SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 30, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

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KA 12-02309

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT.

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

DONYELL J. MCKENZIE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered December 5, 2012. 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 reversed on the law and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We previously affirmed a judgment convicting defendant of that crime (*People v McKenzie*, 81 AD3d 1375, *revd* 19 NY3d 463). In reversing our order, the Court of Appeals concluded that defendant was entitled to a jury instruction on the affirmative defense of extreme emotional disturbance, and ordered a new trial (*McKenzie*, 19 NY3d at 469). In this appeal after that retrial, defendant contends, inter alia, that he was deprived of his right to counsel because defense counsel permitted him to choose a member of the jury. We agree, and we therefore reverse the judgment and grant defendant a new trial.

"It is well established that a defendant, having accepted the assistance of counsel, retains authority only over certain fundamental decisions regarding the case such as whether to plead guilty, waive a jury trial, testify in his or her own behalf or take an appeal" (*People v Colon*, 90 NY2d 824, 825-826 [internal quotation marks omitted]). "The selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments" (*id.* at 826; *see People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922).

Here, during the part of the jury selection process when the attorneys were exercising peremptory challenges, defense counsel stated "[f]or the record, my client is insisting over my objection to keep juror number 21. So, jurors 20 and 21 will be on the jury." We agree with defendant that, contrary to the People's contention, defense counsel "never 'acceded' or 'acquies[ed]' to defendant's decision" (*People v Colville,* 20 NY3d 20, 32). Furthermore, contrary to the circumstances in *People v Hartle* (122 AD3d 1290, 1292, *lv denied* 25 NY3d 1164), defense counsel's statement constitutes a clear indication that his position differed from defendant's position. We respectfully disagree with the dissent's speculative view that "defense counsel merely took the input gained from [the] consultation [with defendant] into account in determining whether to exclude the prospective juror at issue." Although defense counsel stated that juror number 21 would be on the jury, the record establishes that County Court, in seating juror number 21 on the jury, was "guided solely by defendant's choice in the matter," and that was "error because the decision was for the attorney, not the accused, to make" (*Colville*, 20 NY3d at 32). Consequently, the court denied defendant the "expert judgment of counsel to which the Sixth Amendment entitles him," and "we cannot say that the error here was harmless beyond a reasonable doubt" (*id*.).

In view of our determination, there is no need to address defendant's remaining contentions raised in his main and pro se supplemental briefs.

All concur except SMITH, J.P., and TROUTMAN, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent. We disagree with the conclusion of the majority that defendant was deprived of his right to counsel because his attorney permitted him to choose a member of the jury. We conclude that the record establishes that defense counsel acceded to defendant's request to permit the juror at issue to be seated on the trial jury, and we would therefore affirm the judgment.

We agree with the majority that "[t]he selection of particular jurors falls within the category of tactical decisions entrusted to counsel, and defendants do not retain a personal veto power over counsel's exercise of professional judgments" (*People v Colon*, 90 NY2d 824, 826; *see People v Morgan*, 77 AD3d 1419, 1420, *lv denied* 15 NY3d 922). Indeed, the Court of Appeals has unequivocally rejected the contention that "a defendant's right to be present at voir dire includ[es] the right to veto his counsel's choices in selecting a jury" (*People v Sprowal*, 84 NY2d 113, 119). Thus, we agree with the majority that a defendant does not have the right to veto his attorney's choice to exclude a particular prospective juror.

Here, however, the record does not establish that County Court permitted defendant to override defense counsel's choice. While the attorneys were exercising their peremptory challenges, defense counsel stated, "For the record, my client is insisting over my objection to keep juror number 21. So, juror[] . . . 21 will be on the jury." Defendant did not speak, despite being present at the bench at that

time, nor did the court ask any further questions of defendant or defense counsel.

Based on the fact that defense counsel made the determination not to challenge the juror, we would reject defendant's contention that defense counsel abdicated his duty to select the jurors. To the contrary, we conclude that "the record is equally consistent with the inference that, after discussing the issue at length, defense counsel . . . acceded to defendant's position" (*People v Gottsche*, 118 AD3d 1303, 1304-1305, *lv denied* 24 NY3d 1084; *cf. generally People v Colville*, 20 NY3d 20, 32), and that, "after consulting with and weighing the accused's views along with other relevant considerations, [defense counsel] decide[d] to" accept the prospective juror at issue (*Colville*, 20 NY3d at 32; *see People v Hartle*, 122 AD3d 1290, 1292, *lv denied* 25 NY3d 1164). There is no indication that defendant threatened or coerced defense counsel to acquiesce to defendant's wishes, nor any other evidence that defense counsel did not exercise his choice voluntarily. The fact that defense counsel took defendant's views into account in making the determination does not invalidate defense counsel's choice. To the contrary, the Court of Appeals has noted that "defendant's presence at sidebar interviews of prospective jurors for bias or hostility during jury selection is generally required because of the potential input the defendant can give defense counsel in making discretionary choices during jury selection, based on impressions gained from seeing and hearing the juror's responses on voir dire" (*People v Roman*, 88 NY2d 18, 26, *rearg denied* 88 NY2d 920), and it is well settled that defense counsel must have a reasonable time in which to consult with defendant before exercising peremptory challenges (*see e.g. People v Velasco*, 77 NY2d 469, 473; *People v Pierce*, 303 AD2d 314, 315, *lv denied* 100 NY2d 565; *People v Cameron*, 244 AD2d 350, 351, *lv denied* 91 NY2d 940). Here, defense counsel merely took the input gained from that consultation into account in determining whether to exclude the prospective juror at issue. In the final analysis, however, the record clearly establishes that defense counsel decided to permit the juror to remain on the jury. Therefore, it cannot be said that defendant was "denied . . . the expert judgment of counsel to which the Sixth Amendment entitles him" (*Colville*, 20 NY3d at 32).

Contrary to defendant's further contention, we conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see People v Baldi*, 54 NY2d 137, 147).

Entered: September 30, 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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CA 15-01686

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF JOHN SUGGS, CONSECUTIVE NO. 29671, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (MEGAN E. DORR OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Joseph E. Fahey, A.J.), entered October 2, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order granted petitioner's motion for a directed verdict during an annual review hearing, determining that petitioner does not suffer from a mental abnormality and directing his unconditional release from the custody of respondent New York State Office of Mental Health.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is denied, and the matter is remitted to Supreme Court, Oneida County, for further proceedings on the petition in accordance with the following memorandum: Respondents appeal from an order that granted petitioner's motion for a directed verdict during an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that petitioner does not suffer from a mental abnormality under Mental Hygiene Law § 10.03 (i) and directing his unconditional discharge from the custody of respondent New York State Office of Mental Health (*see* § 10.09 [h]). We agree with respondents that Supreme Court erred in granting the motion for a directed verdict. We therefore reverse the order, deny the motion and remit the matter to Supreme Court for further proceedings on the petition.

Pursuant to the Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s]

from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]). "Section 10.03 (i)'s language 'congenital or acquired condition, disease or disorder' is not limited to solely sexual disorders . . . Rather, one may possess a 'condition, disease or disorder' that does not constitute a 'sexual disorder' but nonetheless 'affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense' " (*Matter of State of New York v Dennis K.*, 27 NY3d 718, 743).

Here, the court relied on *Matter of State of New York v Donald DD.* (24 NY3d 174) in concluding that, while petitioner's antisocial personality disorder (ASPD) and psychopathic traits predisposed him to the commission of conduct constituting a sex offense, such disorder and traits, alone or in combination, are not sexual disorders and thus as a matter of law do not constitute a mental abnormality within the meaning of the Mental Hygiene Law. We conclude, however, that the court erred in granting petitioner's motion for a directed verdict inasmuch as "*Donald DD.* did not engraft upon the 'condition, disease, or disorder' prong a requirement that the 'condition, disease or disorder' must constitute a 'sexual disorder' " (*Dennis K.*, 27 NY3d at 743). Thus, upon "view[ing] the evidence in the light most favorable to the nonmoving part[ies]" (*Matter of Wright v State of New York*, 134 AD3d 1483, 1484), we conclude that the evidence presented by respondents in this case was sufficient to withstand petitioner's motion for a directed verdict.

Entered: September 30, 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 16-00052

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

IN THE MATTER OF ANGELA BRIGGS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

CREIGHTON, JOHNSEN & GIROUX, BUFFALO (JONATHAN G. JOHNSEN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ANDREW B. AYERS 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, Monroe County [John J. Ark, J.], entered December 8, 2015) to review a determination of respondent. The determination revoked petitioner's family daycare registration.

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 respondent's determination revoking her registration to operate a family daycare home. Substantial evidence supports the determination that petitioner violated regulations requiring her to provide adequate supervision to the children in her care and prohibiting her from separating a child from the other children for a period that was longer than necessary (*see generally Matter of Liddell v New York State Off. of Children & Family Servs.*, 117 AD3d 742, 742-743; *Matter of Gates of Goodness & Mercy v Johnson*, 49 AD3d 1295, 1295). The evidence at the fair hearing established that petitioner isolated a six-year-old child outside the home in an area where she could not be supervised for an extended period of time.

We reject petitioner's further contention that the penalty is so disproportionate to the offense as to be shocking to one's sense of fairness. Contrary to her contention, petitioner was not confronted by unanticipated circumstances, not of her own making, to which she responded appropriately (*cf. Matter of Lewis v New York State Off. of Children & Family Servs.*, 114 AD3d 1065, 1066-1068; *Matter of Grady v New York State Off. of Children & Family Servs.*, 39 AD3d 1157, 1158-1159). Rather, petitioner created the circumstances that exposed the

child to a significant risk of harm, and the revocation of her registration is not disproportionate to the offense (*see Matter of Sindone-Thompson v New York State Off. of Children & Family Servs. Bur. of Early Childhood Servs.*, 296 AD2d 776, 777-778).

Entered: September 30, 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 13-00913

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS P. BEARDSLEY, JR., DEFENDANT-APPELLANT.

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

DAVID W. FOLEY, DISTRICT ATTORNEY, MAYVILLE (ANDREW M. MOLITOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John L. LaMancuso, A.J.), rendered February 28, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, and aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]) and aggravated unlicensed operation of a motor vehicle in the first degree (§ 511 [3] [a] [i]), both class E felonies, defendant contends that the superior court information to which he pleaded guilty was jurisdictionally defective because certain misdemeanor offenses to which he also pleaded guilty were not properly included therein. That contention is not before us on this appeal. In the matter on appeal, defendant pleaded guilty to and was sentenced on two felony charges in County Court. The plea minutes establish that he contemporaneously pleaded guilty before the same judge, apparently sitting as a local criminal court, to several misdemeanors with which defendant was apparently charged in misdemeanor complaints or informations that are not included in the record on appeal. "An appeal from a judgment of conviction in a local criminal court lies with County Court" (*People v Brady*, 263 AD2d 969, 969, citing CPL 450.60 [3]; *see e.g. People v Eves*, 35 AD3d 1181, 1182).

Defendant did not move to withdraw his plea or to vacate the judgment of conviction and thus failed to preserve for our review his contention that the plea to the charges in the superior court information was not voluntarily entered (*see People v Brinson*, 130 AD3d 1493, 1493, *lv denied* 26 NY3d 965). This case does not fall

within the narrow exception to the preservation requirement set forth in *People v Lopez* (71 NY2d 662, 666), because nothing in the plea colloquy casts significant doubt on defendant's guilt or the voluntariness of the plea (*see Brinson*, 130 AD3d at 1493). Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

665

KA 13-00155

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH J. CUSHMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 13, 2012. The judgment convicted defendant, upon her 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 Nos. 1 and 2, defendant appeals from judgments convicting her upon her respective pleas of guilty of robbery in the first degree (Penal Law § 160.15 [3]) and, in appeal No. 3, she appeals from a judgment convicting her upon her plea of guilty of burglary in the second degree (§ 140.25 [2]). All of the pleas were entered during one plea proceeding, following the denial of defendant's suppression motion concerning all of the charges. We conclude that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256). Supreme Court "thoroughly reviewed the consequences of the waiver with defendant, after which defendant indicated that [she] understood those consequences and orally waived [her] right to appeal" (*People v Abernathy*, 136 AD3d 1276, 1276, *lv denied* 27 NY3d 1127). Contrary to defendant's contention, the record establishes that the valid waiver of the right to appeal "was intended comprehensively to cover all aspects of the case" (*People v Burley*, 136 AD3d 1404, 1404, *lv denied* 27 NY3d 993 [internal quotation marks omitted]), and therefore encompasses defendant's challenge to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342; *People v Kemp*, 94 NY2d 831, 833). Contrary to defendant's further contention, the record also establishes that defendant waived both her right to appeal the conviction and the right to appeal the harshness of the sentence, and the valid waiver therefore forecloses defendant's challenge to the severity of the sentence (*see People v Martin*, 136 AD3d 1310, 1311, *lv*

denied 27 NY3d 1071; *cf. People v Maracle*, 19 NY3d 925, 928; *see generally Lopez*, 6 NY3d at 256).

Entered: September 30, 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 13-00156

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH J. CUSHMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 13, 2012. The judgment convicted defendant, upon her 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 Cushman* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

667

KA 13-00157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH J. CUSHMAN, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered November 13, 2012. The judgment convicted defendant, upon her 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 Cushman* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

668

KA 12-02045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID DALE, DEFENDANT-APPELLANT.

DAVID DALE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 3, 2012. The judgment convicted defendant, upon his plea of guilty, of scheme to defraud in the first degree and practice of law by a disbarred attorney.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of scheme to defraud in the first degree (Penal Law § 190.65 [1] [b]) and practice of law by a disbarred attorney (Judiciary Law former § 486). Preliminarily, to the extent that defendant's contention that Supreme Court erred in failing to amend the certified transcript of the stenographic minutes of the plea proceeding is properly before us on this appeal, we conclude that it is unsubstantiated and lacks merit. As a further preliminary matter, to the extent that defendant contends that the court should have recused itself from considering his motion to withdraw his plea, we conclude that the court's discretionary determination to deny recusal was not an abuse of discretion (*see People v Moreno*, 70 NY2d 403, 405-406; *People v Zer*, 276 AD2d 259, 259, *lv denied* 96 NY2d 837). We also conclude that any challenge by defendant to the voluntariness of his waiver of the right to appeal is without merit (*see People v Holman*, 89 NY2d 876, 878; *People v Hayes*, 71 AD3d 1187, 1188, *lv denied* 15 NY3d 852, *reconsideration denied* 15 NY3d 921). Defendant's contention that his plea was not voluntary, knowing and intelligent because he did not recite the underlying facts of the crimes to which he pleaded guilty and merely gave monosyllabic responses to the court's questions is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by defendant's valid waiver of the right to appeal (*see People v Jamison*, 71 AD3d 1435, 1436, *lv denied* 14 NY3d 888). In any event, defendant's contention

lacks merit (*see People v Gordon*, 98 AD3d 1230, 1230, *lv denied* 20 NY3d 932).

Defendant contends that the court erred in denying his motion to withdraw his plea without conducting a hearing and that his plea was not knowingly, intelligently, and voluntarily entered. Although defendant's contentions survive his waiver of the right to appeal (*see People v Sparcino*, 78 AD3d 1508, 1509, *lv denied* 16 NY3d 746), they lack merit. We reject defendant's contention that the court erred in failing to conduct an evidentiary hearing before denying his motion. "Only in the rare instance will a defendant be entitled to an evidentiary hearing; often a limited interrogation by the court will suffice. The defendant should be afforded [a] reasonable opportunity to present his contentions and the court should be enabled to make an informed determination" (*People v Tinsley*, 35 NY2d 926, 927), and that is what occurred here (*see People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015; *Sparcino*, 78 AD3d at 1509; *People v Dozier*, 12 AD3d 1176, 1176-1177).

Contrary to defendant's further contention, the court properly denied his motion. It is well settled that " '[p]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea' " (*People v Leach*, 119 AD3d 1429, 1430, *lv denied* 24 NY3d 962). Here, " '[t]he court was presented with a credibility determination when defendant moved to withdraw his plea and advanced his belated claims of innocence and coercion, and it did not abuse its discretion in discrediting those claims' " (*People v Colon*, 122 AD3d 1309, 1310, *lv denied* 25 NY3d 1200). Indeed, we conclude that defendant's belated claims of innocence, duress, and coercion are unsupported by the record and belied by his statements during the plea colloquy (*see People v Dames*, 122 AD3d 1336, 1336, *lv denied* 25 NY3d 1162; *Dozier*, 12 AD3d at 1177).

Also contrary to defendant's contention, we conclude that "[t]he unsupported allegations . . . that [defense counsel] pressured him into accepting the plea bargain [did] not warrant vacatur of his plea" (*People v Gast*, 114 AD3d 1270, 1271, *lv denied* 22 NY3d 1198 [internal quotation marks omitted]; *see People v Merritt*, 115 AD3d 1250, 1251). "During the thorough plea colloquy, defendant advised the court that he was satisfied with the services of his attorney[], that he had enough time to discuss his plea with [his] attorney[], that no one had forced him to plead guilty, and that he was pleading guilty voluntarily" (*Merritt*, 115 AD3d at 1251). Thus, to the extent that defendant also contends that defense counsel was ineffective because he coerced him into pleading guilty, that contention is belied by defendant's statements during the plea colloquy (*see Leach*, 119 AD3d at 1430; *People v Culver*, 94 AD3d 1427, 1427-1428, *lv denied* 19 NY3d 1025). Moreover, "[i]n the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of [defense] counsel" (*People v Ford*, 86 NY2d 397, 404), and, upon our review of the record, we conclude that

defendant was afforded such representation here (*see People v Frierson*, 21 AD3d 1211, 1212, *lv denied* 6 NY3d 753). To the extent that defendant contends that certain conversations and interactions with defense counsel gave rise to ineffective assistance of counsel and also established that his plea was involuntary, such contentions are "based on matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440" (*Merritt*, 115 AD3d at 1251; *see People v Graham*, 77 AD3d 1439, 1440, *lv denied* 15 NY3d 920). We have considered the remaining contentions of defendant relating to the voluntariness of his plea and conclude that they lack merit.

Contrary to defendant's contention, by pleading guilty, he forfeited his claim that his prosecution was barred by New York's statutory protection against double jeopardy (*see People v DeProspero*, 91 AD3d 39, 43, *affd* 20 NY3d 527; *People v Prescott*, 66 NY2d 216, 218, *cert denied* 475 US 1150; *see generally* CPL 40.20). Moreover, the valid waiver of the right to appeal encompasses both defendant's constitutional and statutory double jeopardy claims (*see People v Muniz*, 91 NY2d 570, 574-575; *People v McLemore*, 303 AD2d 950, 950, *lv denied* 100 NY2d 540; *cf. People v Bastian*, 6 AD3d 1187, 1188).

