others, defendant Tecumseh Redevelopment Inc., seeking summary judgment dismissing the complaint against that defendant.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

37
CA 15-00818
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF WILFRED TURNER, JOEL GIAMBRA
AND JOSEPH GOLOMBEK, JR., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COMMUNITY COLLEGE,
RESPONDENTS-RESPONDENTS.

RICHARD G. BERGER, BUFFALO, FOR PETITIONERS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (DANIEL A. SPITZER OF COUNSEL), FOR
RESPONDENTS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered February 13, 2015 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul the negative declaration issued by respondent County of Erie under the State Environmental Quality Review Act ([SEQRA] ECL art 8) with respect to the proposed construction of a new academic building on the Amherst Campus of respondent Erie Community College (ECC). Respondents moved to dismiss the petition, contending that the petition failed to raise a single environmental issue related to the proposed construction. Supreme Court determined that petitioners lacked standing and dismissed the petition. We affirm.

It is well settled that "[t]he purposes of SEQRA . . . are to encourage productive and enjoyable harmony with our environment; 'to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state' " (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 777). To that end, the overriding principle of SEQRA is the "maintenance of a quality environment for the people of this state" (ECL 8-0103 [1]), and "every citizen 'has a responsibility to contribute to the preservation and enhancement of the quality of the environment' " (*Society of Plastics Indus.*, 77 NY2d at 777, quoting ECL 8-0103 [2]).

Despite the responsibility of every citizen to contribute to the preservation and enhancement of the quality of the environment, there is a limit on those who may raise environmental challenges to governmental actions (*see id.* at 772-775). Those seeking to raise SEQRA challenges must establish both "an *environmental* injury that is in some way different from that of the public at large, and . . . that the alleged injury falls within the zone of interests sought to be protected or promoted by SEQRA" (*Matter of Tuxedo Land Trust, Inc. v Town Bd. of Town of Tuxedo*, 112 AD3d 726, 727-728 [emphasis added]; *see Matter of Sierra Club v Village of Painted Post*, 26 NY3d 301, ___; *Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 308-309; *Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 653; *see generally Society of Plastics Indus.*, 77 NY2d at 772-774; *Matter of Mobil Oil Corp. v Syracuse Indus. Dev. Agency*, 76 NY2d 428, 433).

Here, petitioners failed to establish that they have suffered an environmental injury. In opposition to the motion to dismiss, each petitioner submitted an affidavit discussing how he had been allegedly harmed. Petitioner Wilfred Turner stated that, as a student at ECC, he would be harmed by the proposed construction because he did not own a motor vehicle, and it would be both expensive and inconvenient for him and other similarly situated students to use public transportation to attend classes at the Amherst Campus. Petitioner Joel Giambra, the former County Executive of Erie County, stated that, if the proposed facility were constructed on the Amherst Campus instead of within the City of Buffalo, "[he] would be harmed in that all of the work [he had] done and all of the procedures [he had] fought for would be shown to have been useless." Finally, petitioner Joseph Golombek, Jr., a City Council member for the City of Buffalo (City), stated that he would be harmed because of the "unfavorable decision on the placement of the facility" inasmuch as his "constituents [would] certainly judge [him] according to how well he accomplished [his] tasks," such as safeguarding the City from "adverse economic decisions" and "promot[ing] the expansion of business and economic opportunity within the City." None of those alleged injuries constitutes an environmental injury under SEQRA (*see* 6 NYCRR 617.2 [l]).

Although Giambra and Golombek stated that construction of the new facility would have "lasting environmental impacts, including urban sprawl, traffic congestion, redistribution of residential development, and the routing of mass transit in the future," and such traffic issues are "clearly within the zone of interests" of SEQRA (*Matter of Pelham Council of Governing Bds. v City of Mount Vernon Indus. Dev. Agency*, 187 Misc 2d 444, 448, *appeal dismissed* 302 AD2d 393), none of the petitioners is a resident "of the community which may be affected by the project since they are outside the 'existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character' in close proximity to [the construction]," and they therefore cannot rely on the traffic and population distribution issues to establish standing (*Matter of Jackson v City of New Rochelle*, 145 AD2d 484, 485, *lv denied* 73 NY2d 706).

Inasmuch as none of the petitioners established an *environmental* injury, different from that of the public at large, that falls within the zone of interests sought to be protected or promoted by SEQRA, we conclude that the court properly dismissed the petition (*see Tuxedo Land Trust, Inc.*, 112 AD3d at 727-728).

In view of our decision, we do not address respondents' contention with respect to an alternative ground for affirmance.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

38

CA 15-00414

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

ELIZABETH RESZKA, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNCILMAN JOSEPH A. COLLINS, DEFENDANT-RESPONDENT.

HOGAN WILLIG, PLLC, AMHERST (STEVEN M. COHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOSEPH A. COLLINS, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered May 22, 2014. The order denied the motion of plaintiff to dismiss the counterclaims of defendant.

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

Memorandum: Plaintiff commenced this action seeking to remove defendant from his position as a council member of the Town Board of the Town of Hamburg. Defendant answered the complaint and asserted as an affirmative defense that Supreme Court lacked subject matter jurisdiction over plaintiff's action. Plaintiff thereafter filed an original proceeding pursuant to Public Officers Law § 36 before this Court, correctly recognizing the validity of defendant's affirmative defense, and we dismissed the petition (*Matter of Reszka v Collins*, 109 AD3d 1134). While that proceeding was pending in this Court, defendant filed an amended answer in this action and asserted two counterclaims. After we dismissed the petition in the original proceeding, plaintiff moved pursuant to CPLR 3211 (a) (2), (6), and (7) to dismiss the two counterclaims in this action, and the court denied the motion. We agree with plaintiff that the court erred in denying that part of her motion seeking to dismiss the second counterclaim, and we therefore modify the order accordingly.

Initially, we reject plaintiff's contention that the court should have dismissed the counterclaims because it lacked subject matter jurisdiction over plaintiff's action (*see generally* CPLR 3211 [a] [2]). The court's lack of jurisdiction over plaintiff's action is not fatal to the counterclaims, which may be severed where a complaint is dismissed or, as here, effectively dismissed (*see* CPLR 3019 [d]; *Evolution Trading Mgt. LLC v Bank of N.Y. Mellon Corp.*, 88 AD3d 605,

605; *Ballen v Aero Mayflower Tr. Co.*, 144 AD2d 407, 410). Contrary to plaintiff's contention, dismissal of the counterclaims is not required even where, as here, a complaint was or should be dismissed on procedural grounds rather than on the merits (*see Levess v Levess*, 28 AD2d 513, 513, *affd* 21 NY2d 758; *Becker v University Physicians of Brooklyn*, 307 AD2d 243, 244-245).

We reject plaintiff's further contention that the first counterclaim, alleging defamation, should be dismissed on the ground that it fails to state a cause of action (*see* CPLR 3211 [a] [7]). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87). "We accept the facts as alleged [in the answer] as true, accord [defendant] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88).