We dismiss the appeal to the extent that defendant challenges the legality of the sentence inasmuch as he has served the sentence in its entirety, and that part of the appeal therefore is moot (*see People v Balkum*, 288 AD2d 910, 911; *People v Hults*, 231 AD2d 836, 836). Finally, we have reviewed defendant's remaining contentions and, to the extent that they are properly before us on this appeal and not rendered academic as a result of our decision herein, we conclude that they are without merit.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

669

KA 14-00007

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO L. JAMES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered November 25, 2013. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree (three counts).

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 three counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that County Court erred in ordering him to pay restitution without conducting a hearing. Defendant's contention " 'is not properly before this Court for review because [defendant] did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding' " (*People v Kirkland*, 105 AD3d 1337, 1338, *lv denied* 21 NY3d 1043, quoting *People v Horne*, 97 NY2d 404, 414 n 3). 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 further contention that the sentence is unduly harsh and severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

670

KA 15-01140

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL EVANS, DEFENDANT-APPELLANT.

ANDREW C. LOTEMPIO, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 4, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). Defendant's two codefendants robbed the victim at gunpoint outside a liquor store and then got into an SUV parked a block away. Following a high-speed police chase, defendant and the codefendants fled from the SUV on foot, and the police recovered the victim's stolen property from the SUV.

Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we reject defendant's contention that the evidence is legally insufficient to establish his accessorial liability for the robbery, i.e., that he intentionally aided the codefendants and "shared a 'community of purpose' " with them (*People v Allah*, 71 NY2d 830, 832; *see* Penal Law § 20.00; *People v Scott*, 25 NY3d 1107, 1109-1110). The People presented evidence that the SUV was registered to a woman at the same address identified by defendant as his home address; that defendant was using his mother's vehicle on the night of the robbery; that defendant fled from the driver's side of the SUV when it stopped; and that defendant told the police that he and the codefendants had left a party together "to get more liquor" and that he had been "the designated driver," although he denied that he had in fact been driving. Based on that evidence, we conclude that there is a valid line of reasoning and permissible inferences, including the inference of consciousness of guilt arising from defendant's flight from police with the codefendants (*see People v Bacote*, 107 AD3d 641, 642, *lv*

denied 21 NY3d 1072; *People v Bido*, 235 AD2d 288, 289, *lv denied* 89 NY2d 1009; *see generally People v Ficarotta*, 91 NY2d 244, 249-250), enabling the jury to determine beyond a reasonable doubt both that defendant was the driver of the SUV at all relevant times and that he was a knowing accomplice to the robbery rather than a mere bystander or an accessory after the fact (*see People v Jackson*, 44 NY2d 935, 937; *People v Keitt*, 42 NY2d 926, 927; *People v DeNormand*, 1 AD3d 1047, 1048, *lv denied* 1 NY3d 626; *cf. People v Robinson*, 90 AD2d 249, 250-251, *affd* 60 NY2d 982; *see generally People v Cabey*, 85 NY2d 417, 420-422).

Defendant's further contention that Supreme Court should have severed his trial from that of the codefendants is not preserved for our review because he did not move for a severance (*see People v Woods*, 284 AD2d 995, 996, *lv denied* 96 NY2d 926). Indeed, no party sought a severance, and the court therefore lacked the authority to grant defendant a separate trial (*see Matter of Brown v Schulman*, 245 AD2d 561, 562, *lv denied* 91 NY2d 814). Finally, we conclude that defendant has not established that he was denied effective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713). In particular, defendant has not shown the absence of strategic or other legitimate explanations for the absence of a severance motion (*see People v McGee*, 20 NY3d 513, 520-521; *People v Barbaran*, 118 AD2d 578, 580, *lv denied* 67 NY2d 1050), or for counsel's choice of defense theories (*see People v Ross*, 209 AD2d 730, 730, *lv denied* 84 NY2d 1038; *see generally People v Satterfield*, 66 NY2d 796, 799-800).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

671

KA 12-01585

PRESENT: WHALEN, P.J., SMITH, CENTRA, AND PERADOTTO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. HUTCHINGS, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered July 31, 2012. The judgment convicted defendant, after a nonjury trial, of scheme to defraud in the first degree (two counts), grand larceny in the third degree, grand larceny in the fourth degree (three counts), and petit larceny (five counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the total amount of restitution to $59,153.68, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him after a nonjury trial of, inter alia, grand larceny in the third degree (Penal Law § 155.35), defendant contends that the verdict is contrary to the weight of the evidence. We reject that contention. Defendant is a former police officer who was the treasurer of the Auburn Police Department's Police Benevolent Association (PBA), and this prosecution arises from his theft over a period of years of some of the PBA funds that he controlled. Viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), and upon "weigh[ing the] conflicting testimony, review[ing the] rational inferences that may be drawn from the evidence and evaluat[ing] the strength of such conclusions" (*id*. at 348), we conclude that the evidence amply supports County Court's determination that defendant committed the crimes of which he was convicted. " 'In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference' " (*People v McCoy*, 100 AD3d 1422, 1422; *see People v White*, 149 AD2d 915, 915-916, *lv denied* 74 NY2d 854). The court was entitled to reject defendant's version of the events "and, upon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556; *see McCoy*, 100 AD3d at 1422).

Defendant next contends that he was deprived of a fair trial by the admission of certain evidence at trial, including summaries of documents that were admitted and one of the rules of the Auburn Police Department. "By stipulating to the admissibility of [some of the summaries of other evidence], defendant waived his present contention that [such summaries] should not have been admitted in[ ] evidence" (*People v Santos-Sosa*, 233 AD2d 833, 833, *lv denied* 89 NY2d 988), and he failed to preserve for our review his contention with respect to the remaining summaries and the police department rule (*see People v Hogue*, 133 AD3d 1209, 1210-1211). In any event, with respect to both the summaries that were admitted upon consent and the remaining summaries, the court did not err in allowing the prosecution to introduce summaries of other documents that had been introduced into evidence and previously provided to the defense, pursuant to the " 'voluminous writings exception' " to the best evidence rule (*Ed Guth Realty v Gingold*, 34 NY2d 440, 452; *see People v Ash*, 71 AD3d 688, 689, *lv denied* 14 NY3d 885; *People v Weinberg*, 183 AD2d 932, 934, *lv denied* 80 NY2d 977). We further conclude that any error in the admission of the evidence challenged by defendant on appeal is harmless. The evidence of guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the admission of the evidence in question (*see generally People v Crimmins*, 36 NY2d 230, 241-242). Furthermore, "in a nonjury trial, the court is presumed to be capable of disregarding any improper or unduly prejudicial aspect of the evidence" (*People v Wise*, 46 AD3d 1397, 1399, *lv denied* 10 NY3d 872; *see People v LoMaglio*, 124 AD3d 1414, 1416, *lv denied* 25 NY3d 1203).

Contrary to defendant's further contention, he was not denied effective assistance of counsel. In order "[t]o prevail on a claim of ineffective assistance, defendants must demonstrate that they were deprived of a fair trial by less than meaningful representation; a simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial, does not suffice" (*People v Flores*, 84 NY2d 184, 187). Defendant's allegations of ineffective assistance of counsel based on defense counsel's failure to object to the admission of the summaries discussed above are without merit. Any objection to the admission of that evidence, as discussed above, would have been fruitless because it was properly admitted, and it is well settled that defense counsel's "failure to make a motion or [an objection] that has little or no chance of success" does not constitute ineffective assistance of counsel (*People v Dashnaw*, 37 AD3d 860, 863, *lv denied* 8 NY3d 945 [internal quotation marks omitted]; *see People v Wragg*, 115 AD3d 1281, 1282, *affd* 26 NY3d 403). With respect to the remaining instances of allegedly ineffective assistance of counsel claimed by defendant, in order to prevail on such claims, "it is incumbent on defendant 'to demonstrate the absence of strategic or other legitimate explanations' for defense counsel's allegedly deficient conduct" (*People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040, quoting *People v Rivera*, 71 NY2d 705, 709), and defendant failed to meet that burden with respect to the claims raised here. We conclude with respect to all of defendant's claims concerning the alleged ineffective assistance of

counsel that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that the sentence is excessive with respect to the amount of restitution and the term of incarceration. Addressing first defendant's challenge to the amount of restitution, we conclude that there is sufficient evidence in the record to support a finding that the amount set by the court represents "the fruits of the offense and the actual out-of-pocket loss to the victim caused by the offense" (Penal Law § 60.27 [2]; *see generally People v Hodge*, 176 AD2d 1234, 1234, *lv denied* 78 NY2d 1127), with the exception of the amount of compensation for lost interest. The evidence in the record does not support the amount of compensation for lost interest, i.e., $10,000.00, but there is sufficient support in the record for an award of $7,281.42 in lost interest. Consequently, we reduce the restitution by the difference between those amounts, which yields a total restitution amount of $56,336.87. Upon adding the 5% surcharge to that amount, we modify the judgment by reducing the overall order of restitution to $59,153.68 (*see generally People v Bennett*, 52 AD3d 1236, 1236, *lv denied* 11 NY3d 785).

Contrary to the People's contention with respect to defendant's challenge to the term of incarceration, this Court's "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783). "As a result, we may 'substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence' " (*People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). Nevertheless, we conclude that the term of incarceration is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

672

KA 12-01925

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES E. HALL, II, DEFENDANT-APPELLANT.

TRACY L. SULLIVAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Charles C. Merrell, J.), rendered October 28, 2011. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]) and endangering the welfare of a child (§ 260.10 [1]). We agree with defendant that County Court erred in denying defendant's request to remove his shackles during the trial without making findings on the record concerning the necessity for such restraints (*see People v Clyde*, 18 NY3d 145, 152-153). Contrary to the People's contention, the evidence of guilt is not overwhelming, and thus "they cannot meet their burden of showing that any constitutional error [is] harmless beyond a reasonable doubt" (*People v Cruz*, 17 NY3d 941, 945; *see generally People v Best*, 19 NY3d 739, 744).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

673

KA 12-00874

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FAHEEM ABDUL-JALEEL, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, NIXON PEABODY LLP (BRIAN J. JACEK OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered April 26, 2012. 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: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]) arising from an incident in which he repeatedly stabbed his 13-year-old cousin with a knife. Defendant contends that County Court erred in denying his request for a missing witness charge with respect to his cousin and his aunt. Even assuming, arguendo, that the court erred in denying the request, we conclude that any error is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant would have been acquitted but for the error (*see People v Fields*, 76 NY2d 761, 763; *People v Thomas*, 96 AD3d 1670, 1672, *lv denied* 19 NY3d 1002; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Contrary to defendant's further contention, we conclude that the court did not err in discharging a juror over his objection. It is well established that the trial court is generally "accorded latitude in making the findings necessary to determine whether a juror is grossly unqualified under CPL 270.35" (*People v Rodriguez*, 71 NY2d 214, 219), and that " '[a] determination whether a juror is . . . grossly unqualified, and subsequently to discharge such a juror, is left to the broad discretion of the court' " (*People v Jean-Philippe*, 101 AD3d 1582, 1582). Here, upon the court's " 'probing and tactful inquiry' into the facts of the situation" (*People v Harris*, 99 NY2d

202, 213), the juror acknowledged that she had "doz[ed] off a little bit" during defense counsel's summation and had turned to another juror to convey her concern about staying awake, and she expressed her impression that she could obtain any missed portions from the court reporter. The court found that the juror acknowledged that there was some part of defense counsel's summation that she did not hear due to nodding off or otherwise being inattentive, and discharged the juror as grossly unqualified. Recognizing that " '[t]he decision to disqualify turns on the facts of each particular case,' " and according deference to the court's evaluation of the juror's answers and demeanor, we conclude that there is no basis upon which to disturb the court's determination (*People v Chatt*, 77 AD3d 1285, 1286, *lv denied* 17 NY3d 793; *see generally People v Snowden*, 44 AD3d 492, 493, *lv denied* 9 NY3d 1039; *People v Williams*, 202 AD2d 1004, 1004).

We reject defendant's contention that the court failed to provide a meaningful response to a note from the jury during deliberations. Here, the jury, which had previously requested a readback of the elements of attempted murder in the second degree, sent another note asking whether "the element of intent [is] satisfied for determining guilt for the attempted murder charge if it is concluded from the evidence that the defend[a]nt consciously intended to cause harm that could cause death and there is some evidence to support the conclusion that the defend[a]nt did not consciously intend to murder the victim?" The jury expressed its preference for a "yes/no" answer, but also indicated that another rereading of the original instruction on the law would be acceptable, and defense counsel suggested that the court simply respond in the negative. We conclude that the court, to avoid juror confusion, did not abuse its discretion in again rereading its original instruction for attempted murder in the second degree, including a description of the element of intent, because, under the circumstances of this case, "rereading the original, proper instruction was sufficient to convey the appropriate message to reasonable jurors" (*People v Santi*, 3 NY3d 234, 249; *see People v Steinberg*, 79 NY2d 673, 684-685). Particularly in light of the phrasing of the question and the jury's apparent misstatement of the law, we conclude that the court appropriately declined to give a categorical "yes" or "no" answer in favor of providing a more expansive supplemental instruction (*see Steinberg*, 79 NY2d at 684-685; *People v Malloy*, 55 NY2d 296, 302, *cert denied* 459 US 847; *see also People v Gonzalez*, 293 NY 259, 262; *People v Mobley*, 118 AD3d 1339, 1340, *lv denied* 24 NY3d 1121). Indeed, "[i]ntent can be a difficult issue to grasp, and thus the trial court cannot be faulted for giving a broader response than defendant would have liked" (*Steinberg*, 79 NY2d at 684). Contrary to defendant's further contention, the court's explanation to the jury of its decision to reread the original instruction merely conveyed that a full explanation of the law was required and did not erroneously imply that the jury could convict defendant of attempted murder in the second degree even without the requisite intent to cause death (*see id.* at 685).

The record before us does not support defendant's further contention that the court failed to conclusively determine his age at the time of the offense and erred in sentencing him as an adult. To

the extent that defendant asserts that there is documentary evidence or other relevant proof that allegedly would establish that he was 15 years old at the time of the offense, thereby demonstrating that he should have been sentenced as a juvenile offender rather than as an adult (*see* Penal Law §§ 10.00 [18] [2]; 60.10 [1]), we conclude that defendant's remedy is to make a motion to set aside the sentence pursuant to CPL 440.20 (*see generally People v Chu-Joi*, 26 NY3d 1105, 1106-1107).

We likewise reject defendant's contention that the court abused its discretion in denying his request for youthful offender status, particularly "[i]n light of the brutal and senseless nature of the crime" (*People v Davis*, 84 AD3d 1710, 1710, *lv denied* 17 NY3d 815; *see People v Abbott*, 24 AD3d 243, 243, *lv denied* 6 NY3d 808). Here, defendant stabbed his 13-year-old cousin in the neck and upper chest multiple times, dragged her behind a vehicle in the garage where the incident occurred and tried to cover her mouth with duct tape, and left her there with severe, life-threatening wounds. Contrary to defendant's contention, the record reflects that the court properly considered the relevant facts and circumstances in denying defendant's request (*see People v Dawson*, 71 AD3d 1490, 1490-1491, *lv denied* 15 NY3d 749), including the mitigating factors presented by the defense, defendant's lack of a criminal record, the presentence report recommending denial of youthful offender status, and the gravity of the crime. In addition, under these circumstances, we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see e.g. People v Gibson*, 134 AD3d 1517, 1518-1519, *lv denied* 27 NY3d 1069). Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

675

KA 15-00239

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS P. FARRELL, DEFENDANT-APPELLANT.

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

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

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

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by determining that defendant is a level one risk pursuant to the Sex Offender Registration Act and as modified the order is affirmed without costs.

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). We agree with defendant that Supreme Court erred in assessing 20 points against him under the risk factor for a continuing course of sexual misconduct inasmuch as the People failed to prove by the requisite clear and convincing evidence that he engaged in, as relevant here, two or more acts of sexual contact with the victim separated by at least 24 hours, including at least one act of oral sexual conduct (*see* Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 10 [2006]; *see generally* Correction Law § 168-n [3]; *People v Mingo*, 12 NY3d 563, 571).

Defendant pleaded guilty to one count of criminal sexual act in the first degree in satisfaction of a five-count indictment and, according to the presentence report (PSR), he told the police that he engaged in oral sex with the 12-year-old victim “a couple times.” When interviewed for the PSR, defendant acknowledged one incident of oral sex, and he described an incident “[a] few days later” in which the victim approached him and began rubbing his thighs and groin area but he “pushed her away.” Although defendant’s statement to the police is evidence that he engaged in acts of oral sexual conduct with

the victim more than once, and the court was entitled to discredit defendant's testimony to the contrary at the SORA hearing (*see People v Woodard*, 63 AD3d 1655, 1656, *lv denied* 13 NY3d 706; *People v Craig*, 45 AD3d 1365, 1366, *lv denied* 10 NY3d 702), that statement does not specify when the acts of oral sexual conduct occurred relative to each other and thus is insufficient to establish a continuing course of sexual misconduct (*see People v Edmonds*, 133 AD3d 1332, 1332, *lv denied* 26 NY3d 918; *see generally People v Donk*, 39 AD3d 1268, 1269). Contrary to the People's contention, we further conclude that defendant's description of the incident in which the victim rubbed his thighs and groin area does not establish a second act of sexual contact with the victim because it fails to show that defendant had the necessary intent to engage in sexual contact on that occasion (*see* Penal Law § 130.00 [3]; *People v Guerra*, 178 AD2d 434, 435; *cf. People v Roe*, 235 AD2d 950, 950-952, *lv denied* 89 NY2d 1099).

Without the 20 points assessed by the court for a continuing course of sexual misconduct, the points assessed against defendant under the remaining risk factors make him a presumptive level one risk, and we therefore modify the order accordingly (*see People v Scala*, 126 AD3d 865, 866; *People v Owens*, 126 AD3d 1512, 1513).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

676

KA 14-02142

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BETTY M. COLLETTE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Monroe County (Daniel J. Doyle, J.), entered September 23, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that she is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court abused its discretion in denying her request for a downward departure from the presumptive level three risk. We reject that contention. "A defendant seeking a downward departure has the initial burden of . . . identifying, as a matter of law, an appropriate mitigating factor, namely, a factor which tends to establish a lower likelihood of reoffense or danger to the community and is of a kind, or to a degree, that is otherwise not adequately taken into account by the risk assessment guidelines" (*People v Clark*, 126 AD3d 1540, 1540, *lv denied* 25 NY3d 910 [internal quotation marks omitted]; *see People v Gillotti*, 23 NY3d 841, 861), and defendant failed to make that showing (*see Clark*, 126 AD3d at 1540; *People v Johnson*, 120 AD3d 1542, 1542, *lv denied* 24 NY3d 910).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

678

CA 15-01924

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

CENTRAL CITY ROOFING COMPANY, INC.,
PLAINTIFF-APPELLANT,

V ORDER

ASHLEY MCGRAW ARCHITECTS, D.P.C.,
DEFENDANT-RESPONDENT.