Defendant alleged in his first counterclaim that plaintiff held a press conference regarding the lawsuit, and he further alleged that plaintiff "made slanderous and defamatory and libelous statements intentionally, willfully and maliciously" attacking him in his individual and professional capacity. Statements made in the course of judicial proceedings are protected by absolute privilege provided that they are material and pertinent to the issue to be resolved in the proceeding (*see* Civil Rights Law § 74; *Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365; *Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1399; *Sinrod v Stone*, 20 AD3d 560, 561; *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382, *lv denied* 93 NY2d 808). A party cannot, however, maliciously commence a judicial proceeding alleging false and defamatory charges and then circulate a press release based on the same charges and escape liability by invoking Civil Rights Law § 74 (*see Williams v Williams*, 23 NY2d 592, 599). The first counterclaim here adequately states that plaintiff's action was without any basis in fact and was commenced solely to defame defendant. Under those circumstances, we conclude that the court properly refused to dismiss the first counterclaim (*see Williams*, 23 NY2d at 596; *Halcyon Jets, Inc. v Jet One Group, Inc.*, 69 AD3d 534, 534-535; *cf. Emergency Enclosures, Inc. v National Fire Adj. Co., Inc.*, 68 AD3d 1658, 1662-1663). Contrary to plaintiff's further contention, the first counterclaim also adequately states that plaintiff acted with actual malice, which is a required element for a defamation claim brought by a public official (*see Silsdorf v Levine*, 59 NY2d 8, 17, *cert denied* 464 US 831; *see generally Freeman v Johnston*, 84 NY2d 52, 56, *cert denied* 513 US 1016).

We agree with plaintiff, however, that the court erred in denying the motion with respect to the second counterclaim, alleging malicious prosecution. Where, as here, the underlying action is civil in nature, the party alleging a claim for malicious prosecution must allege a special injury (*see Engel v CBS, Inc.*, 93 NY2d 195, 201-204; *Shatkin v Drescher*, 24 AD3d 1292, 1292-1293; *Molinoff v Sassower*, 99 AD2d 528, 529). In the instant case, defendant "fail[ed] to plead that the civil proceeding involved wrongful interference with [his]

person or property" (*Wiener v Wiener*, 84 AD2d 814, 815; *see Belsky v Lowenthal*, 47 NY2d 820, 821; *Galanova v Safir*, 127 AD3d 686, 687; *Molinoff*, 99 AD2d at 529). Instead, defendant alleged damages amounting to "the physical, psychological or financial demands of defending a lawsuit," which is insufficient to constitute a special injury for a claim of malicious prosecution (*Engel*, 93 NY2d at 205; *see Dermigny v Siebert*, 79 AD3d 460, 460).

To the extent that defendant contends that the second counterclaim is for abuse of process and not malicious prosecution, we conclude that it must still be dismissed as well. "Insofar as the only process issued [here] was a summons, the process necessary to obtain jurisdiction and begin the lawsuit, there was no unlawful interference with [defendant's] person or property because the institution of a civil action by summons and complaint is not legally considered process capable of being abused" (*Curiano v Suozzi*, 63 NY2d 113, 116; *see Muro-Light v Farley*, 95 AD3d 846, 847). Defendant alleges that plaintiff acted maliciously in bringing the action, but "[a] malicious motive alone . . . does not give rise to a cause of action for abuse of process" (*Curiano*, 63 NY2d at 117; *see Muro-Light*, 95 AD3d at 847).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

39
CA 15-01137
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ.

JGB PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

IRONWOOD, L.L.C., STEELWAY REALTY CORPORATION,
TOWN OF CLAY, 4550 STEELWAY BOULEVARD, LLC,
PLAINVILLE FARMS, LLC, JSF SERVICES, LLC, CSX
TRANSPORTATION, INC., DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

CAMARDO LAW FIRM, P.C., AUBURN (SALVATORE D. FERLAZZO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS IRONWOOD, L.L.C., STEELWAY REALTY CORPORATION, 4550 STEELWAY BOULEVARD, LLC, PLAINVILLE FARMS, LLC, AND JSF SERVICES, LLC.

NIXON PEABODY LLP, ROCHESTER (TERENCE L. ROBINSON, JR., OF COUNSEL), FOR DEFENDANT-RESPONDENT CSX TRANSPORTATION, INC.

ROBERT M. GERMAIN, TOWN ATTORNEY, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF CLAY.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered September 8, 2014. The order, among other things, dismissed the first amended complaint against defendants Ironwood, L.L.C., Steelway Realty Corporation, Town of Clay, 4550 Steelway Boulevard, LLC, Plainville Farms, LLC, JSF Services, LLC, and CSX Transportation, Inc.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

43
TP 15-00056
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF ANTHONY MEDINA, PETITIONER,

V MEMORANDUM AND ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, RESPONDENT.

ANTHONY MEDINA, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered January 6, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously annulled on the law without costs, the petition is granted in part and the matter is remitted to respondent for further proceedings in accordance with the following memorandum: Petitioner commenced this proceeding seeking to annul a determination finding him guilty of violating various inmate rules and imposing a penalty. "Because the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court" (*Matter of Nieves v Goord*, 262 AD2d 1042, 1042; *see* CPLR 7804 [g]; *Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362). We nevertheless address the issues raised in the interest of judicial economy (*see Nieves*, 262 AD2d at 1042).

Petitioner, who is visually impaired, contends that he was not provided with a reasonable accommodation for his disability in these disciplinary proceedings (*see generally* 42 USC §§ 12132, 12133; *Pennsylvania Dept. of Corr. v Yeskey*, 524 US 206, 208-212). Respondent correctly concedes that the record fails to establish that petitioner was provided with sufficiently enlarged copies of the misbehavior reports or offered sufficient magnification to assist in reading them, and thus the record does not establish that respondent took the requisite steps that would "enable him to have comprehended the charges against him and to understand and knowledgeably participate in the hearing[]" (*Matter of Wong v Coughlin*, 138 AD2d 899, 900; *cf. Matter of McFadden v Prack*, 120 AD3d 853, 854-855, *lv*

dismissed 24 NY3d 930, *lv denied* 24 NY3d 908).

Contrary to petitioner's further contention, we conclude that he is not entitled to expungement of his institutional record. The record establishes that respondent had provided petitioner with a CCTV magnifier that met his needs, but it was broken during the incident that was the subject of these proceedings and the parts to repair it had not yet arrived. The record also establishes that other methods of magnifying the documents were attempted, although the record does not establish that they were successful. Therefore, because "a good faith reason for the denial [of petitioner's rights] appears on the record, this amounts to a regulatory violation" rather than a violation of petitioner's constitutional rights, "requiring that the matter be remitted for a new hearing" (*Matter of Morris-Hill v Fischer*, 104 AD3d 978, 978; *see generally Matter of Johnson v Prack*, 122 AD3d 1323, 1324). We therefore annul the determination, grant the petition in part and remit the matter to respondent for a new hearing (*see e.g. Matter of Shoga v Annucci,* 132 AD3d 1338, 1339).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

45
KA 13-01616
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC A. EASTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered June 18, 2013. The judgment convicted defendant, upon his plea of guilty, of reckless endangerment in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of reckless endangerment in the first degree (Penal Law § 120.25). As the People correctly concede, defendant's waiver of the right to appeal does not encompass his challenge to the severity of the negotiated sentence (*see People v Maracle*, 19 NY3d 925, 928), which runs concurrently to longer sentences imposed in other jurisdictions. Nevertheless, based on our review of the record, we perceive no basis to exercise our power to modify his sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

46
KA 14-00719
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AARON W. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered February 25, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, the plea colloquy establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see People v Ingram*, 128 AD3d 1404, 1404, *lv denied* 25 NY3d 1202). That valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lococo*, 92 NY2d 825, 827).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

47
KA 13-01667
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ASHODD J. PARKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 20, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree and criminal possession of a controlled substance in the fifth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of criminal possession of a controlled substance in the third degree, and as modified the judgment is affirmed and a new trial is granted on that count of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), criminal possession of a weapon in the second degree (§ 265.03 [3]), criminal possession of a weapon in the third degree (§ 265.02 [1]), and criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]). Contrary to defendant's contention, Supreme Court did not err in conducting a *Huntley* hearing in his absence. The record establishes that defendant had received the requisite warnings pursuant to *People v Parker* (57 NY2d 136, 141), which applies to pretrial hearings as well as trials (*see e.g. People v Jackson*, 149 AD2d 969, 969, *lv denied* 74 NY2d 741, *reconsideration denied* 74 NY2d 897), and had been told that he had a "duty and obligation" to be present at all court appearances and hearings. We thus conclude that defendant waived his right to be present at the *Huntley* hearing (*see People v Bynum*, 125 AD3d 1278, 1278, *lv denied* 26 NY3d 927; *People v Anderson*, 52 AD3d 1320, 1321, *lv denied* 11 NY3d 733).

We agree with defendant, however, that the court erred in denying

his request to charge criminal possession of a controlled substance in the seventh degree (*see* Penal Law § 220.03) as a lesser included offense of criminal possession of a controlled substance in the third degree. We therefore modify the judgment accordingly, and we grant a new trial on the charge of criminal possession of a controlled substance in the third degree. Criminal possession of a controlled substance in the seventh degree is a lesser included offense of criminal possession of a controlled substance in the third degree (*see People v Washington*, 266 AD2d 412, 412, *lv denied* 94 NY2d 886), and there is "a reasonable view of the evidence to support a finding that the defendant committed the lesser offense but not the greater" (*People v Van Norstrand*, 85 NY2d 131, 135), i.e., that defendant possessed the cocaine but did not have the intent to sell it (*cf. People v Bond*, 239 AD2d 785, 786, *lv denied* 90 NY2d 891).

Finally, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

52
KA 15-01077
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMISO WOOTEN, DEFENDANT-APPELLANT.

SCHIANO LAW OFFICE, P.C., ROCHESTER (CHARLES A. SCHIANO, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), dated March 27, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, points may be assigned under risk factors 3 (number of victims) and 7 (relationship with victim) to a child pornography offender despite the fact that the offender had no contact with the victims (*see People v Gillotti*, 23 NY3d 841, 854-855; *People v Morel-Baca*, 127 AD3d 833, 833-834). We reject defendant's further contention that Supreme Court erred in denying his request for a downward departure from his presumptive risk level. Even assuming, arguendo, that defendant met his burden of establishing the existence of an appropriate mitigating factor by a preponderance of the evidence, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Butler*, 129 AD3d 1534, 1535, *lv denied* 26 NY3d 904; *People v Worrell*, 113 AD3d 742, 742-743).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

53
CAF 14-00524
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

IN THE MATTER OF WILLIAM A. WARREN,
PETITIONER-APPELLANT,

V   MEMORANDUM AND ORDER

GEORGE E. HIBBS, RESPONDENT-RESPONDENT.

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

CARA A. WALDMAN, FAIRPORT, FOR RESPONDENT-RESPONDENT.

ANNE S. GALBRAITH, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered December 20, 2013 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition without prejudice.

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

Memorandum: Petitioner appeals from an order that, inter alia, dismissed without prejudice his petition seeking a modification of a prior order of custody and visitation. While this appeal was pending, Family Court entered an order upon the consent of the parties that resolved, among other things, custody and visitation issues with respect to the subject child, thereby rendering this appeal moot (*see Matter of Salo v Salo*, 115 AD3d 1368, 1368; *Matter of Walker v Adams*, 31 AD3d 1018, 1018). We conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Entered: February 5, 2016   Frances E. Cafarell
                                              Clerk of the Court

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

57

CA 15-01178

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

WILLIAM EISLEBEN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES DEAN, INDIVIDUALLY, AND DOING BUSINESS AS
JAMES DEAN PAVING, DEFENDANT-APPELLANT.

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

LAW OFFICES OF MARC JONAS, UTICA (MARC JONAS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered December 12, 2014 in a personal injury action. The order, insofar as appealed from, granted that part of plaintiff's motion seeking to strike defendant's third affirmative defense in the amended answer and denied defendant's cross motion for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, plaintiff's motion is denied in its entirety, the third affirmative defense in the amended answer is reinstated, defendant's cross motion is granted, and the complaint is dismissed.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when he slipped and fell on a patch of ice in a parking lot upon arriving at work. Defendant was the snowplowing contractor for the property. Supreme Court granted that part of plaintiff's motion seeking to strike defendant's affirmative defense asserting that he had no legal duty to plaintiff and denied defendant's cross motion for summary judgment dismissing the complaint. As limited by the parties' briefs on appeal, the only issue before us is whether the court erred in granting plaintiff's motion in part and in denying defendant's cross motion upon determining that defendant owed plaintiff a duty of care under the third exception in *Espinal v Melville Snow Contrs.* (98 NY2d 136), i.e., "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 140). We agree with defendant that the court erred, and we therefore reverse the order insofar as appealed from. Here, the contract between defendant and the property owner was not so comprehensive and exclusive that it entirely displaced the property owner's duty to maintain the premises

safely, such that defendant owed a duty to plaintiff. Although the contract required around-the-clock monitoring of the conditions at the premises, “it also gave the property owner the right to request additional services [or re-performance], and employees of the property owner monitored the performance of the snow plowing contract” (*Torella v Benderson Dev. Co.*, 307 AD2d 727, 728).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

59
CA 15-01125
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

JULIE L. GARDNER, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 119681.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., ROCHESTER (TIMOTHY R. HEDGES OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Court of Claims (Nicholas V. Midey, Jr., J.), entered July 30, 2014. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

62
CA 15-00640
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

PAUL E. GILLETTE AND KIM A. GILLETTE,
PLAINTIFFS-RESPONDENTS,

V ORDER

ESTATE OF IVAN H. ENSTROM, DECEASED, BY
ELIZABETH P. ENSTROM, AS EXECUTOR,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CANNON & VANALLEN, LLP, GENESEO (SCOTT D. CANNON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered July 8, 2014. The order granted plaintiffs’ motion for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 7 and 21, 2015,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

63
CA 15-00746
PRESENT: SMITH, J.P., CARNI, LINDLEY, AND DEJOSEPH, JJ.

PAUL E. GILLETTE AND KIM A. GILLETTE,
PLAINTIFFS-RESPONDENTS,

V ORDER

ESTATE OF IVAN H. ENSTROM, DECEASED, BY
ELIZABETH P. ENSTROM, AS EXECUTOR,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

THE LAW FIRM OF JANICE M. IATI, P.C., ROCHESTER (JANICE M. IATI OF COUNSEL), FOR DEFENDANT-APPELLANT.