THE WARD FIRM, PLLC, LIVERPOOL (JON COOPER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (MATTHEW D. GUMAER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered January 16, 2015. The order granted the motion of defendant for summary judgment, dismissed the complaint and denied the cross motion of plaintiff for leave to amend the complaint.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

680

CA 15-01974

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

WILLIAM M. EDDY, PLAINTIFF-APPELLANT,

V ORDER

DAVID ANTANAVIGE, DEFENDANT-RESPONDENT.

MURRAY JS KIRSHTEIN, UTICA, FOR PLAINTIFF-APPELLANT.

LONGERETTA LAW FIRM, UTICA (DAVID A. LONGERETTA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County (David A. Murad, J.), entered July 1, 2015. The judgment awarded plaintiff $25,000 together with interest thereon from June 14, 2013.

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: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

687

KA 14-02255

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LYLE F. DAVOY, SR., DEFENDANT-APPELLANT.

ADAM R. MATTESON, LOWVILLE, FOR DEFENDANT-APPELLANT.

LEANNE K. MOSER, DISTRICT ATTORNEY, LOWVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Lewis County Court (Daniel R. King, J.), rendered December 6, 2013. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of murder in the second degree (Penal Law § 125.25 [1]). As conceded by defendant, the record of the plea colloquy establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see People v Dean*, 48 AD3d 1244, 1244-1245, *lv denied* 10 NY3d 839), and that valid waiver encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Griffin*, 120 AD3d 1569, 1570, *lv denied* 24 NY3d 1084; *People v Irvine*, 42 AD3d 949, 950, *lv denied* 9 NY3d 962). Moreover, defendant failed to preserve for our review his contention that the plea colloquy was factually insufficient inasmuch as he failed to move to withdraw the plea or to vacate the judgment of conviction on that ground (*see People v Lawrence*, 118 AD3d 1501, 1501, *lv denied* 24 NY3d 1220; *People v Kozody*, 74 AD3d 1907, 1908, *lv denied* 15 NY3d 806), and this case does not fall within the rare exception to the preservation rule (*see Lawrence*, 118 AD3d at 1501-1502; *see generally People v Lopez*, 71 NY2d 662, 665-666). Although defendant's initial statements during the factual allocution negated the element of intent to cause death, defendant's subsequent statements " 'removed any doubt' " regarding his intent to cause the victim's death (*People v Manor*, 121 AD3d 1581, 1582-1583, *affd* 27 NY3d 1012; *see People v Trinidad*, 23 AD3d 1060, 1060, *lv denied* 6 NY3d 760). Specifically, defendant agreed that, by loading the gun, pointing it at the victim, and firing it, he was intentionally causing the death of the victim and that the incident in fact caused the death of the victim. To the extent that defendant contends that County Court was required to conduct further

inquiry regarding a possible affirmative defense, we reject that contention inasmuch as defendant said nothing during the plea colloquy that " 'raised the possibility of a viable [extreme emotional disturbance] defense' " (*Manor*, 121 AD3d at 1582; *see People v Hart*, 114 AD3d 1273, 1273, *lv denied* 23 NY3d 963).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

688

KA 08-01006

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON L. ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (David D. Egan, J.), rendered April 3, 2008. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminally using drug paraphernalia in the second degree and unlawful possession of marihuana.

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 controlled substance in the third degree (Penal Law § 220.16 [1]), criminally using drug paraphernalia in the second degree (§ 220.50 [2]), and unlawful possession of marihuana (§ 221.05). On June 28, 2007, officers from the Rochester Police Department executing a search warrant entered defendant's apartment building and observed him standing in the first floor hallway next to a dryer. When defendant saw the officers, he ran into his apartment. The officers entered the apartment and found four men—defendant, Jasman Campbell, and two others—in a 10-foot-by-10-foot room with cocaine, marihuana, and several dozen small plastic bags. In addition, the officers found "two clear knotted bags" containing crack cocaine in the dryer and $460 in small bills on defendant's person. The officers found no money on Campbell's person, nor did they find a pipe or other equipment in the apartment such as would facilitate personal use of crack cocaine. Upon his arrest, defendant made a request of the officers, which the People later disclosed to defendant in a CPL 710.30 notice: "Please board up or lock up my apartment. All my possessions are inside." Defendant, Campbell, and the two other men were to be tried jointly but, before that happened, Campbell pleaded guilty to criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]) in exchange for the minimum sentence. At trial, Campbell testified for

the defense that he alone possessed and sold the drugs, and that he did not share the proceeds of the sales with defendant.

We reject defendant's contention that Supreme Court erred in admitting evidence that he possessed $460 in cash at the time of his arrest. It is well settled that where a defendant is charged with possession of a controlled substance with intent to sell, evidence of money found on the defendant's person at the time of the arrest constitutes circumstantial evidence of defendant's intent to sell (*see People v Mosby*, 237 AD2d 990, 990, *lv denied* 90 NY2d 861; *see also People v Lowman*, 49 AD3d 1262, 1263, *lv denied* 10 NY3d 936).

Viewing the evidence in light of the elements of the crimes and the violation as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). We note, specifically, that the determination whether to discredit Campbell's testimony was within the province of the jury, and its determination "should not be lightly disturbed" (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831).

Finally, defendant failed to preserve for our review his contention that the court erred in permitting the People to use a peremptory challenge based on race. Defendant did not object to the challenge at trial, and he cannot rely on the objection of a codefendant's attorney as a basis for preservation (*see People v Neil*, 213 AD2d 1014, 1014, *lv denied* 86 NY2d 783). In any event, defendant's contention lacks merit. The prospective juror's distrust of and past involvement with the law enforcement community constituted an indisputably race-neutral, nonpretextual reason for the People's use of a peremptory challenge (*see generally People v Smocum*, 99 NY2d 418, 423).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

689

KA 15-00418

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHANNES HIRAM, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered January 21, 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 under the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 9 for his nonviolent felony criminal history. That assessment is supported by the reliable hearsay contained in the case summary (*see People v Thompson*, 66 AD3d 1455, 1456, *lv denied* 13 NY3d 714; *People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809; *see generally People v Mingo*, 12 NY3d 563, 573), and defendant's criminal history report (*see People v Palmer*, 68 AD3d 1364, 1366; *People v Mann*, 52 AD3d 884, 886), which establish that defendant committed a felony in the State of Texas. "Although given an opportunity to discover and present evidence on the matter . . . defendant adduced nothing in opposition to those materials" (*People v Wroten*, 286 AD2d 189, 199, *lv denied* 97 NY2d 610).

We further conclude that the court properly assessed 10 points under risk factor 12 based on defendant's failure to accept responsibility. Although defendant pleaded guilty to attempted sexual abuse in the first degree (*see* Penal Law §§ 110.00, 130.65 [3]), and stated that he was sorry and "never, never wants this to happen again[,]" he denied that he touched the 10-year-old victim's vagina and also denied that his actions were motivated by sexual desire. Defendant's denials, however, are in direct contradiction to his

guilty plea of attempted sexual abuse in the first degree (*see* §§ 130.00 [3]; 130.65 [3]). Defendant's "contradictory statements, considered together, do not reflect a 'genuine acceptance of responsibility' as required by the risk assessment guidelines developed by the Board [of Examiners of Sex Offenders]" (*People v Noriega*, 26 AD3d 767, 767, *lv denied* 6 NY3d 713 [internal quotation marks omitted]). Finally, defendant's contention that the People failed to present clear and convincing evidence that he in fact touched the victim's vagina is raised for the first time on appeal and is thus not preserved for our review (*see People v Smith*, 17 AD3d 1045, 1045, *lv denied* 5 NY3d 705).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

690

KA 11-01062

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAPHER HAMPTON, DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (Elma A. Bellini, J.), rendered March 15, 2010. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that his waiver of the right to appeal is not valid. We agree. Supreme Court did not ensure "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; *see People v Garcia-Cruz*, 138 AD3d 1414, 1414; *People v Cooper*, 136 AD3d 1397, 1398, *lv denied* 27 NY3d 1067). Defendant failed to preserve for our review his contention that the plea colloquy was factually insufficient inasmuch as he failed to move to withdraw the plea on that ground (*see People v Green*, 132 AD3d 1268, 1268-1269, *lv denied* 27 NY3d 1069; *People v Lawrence*, 118 AD3d 1501, 1501, *lv denied* 24 NY3d 1220; *see generally People v Lopez*, 71 NY2d 662, 666), and this case does not fall within the rare exception to the preservation rule (*see Lawrence*, 118 AD3d at 1501-1502; *People v Morgan*, 46 AD3d 1418, 1418, *lv denied* 10 NY3d 768; *see generally Lopez*, 71 NY2d at 666). Notably, while defendant's initial statements during the colloquy cast doubt on his intent to cause the victim's death, the court conducted a further inquiry to ensure that the plea was intelligently entered (*see Lawrence*, 118 AD3d at 1502; *see generally Lopez*, 71 NY2d at 666). Defendant agreed with the court that stabbing someone 46 times "in all likelihood is going to kill that person" and that "it, in fact, killed [the victim]." Defendant further admitted that he knew when he was stabbing the victim that it would kill him, and that was "what [he] wanted to do." In addition,

to the extent that defendant's statements during the plea colloquy raised a question regarding the defense of extreme emotional disturbance, the court also made the appropriate further inquiry (*see People v Murphy*, 43 AD3d 1276, 1277, *lv denied* 9 NY3d 1008). Defendant indicated that he had discussed the possibility of that defense with his attorney, and they decided not to pursue it.

Defendant further contends that the plea was not knowingly, voluntarily, and intelligently entered because the court failed to advise him of the *Boykin* rights. That contention likewise is not preserved for our review inasmuch as defendant did not move to withdraw the plea on that ground (*see People v Conceicao*, 26 NY3d 375, 382; *cf. People v Monroe*, 98 AD3d 1293, 1294, *lv denied* 20 NY3d 1013).

The court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. Defendant's assertions that he was forced to plead guilty and that he did not understand the proceedings are belied by the statements he made during the plea colloquy (*see People v Lewicki*, 118 AD3d 1328, 1329, *lv denied* 23 NY3d 1064). We reject defendant's further contention that an evidentiary hearing was warranted. Defendant was afforded a "reasonable opportunity to present his contentions[,]" and we conclude that nothing further was required in this case (*People v Tinsley*, 35 NY2d 926, 927; *see People v Green*, 122 AD3d 1342, 1343-1344; *see generally People v Brown*, 14 NY3d 113, 116).

We reject defendant's contention that he did not receive effective assistance of counsel. Defendant "received an advantageous plea, and 'nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Shaw*, 133 AD3d 1312, 1313, *lv denied* 26 NY3d 1150, quoting *People v Ford*, 86 NY2d 397, 404; *see People v Martin*, 136 AD3d 1310, 1311). Contrary to defendant's further contention, County Court (Connell, J.) properly determined after a hearing that he was competent to proceed (*see People v Mendez*, 1 NY3d 15, 19-20; *People v Wright*, 107 AD3d 1398, 1399, *lv denied* 23 NY3d 1026). We reject defendant's contention that County Court erred in refusing to suppress his statement to the police. Although the interrogation by the police occurred over a 10-hour period, defendant was given food, drink, and cigarettes, and there were breaks in the interrogation. In addition, at one point the detectives began terminating the interrogation, but defendant asked them to "sit back down and . . . talk to [him]." We conclude that, "[c]onsidering all the circumstances, the statement was not involuntary" (*People v Weeks*, 15 AD3d 845, 847, *lv denied* 4 NY3d 892; *see People v Collins*, 106 AD3d 1544, 1545, *lv denied* 21 NY3d 1072). The sentence is not unduly harsh or severe. We have considered defendant's remaining contentions and conclude that they are without merit.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

693

CAF 15-00037

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

IN THE MATTER OF HUNTER K., BRIANNA K.,
SYLVIA K., AND TIMOTHY B.
---------- MEMORANDUM AND ORDER
LIVINGSTON COUNTY DEPARTMENT OF SOCIAL
SERVICES, PETITIONER-RESPONDENT;

PAUL K., RESPONDENT,
AND ROBIN K., RESPONDENT-APPELLANT.

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

JOHN T. SYLVESTER, MT. MORRIS, FOR PETITIONER-RESPONDENT.

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Family Court, Livingston County (Robert B. Wiggins, J.), entered October 30, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, adjudged that the respondents had neglected the subject children.

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

Memorandum: Respondent mother appeals from an order that, inter alia, adjudged that she had neglected her four children. We previously affirmed the order with respect to the mother's husband, who is father of three of the children and stepfather of one of them (*see Matter of Timothy B. [Paul K.]*, 138 AD3d 1460), and we likewise affirm the order with respect to the mother. As a preliminary matter, we exercise our discretion to treat the mother's notice of appeal from the fact-finding order as a valid notice of appeal from the dispositional order (*see* CPLR 5520 [c]; *Matter of Crystiana M. [Crystal M.– Pamela J.]*, 129 AD3d 1536, 1537). Furthermore, we agree with the mother that she is aggrieved by the dispositional order to the extent that it concerns the fact-finding hearing, and thus her contentions are properly before us (*see Matter of Zoe L. [Melissa L.]*, 122 AD3d 1445, 1446, *lv denied* 24 NY3d 918).

We nonetheless reject the mother's contention that the finding of neglect is against the weight of the evidence. Under Family Court Act § 1046 (a) (iii), there is a presumption of neglect " 'if the parent chronically and persistently misuses alcohol and drugs which, in turn, substantially impairs his or her judgment while [the] child is entrusted to his or her care' " (*Timothy B.*, 138 AD3d at 1461

[internal quotation marks omitted]). Based on the evidence at the hearing, we conclude that Family Court properly applied the presumption here. The caseworker testified at the hearing that the mother admitted that she drank vodka for days at a time and that she felt guilty because of the effect that her and her husband's drinking had on the children. The caseworker further testified that the children made statements to her that there were times when the parents were so intoxicated that the eldest son had to cook for his siblings, and times when he had to make arrangements for the youngest daughter to go to friends' homes so that he could go to work. On at least one occasion, the youngest daughter hid under furniture to avoid the parents, who were drinking and fighting. Moreover, there was evidence that the mother was too intoxicated to protect the children from her husband, who became physically abusive towards the children when he was drinking (*see Matter of Brian P. [April C.]*, 89 AD3d 1530, 1531).

We conclude that such evidence is sufficient to establish that the mother chronically misused alcohol by drinking to the point that she was intoxicated and incompetent, with substantially impaired judgment (*see* Family Ct Act § 1046 [a] [iii]), thereby giving rise to the presumption of neglect in the instant proceeding. The mother's "failure to rebut the presumption of neglect obviated the requirement that petitioner present evidence establishing actual impairment or risk of impairment" (*Timothy B.*, 138 AD3d at 1462).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

694

CAF 15-00233

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

IN THE MATTER OF KEVIN A.B., JR.

LEWIS COUNTY DEPARTMENT OF SOCIAL SERVICES, ORDER
PETITIONER-RESPONDENT;

DEASIA R., RESPONDENT-APPELLANT.

SCOTT A. OTIS, WATERTOWN, FOR RESPONDENT-APPELLANT.

MARY M. IOCOVOZZI, LOWVILLE, FOR PETITIONER-RESPONDENT.

KRYSTAL A. RUPERT, ATTORNEY FOR THE CHILD, LOWVILLE.

Appeal from an order of the Family Court, Lewis County (Daniel R. King, J.), entered October 15, 2014 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent had neglected the subject child.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

695

CAF 15-00154

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

IN THE MATTER OF CARTER W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT;

ORDER

VICTORIA W., RESPONDENT.

JAMES D., RESPONDENT.
(APPEAL NO. 1.)

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

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT JAMES D.

RHIAN D. JONES, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered January 16, 2015 in a proceeding pursuant to Family Court Act article 10. The order granted respondent James D. supervised visitation with the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 17 and 22, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

696

CAF 15-00243

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

IN THE MATTER OF CARTER W.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-APPELLANT;

ORDER

VICTORIA W., RESPONDENT.

JAMES D., RESPONDENT.
(APPEAL NO. 2.)

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

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT JAMES D.

RHIAN D. JONES, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeal from an amended order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered February 5, 2015 in a proceeding pursuant to Family Court Act article 10. The amended order granted respondent James D. supervised visitation with the subject child.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 17 and 22, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

697

CAF 15-00717

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

IN THE MATTER OF CHRISTINE P., RACHEL P., AND ANDREW P.

---------- ORDER

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

PAUL P., RESPONDENT-APPELLANT.

LISA DIPOALA HABER, SYRACUSE, FOR RESPONDENT-APPELLANT.

MICHAEL D. WERNER, WATERTOWN, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered February 25, 2015 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent abused and neglected Christine P. and derivatively abused and neglected Rachel P. and Andrew P.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

698

CA 15-01977

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

GASPER A. TIRONE AND ELAINE E. TIRONE,
CO-TRUSTEES OF GASPER A. TIRONE AND
ELAINE E. TIRONE TRUST, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

DEBORAH A. BUCZEK, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

DEBORAH ANN BUCZEK, DEFENDANT-APPELLANT PRO SE.

HODGSON RUSS LLP, BUFFALO (KEVIN M. KEARNEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 10, 2015. The judgment, inter alia, granted plaintiffs a judgment of foreclosure and sale.

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

Memorandum: Plaintiffs commenced this foreclosure action after Deborah A. Buczek (defendant) defaulted on a note and mortgage. According to plaintiffs, defendant borrowed $385,000 from them in May 2009 to purchase commercial property in Derby, and signed a note in that amount in favor of plaintiffs. The note was secured by a mortgage. In March 2011, plaintiffs executed an allonge to the note, making the note payable to "the Gasper A. Tirone and Elaine E. Tirone Trust" (Trust). The mortgage also was assigned to the Trust. Defendant later defaulted on the note.

In June 2014, plaintiffs issued a demand letter and informed defendant that the original note had been lost. With that letter, plaintiffs provided a copy of the note together with a lost note affidavit, which contained an averment that the Trust held the note. The Trust also re-recorded the mortgage to append the property's legal description, which had been omitted, apparently inadvertently, from the original. Plaintiffs thereafter commenced this foreclosure action.

Plaintiffs attached to the complaint, among other things, a copy of the note and allonge, the mortgage and re-recorded mortgage, and the assignment of the note and mortgage to the Trust. Defendant, in documents which can be construed as her pro se answer, appeared to

contend that the Trust lacked standing to sue her because plaintiffs had lost the note and because plaintiffs did not validly assign the note and mortgage to the Trust. Supreme Court granted plaintiffs' motion for summary judgment seeking dismissal of the answer, a Referee was appointed, a judgment of foreclosure and sale was entered upon the Referee's report, and the property was sold in April 2015 for an amount sufficient to pay both the note and the fees attendant upon the foreclosure and sale.