CANNON & VANALLEN, LLP, GENESEO (SCOTT D. CANNON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Livingston County (Dennis S. Cohen, A.J.), entered September 11, 2014. The amended order granted plaintiffs' motion for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on December 7 and 21, 2015,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

64
TP 15-01231
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

IN THE MATTER OF DION JOHN, PETITIONER,

V ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered July 14, 2015) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

68
KA 14-01980
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY C. DEPETRIS, DEFENDANT-APPELLANT.

MUSCATO, DIMILLO & VONA, LLP, LOCKPORT (GEORGE V.C. MUSCATO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered June 30, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree (three counts), criminal use of a firearm in the first degree and criminal trespass 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, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his motion to withdraw his plea of guilty. Although the record establishes that defendant had attempted to commit suicide while incarcerated three weeks before the plea, that he was taking prescribed antidepressants, and that he was emotionally upset during the plea proceedings, we reject his contention that his mental health condition prevented him from understanding the proceedings and entering a knowing and voluntary plea (*see People v Wilson*, 117 AD3d 1476, 1477; *see also People v Alexander*, 97 NY2d 482, 485-486). In denying the motion, the court acknowledged that defendant was depressed when he entered the plea, in part because he was placed in isolation after allegedly plotting three murders from the jail, but it nevertheless determined that defendant's plea was knowing and voluntary. There is no basis to disturb that determination. We conclude that the court "conducted an inquiry that 'was sufficient to ensure that the plea was voluntary' " (*People v Zuliani*, 68 AD3d 1731, 1732, *lv denied* 14 NY3d 894). The record establishes that defendant understood the proceedings; that he declined the court's offer to change any of his responses; that his medication did not affect his

ability to understand the proceedings; and that he admitted the factual basis for each count of the indictment before pleading guilty. Although defendant initially denied that he attempted to kill the victim, after he consulted with counsel, he admitted that he did so. Thus, the record belies defendant's contention that he was confused and did not understand the consequences of the plea (*see People v Williams*, 103 AD3d 1128, 1129, *lv denied* 21 NY3d 915).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

69

KA 11-00349

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. YAW, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered December 20, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). It is well settled that "[g]reat deference is to be accorded to the fact[]finder's resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956 [internal quotation marks omitted]; *see People v Gay*, 105 AD3d 1427, 1428). "[A] jury's verdict is not necessarily against the weight of the evidence merely because it accepts part of a witness's testimony and rejects other parts" (*People v Alteri*, 49 AD3d 918, 920; *see People v Paulk*, 107 AD3d 1413, 1414, *lv denied* 21 NY3d 1076, *reconsideration denied* 22 NY3d 1157). We perceive no reason to disturb the jury's resolution of the credibility issues or the weight that the jury accorded to the evidence (*see Gay*, 105 AD3d at 1428). Contrary to defendant's further contention, the sentence is not unduly harsh and severe.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

72

KA 13-00120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANDRE R. MARTIN, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered May 29, 2012. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of two counts of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [2] [b]). Contrary to defendant's contention, he knowingly, voluntarily, and intelligently waived both his right to appeal the conviction, as well as his separate and distinct right to appeal the harshness of the sentence (*see People v Rodman*, 104 AD3d 1186, 1188, *lv denied* 22 NY3d 1202; *cf. People v Maracle*, 19 NY3d 925, 928).

Defendant contends that he was denied effective assistance of counsel at sentencing. To the extent that defendant's contention survives his plea of guilty and valid waiver of the right to appeal (*see People v Bonavito*, 121 AD3d 1499, 1500, *lv denied* 25 NY3d 988), we conclude that it is without merit (*see generally People v Ford*, 86 NY2d 397, 404). The record establishes that defendant received "an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*Ford*, 86 NY2d at 404).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

73
KA 12-00687
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANKLIN A. RUPERT, DEFENDANT-APPELLANT.

SHIRLEY A. GORMAN, BROCKPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered February 10, 2012. 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]). Contrary to defendant’s contention, County Court (John L. DeMarco, J.) did not abuse its discretion in denying his request for new assigned counsel after “inquiring as to ‘the nature of the disagreement’ ” between defendant and defense counsel inasmuch as defendant failed to establish that there was “ ‘good cause’ ” for substitution (*People v Porto*, 16 NY3d 93, 100). Instead, defendant’s allegations regarding defense counsel “evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution” (*People v Blackwell*, 129 AD3d 1690, 1691 [internal quotation marks omitted]).

Defendant failed to object to the testimony of two police officers regarding statements he made at the scene of his arrest, i.e., “I’m here” in response to a “K-9 warning,” and “no,” in response to a question by a police officer whether anyone else was in the house, and he thus failed to preserve for our review his contention that the testimony deprived him of a fair trial because those statements were not included in the CPL 710.30 notice (*see People v Davis*, 118 AD3d 1264, 1266, *lv denied* 24 NY3d 1083). Even assuming, arguendo, that those statements should have been included in the CPL 710.30 notice, we conclude that any error in admitting them in evidence is harmless because the evidence against defendant is overwhelming, and there is no reasonable possibility that defendant would have been acquitted if the statements had not been admitted in

evidence (*see People v Roosevelt*, 125 AD3d 1452, 1454, *lv denied* 25 NY3d 1076; *see generally People v Crimmins*, 36 NY2d 230, 237).

Contrary to defendant's contention, the court (Melchor E. Castro, A.J.) properly determined that the People proved beyond a reasonable doubt that defendant is a persistent violent felony offender by establishing that he was convicted of burglary in the second degree on two occasions within 10 years prior to the commission of the instant offense (*see* Penal Law § 70.04 [1] [b] [iv], [v]). The evidence presented by the People included a fingerprint comparison for the three offenses, together with the certificates of conviction of the two predicate offenses, as well as the second felony offender information for the second predicate offense (*see People v Clyde*, 90 AD3d 1594, 1596, *lv denied* 19 NY3d 971). Defendant correctly contends that the court erred in determining how much of the 10-year period was tolled by periods of incarceration when it included a period of parole supervision, and in using the incorrect date for the commission of the instant offense. Upon our review of the record, however, we conclude that the sentence for the first predicate offense was not imposed more than ten years before the commission of the instant offense (*see* § 70.04 [1] [b] [iv], [v]; *see generally People v VanHooser* [appeal No. 2], 126 AD3d 1531, 1532). Defendant failed to object to the testimony of a police officer at the persistent violent felony offender hearing, elicited during cross-examination, regarding a statement that defendant made following his arrest, and which was not included in the CPL 710.30 notice, and he thus failed to preserve for our review his contention that the statement was not admissible (*see People v Oliver*, 63 NY2d 973, 975). Contrary to defendant's contention, we conclude that he received meaningful representation at the persistent violent felony offender hearing (*see generally People v Baldi*, 54 NY2d 137, 147; *People v Gregg*, 107 AD3d 1451, 1452).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

74

KA 15-00545

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY KING, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 12, 2010. 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 convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction because his motion to dismiss was not specifically directed at the ground advanced on appeal (*see People v Gray*, 86 NY2d 10, 19; *see also People v Hawkins*, 11 NY3d 484, 492). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note in particular that the jury's credibility determinations are entitled to great deference " 'because those who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record' " (*People v Ange*, 37 AD3d 1143, 1144, *lv denied* 9 NY3d 839, quoting *People v Lane*, 7 NY3d 888, 890).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

86
CA 15-00084
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ.

DONTIE S. MITCHELL, PLAINTIFF-APPELLANT,

V   ORDER

WOODS OVIATT GILMAN, LLP, AND WILLIAM G. BAUER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

DONTIE S. MITCHELL, PLAINTIFF-APPELLANT PRO SE.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered June 5, 2014. The order, among other things, denied that part of plaintiff's motion seeking to strike defendants' answer.