Contrary to defendant's contention, we conclude that plaintiffs met their burden of establishing their standing to foreclose on the mortgage (*see HSBC Bank USA, N.A. v Baptiste*, 128 AD3d 773, 774; *see also Deutsche Bank Natl. Trust Co. v Monica*, 131 AD3d 737, 738), and defendant failed to raise a triable issue of fact in opposition (*see Comptroller of State of N.Y. v Level Acres LLC*, 134 AD3d 1528, 1529; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

700

CA 15-01923

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

IN THE MATTER OF NANCY ALTIC, ET AL.,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION, ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, J. FRANCIS MANNING, IN HIS CAPACITY AS SUPERINTENDENT OF ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, AND ONONDAGA-CORTLAND-MADISON BOARD OF COOPERATIVE EDUCATIONAL SERVICES, RESPONDENTS-APPELLANTS.

FERRARA FIORENZA PC, EAST SYRACUSE (CRAIG M. ATLAS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered January 20, 2015 in a CPLR article 78 proceeding. The judgment granted the petition and annulled respondents' determination to reduce the prescription drug benefits of petitioners.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: In this CPLR article 78 proceeding, respondents appeal from a judgment that granted the petition and annulled respondents' determination to reduce the prescription co-pay benefit for petitioners, who are retired employees, to the same level as active employees. We agree with respondents that Supreme Court erred in determining that respondents' action violated chapter 504 of the Laws of 2009 (hereafter, moratorium statute). The moratorium statute, first enacted in 1994 (*see* L 1994, ch 729, § 1) "sets a minimum baseline or 'floor' for retiree health benefits, and that 'floor' is measured by the health insurance benefits received by active employees . . . In other words, the moratorium statute does not permit an employer to whom the statute applies to provide retirees with lesser health insurance benefits than active employees" (*Matter of Anderson v Niagara Falls City Sch. Dist.*, 125 AD3d 1407, 1408, *lv denied* 25 NY3d 908). Here, it is undisputed that the prescription co-pay benefits

for petitioners and active employees were identical from June 30, 1994, the "starting date" of the moratorium law (*Matter of Jones v Board of Ed. of Watertown City Sch. Dist.*, 30 AD3d 967, 969; *see* L 2009, ch 504, part B, § 14), until July 1, 2007, when, pursuant to a collective bargaining agreement (CBA), the benefit for active employees was reduced. The benefit for active employees was again reduced pursuant to a subsequent CBA, effective September 1, 2013. Thereafter, petitioners were notified that their benefit would be reduced to the same level as the active employees' benefit, effective April 1, 2014. We conclude that, inasmuch as there was a "corresponding diminution of benefits . . . effected [with respect to petitioners and active employees] . . . from the present level during this period" (L 2009, ch 504, part B, § 14), i.e., "on or after June 30, 1994" (*id.*; *cf. Anderson*, 125 AD3d at 1408-1409; *Jones*, 30 AD3d at 969), respondents did not violate the moratorium statute.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

701

CA 15-00775

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

DENISE AMBROSE AND DAVID AMBROSE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF MADELEINE AMBROSE, AN INFANT, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES E. BROWN, JR., M.D., ET AL., DEFENDANTS, SUCHITRA KAVETY, M.D., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ASSOCIATES FOR WOMEN'S MEDICINE, JANE FIELDS, C.N.M., INDIVIDUALLY AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ASSOCIATES FOR WOMEN'S MEDICINE, AND ASSOCIATES FOR WOMEN'S MEDICINE, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DEFENDANTS-APPELLANTS.

FAGER AMSLER & KELLER, LLP, LATHAM (NANCY E. MAY-SKINNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOTTAR LEONE, PLLC, SYRACUSE (MICHAEL A. BOTTAR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered March 12, 2015. The order denied the posttrial motion of defendants Suchitra Kavety, M.D., Jane Fields, C.N.M., and Associates for Women's Medicine to reverse the court's prior decision granting a mistrial and to reinstate the verdict in favor of defendants.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed (*see Empire Ins. Co. v Food City*, 167 AD2d 983, 984), and the order is reversed on the law without costs, defendants-appellants' motion is granted, and the verdict is reinstated.

Memorandum: Plaintiffs, individually and on behalf of their daughter, commenced this medical malpractice action seeking damages for injuries allegedly sustained by the child during labor and delivery. The jury rendered a verdict in favor of Suchitra Kavety, M.D., Jane Fields, C.N.M., and Associates for Women's Medicine (defendants), and Supreme Court granted plaintiffs' motion for a mistrial based on substantial juror confusion. Invoking, inter alia,

CPLR 2221 and 4404 (a), defendants made a posttrial motion seeking leave to reargue and/or an order reversing the court's decision, reinstating the verdict, and directing that judgment be entered in their favor. The court denied the motion.

We agree with defendants that the court erred in denying their motion (*see generally Thorp v Makuen*, 73 AD2d 617, 618). On the verdict sheet submitted to the jury, the first question asked if Dr. Kavety was negligent, the second question asked if Dr. Kavety's negligence was a substantial factor in causing harm to the child, the third question asked if Fields was negligent, and the fourth question asked if Fields's negligence was a substantial factor in causing harm to the child. The verdict sheet instructed the jurors that, if their answer to the first question was no, to proceed to question three, and if the answer to question three was no, to proceed to instruction 4.2, which stated that they had rendered a verdict in favor of defendants and must report it to the court. Despite those instructions, the jury answered "no" to questions one through four, i.e., they found that Dr. Kavety and Fields were not negligent and that their negligence was not a substantial factor in causing harm to the child.

We conclude that the court erred in granting a mistrial inasmuch as the jury verdict was not the product of substantial confusion among the jurors (*see Martinez v Te*, 75 AD3d 1, 6-7; *Luzardo v Jamaica Hall Corp.*, 296 AD2d 383, 384). The jurors did not need to answer questions two and four regarding proximate cause because they found, in response to questions one and three, that Dr. Kavety and Fields were not negligent. The jurors' answering of questions two and four was merely a " 'superfluous act that does not require a new trial' " (*Alcantara v Knight*, 123 AD3d 622, 623). Indeed, after the verdict, the court questioned the jury foreman, who stated that the jury mistakenly believed that an answer was required for all four questions and that they discussed only the negligence questions. The record establishes that the jury foreman understood that, once the jury resolved to answer the negligence questions in the negative, the proximate cause questions "automatically had to be 'no.' "

Plaintiffs nevertheless contend that the order should be affirmed because a mistrial was appropriate on alternative grounds. We note, however, that plaintiffs moved for a mistrial only on the ground of substantial juror confusion and, thus, plaintiffs' alternative grounds for affirmance are not properly before us (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546; *Reynolds v Krebs*, 81 AD3d 1269, 1271; *Fleiss v South Buffalo Ry. Co.*, 280 AD2d 1004, 1005).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

703

CA 15-02004

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

BRITTANY PERKINS, PLAINTIFF-RESPONDENT,

V ORDER

SHARON E. COLOMBO, FORMERLY KNOWN AS SHARON E. BAILEY, ET AL., DEFENDANTS, CORBRITT MANAGEMENT SERVICES, INC., AND DAVID STASAITIS, INDIVIDUALLY AND AS CEO OF CORBRITT MANAGEMENT SERVICES, INC., DEFENDANTS-APPELLANTS.

FELDMAN KIEFFER, LLP, BUFFALO (CHRISTOPHER E. WILKINS OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LIPSITZ & PONTERIO, LLC, BUFFALO (KATHLEEN A. BURR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

BENNETT SCHECHTER ARCURI & WILL, LLP, BUFFALO (PAULINE C. WILL OF COUNSEL), FOR DEFENDANT PATRICIA MELROSE.

EPSTEIN GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR DEFENDANT BRUCE MACMASTER.

THE LEGAL AID SOCIETY OF ROCHESTER, ROCHESTER (MARK S. MUOIO OF COUNSEL), FOR DEFENDANT GERALDINE COLEMAN.

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

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered February 10, 2015. The order denied the motion of defendants Corbritt Management Services, Inc. and David Stasaitis, individually and as CEO of Corbritt Management Services, Inc., to dismiss the complaint against them.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on May 25, 2016, and filed in the Monroe County Clerk’s Office on July 15, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

704

CA 15-00301

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

ANTHONY BOTTOM, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 121214.)

ANTHONY BOTTOM, CLAIMANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Court of Claims (Michael E. Hudson, J.), entered January 2, 2015. The judgment denied and dismissed the claim against defendant.

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

Memorandum: Claimant, a pro se prison inmate, appeals from a judgment denying and dismissing his claim seeking damages for anxiety and mental distress that he allegedly suffered while confined in the Special Housing Unit (SHU) of Attica Correctional Facility. On January 5, 2012, correction officers frisked claimant's cell, confiscated alleged contraband consisting of 14 photographs contained within claimant's photo album, and completed an inmate misbehavior report charging claimant with violating inmate rule 105.14 (7 NYCRR 270.2 [B] [6] [v] [unauthorized organization]). The photographs purportedly depict family members and friends of claimant at a memorial service for a deceased former member of the Black Panther Party. At the prison disciplinary hearing, claimant sought to call three employees of the Department of Corrections and Community Supervision as witnesses in his defense. Claimant explained that he expected those witnesses to testify that, when the photographs arrived at the correctional facility, they personally reviewed them, and that claimant was "allowed to have them." The Hearing Officer denied all three witnesses and considered as evidence only the inmate misbehavior report, the photographs themselves, and the testimony of a correction officer that the photographs depict an unauthorized organization. Claimant was thereafter found guilty of violating inmate rule 105.14 and sentenced to six months in the SHU. Claimant filed an administrative appeal contending, among other things, that the Hearing Officer's determination was not based on substantial evidence and that claimant was denied his due process right to call witnesses (*see* 7

NYCRR 254.5 [a]). The determination was summarily reversed, and claimant was returned to the general inmate population after 66 days of being confined in the SHU. Claimant thereafter commenced this action alleging that defendant had unlawfully confined him.

We agree with claimant that, under the circumstances of this case, the Court of Claims erred in concluding that defendant is afforded absolute immunity for the disciplinary determination of its Hearing Officer. "It is well settled that, where, as here, the actions of correction personnel have violated the due process safeguards contained in 7 NYCRR parts 252 through 254, those actions '[will] not receive immunity' " (*Moustakos v State of New York*, 133 AD3d 1268, 1269, quoting *Arteaga v State of New York*, 72 NY2d 212, 221). Those due process safeguards include the right to call witnesses at a disciplinary hearing unless the witnesses' testimony is immaterial or redundant, or puts institutional safety or correctional goals in jeopardy (*see* 7 NYCRR 254.5 [a]; *Matter of Texeira v Fischer*, 26 NY3d 230, 233-234, citing *Wolff v McDonnell*, 418 US 539, 556-558). In ruling that the proffered testimony of claimant's witnesses was irrelevant, the Hearing Officer improperly limited the scope of the evidence and, as a result, failed to consider whether the alleged contraband "advocates either expressly or by clear implication, violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the institution" (7 NYCRR 270.2 [B] [6] [v]; *see generally Perez v Annucci*, 126 AD3d 1387, 1388; *Matter of Kimbrough v Fischer*, 96 AD3d 1251, 1252). Thus, we conclude that the proffered testimony was material and relevant because it tended to support claimant's defense to the violation charged (*see generally People v Scarola*, 71 NY2d 769, 777). Moreover, the testimony should have been permitted as evidence of mitigating circumstances relevant to the appropriate penalty (*see Matter of Coleman v Coombe*, 65 NY2d 777, 780; *Matter of Wilson v Coughlin*, 186 AD2d 1090, 1090-1091).

We nonetheless agree with defendant that claimant failed to prove a prima facie case of unlawful confinement inasmuch as he failed to present evidence that the testimony of his witnesses " 'would have . . . changed the outcome of the hearing' " (*Moustakos*, 133 AD3d at 1270; *see Watson v State of New York*, 125 AD3d 1064, 1065). Finally, to the extent that claimant bases his claim on alleged violations of the First Amendment, the claim was properly dismissed inasmuch as the Court of Claims lacks jurisdiction to adjudicate federal constitutional torts (*see Lakram v State of New York*, 206 AD2d 568, 568; *DuBois v State of New York*, 25 Misc 3d 1137, 1138).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

709

TP 15-01941

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

IN THE MATTER OF RACHEL FIGUEROA, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS
AND BUFFALO CITY SCHOOL DISTRICT, RESPONDENTS.

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

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX, FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

GOLDBERG SEGALLA LLP, BUFFALO (KRISTIN K. WHEATON OF COUNSEL), FOR RESPONDENT BUFFALO CITY SCHOOL DISTRICT.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Catherine R. Nugent Panepinto, J.], dated November 16, 2015) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint.

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

Memorandum: Petitioner Rachel Figueroa commenced this proceeding and petitioner Ashleigh Schwallie commenced a separate proceeding (*Matter of Schwallie v New York State Div. of Human Rights*, ___ AD3d ___ [Sept. 30, 2016]) pursuant to Executive Law § 298 seeking to annul the determination of respondent New York State Division of Human Rights (Division) dismissing their complaints alleging sexual harassment and retaliation. At the time of the alleged employment discrimination, petitioners were employed by respondent Buffalo City School District (District) at the same school.

At the outset, we conclude that the District waived its contention that the petitions should be dismissed for lack of jurisdiction based upon the alleged failure of petitioners to serve the District in accordance with CPLR 311 (a) (7). Those objections to service were raised in the District's answers, and the District failed to move to dismiss the petitions on that ground within 60 days after serving its answers (*see* CPLR 3211 [e]; *Anderson & Anderson, LLP-Guangzhou v Incredible Invs. Ltd.*, 107 AD3d 1520, 1521; *Matter of*

Resnick v Town of Canaan, 38 AD3d 949, 951). We also reject the District's contention that the proceedings were not timely commenced, inasmuch as the limitations period commenced on the date of service of the Division's order and the record does not establish the date of such service (*see Matter of Fantauzzi v New York State Div. of Human Rights*, 113 AD3d 518, 519).

On the merits, however, we agree with the District that substantial evidence supports the determination of the Division that the District is not liable for the coworker's discriminatory conduct. "Under the Human Rights Law, an 'employer cannot be held liable for an employee's discriminatory act[s] unless the employer became a party to [them] by encouraging, condoning, or approving [them]' " (*Matter of New York State Div. of Human Rights v ABS Elecs., Inc.*, 102 AD3d 967, 968, *lv denied* 24 NY3d 901, quoting *Matter of Totem Taxi v New York State Human Rights Appeal Bd.*, 65 NY2d 300, 305, *rearg denied* 65 NY2d 1054). Petitioners failed to establish that the District became a party to the discriminatory conduct. "Rather, the record establishes that [the District] 'reasonably investigated complaints of discriminatory conduct and took corrective action' " (*Matter of Gordon v New York State Dept. of Corr. & Community Supervision*, 138 AD3d 1477, 1479).

Substantial evidence also supports the determination of the Division that petitioners were not subjected to retaliation for complaining about unlawful discrimination. Although petitioners established a prima facie case of retaliation, the District "came forward with 'legitimate, independent, and nondiscriminatory reasons to support its employment decision[s]' " (*Matter of Childs v New York State Div. of Human Rights*, 57 AD3d 1457, 1458, *lv dismissed* 12 NY3d 888, 13 NY3d 926, quoting *Matter of Miller Brewing Co. v State Div. of Human Rights*, 66 NY2d 937, 938), and petitioners failed to show that those reasons were pretextual (*see Matter of Pace Univ. v New York City Commn. on Human Rights*, 85 NY2d 125, 129).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

712

KA 14-01095

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER L. JONES, DEFENDANT-APPELLANT.

WILLIAMS, HEINL, MOODY & BUSCHMAN, P.C., AUBURN (RYAN JAMES MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (NATHAN J. GARLAND OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 10, 2014. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the fourth degree.

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 grand larceny in the fourth degree (Penal Law § 155.30 [1]). Contrary to defendant's sole contention on appeal, the People established the amount of restitution by a preponderance of the evidence (*see generally* § 60.27 [2]; CPL 400.30 [4]; *People v Tzitzikalakis*, 8 NY3d 217, 221), inasmuch as the sworn testimony of the employees and officers of the company that was the victim of the crime was sufficient to establish the company's out-of-pocket losses (*see People v Howell*, 46 AD3d 1464, 1465, *lv denied* 10 NY3d 841). Despite the company's lax business and accounting practices, there is "no basis to disturb the restitution award" (*People v Lucieer*, 107 AD3d 1611, 1613).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

713

KA 13-00941

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS J. RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered March 26, 2013. The judgment convicted defendant, after a nonjury trial, of incest 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, following a bench trial, of incest in the third degree (Penal Law § 255.25) and sentencing him, as a second felony offender, to an indeterminate term of incarceration of 2 to 4 years. Defendant's sole contention on appeal is that Supreme Court erred in failing to redact or correct allegedly inaccurate or otherwise improper information contained in the presentence report (PSR) concerning defendant's present offense. We conclude that defendant has failed to preserve his contention for our review (*see People v Russell*, 133 AD3d 1199, 1200, *lv denied* 26 NY3d 1149). Although defense counsel brought the alleged errors in the PSR to the sentencing court's attention (*see generally People v Williams*, 89 AD3d 1222, 1224, *lv denied* 18 NY3d 887), he failed to request any corrective action. As we held in *People v James* (114 AD3d 1312, 1312), "[i]f the investigation report contains incorrect information, [defendant] should object at sentencing to the inclusion of the erroneous information and move to strike it" (internal quotation marks omitted).

In any event, " 'defendant has made no showing that the information [in the PSR] was inaccurate' " (*People v Rudduck*, 85 AD3d 1557, 1558, *lv denied* 17 NY3d 861; *see People v James*, 140 AD3d 1628, 1628). The contention that the PSR may not refer to accusations and charges of which defendant was acquitted as part of the instant prosecution is belied by the regulations and statutes cited by

defendant (*see* 9 NYCRR 350.1 [e], incorporating by reference Penal Law § 60.27 [4] [a]; *see also* 9 NYCRR 350.6 [c] [1] [iv]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

714

TP 15-01940

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

IN THE MATTER OF ASHLEIGH SCHWALLIE, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
BUFFALO CITY SCHOOL DISTRICT, RESPONDENTS.

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

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX, FOR RESPONDENT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

GOLDBERG SEGALLA LLP, BUFFALO (KRISTIN K. WHEATON OF COUNSEL), FOR RESPONDENT BUFFALO CITY SCHOOL DISTRICT.

Proceeding pursuant to Executive Law § 298 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Catherine R. Nugent Panepinto, J.], dated November 16, 2015) to review a determination of respondent New York State Division of Human Rights. The determination dismissed petitioner's complaint.

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

Same memorandum as in *Matter of Figueroa v New York State Div. of Human Rights* (___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

718

KA 15-02030

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRENT M. STEINIGER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Alex R. Renzi, J.), rendered September 26, 2014. The judgment convicted defendant, upon a nonjury verdict, of sexual abuse in the first degree and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of sexual abuse in the first degree (Penal Law § 130.65 [3]) and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his challenge to the sufficiency of County Court's inquiry concerning his waiver of the right to a jury trial (*see People v Hailey*, 128 AD3d 1415, 1415-1416, *lv denied* 26 NY3d 929). In any event, defendant's challenge is without merit inasmuch as he " 'waived his right to a jury trial in open court and in writing in accordance with the requirements of NY Constitution, art I, § 2 and CPL 320.10 (2) . . . , and the record establishes that [his] waiver was knowing, voluntary, and intelligent' " (*id.* at 1416).

Contrary to defendant's contention, the court properly refused to suppress statements that he made to the police. Even assuming, arguendo, that defendant was in custody at the time he was questioned by the police, we note that a police officer testified that he read defendant his full *Miranda* rights from a *Miranda* card that was introduced into evidence, and began discussing the subject incident with defendant only after defendant indicated that he understood his rights, but wanted to talk (*see People v Lewis*, 277 AD2d 1010, 1011, *lv denied* 96 NY2d 736). Although defendant testified that the police officer did not read him his full *Miranda* rights, the court was entitled to credit the police officer's testimony over that of

defendant. " '[W]here there are conflicting inferences to be drawn from the proof, the choice of inferences is for the trier of the facts[, a]nd that choice is to be honored unless unsupported, as a matter of law' " (*People v Semrau*, 77 AD3d 1436, 1437, *lv denied* 16 NY3d 746). Contrary to defendant's related contention, defendant failed to meet his burden of establishing that his right to counsel attached prior to questioning (*see People v Castor*, 128 AD3d 1357, 1358, *lv denied* 26 NY3d 927). Defense counsel's testimony about the timing of his telephone call to the police was equivocal, and the court was entitled to credit the police officer's testimony that questioning ceased as soon as defense counsel "called the police directly" (*see People v McCray*, 121 AD3d 1549, 1550, *lv denied* 25 NY3d 1204).

Defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence with respect to the sexual gratification element of sexual abuse inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, defendant's challenge lacks merit because "the element of sexual gratification may be inferred from the sexual nature of defendant's actions" (*People v Schroo*, 87 AD3d 1287, 1289, *lv denied* 19 NY3d 977; *see People v Chrisley*, 126 AD3d 1495, 1496, *lv denied* 26 NY3d 1007). Furthermore, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that he was deprived of a fair trial by prosecutorial misconduct and, in any event, that contention lacks merit. "In view of the intimate and embarrassing nature of the crimes, we conclude that the court did not abuse its discretion in allowing the prosecutor to ask the child victim leading questions in this sexual abuse case" (*People v Martina*, 48 AD3d 1271, 1272, *lv denied* 10 NY3d 961 [internal quotation marks omitted]). We further conclude that the prosecutor's comments on summation "were within the broad bounds of rhetorical comment permissible in closing arguments" (*People v McClean*, 137 AD3d 940, 941, *lv denied* 27 NY3d 1135).

We reject defendant's further contention that he was denied effective assistance of counsel. "Inasmuch as the court did not abuse its discretion in permitting the victim to testify, defense counsel's failure to object to the admission of that testimony cannot be considered ineffective assistance of counsel" (*People v Alexander*, 109 AD3d 1083, 1085). Furthermore, defendant was not denied effective assistance of counsel based on his attorney's failure to object to the prosecutor's use of leading questions on direct examination of the victim. The prosecutor's questioning was proper, in light of the age of the victim and "particularly in view of the intimate and embarrassing nature of the crime[s]" (*People v Cordero*, 110 AD3d 1468, 1470, *lv denied* 22 NY3d 1137 [internal quotation marks omitted]), and defense counsel was not ineffective for failing to make an objection

that had little or no chance of success (*see People v Caban*, 5 NY3d 143, 152; *People v Horton*, 79 AD3d 1614, 1616, *lv denied* 16 NY3d 859). Lastly, inasmuch as we have concluded that the evidence is legally sufficient to support the conviction, defense counsel's failure to renew his motion for a trial order of dismissal does not amount to ineffective assistance (*see People v Washington*, 60 AD3d 1454, 1455, *lv denied* 12 NY3d 922; *see generally People v Baldi*, 54 NY2d 137, 147).

Defendant's contention relating to the court's reliance at sentencing on information not contained in the record is unpreserved for our review (*see People v Cooper*, 136 AD3d 1397, 1398, *lv denied* 27 NY3d 1067), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we reject defendant's challenge to the severity of the sentence.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

719

CAF 15-01139

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

IN THE MATTER OF DOUGLAS MACHADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHANDRA TANOURY, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

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

MICHELE E. DETRAGLIA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 5, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of respondent to dismiss the petition.

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

Memorandum: In this proceeding to modify a prior consent order regarding custody and visitation of the parties' child, petitioner father appeals from two orders. We dismiss the appeal from the order in appeal No. 2 because that order is duplicative of the order in appeal No. 1 (*see Matter of Chendo O.*, 175 AD2d 635, 635; *see generally Reading v Fabiano* [appeal No. 2], 126 AD3d 1523, 1524). We agree with the father in appeal No. 1 that Family Court erred in summarily dismissing his petition to expand his visitation with the child from 10 hours every two weeks to one overnight visit every two weeks. " 'To survive a motion to dismiss, a petition seeking to modify a prior order of custody and visitation must contain factual allegations of a change in circumstances warranting modification to ensure the best interests of the child' " (*Matter of Gelling v McNabb*, 126 AD3d 1487, 1487). On a motion to dismiss a pleading for facial insufficiency, the court must give the pleading a liberal construction, accept the facts alleged therein as true, accord the nonmoving party the benefit of every favorable inference, and determine only whether the facts fit within a cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88; *Matter of McBride v Springsteen-El*, 106 AD3d 1402, 1402). Here, we conclude that the

father has adequately alleged a change in circumstances warranting a modification of the existing consent order with respect to visitation in the best interests of the child, namely, that respondent mother had, since the parties' agreement to the consent order, repeatedly reneged on her promises, made both before and since the agreement to the consent order, to allow the father to have overnight visitation with the child (*see Gelling*, 126 AD3d at 1487-1488).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

720

CAF 15-01141

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

IN THE MATTER OF DOUGLAS C. MACHADO,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

CHANDRA V. TANOURY, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR PETITIONER-APPELLANT.

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

MICHELE E. DETRAGLIA, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 5, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

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

Same memorandum as in *Matter of Machado v Tanoury* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

721

CAF 15-00189

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

IN THE MATTER OF SARAH ROSEMAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

ERNEST SIERANT, RESPONDENT-APPELLANT,
AND ROBIN SIERANT, RESPONDENT.
(PROCEEDING NO. 1.)

IN THE MATTER OF CYNTHIA CARROLL,
PETITIONER-RESPONDENT,

V

ERNEST SIERANT, RESPONDENT-APPELLANT,
AND ROBIN SIERANT, RESPONDENT.
(PROCEEDING NO. 2.)

LAW OFFICES OF TINA C. BENNET, ESQ. AND BETH A. LOCKHART, ESQ., CANASTOTA (BETH A. LOCKHART OF COUNSEL), FOR RESPONDENT-APPELLANT.

JASON R. DIPASQUALE, BUFFALO, FOR PETITIONER-RESPONDENT CYNTHIA CARROLL.

KOSLOSKY & KOSLOSKY, UTICA (WILLIAM L. KOSLOSKY OF COUNSEL), FOR RESPONDENT.

DOUGLAS M. DEMARCHÉ, JR., ATTORNEY FOR THE CHILD, NEW HARTFORD.

JOHN J. RASPANTE, ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered December 16, 2014 in proceedings pursuant to Family Court Act article 6. The order, inter alia, awarded custody of respondents' eldest minor daughter to petitioner Sarah Roseman and custody of respondents' other two minor daughters to petitioner Cynthia Carroll.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the fourth and fifth ordering paragraphs and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Respondent father appeals from an order that, inter alia, granted

custody of respondents' eldest minor daughter to petitioner Sarah Roseman in proceeding No. 1 and custody of respondents' other two minor daughters to petitioner Cynthia Carroll in proceeding No. 2. Where, as here, there are "child custody dispute[s] between a parent and [two] nonparents, the parent has a superior right to custody that cannot be denied unless the nonparent[s] establish[] that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness, or other extraordinary circumstances" (*Matter of Herrera v Vallejo*, 107 AD3d 714, 714; *see Matter of Bennett v Jeffreys*, 40 NY2d 543, 548; *Matter of Komenda v Dininny*, 115 AD3d 1349, 1350). Contrary to the father's contention, the record supports Family Court's determination that petitioners met their burden of establishing such extraordinary circumstances. They presented evidence of the father's long and serious history of alcohol abuse and the "highly unstable and unsafe living situation" such abuse created for the children (*Herrera*, 107 AD3d at 715; *see Komenda*, 115 AD3d at 1350). The evidence further established that the father failed to attend to the medical needs of his two youngest daughters (*see Matter of Braun v Decicco*, 117 AD3d 1453, 1454, *lv dismissed in part and denied in part* 24 NY3d 927). Contrary to the father's further contention, a sound and substantial basis in the record supports the court's determination that the best interests of the children would be served by the respective awards of custody to petitioners (*see Herrera*, 107 AD3d at 715). We reject the father's contention that the court erred in denying his request to bifurcate the hearing with respect to the issues of extraordinary circumstances and best interests. While the court was required to conduct an evidentiary hearing concerning both issues (*see Matter of Griffin v Griffin*, 117 AD3d 1570, 1570-1571), and it could have conducted separate hearings (*see Matter of Parker v Tompkins*, 273 AD2d 890, 890, *lv denied* 95 NY2d 762), it was not required to do so (*see e.g. Matter of Yandon v Boisvert*, 130 AD3d 1257, 1258).

The father failed to preserve for our review his contentions concerning the timing of the initial appearance in proceeding No. 1 and the service of the first and second amended petitions in proceeding No. 2 (*see Matter of Borggreen v Borggreen*, 13 AD3d 756, 757). The father also failed to preserve for our review his contentions that the court erred in hearing both petitions at the same time, and that he was denied his right to a speedy hearing (*see Matter of Starkey v Starkey*, 247 AD2d 894, 894). Also unpreserved for our review is the father's contention that the court erred in allowing the mother to participate in the hearing after she stipulated to the custody arrangement sought by petitioners (*see Matter of Cyle J.F. [Alexander F.]*, 128 AD3d 1364, 1364). While the father preserved his related contention that the court erred in accepting the mother's stipulation, we conclude that the father was not prejudiced thereby, inasmuch as the court conducted a full evidentiary hearing on the issues of extraordinary circumstances and the best interests of the children (*cf. Matter of Stiles v Orshal*, 290 AD2d 824, 825-826).

The father's contention that the court erred in temporarily transferring custody of the subject children without conducting a

hearing was rendered moot by the entry of the permanent custody order following a hearing (*see Matter of Dench-Layton v Dench-Layton*, 123 AD3d 1350, 1351). The father lacks standing to complain about the assignment of counsel to petitioners (*see Matter of Anderson v Harris*, 73 AD3d 456, 458). Similarly, the father's contentions concerning the court's alleged errors in proceeding with the hearing in the absence of counsel for Carroll and the father's youngest son fall within the "general prohibition on one litigant raising the legal rights of another" (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 773).

The court properly refused to recuse itself inasmuch as the record does not support the father's allegations that the court was biased against him and had prejudged the merits. Contrary to the father's contention, the court did nothing inappropriate when it encouraged the parties to discuss settlement options (*see Martin v Martin*, 74 AD2d 419, 423).

We conclude that the father received effective assistance of counsel at the hearing, inasmuch as he failed to demonstrate the absence of strategic or other legitimate explanations for the alleged shortcomings of his first attorney (*see Matter of Brown v Gandy*, 125 AD3d 1389, 1390-1391). Nor did the father establish any improper conduct on the part of the court or his first attorney in connection with that attorney's motion to withdraw from representing the father.

We agree with the father, however, that the court erred in its determinations with respect to visitation. The court improperly denied contact of any kind with the father's eldest minor daughter, inasmuch as " '[t]he denial of visitation to a parent is a drastic remedy that is warranted only where there are compelling reasons and substantial evidence that such visitation is detrimental to the child's welfare' " (*Murek v Murek* [appeal No. 2], 292 AD2d 839, 840). While the evidence established that the father's relationship with his eldest minor daughter is strained, it did not establish that visitation would be detrimental to her welfare. The court further erred in limiting the father's contact with his other two minor daughters to communication via Skype supervised by Carroll, inasmuch as the record fails to establish that visitation with the father would be harmful to them (*see id.*; *Matter of Mallory v Mashack*, 266 AD2d 907, 907). We therefore modify the order by vacating the fifth ordering paragraph, and we remit the matter to Family Court for a determination of the father's visitation with each of the three subject children.

Finally, we agree with the father that the court erred in suspending the father's visitation with the subject children until, inter alia, he completes an alcohol and drug evaluation and all recommended treatment (*see Matter of Avdic v Avdic*, 125 AD3d 1534, 1535). We therefore further modify the order by vacating the fourth ordering paragraph.

We have considered the father's remaining contentions and conclude that none warrants reversal or further modification of the

order.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

725

CA 16-00025

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

YESENIA CRUZ, INDIVIDUALLY, AND AS PARENT AND NATURAL GUARDIAN OF ELIJAH B. CRUZ, AN INFANT, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL J. STACHOWSKI, AS GUARDIAN OF PROPERTY OF TAQUILO CASTELLANOS, AN INFANT, TAQUILO CASTELLANOS, AN INFANT, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (ARTHUR A. HERDZIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CELLINO & BARNES, P.C., BUFFALO (GREGORY V. PAJAK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 5, 2015. The order, insofar as appealed from, denied the motion of defendants Michael J. Stachowski, as guardian of the property of Taquilo Castellanos, an infant, and Taquilo Castellanos, an infant, for summary judgment dismissing the complaint against them.

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 complaint against defendant Michael J. Stachowski, as guardian of the property of Taquilo Castellanos, an infant, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action, individually and on behalf of her son, seeking damages for injuries that he sustained when he was attacked by a dog at the residence shared by defendants Taquilo Castellanos (Taquilo) and Rogelio Castellanos, Jr. (Rogelio). At the time of the incident Taquilo was 17 years old, and the deed to the residence was in the name of defendant Michael J. Stachowski, in his capacity as guardian of the property of Taquilo.

Supreme Court erred in denying the motion of Taquilo and Stachowski (defendants) insofar as it sought summary judgment dismissing the complaint against Stachowski. Defendants' contention that Stachowski is protected from liability by quasi-judicial immunity is not properly before us because it is raised for the first time in their reply brief (*see Matter of Rossborough v Alatawneh*, 129 AD3d

1537, 1538, *lv dismissed in part and denied in part* 26 NY3d 982). Defendants established, however, that Stachowski was entitled to judgment by submitting evidence that Stachowski "lacked actual or constructive knowledge that the dog had any vicious propensities" (*Hargro v Ross*, 134 AD3d 1461, 1462) and, in opposition to that part of the motion, plaintiff failed to raise a triable issue of fact (*see Doerr v Goldsmith*, 25 NY3d 1114, 1116). We therefore modify the order accordingly.

The court properly denied the motion, however, insofar as it sought summary judgment dismissing the complaint against Taquilo. We reject defendants' contention that Taquilo is relieved of potential liability for the child's injuries based upon Taquilo's age at the time of the incident. "It is elementary in this State that an infant may be held civilly liable for damages caused by his [or her] tortious acts" (*Taksen v Kramer*, 239 App Div 756, 756; *see generally Kern v Ray*, 283 AD2d 402, 402; *Adolph E. v Lori M.*, 166 AD2d 906, 906-907), and defendants cite no authority to support their contention that an infant cannot be subject to strict liability for harm caused by an animal. Nor is it dispositive that the dog was owned by Taquilo's father, Rogelio. "Strict liability can . . . be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensit[ies]" (*Matthew H. v County of Nassau*, 131 AD3d 135, 144). Here, defendants' own submissions raise issues of fact whether Taquilo harbored the dog (*see id.* at 145), and whether he knew or should have known of the dog's vicious propensities (*see Francis v Becker*, 50 AD3d 1507, 1507-1508).

Finally, the court also properly denied the motion insofar as it sought to dismiss the claim for punitive damages against Taquilo. "Viewing the evidence in the light most favorable to the nonmoving party as we must . . . , we conclude that there are triable issues of fact that preclude summary judgment" (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089, 1089, *lv dismissed* 5 NY3d 746). Indeed, defendants' submissions include evidence that Taquilo was both aware of the dog's vicious propensities and cultivated and encouraged those propensities, thus raising issues of fact whether he exhibited the type of " 'heedlessness and . . . utter disregard' for the 'rights and safety of others' " that would support an award of punitive damages (*Sweeney v McCormick*, 159 AD2d 832, 834).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

726

CA 15-01754

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

ZELASKO CONSTRUCTION, INC.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MERCHANTS MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

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

PHILLIPS LYTLE LLP, BUFFALO (CRAIG R. BUCKI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Penny M. Wolfgang, J.), entered December 12, 2014. The order, insofar as appealed from, awarded plaintiff attorneys' fees upon plaintiff's motion for summary judgment.

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 part and that part of the complaint seeking to recover attorneys' fees incurred in prosecuting this action is dismissed.

Memorandum: Plaintiff insured commenced this action against defendant insurer seeking, inter alia, damages in the amount of $49,302.57 arising from defendant's breach of its payment obligations under the "physical damage" coverage provisions of a commercial auto insurance policy. Defendant appeals from an order granting plaintiff's motion for summary judgment on the complaint only insofar as Supreme Court awarded plaintiff the attorneys' fees it incurred in commencing and prosecuting this action.

The court erred in granting that part of the motion seeking attorneys' fees. This case is governed by the general rule that attorneys' fees and other litigation expenses are "incidents of litigation" that the prevailing party may not collect "from the loser unless an award is authorized by agreement between the parties or by statute or court rule" (*Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5; *see Mt. Vernon City Sch. Dist. v Nova Cas. Co.*, 19 NY3d 28, 39; *The Wharton Assoc., Inc. v Continental Indus. Capital LLC*, 137 AD3d 1753, 1755). Indeed, it is well established that "an insured may not recover the expenses incurred in bringing an affirmative action against an insurer to settle its rights under the policy" (*New York*

Univ. v Continental Ins. Co., 87 NY2d 308, 324; *see U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597; *Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12, 16). Here, there is nothing in the insurance policy that obligates defendant to reimburse or indemnify plaintiff for attorneys' fees incurred by it in prosecuting an action to enforce the property coverage provisions of the policy, nor does plaintiff refer to any statute or a court rule authorizing its recovery of attorneys' fees from defendant.