Now, upon reading and filing the stipulation of discontinuance signed by the plaintiff on November 27, 2015 and by the attorney for the defendants on December 3, 2015,

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

Entered: February 5, 2016   Frances E. Cafarell
                                         Clerk of the Court

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

87

CA 15-00085

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

DONTIE S. MITCHELL, PLAINTIFF-APPELLANT,

V ORDER

WOODS OVIATT GILMAN, LLP, AND WILLIAM G. BAUER,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

DONTIE S. MITCHELL, PLAINTIFF-APPELLANT PRO SE.

WOODS OVIATT GILMAN LLP, ROCHESTER (WILLIAM G. BAUER OF COUNSEL), FOR
DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered December 23, 2014. The order denied plaintiff's motion seeking, inter alia, to strike defendants' answer.

Now, upon reading and filing the stipulation of discontinuance signed by the plaintiff on November 27, 2015 and by the attorney for the defendants on December 3, 2015,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

88
KA 13-00439
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CORTNEY TOOSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Donald E. Todd, A.J.), rendered December 14, 2012. 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.

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

89

KA 14-02223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH S. LATHROP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered June 11, 2014. The judgment convicted defendant, upon his plea of guilty, of reckless assault 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 his guilty plea of reckless assault of a child (Penal Law § 120.02 [1]). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal both orally and in writing before pleading guilty. The record establishes that Supreme Court conducted " 'an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Glasper*, 46 AD3d 1401, 1401, *lv denied* 10 NY3d 863; *see People v Barber*, 117 AD3d 1430, 1430, *lv denied* 24 NY3d 1081). Defendant contends that his plea was not knowingly and intelligently entered because he did not admit that his actions caused a serious physical injury to the child. Defendant's contention is actually a challenge to the factual sufficiency of the plea allocution (*see People v Schmidli*, 118 AD3d 1491, 1491, *lv denied* 23 NY3d 1067; *People v Daniels*, 59 AD3d 943, 943, *lv denied* 12 NY3d 852), which does not survive his valid waiver of the right to appeal (*see People v Zimmerman*, 100 AD3d 1360, 1361, *lv denied* 20 NY3d 1015; *People v Wackwitz*, 93 AD3d 1220, 1221, *lv denied* 19 NY3d 868; *Daniels*, 59 AD3d at 943). In any event, defendant failed to preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction on that ground (*see Wackwitz*, 93 AD3d at 1221; *People v Copp*, 78 AD3d 1548, 1549, *lv denied* 16 NY3d 797). To the extent that defendant contends that the court abused its discretion in denying his motion to withdraw his plea, we conclude

that it is without merit (*see People v Davis*, 129 AD3d 1613, 1613-1614, *lv denied* 26 NY3d 966). The valid waiver of the right to appeal encompasses defendant's further contention that the sentence is unduly harsh and severe (*see People v Lopez*, 6 NY3d 248, 256).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

92
KA 11-01060
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

PETER J. VIANA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered March 2, 2011. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

93

KA 12-00206

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE D. SPIRLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered December 13, 2011. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting her, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that Supreme Court erred in refusing to suppress the statements she made to the first police officer who responded to the crime scene, i.e., her home, in response to a 911 call. According to defendant, she was subjected to custodial interrogation and was not *Mirandized*. We reject that contention. It is well settled that "both the elements of police 'custody' and police 'interrogation' must be present before law enforcement officials constitutionally are obligated to provide the procedural safeguards imposed upon them by *Miranda*" (*People v Huffman*, 41 NY2d 29, 33; *see People v Anthony*, 85 AD3d 1634, 1635, *lv denied* 17 NY3d 813). "Under the circumstances [presented here], we conclude that a reasonable person, innocent of any crime, would not have believed that he or she was in police custody but, rather, would have believed that he or she was being interviewed as a witness to a crime" (*People v Debo*, 45 AD3d 1349, 1350, *lv denied* 10 NY3d 809). Furthermore, the officer asked only preliminary questions in an attempt to identify the victim and determine what had happened to him, and "[i]t is well established that threshold crime scene inquiries designed to clarify the situation and questions that are purely investigatory in nature do not need to be preceded by *Miranda* warnings" (*People v Shelton*, 111 AD3d 1334, 1336-1337, *lv denied* 23 NY3d 1025 [internal quotation marks omitted]). "This determination disposes of defendant's further argument that

[her] statement[s] to the investigator [at the police station were] tainted by the alleged illegality of the [officer's] initial questioning" (*People v Coffey*, 107 AD3d 1047, 1050, *lv denied* 21 NY3d 1041; *see People v Oakes*, 57 AD3d 1425, 1426, *lv denied* 12 NY3d 786).

Defendant failed to preserve for our review her further contention that the court deprived her of her right of confrontation by limiting her cross-examination of her landlord (*see People v Liner*, 9 NY3d 856, 856-857, *rearg denied* 9 NY3d 941; *People v Castor*, 99 AD3d 1177, 1181, *lv denied* 20 NY3d 1010), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We otherwise reject defendant's contention that the court abused its discretion in sustaining the prosecutor's objection to the questioning of the landlord on cross-examination concerning possible fraud by the witness. "Although a witness may be questioned about prior bad acts which bear upon his [or her] credibility, the questions must be asked in good faith and must have a basis in fact" (*People v Steele*, 168 AD2d 937, 938, *lv denied* 77 NY2d 967) and, here, defense counsel failed to establish that she had a good-faith basis for the questions at issue (*see People v Lester*, 83 AD3d 1578, 1578-1579, *lv denied* 17 NY3d 818; *People v Dellarocco*, 115 AD2d 904, 905, *lv denied* 67 NY2d 941).

Defendant failed to preserve for our review her contention that the prosecutor engaged in several instances of misconduct during summation inasmuch as she failed to object to any of those instances (*see People v McEathron*, 86 AD3d 915, 916, *lv denied* 19 NY3d 975). In any event, the challenged comments were " 'either a fair response to defense counsel's summation or fair comment on the evidence' " (*People v Green*, 60 AD3d 1320, 1322, *lv denied* 12 NY3d 915; *see generally People v Halm*, 81 NY2d 819, 821).

Defendant further contends that the court failed to conduct an audibility hearing prior to ruling on the admissibility of a recording of a witness's 911 call. That contention is belied by the record, however, which establishes that the court reviewed the recording in open court with the attorneys present and concluded that it was admissible (*see e.g. People v Lubow*, 29 NY2d 58, 68). Contrary to defendant's further contention, the court properly determined that the recording was not "so inaudible and indistinct that the jury would have to speculate concerning its contents" (*People v Cleveland*, 273 AD2d 787, 788, *lv denied* 95 NY2d 864; *see People v Leeson*, 299 AD2d 919, 919, *lv denied* 99 NY2d 560).