The decisions of the Court of Appeals in *Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.* (10 NY3d 187, 192-193, *rearg denied* 10 NY3d 890) and *Panasia Estates, Inc. v Hudson Ins. Co.* (10 NY3d 200, 203), which concern an insured's entitlement under given circumstances to consequential damages for breach of an insurance policy, do not warrant a different result here (*see e.g. Pandarakalam v Liberty Mut. Ins. Co.*, 137 AD3d 1234, 1235-1236; *O'Keefe v Allstate Ins. Co.*, 90 AD3d 725, 726). There is no support in this record for plaintiff's allegation that the insurer breached its implied covenant of good faith and fair dealing by not investigating the claim before denying it, or that the insurer otherwise acted in bad faith toward plaintiff (*see Panasia Estates, Inc*., 10 NY3d at 203; *see also Bi-Economy Mkt., Inc.*, 10 NY3d at 194-196). Nor is there any justification for a conclusion that the recovery of attorneys' fees by plaintiff was, at the time of formation of the contract, within the contemplation of the parties as an intended or foreseeable consequence of any breach (*see Bi-Economy Mkt., Inc.*, 10 NY3d at 192-193; *Panasia Estates, Inc*., 10 NY3d at 203).

Finally, because there is no merit to the request for attorneys' fees, we search the record and grant defendant summary judgment dismissing that part of plaintiff's complaint (*see generally Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

727

CA 16-00043

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

MICHAEL STEBICK, RONALD R. ANASTASIA AND JEFFREY R. ANASTASIA, PLAINTIFFS-RESPONDENTS,

V ORDER

RITA MCGEE, PATRICIA L. HUSTED, SANDRA L. KIBODEAUX, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

COLLIGAN LAW LLP, BUFFALO (A. NICHOLAS FALKIDES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WAGNER & HART, LLP, OLEAN (JANINE FODOR OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a corrected order and judgment (one paper) of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered November 4, 2015. The corrected order and judgment granted the motion of plaintiffs for summary judgment, declared null and void the subject deed of conveyance and granted plaintiffs specific performance.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

728

CA 15-02116

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

EUGENE MARGERUM, JOSEPH FAHEY, TIMOTHY HAZELET, PETER KERTZIE, PETER LOTOCKI, SCOTT SKINNER, THOMAS REDDINGTON, TIMOTHY CASSEL, MATHEW S. OSINSKI, MARK ABAD, BRAD ARNONE, DAVID DENZ, PLAINTIFFS-RESPONDENTS, AND ANTHONY HYNES, PLAINTIFF,

V ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF FIRE, DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

HODGSON RUSS LLP, BUFFALO (JOSHUA FEINSTEIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (LISA A. POCH OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered October 23, 2015. The order denied the motion of defendants City of Buffalo and City of Buffalo Department of Fire for the Court to recuse itself from this action.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 12, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

730

CA 15-01162

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

MAURA CLUNE, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF JAMES CAMPBELL, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL C. MOORE, M.D., DEFENDANT,
MERCY HOSPITAL OF BUFFALO AND CATHOLIC HEALTH
SYSTEM, INC., DOING BUSINESS AS MERCY HOSPITAL
OF BUFFALO, DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered April 17, 2015. The judgment dismissed the complaint against defendants Mercy Hospital of Buffalo and Catholic Health System, Inc., doing business as Mercy Hospital of Buffalo upon defendants' motion pursuant to CPLR 4401.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated and a new trial is granted.

Memorandum: In appeal Nos. 1 and 2, plaintiff appeals from judgments dismissing the complaints in these consolidated medical malpractice/wrongful death actions against, respectively, defendants Mercy Hospital of Buffalo and Catholic Health System, Inc., doing business as Mercy Hospital of Buffalo (collectively, Mercy defendants) and defendant Michael C. Moore, M.D. (Moore). We agree with plaintiff that Supreme Court erred in granting defendants' motion at the close of plaintiff's case for judgment as a matter of law on the issue of causation (*see* CPLR 4401).

"A directed verdict pursuant to CPLR 4401 is appropriate when, viewing the evidence in [the] light most favorable to the nonmoving party and affording such party the benefit of every inference, there is no rational process by which a jury could find in favor of the nonmovant" (*Hytko v Hennessey*, 62 AD3d 1081, 1083; *see Szczerbiak v Pilat*, 90 NY2d 553, 556; *Wolf v Persaud*, 130 AD3d 1523, 1524). Stated

differently, the test for evidentiary insufficiency is whether there is " 'simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion [advocated by the nonmovant] on the basis of the evidence presented at trial' " (*Szczerbiak*, 90 NY2d at 556, quoting *Cohen v Hallmark Cards*, 45 NY2d 493, 499; *see Mazella v Beals*, 27 NY3d 694, 705).

In order to make out a prima facie case of medical malpractice, a plaintiff must show that the defendant "deviated from acceptable medical practice, and that such deviation was a proximate cause of the [patient's] injury" (*James v Wormuth*, 21 NY3d 540, 545; *see Mazella*, 27 NY3d at 705). In order to establish proximate causation, the plaintiff must demonstrate that the defendant's deviation from the standard of care "was a substantial factor in bringing about the injury" (PJI 2:70; *see Wild v Catholic Health Sys.*, 21 NY3d 951, 954-955; *see also Mazella*, 27 NY3d at 706). Where, as here, the plaintiff alleges that the defendant negligently failed or delayed in diagnosing and treating a condition, a finding that the negligence was a proximate cause of an injury to the patient may be predicated on the theory that the defendant thereby "diminished [the patient's] chance of a better outcome," in this case, survival (*Wolf*, 130 AD3d at 1525; *see Goldberg v Horowitz*, 73 AD3d 691, 694). In that instance, the plaintiff must present evidence from which a rational jury could infer that there was a "substantial possibility" that the patient was denied a chance of the better outcome as a result of the defendant's deviation from the standard of care (*Gregory v Cortland Mem. Hosp.*, 21 AD3d 1305, 1306; *see Candia v Estepan*, 289 AD2d 38, 39-40; *Stewart v New York City Health & Hosps. Corp.*, 207 AD2d 703, 704, *lv denied* 85 NY2d 809). However, "[a] plaintiff's evidence of proximate cause may be found legally sufficient even if his or her expert is unable to quantify the extent to which the defendant's act or omission decreased the [patient's] chance of a better outcome . . . , 'as long as evidence is presented from which the jury may infer that the defendant's conduct diminished the [patient's] chance of a better outcome' " (*Goldberg*, 73 AD3d at 694; *see Flaherty v Fromberg*, 46 AD3d 743, 745; *see generally Brown v State of New York*, 192 AD2d 936, 937-938, *lv denied* 82 NY2d 654).

Here, in appeal No. 1, we conclude that plaintiff, through the testimony of her expert, presented legally sufficient evidence from which a jury could have concluded that the alleged negligence of the Mercy defendants' nursing staff deprived decedent of the substantial possibility of surviving the bowel perforation and resultant peritonitis that led to the death (*see Wolf*, 130 AD3d at 1525; *see Goldberg*, 73 AD3d at 694). We likewise conclude in appeal No. 2 that the evidence adduced by plaintiff at trial provided a rational basis upon which a jury could have found that Moore's alleged departures from the standard of care substantially diminished decedent's chance of surviving the bowel perforation and infection (*see Wolf*, 130 AD3d at 1525; *Goldberg*, 73 AD3d at 694).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

731

CA 15-01163

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

MAURA CLUNE, INDIVIDUALLY AND AS ADMINISTRATRIX
OF THE ESTATE OF JAMES CAMPBELL, DECEASED,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL C. MOORE, M.D., DEFENDANT-RESPONDENT,
MERCY HOSPITAL OF BUFFALO, ET AL., DEFENDANTS.
(APPEAL NO. 2.)

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

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John M. Curran, J.), entered April 27, 2015. The judgment dismissed the complaint against defendant Michael C. Moore, M.D. upon defendants' motion pursuant to CPLR 4401.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the motion is denied, the complaint is reinstated and a new trial is granted.

Same memorandum as in *Clune v Moore* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

733

KA 14-00310

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JULIO DIAZ, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Joanne M. Winslow, J.), rendered November 12, 2013. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]). As the People correctly concede, defendant's oral and written waivers of his right to appeal from his conviction do not encompass his challenge to the severity of his sentence and thus do not foreclose our review of that challenge (*see People v Maracle*, 19 NY3d 925, 927-928; *People v Tomeno*, 141 AD3d 1120, 1120-1121). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

736

KA 13-00168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYLAND L. HICKS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 12, 2012. The judgment convicted defendant, upon a nonjury verdict, of burglary in the first degree, aggravated sexual abuse in the second degree and aggravated criminal contempt.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts one, two and four of the indictment.

Memorandum: Defendant appeals from a judgment, following a bench trial conducted upon remittitur from this Court (*People v Hicks*, 94 AD3d 1483), convicting him of burglary in the first degree (Penal Law § 140.30 [2]), aggravated sexual abuse in the second degree (§ 130.67 [1] [a]), and aggravated criminal contempt (§ 215.52 [1]). The conviction stems from defendant's alleged physical and sexual assault of his former girlfriend (victim). During the pendency of defendant's first appeal, the victim advised defendant's trial counsel that she had lied during her testimony when she testified that defendant committed the above crimes, and that the crimes were committed instead by a person whom she knew only by his "street name." The conversation between defense counsel and the victim was recorded in the presence of defense counsel's employee, and that employee transcribed the conversation. The victim, however, failed to return to defense counsel's office to sign an affidavit regarding her recantation. The People thereafter acknowledged that the victim told the prosecutor that she had lied during the first trial, but that she did not want to testify at the second trial. The victim appeared at the second trial with her attorney and exercised her Fifth Amendment right to remain silent. County Court determined that the victim was not available to testify and permitted the People to admit in evidence a transcript of the victim's testimony from the first trial (*see* CPL 670.10 [2] [a]).

Contrary to defendant's contention, the court did not err in denying his request to use the victim's hearsay recantation to impeach her credibility inasmuch as no foundation could be laid for the admission of that evidence (*see People v Whitley*, 61 AD3d 423, 423, *lv denied* 12 NY3d 922; Jerome Prince, Richardson on Evidence § 8-111 [Farrell 11th ed 1995]). We agree with the holding by the First Department in *Whitley* that the victim's recantation is inadmissible pursuant to *Mattox v United States* (156 US 237, 244-250), which "remains part of this State's evidentiary law" (*Whitley*, 61 AD3d at 423). The Supreme Court explained that, "before a witness can be impeached by proof that he [or she] has made statements contradicting or differing from the testimony given by him [or her] upon the stand, a foundation must be laid by interrogating the witness himself [or herself] as to whether he [or she] has ever made such statements" (*Mattox*, 156 US at 245-246). The Court of Appeals concluded similarly in *People v Hines* (284 NY 93, 115, *overruled in part on other grounds by People v Kohut*, 30 NY2d 183, 184), that "[t]he law is well settled that a[n unavailable] witness whose prior testimony is admitted may not be impeached by showing alleged contradictory or inconsistent statements or alleged declarations that the prior testimony was false." Thus we conclude that, because the victim was cross-examined at the first trial, her credibility could not be impeached at the second trial by the admission of hearsay evidence that she later recanted the testimony implicating defendant unless a foundation was first laid by questioning the victim about the alleged recantation (*see Mattox*, 156 US at 245-246; *see also Hines*, 284 NY at 115). Defendant failed to preserve for our review his contention that his Fourteenth Amendment rights to due process were violated by his inability to impeach the credibility of the victim 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 further contention that his Sixth Amendment right to confrontation was violated by the court's determination (*see Mattox*, 156 US at 242-243; *but see People v Powell*, 27 NY3d 523, 529-531).

We agree with defendant, however, that his Sixth Amendment right to confrontation was violated when the victim exercised her Fifth Amendment right to remain silent and refused to answer defense counsel's questions regarding the recantation of her testimony because the court failed in its duty "[to] explore whether [she] ha[d] essentially refused to testify on questions of matters so closely related to the commission of the crime[s] that [some or all of her] testimony . . . [from the first trial] should be stricken" (*People v Vargas*, 88 NY2d 363, 380 [internal quotation marks omitted]; *see People v Chin*, 67 NY2d 22, 28-29; *cf. People v Montes*, 16 NY3d 250, 253). We note, too, that the victim's testimony is central to the People's case (*see Vargas*, 88 NY2d at 380) and, given that we have previously determined that the evidence against defendant is "less than overwhelming" (*Hicks*, 94 AD3d at 1484), we cannot conclude that the court's error is harmless (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 237).

We therefore reverse the judgment and grant a new trial on counts one, two and four of the indictment. In the interest of judicial economy, we exercise our power to review as a matter of discretion in the interest of justice defendant's contention that the court failed to rebut the presumption of vindictiveness when it imposed a greater sentence than was imposed following the first trial (*see* CPL 470.15 [6] [b]; *see also People v Bludson*, 15 AD3d 912, 912, *lv denied* 4 NY3d 827, *reconsideration denied* 5 NY3d 785). The People correctly concede that the court failed to identify " 'conduct on the part of the defendant occurring after the time of the original sentencing proceeding' " to justify an increased sentence (*People v Rice*, 224 AD2d 972, 972, quoting *North Carolina v Pearce*, 395 US 711, 726), and thus we conclude that the court erred in increasing the sentence after the retrial (*see People v Rogers*, 56 AD3d 1173, 1174, *lv denied* 12 NY3d 787).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

737

KA 13-01688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EMILIER CARRASQUILLO-FUENTES, DEFENDANT-APPELLANT.

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

EMILIER CARRASQUILLO-FUENTES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 24, 2013. The judgment convicted defendant, upon a jury verdict, of 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: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). This prosecution arose from an incident in which several gang members, including defendant and two codefendants, allegedly acting on orders from the gang's leader, fired a fusillade of bullets at a member of a rival gang in a gas station parking lot, killing him and injuring another person. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention in his main brief that the verdict is contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant's contention is based solely on his challenge to the credibility of the witnesses, and we conclude that their testimony "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we see no reason to disturb

the jury's credibility determinations here.

We reject defendant's further contention in his main brief that the identification procedures used by the police, i.e., photo arrays by which he was identified as one of the perpetrators of the crime, were unduly suggestive. "A photo array is unduly suggestive where some characteristic of one picture draws the viewer's attention to it, indicating that the police have made a particular selection" (*People v Smiley*, 49 AD3d 1299, 1300, *lv denied* 10 NY3d 870 [internal quotation marks omitted]; *see People v Robert*, 184 AD2d 597, 598, *lv denied* 80 NY2d 929). Contrary to defendant's contention, "the differences in skin tone and head size of the individuals depicted in the photo array were not so great as to indicate that the police were urging a particular selection" (*Smiley*, 49 AD3d at 1300). Consequently, County Court properly concluded that "[t]he composition and presentation of the photo array[s] were such that there was no reasonable possibility that the attention of the witness[es] would be drawn to defendant as the suspect chosen by the police" (*People v Sylvester*, 32 AD3d 1226, 1227, *lv denied* 7 NY3d 929; *see generally People v Chipp*, 75 NY2d 327, 335-336, *cert denied* 498 US 833).

The court properly admitted in evidence a recording of a 911 emergency call from a woman who indicated that she had observed the perpetrators leaving the scene of the shooting. Contrary to defendant's contention in his pro se supplemental brief, the court properly admitted the recording as an excited utterance. The People established that the call was " 'made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection' " (*People v Johnson*, 1 NY3d 302, 306, quoting *People v Marks*, 6 NY2d 67, 71). Contrary to defendant's further contention in his pro se supplemental brief, the People were not required to establish the woman's unavailability as a witness at trial inasmuch as "unavailability of the declarant is not a prerequisite to the admission of statements deemed to be excited utterances" (*People v Johnson*, 272 AD2d 555, 555, *lv denied* 95 NY2d 854; *see People v Buie*, 86 NY2d 501, 506).

In his main brief, defendant contends that the admission in evidence of the 911 emergency call violated his right to confront the witnesses against him because it contained testimonial evidence from a nontestifying witness. We reject that contention. It is well settled that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution" (*Davis v Washington*, 547 US 813, 822). Here, we agree with the court's conclusion that the information in the recording was nontestimonial because the questions asked by the 911 operator, and the responses thereto, were designed to allow the police to respond to the shooting (*see People v Dockery*, 107 AD3d 913, 914, *lv denied* 22

NY3d 955), and to apprehend and "prevent further harm by the perpetrator[s], who at that point, [were] still at large and armed" (*People v Legere*, 81 AD3d 746, 750; *see People v Shaver*, 86 AD3d 800, 802, *lv denied* 18 NY3d 962, *reconsideration denied* 19 NY3d 967).

Defendant did not object to any of the alleged instances of prosecutorial misconduct during the prosecutor's opening statement or summation, and thus he failed to preserve for our review his further contention in his main brief that he was thereby deprived of a fair trial (*see People v Lane*, 106 AD3d 1478, 1480, *lv denied* 21 NY3d 1043; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). In any event, we reject defendant's contention. We note that "the prosecutor's closing statement must be evaluated in light of the defense summation, which put into issue the [witnesses'] character and credibility and justified the People's response" (*People v Halm*, 81 NY2d 819, 821) and, here, we conclude that the prosecutor's comments at issue on summation were "a fair response to defense counsel's summation and did not exceed the bounds of legitimate advocacy" (*People v Melendez*, 11 AD3d 983, 984, *lv denied* 4 NY3d 888; *see generally Halm*, 81 NY2d at 821). We further conclude that any of the prosecutor's further comments during the opening or closing statements that may have exceeded the bounds of propriety " '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; *see People v Miller*, 104 AD3d 1223, 1224, *lv denied* 21 NY3d 1017; *People v Scott*, 60 AD3d 1483, 1484, *lv denied* 12 NY3d 859).

Defendant contends in his pro se supplemental and pro se reply briefs that the court failed to include all of the testimony that the jury requested in a readback. That contention is not preserved for our review inasmuch as defendant did not object to the court's response to the request. Contrary to defendant's contention, any error that may have occurred "does not constitute a mode of proceedings error for which no preservation is required . . . Counsel had meaningful notice of the precise content of the jury's note and was in the courtroom as the readback was conducted. Counsel was therefore aware [of whether the court] failed to read [all of the testimony that the jury requested]. Counsel's knowledge of the precise content of the note and of the court's actual response, or lack thereof, removes the claimed error from the very narrow class of mode of proceedings errors for which preservation is not required" (*People v Morris*, 27 NY3d 1096, 1099). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's additional contention in his pro se supplemental and pro se reply briefs, the People did not commit a *Brady* violation with respect to one of the bullets recovered from the body of the deceased victim, i.e., the bullet found in the victim's shoulder. Within one day of receiving information indicating that the victim did not sustain that bullet wound in this incident, the People provided that information to the defense. Thus, defendant failed to establish that "the evidence was suppressed by the prosecution" as required to establish a *Brady* violation (*People v Fuentes*, 12 NY3d

259, 263). In any event, even assuming, arguendo, that there was a delay in disclosing the evidence, "[i]t is well settled that 'a defendant's constitutional right to a fair trial is not violated when, as here, he is given a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his case' " (*People v Vickio*, 50 AD3d 1479, 1480, quoting *People v Cortijo*, 70 NY2d 868, 870).