We reject defendant's contention that the court abused its discretion in curtailing defense counsel's cross-examination of the officers during the suppression hearing. Defense counsel's questions were not relevant to the suppression issues before the court (*see generally People v Colvin*, 112 AD3d 1348, 1348-1349, *lv denied* 22 NY3d 1155; *People v Agostini*, 84 AD3d 1716, 1717, *lv denied* 17 NY3d 857; *People v Rutley*, 57 AD3d 1497, 1497, *lv denied* 12 NY3d 821). Finally, we reject defendant's contention that the cumulative effect of the court's alleged errors deprived her of a fair trial (*see People v

McKnight, 55 AD3d 1315, 1317, *lv denied* 11 NY3d 927; *People v Wurthmann*, 26 AD3d 830, 831, *lv denied* 7 NY3d 765).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

94
CAF 14-01546
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF ISOBELLA A. AND CAMERON K.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANNA W., RESPONDENT-APPELLANT.

IN THE MATTER OF CHARLES J.S., II,
PETITIONER-RESPONDENT,

V

ANNA W., RESPONDENT-APPELLANT.

IN THE MATTER OF ANNA W., PETITIONER-APPELLANT,

V

CHARLES J.S., II, RESPONDENT-RESPONDENT.

IN THE MATTER OF SCHAVON R. MORGAN, ESQ., ON
BEHALF OF ISOBELLA A., PETITIONER-RESPONDENT,

V

ANNA W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT CHARLES J.S., II AND RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 26, 2014 in proceedings pursuant to Family Court Act article 10 and article 6. The order, among other things, awarded custody of Isobella A. to petitioner-respondent Charles J.S., II.

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

Memorandum: These related appeals arise from a neglect proceeding pursuant to Family Court Act article 10 and custody proceedings pursuant to Family Court Act article 6. In appeal No. 3, respondent mother appeals from an order that, inter alia, adjudged that her children Isobella A. and Cameron K. had been neglected by her. In appeal No. 1, the mother, the respondent-petitioner therein, appeals from an order granting custody of Isobella to petitioner-respondent Charles J.S., II (Charles), the father of Isobella. In appeal No. 2, the mother, the respondent-petitioner therein, appeals from an order granting custody of Cameron to respondent Joseph K. (Joseph), the father of Cameron.

To the extent that the mother contends in all appeals that Family Court erred in holding a combined hearing on the petitions, that contention is not preserved for our review (*see generally Matter of Qua'Mel W. [Niaya W.]*, 129 AD3d 1487, 1487; *Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648, *lv denied* 21 NY3d 852). In any event, the proceedings were properly consolidated given "the many common factual and legal issues" (*Matter of Daniel D.*, 57 AD3d 444, 444, *lv dismissed* 12 NY3d 906; *see Matter of Lebraun H. [Brenda H.]*, 111 AD3d 1439, 1439). In addition, to the extent that the mother contends in all appeals that the court erred in admitting the reports and testimony of a psychologist, that contention is also not preserved for our review (*see Qua'Mel W.*, 129 AD3d at 1487; *Kaylene S.*, 101 AD3d at 1648-1649).

We reject the mother's contention in appeal No. 3 that there was no basis for the finding of neglect. The evidence established that the mother alienated the children from their fathers, with the result that Isobella was confused whether Charles was her real father. The mother also interfered with the fathers' visitation with the children and made false allegations against the fathers or their significant others. Isobella was diagnosed with adjustment disorder and had poor behavior in school as a result of the mother's conduct. The evidence also established that the mother forced Cameron to lie about Joseph and videotaped him stating those lies. The court properly determined that the mother's conduct impaired the children's emotional condition or placed them in imminent danger of such impairment (*see* Family Ct Act § 1012 [f] [i] [B]; *Matter of Ceanna B. [Thawanda C.]*, 105 AD3d 1044, 1044, *lv denied* 21 NY3d 860; *Matter of Kevin M.H. [Kenneth H.]*, 76 AD3d 1015, 1016, *lv denied* 15 NY3d 715).

We reject the mother's contention in appeal Nos. 1 and 2 that the determinations to grant the fathers sole custody of the children do not have a sound and substantial basis in the record. A court's determination following a hearing that the best interests of the child would be served by such an award is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173), particularly in view of the hearing court's superior ability to evaluate the character and crediblity of the witnesses (*see Matter of Howden v Keeler*, 85 AD3d 1561, 1562; *Matter of Paul C. v Tracy C.*, 209 AD2d 955, 956). We will not disturb the determinations herein inasmuch as the record establishes that they are the product of the court's "careful weighing of [the] appropriate factors" (*Matter of Pinkerton v Pensyl*, 305 AD2d

1113, 1114), and they have a sound and substantial basis in the record (*see Matter of Tarrant v Ostrowski*, 96 AD3d 1580, 1582, *lv denied* 20 NY3d 855).

The mother's contention in appeal Nos. 1 and 2 that the court erred in admitting the hearsay statements of the children is not preserved for our review inasmuch as she did not object to the admission of the psychologist's reports that contained those statements or the vast majority of the hearsay statements at trial (*see Matter of Oravec v Oravec*, 89 AD3d 1475, 1476; *Matter of Thomas M.F. v Lori A.A.*, 63 AD3d 1667, 1667-1668, *lv denied* 13 NY3d 703). Indeed, we note that she even elicited such statements herself. In any event, that contention is without merit because "[i]t is well settled that there is an exception to the hearsay rule in custody cases involving allegations of abuse and neglect of a child, based on the Legislature's intent to protect children from abuse and neglect as evidenced in Family [Court] Act § 1046 (a) (vi) . . . where . . . the statements are corroborated" (*Thomas M.F.*, 63 AD3d at 1668 [internal quotation marks omitted]). Here, some of the statements of the children were corroborated and, to the extent that they were not, any error in allowing them in evidence is harmless because the evidence is otherwise sufficient to support the court's determination (*see Matter of Higgins v Higgins*, 128 AD3d 1396, 1397).

The mother failed to preserve for our review her contention in appeal No. 1 that the Attorney for the Child (AFC) for Isobella should not have substituted her judgment for that of the child or advocated against her wishes (*see Matter of Mason v Mason*, 103 AD3d 1207, 1207-1208). In any event, that contention is without merit inasmuch as Isobella was five and six years old at the time of these proceedings, and the evidence showed that "the child lack[ed] the capacity for knowing, voluntary and considered judgment, or that following the child's wishes [was] likely to result in a substantial risk of imminent, serious harm to the child" (*id.* at 1208 [internal quotation marks omitted]). Indeed, the evidence establishes that, if the AFC followed the child's wishes, that "would be tantamount to severing her relationship with her father" (*Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680 [internal quotation marks omitted]).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

96
CAF 15-00405
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF CHRISTOPHER P. FOWLER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

VALERIE M. VANGEE, RESPONDENT-RESPONDENT.

ROBERT A. DINIERI, CLYDE, FOR PETITIONER-APPELLANT.

Appeal from an order of the Family Court, Wayne County (Daniel G. Barrett, J.), entered December 16, 2014 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Memorandum: Petitioner father appeals from an order dismissing his petition seeking to modify a prior order of visitation. Contrary to the father's contention, we conclude that Family Court did not abuse its discretion in dismissing his petition without conducting a hearing. A hearing is not required whenever a parent seeks modification of a visitation order and, here, the father "failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing" (*Matter of Consilio v Terrigino*, 114 AD3d 1248, 1248 [internal quotation marks omitted]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

97
CAF 13-02133

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

IN THE MATTER OF BRAYDEN R.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DUANE R., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered November 26, 2013 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent.