We have considered defendant's remaining contentions in both of his pro se briefs and in his main brief, and we conclude that they are without merit. Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

738

KA 10-02421

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON L. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 26, 2010. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), defendant contends that Supreme Court abused its discretion in denying that part of his omnibus motion seeking funds to retain an investigator and a ballistics expert pursuant to County Law § 722-c. We reject that contention inasmuch as defendant failed to establish that such services were "necessary to his defense" (*People v Clarke*, 110 AD3d 1341, 1342, *lv denied* 22 NY3d 1197; *see People v Brown*, 67 AD3d 1369, 1370, *lv denied* 14 NY3d 886; *People v Coleman*, 45 AD3d 432, 433, *lv denied* 10 NY3d 763).

Inasmuch as defendant did not object to the charge conference being held off the record in chambers, his contention that the court erred in failing to record the charge conference stenographically is not preserved for our review (*see People v Vasquez*, 89 NY2d 521, 534, *cert denied* 522 US 846; *People v Samuels*, 291 AD2d 823, 824, *lv denied* 98 NY2d 655; *see generally* Judiciary Law § 295). In any event, "defendant failed to show any prejudice he suffered as a result of that conference not being transcribed" (*People v Richard*, 30 AD3d 750, 754, *lv denied* 7 NY3d 869; *see generally People v Harrison*, 85 NY2d 794, 796). Moreover, we conclude that any challenge by defendant to the adequacy of the jury charge is not preserved for our review because defendant failed to object to the jury charge as given (*see* CPL 470.05 [2]; *Richard*, 30 AD3d at 754-755; *see generally People v*

Robinson, 88 NY2d 1001, 1001-1002). To the extent that defendant asserts an ineffective assistance of counsel claim on the ground that defense counsel could have sought certain jury charges, that claim involves matters outside the record on appeal in this case and thus is properly raised by way of a motion pursuant to CPL article 440 (*see generally People v Rivera*, 71 NY2d 705, 709).

We reject defendant's contention that the evidence is legally insufficient to support the conviction. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [jury] on the basis of the evidence at trial, viewed in the light most favorable to the People" (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678 [internal quotation marks omitted]; *see generally People v Bleakley*, 69 NY2d 490, 495). Here, "[t]he fact that no one saw defendant fire the shot that killed the victim does not render the evidence legally insufficient, inasmuch as there was ample circumstantial evidence establishing defendant's identity as the shooter" (*People v Moore* [appeal No. 2], 78 AD3d 1658, 1659, *lv denied* 17 NY3d 798). 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 further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Even assuming, arguendo, that a different verdict would not have been unreasonable, [we note that] 'the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded' " (*People v Chelley*, 121 AD3d 1505, 1506, *lv denied* 24 NY3d 1218, *reconsideration denied* 25 NY3d 1070).

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

739

KA 14-01526

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD O. PIERCE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered June 19, 2014. The judgment convicted defendant, upon his plea of guilty, of assault 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 affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Initially, we note that, "[b]y pleading guilty, defendant forfeited review of [Supreme] Court's *Molineux* ruling" (*People v Brown*, 305 AD2d 1068, 1068, *lv denied* 100 NY2d 579). Contrary to defendant's contention, the court properly refused to suppress his statements to the police inasmuch as the record establishes that defendant spoke "freely and unguardedly" in the presence of two different police officers after voluntarily waiving his *Miranda* rights (*People v Cascio*, 79 AD3d 1809, 1811, *lv denied* 16 NY3d 893; *see People v Carbonaro*, 134 AD3d 1543, 1547-1548, *lv denied* 27 NY3d 994, *reconsideration denied* 27 NY3d 1149; *People v Collins*, 43 AD3d 1338, 1339, *lv denied* 9 NY3d 1005). Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

741

KA 13-01825

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT CARTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (EVAN 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 (Thomas J. Miller, J.), rendered March 7, 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 modified on the law by remitting the matter to Onondaga County Court for a suppression hearing and as modified the judgment is affirmed in accordance with the following memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's guilty plea to that count was in satisfaction of an indictment that also charged him with robbery in the first degree (§ 160.15 [4]). Defendant contends that the gun, his oral statements to the police, and the complainant's identification testimony should be suppressed as the fruit of an unlawful police encounter (*see generally People v De Bour*, 40 NY2d 210, 223). As an initial matter, we agree with the People that defendant's contention is not preserved for our review inasmuch as defendant failed to assert unlawful police action as a basis for suppression in his omnibus motion (*see* CPL 470.05 [2]). The People were thus "never placed on notice of any need to develop the record . . . as to the particular issue defendant now raises" (*People v Jie Chen*, 129 AD3d 548, 549; *see People v Ramos*, 116 AD3d 618, 619, *lv denied* 23 NY3d 1041). Although County Court made factual findings with respect to defendant's encounter with the police, we note that such findings were not made "in re[s]ponse" to defendant's protest (CPL 470.05 [2]). We note, moreover, that the court's factual findings are not supported by the evidence at the *Wade/Huntley* hearing; instead, they appear to be based upon the unsworn police report of the arresting officer, who did not testify, and the police report was not admitted in evidence. We therefore cannot address the substance of defendant's suppression

contention.

Defendant further contends that defense counsel failed to provide him with effective assistance of counsel by failing to seek suppression of the above-mentioned evidence on the ground of unlawful police action. We agree. Although defense counsel otherwise competently represented defendant, we conclude that this single omission deprived defendant of meaningful representation (*see generally People v Turner*, 5 NY3d 476, 480). Suppression of the gun that was seized as a result of defendant's encounter with the police would have been dispositive of the count charging defendant with criminal possession of a weapon (*see People v Clermont*, 22 NY3d 931, 934; *see generally People v Bilal*, 27 NY3d 961, 962). With respect to the police encounter, the record on appeal contains only the arresting officer's report. Based upon that report, we conclude that the suppression "issue is [a] close [one] under [the] complex *De Bour* jurisprudence" (*Clermont*, 22 NY3d at 934). Thus, we cannot conclude that a motion to suppress the evidence on the ground now asserted on appeal would have little or no chance of success (*see People v Caban*, 5 NY3d 143, 152). We further conclude that defendant's contention survives his guilty plea inasmuch as the error in failing to seek suppression of the weapon infected the plea bargaining process because suppression of the weapon would have resulted in dismissal of that count of the indictment (*see generally People v Atkinson*, 105 AD3d 1349, 1350, *lv denied* 24 NY3d 958).

"Accordingly, defendant is entitled to a suppression hearing" with respect to the legality of the police encounter (*Bilal*, 27 NY3d at 962). We therefore "conditionally modify the judgment by remitting th[e] matter to [County] Court" for further proceedings (*Clermont*, 22 NY3d at 934; *see People v Layou*, 114 AD3d 1195, 1198). In the event that defendant prevails at the suppression hearing, the judgment is reversed, the plea is vacated, count three of the indictment is dismissed, and the matter is remitted to County Court for further proceedings on count one of the indictment and, if the People prevail, then the judgment should be amended to reflect that result (*see Bilal*, 27 NY3d at 961-962; *Clermont*, 22 NY3d at 932; *Layou*, 114 AD3d at 1198-1199). In light of our determination, we need not address defendant's remaining contention.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

742

CAF 15-00345

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

IN THE MATTER OF JOYCE S., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT W.S., RESPONDENT-RESPONDENT.

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-APPELLANT.

JENNIFER M. LORENZ, ATTORNEY FOR THE CHILD, LANCASTER.

Appeal from an order of the Supreme Court, Wyoming County (Michael F. Griffith, A.J.), entered January 22, 2015 in a proceeding pursuant to Family Court Act article 6. The order granted sole custody of the subject child to respondent and supervised visitation to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, which was transferred to the Integrated Domestic Violence Part of Supreme Court (*see* 22 NYCRR 141.4), petitioner mother appeals from an order that, inter alia, awarded custody of the subject child to respondent with supervised visitation to her. Initially, we reject the mother's contention that the court erred in ruling that she is estopped from contending that respondent is not the child's biological father. The estoppel issue was decided in respondent's favor by an order that was affirmed on a prior appeal (*Matter of Joyce S. v Kevin M.*, 132 AD3d 1419, 1420, *lv denied* 26 NY3d 919), and "[t]he doctrine of collateral estoppel precludes a party from relitigating 'an issue which has previously been decided against him [or her] in a proceeding in which he [or she] had a fair opportunity to fully litigate the point' " (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455; *see Pinnacle Consultants v Leucadia Natl. Corp.*, 94 NY2d 426, 431-432).

We reject the mother's contention that the court erred in awarding respondent custody of the child. "The 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 . . . , particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses . . . We will not disturb that determination inasmuch as the record establishes that it is the product of the court's 'careful weighing of [the] appropriate factors' . . . , and it has a sound and substantial basis

in the record" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625; *see Matter of Walker v Carroll*, 140 AD3d 1669, 1669; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171).

Finally, contrary to the mother's contention, we conclude that the "[c]ourt's determination to impose supervised visitation is supported by the requisite sound and substantial basis in the record" (*Matter of Rice v Cole*, 125 AD3d 1466, 1467, *lv denied* 26 NY3d 909 [internal quotation marks omitted]; *see Matter of Kirkpatrick v Kirkpatrick*, 137 AD3d 1695, 1696; *see generally Matter of Van Court v Wadsworth*, 122 AD3d 1339, 1340, *lv denied* 24 NY3d 916), especially considering, inter alia, the mother's "continued attempts to undermine [respondent's] ability to . . . maintain a relationship with the child" (*Matter of Goldfarb v Szabo*, 130 AD3d 728, 729, *lv denied* 26 NY3d 909, *cert denied* ___ US ___, 136 S Ct 1389).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

743

CAF 14-01019

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

IN THE MATTER OF MADELYN THOMAS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FELICIA SMALL, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

JENNIFER PAULINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered April 24, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner.

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

Memorandum: In appeal No. 1, respondent-petitioner mother appeals from an order that, inter alia, granted the petition of petitioner-respondent grandmother seeking to modify a prior consent order by awarding the grandmother sole custody and primary physical residence of the subject child. In appeal Nos. 2 and 3, the mother appeals from orders that dismissed her petitions seeking to modify the prior order by awarding her custody of the child. Contrary to the mother's contention in appeal No. 1, we conclude that Family Court properly determined that the grandmother met her burden of proving the existence of extraordinary circumstances and, thus, that she had standing to seek custody of the child (*see Matter of Suarez v Williams*, 26 NY3d 440, 446; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 549-551). We also conclude that the court, upon carefully weighing the appropriate factors (*see generally Fox v Fox*, 177 AD2d 209, 210), properly determined that modifying the prior order by awarding the grandmother sole custody and primary physical residence is in the best interests of the child (*see Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1727; *Matter of Iris R. v Jose R.*, 74 AD3d 457, 457). Contrary to the mother's further challenge to the order in appeal No. 1, the court did not improperly delegate its authority to schedule visitation to the grandmother (*see Matter of Dylan Mc. [Michelle M. Mc.]*, 105 AD3d 1049, 1049; *cf. Matter of Nicolette I. [Leslie I.]*, 110 AD3d

1250, 1255; *Matter of Taylor v Jackson*, 95 AD3d 1604, 1604-1605), and we thus reject the mother's contention that the matter should be remitted to the court to fashion a more specific visitation schedule (*see Matter of Moore v Kazacos*, 89 AD3d 1546, 1547, *lv denied* 18 NY3d 806). If the mother is unable to obtain "access with the child as the parties can agree and arrange" pursuant to the order in appeal No. 1, she may file a petition seeking to enforce or modify the order (*see id.*; *see generally Gelling v McNabb*, 126 AD3d 1487, 1487-1488). Finally, to the extent that the mother contends in appeal Nos. 2 and 3 that the court erred in dismissing her petitions, we conclude that her contention is without merit.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

744

CAF 14-01020

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

IN THE MATTER OF FELICIA SMALL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MADELYN THOMAS, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

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

JENNIFER PAULINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered April 24, 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.

Same memorandum as in *Matter of Thomas v Small* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

745

CAF 14-01021

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

IN THE MATTER OF FELICIA SMALL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ERIC PEARSON, SR., RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

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

JENNIFER M. LORENZ, LANCASTER, FOR RESPONDENT-RESPONDENT.

JENNIFER PAULINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Michael F. Griffith, A.J.), entered April 24, 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.

Same memorandum as in *Matter of Thomas v Small* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

747

CA 15-02023

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

AMIE E. WIRTH, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WAYSIDE PUB, INC., DOING BUSINESS AS SMART'S WAYSIDE INN, ROGER SPAIN, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

O'HARA, O'CONNELL & CIOTOLI, FAYETTEVILLE (STEPHEN CIOTOLI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER K. ZIMMERMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered August 6, 2015. The order granted the motion of defendants Wayside Pub, Inc., doing business as Smart's Wayside Inn and Roger Spain for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained on the premises of a restaurant and bar owned by Wayside Pub, Inc., doing business as Smart's Wayside Inn, a close corporation of which Roger Spain is the sole shareholder (defendants). Plaintiff sustained her injuries in a fight involving her and her companion against a group of customers that included plaintiff's alleged assailant. The fight erupted as a result of preexisting tension between plaintiff's companion and the alleged assailant.

We reject plaintiff's contention that Supreme Court erred in granting defendants' motion for summary judgment dismissing the complaint against them. It is well settled that restaurants and bars have a duty to exercise reasonable care to protect their customers from injuries arising from reasonably anticipated causes, including a "duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control" (*D'Amico v Christie*, 71 NY2d 76, 85; *see Jayes v Storms*, 12 AD3d 1090, 1090-1091). A restaurant or bar is not liable, however, for injury resulting from a fight between its customers where the fight reasonably could not have been anticipated or prevented (*see Williams v TeDave Enters.*, 242 AD2d 861, 861;

Stevens v Spec, Inc., 224 AD2d 811, 812). We conclude that defendants met their initial burden on their motion by establishing that they were not aware of the need to control the alleged assailant and did not have the opportunity to do so. Plaintiff testified at her deposition that, until the moment the fight broke out, she and her companion stayed on the opposite side of the bar from the other group of customers, the two groups had little interaction other than occasional "staring," and any unpleasant interaction that did occur was subtle and fleeting. Furthermore, defendants established that there was no evidence of past incidents involving plaintiff's alleged assailant of which they were aware. We further conclude that plaintiff failed to raise an issue of fact in opposition to the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Notably, plaintiff's contention that defendants failed to follow their own internal staffing policies is belied by the record.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

748

CA 15-01669

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

RICHARD T. ANDREWS,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF CAYUGA,
DEFENDANT-APPELLANT-RESPONDENT.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (RICHARD J. GRAHAM OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

KUEHNER LAW FIRM, PLLC, SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 5, 2015. The order denied plaintiff's motion for partial summary judgment and denied defendant's cross motion for dismissal and partial summary judgment.

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

Memorandum: As we explained on a prior appeal, "[p]laintiff commenced this action seeking damages for injuries he sustained while he was a detainee at the Cayuga County Jail" (*Andrews v County of Cayuga*, 96 AD3d 1477, 1477). In his amended complaint, plaintiff asserts three causes of action: for negligence and medical malpractice, for an alleged violation of his civil rights under 42 USC § 1983, and for an alleged violation of his Fourteenth Amendment rights to due process for defendant's failure to provide him with adequate medical care (*see Powlowski v Wullich*, 102 AD2d 575, 583-584), respectively. Plaintiff moved for partial summary judgment with respect to liability on his negligence claim, and defendant cross-moved for partial summary judgment dismissing that part of the first cause of action seeking damages for injuries to plaintiff's shoulders, i.e., bilateral fractures and dislocations; for summary judgment dismissing the third cause of action; and for dismissal of the second cause of action pursuant to CPLR 3211 (a) (7) for failure to state a cause of action. Supreme Court denied the motion and cross motion, and we affirm.

Contrary to plaintiff's contention on his cross appeal, we conclude that the court properly denied his motion inasmuch as

defendant raised an issue of fact whether jail personnel were negligent in his treatment. Both parties submitted expert affidavits with respect to plaintiff's treatment, and it is axiomatic that "the conflicting opinions of the experts . . . present credibility issues that cannot be resolved on a motion for summary judgment" (*Haas v F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 [internal quotation marks omitted]). The conflicting expert opinions also preclude summary judgment dismissing plaintiff's third cause of action for an alleged violation of his Fourteenth Amendment rights based upon the failure of defendant to provide adequate medical care (*see id.*).

The court also properly denied that part of defendant's cross motion seeking partial summary judgment with respect to the injuries to plaintiff's shoulders. "It is well settled that, on a motion for summary judgment, a defendant in a medical malpractice action bears the initial burden of establishing either that there was no deviation or departure from the applicable standard of care or that any alleged departure did not proximately cause the plaintiff's injuries" (*Bagley v Rochester Gen. Hosp.*, 124 AD3d 1272, 1273). Here, defendant failed to establish that its expert, a psychiatrist, was qualified to offer an opinion that plaintiff's shoulder injuries were not caused by defendant's negligence (*cf. Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1525). The remaining evidence submitted by defendant merely notes "gaps in its opponent's proof," which is not sufficient to establish its entitlement to summary judgment (*Andrews*, 96 AD3d at 1478 [internal quotation marks omitted]).

Accepting as true the facts as alleged in the amended complaint and according plaintiff the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88; *Board of Trustees of IBEW Local 43 Elec. Contrs. Health & Welfare, Annuity & Pension Funds v D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1359), we conclude that plaintiff's allegation that he was denied his Fourteenth Amendment rights to adequate medical care by jail personnel is sufficient basis for the assertion of a cause of action pursuant to 42 USC § 1983 (*see Powlowski*, 102 AD2d at 583-584; *cf. Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 281-283, *rearg denied* 15 NY3d 841). "[I]t is well established that[,] in order to state a claim under [section] 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to a person acting under color of state law, and (2) that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States" (*Kennedy v St. Barnabas Hosp.*, 283 AD2d 364, 366). Contrary to defendant's contention, plaintiff made the requisite allegations here.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

749

CA 15-02092

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

DARRYL GAITER AND HELEN GAITER,
PLAINTIFFS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO BOARD OF EDUCATION,
ET AL., DEFENDANTS.