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

Memorandum: We affirm for reasons stated in the decision at Family Court. We add only that the testimony at the hearing established that nothing concerning respondent father's mental health had changed since we previously affirmed an order terminating his parental rights with respect to another child on the ground of mental illness (*Matter of Zachary R. [Duane R.]*, 118 AD3d 1479, 1480). Inasmuch as the father agreed that the court could take judicial notice of those past proceedings, we again conclude "that petitioner met its burden of demonstrating by clear and convincing evidence that the father is 'presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child' " (*id.*, quoting Social Services Law § 384-b [4] [c]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

99
CAF 14-01547
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF ISOBELLA A. AND CAMERON K.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANNA W., RESPONDENT-APPELLANT.

IN THE MATTER OF ANNA W., PETITIONER-APPELLANT,

V

JOSEPH K., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

EMILY A. VELLA, SPRINGVILLE, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 26, 2014 in proceedings pursuant to Family Court Act article 10 and article 6. The order, among other things, awarded custody of Cameron K. to respondent Joseph K.

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

Same memorandum as in *Matter of Isobella A.* ([appeal No. 1] ___ AD3d ___ [Feb. 5, 2016]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

101
CA 15-01066
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

PETER W. BEYER, JR., PLAINTIFF-RESPONDENT,

V ORDER

FAMILY VIDEO MOVIE CLUB, INC., ZOOM TAN, INC.,
AND ROCKFORD CONSTRUCTION CO.,
DEFENDANTS-APPELLANTS.

LAW OFFICE OF JOHN WALLACE, BUFFALO, MAURO LILLING NAPARTY LLP, WOODBURY (ANTHONY F. DESTEFANO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

DOLCE PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered February 12, 2015. The order granted the motion of plaintiff for partial summary judgment on the issue of liability pursuant to Labor Law §§ 240 (1) and 241 (6) and denied the cross motion of defendants for partial summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) causes of action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties and filed on January 4, 2016,

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

102
CA 15-01111
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

MARILYN RODRIGUES, MADELINE RODRIGUES, AND
ANIBAL RODRIGUES, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERT LESSER, ET AL., DEFENDANTS,
AND CATHERINE M. PIRILLO, DEFENDANT-RESPONDENT.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (ANDREW L. BOUGHRUM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

MCGIVNEY & KLUGER, P.C., SYRACUSE (ERIC M. GERNANT, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered December 15, 2014. The order granted the motion of defendant Catherine M. Pirillo for summary judgment dismissing the complaint and all cross claims against her.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the complaint and cross claims against defendant Catherine M. Pirillo are reinstated.

Memorandum: Plaintiffs commenced this action seeking damages for injuries they allegedly sustained as a result of their exposure to lead paint as children. The exposure allegedly occurred when they resided in various apartments rented by their mother, including one owned by Catherine M. Pirillo (defendant). Plaintiffs contended that defendant was negligent in her ownership and maintenance of the apartment and that she was negligent in her abatement of the lead paint hazard. We agree with plaintiffs that Supreme Court erred in granting defendant’s motion for summary judgment dimissing the complaint and cross claims against her.

Due to the fact that New York State has not enacted legislation imposing a duty on landlords to test for or abate lead-based paint hazards, a landlord’s liability for such a dangerous condition will be based on “traditional common-law principles,” meaning that “a landlord may be found liable for failure to repair a dangerous condition, of which it has notice, on leased premises if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs” (*Chapman v Silber*, 97 NY2d 9, 19-20). Put another way, the “ ‘plaintiff must demonstrate that the landlord had

actual or constructive notice of, and a reasonable opportunity to remedy, the hazardous condition' " (*Pagan v Rafter*, 107 AD3d 1505, 1506).

In moving for summary judgment, defendant contended that there was no evidence of a hazardous condition in the apartment; that, even if such a condition did exist, she lacked notice of it; and that any exposure to that condition in defendant's apartment was not a cause of the injuries claimed by plaintiffs. There can be no dispute that the existence of chipping and peeling lead-based paint is, in fact, a hazardous condition inasmuch as "[t]he serious health hazard posed to children by exposure to lead-based paint is by now well established" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 640). Defendant failed to meet her burden on the motion of establishing as a matter of law that a hazardous condition did not exist in the apartment. It is well settled that "[a] moving party must affirmatively establish the merits of its cause of action or defense and does not meet its burden by noting gaps in its opponent's proof" (*Orcutt v American Linen Supply Co.*, 212 AD3d 979, 980; *see Jackson v Brown*, 26 AD3d 804, 805) and, here, as in *Jackson*, defendant failed to establish "the absence of a lead paint condition at the residence" (*Jackson*, 26 AD3d at 805; *see Aldrich v County of Oneida*, 299 AD2d 938, 939).

We further conclude that defendant failed to meet her burden of establishing that she lacked either actual or constructive notice of the condition. On the issue of actual notice, defendant denied knowing that there was lead paint in the apartment, but she admitted receiving some documents from the Oneida County Department of Health indicating the presence of lead paint at that apartment. Even assuming, arguendo, that defendant's admission is insufficient to establish actual notice, we nevertheless conclude that defendant failed to establish as a matter of law that she lacked constructive notice of the condition.

In *Chapman*, the Court of Appeals addressed constructive notice, writing that "a triable issue of fact [on notice] is raised when [the evidence] shows that the landlord (1) retained a right of entry to the premises and assumed a duty to make repairs, (2) knew that the apartment was constructed at a time before lead-based interior paint was banned, (3) was aware that paint was peeling on the premises, (4) knew of the hazards of lead-based paint to young children and (5) knew that a young child lived in the apartment" (*id.* at 15). Here, it is undisputed that defendant retained a right of entry and assumed a duty to make repairs; that she knew that the residence was constructed before lead-based paint was banned; and that she knew that young children lived in the apartment. Defendant, however, contended that she did not know that the paint in the apartment was peeling or that lead-based paint was hazardous to children.

By submitting the deposition testimony of plaintiffs' mother, wherein she alleged that she complained to defendant and defendant's mother, who resided in the building, about peeling and chipping paint in the apartment, defendant herself raised triable issues of fact on the third *Chapman* factor concerning notice. With respect to the

fourth *Chapman* factor on notice, defendant submitted her deposition testimony in which she admitted that she "suppose[d]" that lead was bad for people if ingested. Even assuming, arguendo, that such an admission does not raise a triable issue of fact on defendant's awareness of the dangers of lead paint, we conclude that plaintiffs raised a triable issue of fact by submitting " 'evidence from which a jury could infer that [defendant] knew or should have known of the dangers of lead paint to children' " (*Bowman v Zumpano*, 132 AD3d 1357, 1358; *see Manford v Wilber*, 128 AD3d 1544, 1545, *lv dismissed* 26 NY3d 1082).

Contrary to the contention of defendant, she also failed to meet her burden of establishing that any exposure to lead at defendant's apartment was not a cause of the psychiatric and cognitive injuries sustained by plaintiffs inasmuch as defendant submitted reports from a clinical psychologist attributing plaintiffs' injuries to their exposure to lead as children (*cf. Veloz v Refika Realty Co.*, 38 AD3d 299, 300, *lv denied* 9 NY3d 817). In any event, we further conclude that plaintiffs raised triable issues of fact on causation by submitting an affirmation from a medical expert opining that the cause of plaintiffs' injuries was plaintiffs' "significant" exposure to lead. We thus conclude that there are triable issues of fact whether plaintiffs' "cognitive and behavioral difficulties were caused by [their] exposure to lead-based paint while [they] lived in [defendant's] apartment" (*Robinson v Bartlett*, 95 AD3d 1531, 1535).

Finally, we conclude that the court erred in dismissing the negligent abatement cause of action "inasmuch as [defendant] failed to address that cause of action in support of [her] motion" (*Wood v Giordano*, 128 AD3d 1488, 1489; *see Stokely v Wright*, 111 AD3d 1382, 1383; *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). In any event, defendant failed to establish as a matter of law that she performed the abatement in a reasonable manner and within a reasonable time after learning that there was lead paint in the apartment (*see Pagan*, 107 AD3d at 1506-1507).

Entered: February 5, 2016 Frances E. Cafarell
Clerk of the Court

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

103
CA 14-01790
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF WILFREDO POLANCO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 29, 2014 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, after a tier II hearing, that he violated several inmate rules arising from his refusal to follow an order directing him to move to a different cell. We reject petitioner's contention that he was denied due process when the Hearing Officer did not allow him to call certain witnesses to testify at the hearing. Petitioner contended that the witnesses would support his contention that he had a valid reason for refusing to follow the correction officer's order that he move to a different cell. "It is well settled that petitioner, as a prison inmate, 'was required to promptly obey the order even if he disagreed with it' " (*Matter of Bailey v Prack*, 125 AD3d 1028, 1028; *see Matter of Miller v Goord*, 2 AD3d 928, 930). Inasmuch as the proposed witnesses had no information regarding whether petitioner refused to obey an order, their testimony was properly excluded based on "their lack of direct knowledge of the facts giving rise to this proceeding" (*Matter of Nijman v Goord*, 294 AD2d 737, 738; *see Miller*, 2 AD3d at 930). Finally, petitioner failed to exhaust his administrative remedies with respect to his contention that the Hearing Officer was biased against him because he failed to raise it in his administrative appeal, and this Court "has no discretionary power to reach [it]" (*Matter of Nelson v Coughlin*, 188

AD2d 1071, 1071, *appeal dismissed* 81 NY2d 834).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

104
CAF 14-01940
PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ.

IN THE MATTER OF ISOBELLA A. AND CAMERON K.

CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANNA W., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

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

STEPHEN J. RILEY, OLEAN, FOR PETITIONER-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), dated September 15, 2014 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Same memorandum as in *Matter of Isobella A.* ([appeal No. 1] ___ AD3d ___ [Feb. 5, 2016]).

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

116
KA 13-01069
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ERIC BELLAMY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered December 17, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

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

133
CA 15-01123
PRESENT: WHALEN, P.J., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ.

JOHN M. HOLMES, PLAINTIFF-RESPONDENT,

V   ORDER

MICHAEL A. FIORE, CITY OF UTICA,
DEFENDANTS-APPELLANTS,
AND WYATT T. HOLMES, DEFENDANT-RESPONDENT.

LAW OFFICES OF KEVIN A. LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOYCE & HOLBROOK LAW FIRM, SHERBURNE (SAMANTHA M. HOLBROOK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

RUSSO, APOZNANSKI & TAMBASCO, MELVILLE (FRED LUTZEN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered December 22, 2014. The order and judgment, among other things, denied the motion of defendants Michael A. Fiore and City of Utica seeking summary judgment dismissing the second amended complaint.

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

Entered: February 5, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (750/01) KA 00-00093. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH LEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (286/02) KA 97-05362. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL SPIRLES, DEFENDANT-APPELLANT. -- Motions for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND DEJOSEPH, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1301/08) KA 07-00148. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY L. KING, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1363/08) KA 06-00778. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICARDO ROSADO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (247/11) KA 99-02223. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY SHERROD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (710/12) CAF 10-01623. -- IN THE MATTER OF CHRISTOPHER A. NICHOLSON, PETITIONER-APPELLANT, V DONNA M. NICHOLSON, RESPONDENT-RESPONDENT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (796/12) KA 11-00972. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MIGUEL A. JARAMILLO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1448/12) KA 10-01825. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DASHAWN DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1368/13) KA 12-00763. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DONALD HUGHES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1105/14) KA 13-00035. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JORDAN J. ELLISON, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis granted. Memorandum: Defendant contends that he was

denied effective assistance of appellate counsel because counsel failed to raise an issue on direct appeal, specifically, whether the trial court abused its discretion in finding defendant a persistent felony offender. Upon our review of the motion papers, we conclude that the issue may have merit. The order of January 2, 2015 is vacated and this Court will consider the appeal de novo (*see People v LeFrois*, 151 AD2d 1046). Defendant is directed to file and serve his records and briefs with this Court on or before May 5, 2016. PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1126/14) KA 12-01690. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TYREEK WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (286/15) CA 14-01113. -- ALTSHULER SHAHAM PROVIDENT FUNDS, LTD., PLAINTIFF-APPELLANT, V GML TOWER LLC, ET AL., DEFENDANTS, THE PIKE COMPANY, INC., L.A. PAINTING, INC., THE HAYNER HOYT CORPORATION, SYRACUSE MERIT ELECTRIC, A DIVISION OF O'CONNELL ELECTRIC CO., INC., AND TAG MECHANICAL SYSTEMS, INC., DEFENDANTS-RESPONDENTS. SYMPHONY TOWER LLC, RESPONDENT. -- Motion for this Court to withdraw its June 12, 2015 memorandum and order denied. PRESENT: WHALEN, P.J., LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (723/15) CAF 13-02102. -- IN THE MATTER OF ALEXANDER S. STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; DAVID S. AND ALECIA P., RESPONDENTS-APPELLANTS. -- Motion to vacate order entered July 2, 2015 denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (971/15) KA 12-00287. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES A. GHENT, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Feb. 5, 2016.)

MOTION NOS. (1159/15 AND 534-535/11) KA 12-01818. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS B. WORTH, DEFENDANT-APPELLANT. KA 06-00414. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. KA 09-01449. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. -- Motion for reargument and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1195/15) CA 15-00532. -- JANICE A. MCDONELL AND WILLIAM J. MCDONELL, JR., PLAINTIFFS-RESPONDENTS, V WAL-MART STORES, INC., WAL-MART STORES EAST, LP, WAL-MART REAL ESTATE BUSINESS TRUST AND WALMART REALTY COMPANY, DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court

of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1234/15) CAF 14-00685. -- IN THE MATTER OF JAMES E. DONOHUE, PETITIONER-APPELLANT, V TANYA M. DONOHUE, RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND DEJOSEPH, JJ. (Filed Feb. 5, 2016.)

MOTION NO. (1260/15) CA 15-00326. -- DEBRA L. SHERMAN, PLAINTIFF-APPELLANT, V STEVE J. HEROD, DEFENDANT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Feb. 5, 2016.)