HOGANWILLIG, PLLC, RESPONDENT,
AND LAW OFFICE OF ERIC B. GROSSMAN,
APPELLANT.
(APPEAL NO. 1.)

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

HOGAN WILLIG, PLLC, AMHERST (DIANE TIVERON OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered August 14, 2015. The order directed the appellant Law Office of Eric B. Grossman to pay to respondent HoganWillig, PLLC, 35% of the legal fees generated in the underlying action.

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

Memorandum: In appeal No. 1, Law Office of Eric B. Grossman (Grossman), plaintiffs' counsel in the underlying personal injury action, appeals from an order directing it to pay plaintiffs' former counsel, respondent HoganWillig, PLLC, 35% of the legal fees generated in the underlying action. In appeal No. 2, Grossman appeals from an order denying its motion for leave to renew and/or reargue its opposition to the relief granted in the order in appeal No. 1. Insofar as the order in appeal No. 2 denied the motion for leave to reargue, it is not appealable, and we therefore dismiss the appeal to that extent on that ground (*see Indus PVR, LLC v Maa-Sharda, Inc.*, 140 AD3d 1666, 1667). In addition, we note that, in its brief on appeal, Grossman fails to advance any contentions concerning the order in appeal No. 2, and it therefore has abandoned any issue with respect to that order (*see Villar v Howard*, 126 AD3d 1297, 1300; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We therefore dismiss appeal No. 2 in its entirety.

We affirm the order in appeal No. 1. Grossman contends that it may not share any part of the fees generated in the case with HoganWillig because HoganWillig had a conflict of interest, i.e., a member of the firm was also a member of the Board of Education of the City of Buffalo, a defendant in the underlying action. We reject that contention. Grossman, which "is bound by the same [Rules of Professional Conduct] as [HoganWillig], cannot be heard to argue that the fee-sharing agreement and the obligations thereunder must be voided on ethical grounds, when [Grossman's principal] freely agreed to be bound by and received the benefit of the same agreement, particularly where, as here, there is no indication that the client was in any way deceived or misled" (*Samuel v Druckman & Sinel, LLP*, 12 NY3d 205, 210, *rearg denied* 12 NY3d 899; *see Benjamin v Koeppel*, 85 NY2d 549, 556).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

750

CA 15-02094

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

DARRYL GAITER AND HELEN GAITER,
PLAINTIFFS,

V MEMORANDUM AND ORDER

CITY OF BUFFALO BOARD OF EDUCATION,
ET AL., DEFENDANTS.

HOGANWILLIG, PLLC, RESPONDENT,
AND LAW OFFICE OF ERIC B. GROSSMAN,
APPELLANT.
(APPEAL NO. 2.)

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

HOGAN WILLIG, PLLC, AMHERST (DIANE TIVERON OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 15, 2015. The order denied the motion of Law Office of Eric B. Grossman for leave to renew and reargue.

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

Same memorandum as in *Gaiter v City of Buffalo Bd. of Educ.* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

751

CA 15-01705

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

ALL-STATE SALES & ADMINISTRATIVE SERVICES, INC.,
PLAINTIFF-RESPONDENT,

V ORDER

TOLEDO MOLDING & DIE, INC., DEFENDANT-APPELLANT.

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

BOTTAR LEONE, PLLC, SYRACUSE (MICHAEL A. BOTTAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Walter W. Hafner, Jr., A.J.), entered January 13, 2015. The order, insofar as appealed from, denied the motion of defendant for summary judgment.

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: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

752

CA 15-01359

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

TAMRA J. WERNER, FORMERLY KNOWN AS TAMRA J. KENNEY,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KRAIG H. KENNEY, DEFENDANT-RESPONDENT.

INCLIMA LAW FIRM, PLLC, ROCHESTER (CHARLES P. INCLIMA OF COUNSEL), FOR PLAINTIFF-APPELLANT.

JOAN de R. O'BYRNE, ROCHESTER, FOR DEFENDANT-RESPONDENT.

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

Appeal from an order of the Supreme Court, Ontario County (William F. Kocher, A.J.), entered December 23, 2014. The order, among other things, awarded defendant sole custody of the parties' child.

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

Memorandum: In this post-divorce modification and enforcement action, plaintiff mother appeals from an order that modified the judgment of divorce, which incorporated the custody provisions of the parties' Separation and Property Settlement and "Opting Out" Agreement, by awarding sole custody of the parties' child to defendant father, with visitation to the mother. We affirm. Contrary to the mother's contention, we conclude that the father met his burden of establishing a change in circumstances " 'since the time of the stipulation' " sufficient to warrant an inquiry into whether a change in custody is in the child's best interests (*Matter of Maracle v Deschamps*, 124 AD3d 1392, 1392; *see Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1725). Here, the record supports Supreme Court's determination that the continued deterioration of the parties' relationship and their inability to coparent constitutes the requisite change in circumstances (*see Matter of York v Zullich*, 89 AD3d 1447, 1448; *Matter of Ingersoll v Platt*, 72 AD3d 1560, 1561).

Contrary to the mother's further contention, we conclude that the court's decision properly set forth the grounds for its determination and that the determination is supported by a sound and substantial basis in the record (*see Matter of Saletta v Vecere*, 137 AD3d 1685, 1686). "It is well settled . . . that [a] concerted effort by one

parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695 [internal quotation marks omitted]). Here, the record supports the court's conclusions that the mother interfered with the father's relationship with the child and that her unfounded allegations of domestic violence against the father, some of which were made in the presence of the child, render her unfit to be a custodial parent (*see Matter of Perez v Sepulveda*, 21 AD3d 558, 559). "Although the court must consider the effects of domestic violence in determining the best interests of the child[ ]," the mother failed to prove her allegations by a preponderance of the evidence (*Matter of Miller v Jantzi*, 118 AD3d 1363, 1363-1364). We therefore see no reason to disturb the court's custody determination (*see Matter of Lewis R.E. v Deloris A.E.*, 37 AD3d 1092, 1093).

We agree with the mother that the court's delay in making a determination was unreasonable, but reversal or remittal in this case is not required inasmuch as the court's decision is supported by the record (*see Hanway v Hanway*, 208 AD2d 499, 500).

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

754

CA 15-02074

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

RICCELLI ENTERPRISES, INC., ET AL.,
PETITIONERS-PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK WORKERS' COMPENSATION
BOARD, ROBERT E. BELOTEN, CHAIRMAN OF
WORKERS' COMPENSATION BOARD AND SAFE LLC,
RESPONDENTS-DEFENDANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JEFFREY W. LANG OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

GILBERTI STINZIANO HEINTZ & SMITH, P.C., SYRACUSE (GARY KELDER OF COUNSEL), FOR PETITIONERS-PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald F. Cerio, Jr., A.J.), entered May 8, 2015. The order granted the motion of petitioners-plaintiffs to hold respondents-defendants in contempt and granted petitioners-plaintiffs costs and fees.

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

Memorandum: In a prior appeal, we affirmed an order in which Supreme Court granted "petitioners'-plaintiffs' application pursuant to CPLR 7805 for a stay of, inter alia, the enforcement of [respondents'-defendants'] determination to levy deficit assessments against them under the authority of Workers' Compensation Law § 50 (3-a) (7) (b) pending the determination of the instant CPLR article 78 proceeding/declaratory judgment action (hereafter proceeding)" (hereafter, stay order) (*Matter of Riccelli Enters., Inc. v State of N.Y. Workers' Compensation Bd.*, 117 AD3d 1438, 1439). As we explained in our prior memorandum, "petitioners-plaintiffs (petitioners) are former members of a group self-insured trust (GSIT or Trust), which provided workers' compensation benefits to their respective employees" (*id.*). During the pendency of the prior appeal, respondents-defendants (hereafter, Board), commenced an action in Albany County against approximately 600 other former members of the Trust to collect deficit assessments and fees related to the Trust. Some of those former members thereafter commenced a third-party action seeking indemnification and/or contribution from petitioners herein. The Board brought a cross motion in the Albany County action seeking to consolidate that action and the instant proceeding, and to change the

venue of the instant proceeding from Onondaga County to Albany County. When the Board refused petitioners' request to withdraw its cross motion, petitioners moved pursuant to, inter alia, Judiciary Law § 756 for a determination that the Board was in contempt of the stay order. The court determined that the Board violated that part of the stay order providing that "all further proceedings are [stayed] until a final determination can be made as to all claims in this proceeding[ ], preventing respondents[ ] from taking any further action against the [p]etitioners[ ]," and it assessed fees and costs against the Board as a penalty for the contempt.

It is well settled that, in order to establish civil contempt under Judiciary Law § 753, the party seeking the order must show by clear and convincing evidence that there was a lawful order of the court with a clear and unequivocal mandate; that the order had been disobeyed; that the party to be held in contempt had knowledge of the court's order; and that the party seeking the order was prejudiced (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29). " 'An application to punish a party for contempt is addressed to the sound discretion of the court' " (*Fernandez v Fernandez*, 278 AD2d 882, 882; *see generally Pezhman v Chanel, Inc.*, 135 AD3d 596, 596; *Korea Chosun Daily Times, Inc. v Dough Boy Donuts, Inc.*, 129 AD3d 918, 918). Contrary to the Board's contention, the stay order was " 'clear and explicit[,] and . . . the act complained of [was] clearly proscribed' " (*Halfond v White Lake Shores Assn., Inc.*, 114 AD3d 1315, 1316). Here, the stay order clearly and explicitly proscribed the Board from "taking any further action" against petitioners, and yet the Board took further action against petitioners by seeking to consolidate the proceeding with the action it had commenced in Albany County and to transfer the venue of the instant proceeding to Albany County. Contrary to the Board's further contention, its actions prejudiced petitioners inasmuch as "[t]he stay was meant to ensure that any relief petitioners might be deemed entitled to was not rendered altogether academic" by consolidating this proceeding with an action to collect assessments from approximately 600 other former Trust members in another county (*Matter of McCormick v Axelrod*, 59 NY2d 574, 587, *order amended* 60 NY2d 652). We therefore conclude that the court did not improvidently exercise its discretion in determining that the Board was in contempt of the stay order.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

755

KA 08-01549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BURGESS MATTHEWS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Monroe County Court (John J. Connell, J.), rendered April 4, 2008. The judgment convicted defendant, upon a jury verdict, of course of sexual conduct against a child in the first degree, endangering the welfare of a child and rape in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence on the conviction of course of sexual conduct against a child in the first degree is unanimously dismissed and the judgment is affirmed.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [a]), endangering the welfare of a child (§ 260.10 [1]) and rape in the third degree (§ 130.25 [2]). In appeal No. 2, defendant appeals from a resentence involving the conviction of course of sexual conduct against a child. We note at the outset that, inasmuch as the sentence on that conviction in appeal No. 1 was superseded by the resentence in appeal No. 2, the appeal from the judgment in appeal No. 1 insofar as it imposed sentence on that conviction must be dismissed (*see People v Weathington* [appeal No. 2], 141 AD3d 1173, 1173). Defendant raises no contention with respect to the resentence in appeal No. 2, however, and we therefore dismiss the appeal therefrom (*see People v Drake*, 138 AD3d 1396, 1396).

We reject defendant's contention that County Court erred in admitting in evidence photographs depicting the victim at ages 10, 13 and 15. The photographs were relevant to illustrate the victim's age at the time the crimes occurred (*see People v Khan*, 88 AD3d 1014, 1015, *lv denied* 18 NY3d 884). In any event, inasmuch as there was

overwhelming evidence of defendant's guilt and no significant probability that the jury would have otherwise acquitted him, we conclude that, "[e]ven if the court erred in admitting the photographs, the error [is] harmless" (*People v Murray*, 140 AD2d 949, 950, *lv denied* 72 NY2d 960; *see People v Marra*, 96 AD3d 1623, 1626, *affd* 21 NY3d 979).

We reject defendant's contention that defense counsel should have been permitted to withdraw from representing defendant, inasmuch as defense counsel never sought permission to withdraw. There is no merit to defendant's further contention that the court erred in failing to inquire into his request for substitution of counsel. Defendant's nonspecific complaint that defense counsel had been dishonest with him did not constitute a request for substitution of counsel and thus "did not trigger the need for an inquiry into whether good cause existed for substitution" (*People v Mitchell*, 129 AD3d 1319, 1321, *lv denied* 26 NY3d 1041).

The court properly exercised its discretion in granting the People's *Molineux* application, inasmuch as the evidence that the People proposed to introduce at trial had substantial probative value with respect to issues other than criminal propensity, and the probative value of the evidence outweighed the danger of undue prejudice to defendant (*see People v Cass*, 18 NY3d 553, 560). The evidence of uncharged acts of physical and sexual abuse against the victim was relevant to complete the narrative and provide background information (*see People v Dorm*, 12 NY3d 16, 19; *People v Washington*, 122 AD3d 1406, 1408, *lv denied* 25 NY3d 1173). In addition, evidence concerning defendant's violent and threatening behavior was relevant to explain the victim's delay in disclosing the crimes charged, irrespective of whether the violence was directed against her (*see People v Justice*, 99 AD3d 1213, 1215, *lv denied* 20 NY3d 1012; *People v Workman*, 56 AD3d 1155, 1156-1157, *lv denied* 12 NY3d 789) or her siblings (*see People v Rivers*, 82 AD3d 1623, 1623, *lv denied* 17 NY3d 904; *People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). The court provided extensive and repeated limiting instructions with respect to the *Molineux* evidence that minimized the prejudice to defendant (*see Washington*, 122 AD3d at 1408; *Rivers*, 82 AD3d at 1623; *cf. People v Westerling*, 48 AD3d 965, 968).

The court also properly exercised its discretion in admitting evidence concerning defendant's suicide attempt, including the suicide note, as relevant to his consciousness of guilt (*see People v Smith*, 191 AD2d 284, 284-285, *lv denied* 81 NY2d 1020). Defendant failed to preserve for our review his contention that the prosecutor engaged in misconduct on summation by vouching for the credibility of a prosecution witness (*see People v Mull*, 89 AD3d 1445, 1446, *lv denied* 19 NY3d 965), 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]). Finally, even assuming, arguendo, that the prosecutor "improperly appealed to the sympathy of the jury" by displaying the victim's photographs during the graphic description of her victimization on summation (*People v Presha*, 83 AD3d 1406, 1408),

we conclude that the prosecutor's isolated conduct was not so egregious as to deprive defendant of a fair trial (*see People v Lyon*, 77 AD3d 1338, 1339, *lv denied* 15 NY3d 954).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

756

KA 08-01938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BURGESS MATTHEWS, JR., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a resentence of the Monroe County Court (John J. Connell, J.), rendered May 9, 2008. Defendant was resentenced upon his conviction of course of sexual conduct against a child in the first degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same memorandum as in *People v Matthews* ([appeal No. 1] ___ AD3d ___ [Sept. 30, 2016]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

757

KA 15-00024

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WESLEY WOODS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 3, 2014. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree, robbery in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the first degree (Penal Law § 135.25 [2] [a]), robbery in the first degree (§ 160.15 [4]), and assault in the second degree (§ 120.05 [2]). The charges arose from an incident in which the victim was held captive, pistol whipped, and then repeatedly humiliated, including being forced to lick his own blood from a boot of one of the perpetrators. The perpetrators made a video recording of parts of the incident and posted the recording on social media.

Defendant contends that Supreme Court erred in refusing to permit him to introduce into evidence a video recording in which the victim told defendant's girlfriend that defendant did not commit the crime, because the recording established that he did not commit the crime. At trial, however, he contended only that the recording was admissible to impeach the victim. "Inasmuch as [defendant's current] theory was not expressed to the trial court, the issue is not preserved for our review" (*People v Lyons*, 81 NY2d 753, 754). In any event, any error in the court's refusal to admit the recording in evidence is harmless inasmuch as "[t]he substance of th[e] prior statement was admitted in evidence through defense counsel's cross-examination of [the victim]" (*People v Lewis*, 277 AD2d 1022, 1022, *lv denied* 96 NY2d 802; *see People v Person*, 26 AD3d 292, 294, *affd* 8 NY3d 973), wherein the victim admitted that he said that defendant did not commit the crime.

Defendant's contention that the evidence is not legally sufficient is not preserved for our review because his "motion for a trial order of dismissal was not specifically directed at the same alleged shortcoming[s] in the evidence raised on appeal" (*People v Brown*, 96 AD3d 1561, 1562, *lv denied* 19 NY3d 1024 [internal quotation marks omitted]; *see People v Abon*, 132 AD3d 1235, 1235-1236, *lv denied* 27 NY3d 1127; *see generally People v Gray*, 86 NY2d 10, 19). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), and affording them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d 490, 495), we conclude that the evidence is legally sufficient to establish the elements of the crimes of which defendant was convicted.

Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's contention is based largely on his assertion that the victim and the codefendant who testified at trial in order to obtain a more favorable plea bargain are not credible, and that their versions of the event are in conflict with, and unsupported by, other evidence. It is well settled that "[r]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]). Contrary to defendant's contention, the testimony of the victim and the codefendant "was not so inconsistent or unbelievable as to render it incredible as a matter of law" (*People v Black*, 38 AD3d 1283, 1285, *lv denied* 8 NY3d 982). In addition, there was significant evidence, including video recordings, that the victim was beaten and humiliated in defendant's house, and testimony indicating that, in the recordings, defendant was directing the victim to stop resisting during the beating. Furthermore, contrary to defendant's contention, there is expert scientific evidence establishing that the victim's blood was found in numerous places in defendant's house, lending further credence to the victim's testimony. Thus, we see no basis for disturbing the jury's credibility determinations in this case. Contrary to defendant's further contention, the jury's conclusion that there was insufficient evidence to establish the affirmative defense to robbery under Penal Law § 160.15 (4) is not contrary to the weight of the evidence.

Defendant further contends that the sentence is unduly harsh and severe. Contrary to the People's contention, it is well settled that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783; *see People v Lopez*, 6 NY3d 248, 260 n 5). Thus, we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86; *see People v Smart*, 100 AD3d 1473, 1475, *affd* 23 NY3d 213; *People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). Nevertheless, we conclude that the sentence is

not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

758

KA 13-01913

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICARDO CARRASQUILLO, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PIOTR BANASIAK 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 July 22, 2013. 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: On appeal from a judgment convicting him, upon a jury verdict, of criminal possession of weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to give a missing witness charge. We reject that contention inasmuch as defendant did not establish that the uncalled witness was "knowledgeable about a material issue pending in the case" (*People v Gonzalez*, 68 NY2d 424, 427; *see generally People v Keen*, 94 NY2d 533, 539).

Defendant's contention that he was denied a fair trial by prosecutorial misconduct upon summation is unpreserved for our review inasmuch as defendant did not object to any of the alleged instances of misconduct (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834; *People v Smith*, 32 AD3d 1291, 1292, *lv denied* 8 NY3d 849), 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 Smith*, 129 AD3d 1549, 1549-1550, *lv denied* 26 NY3d 971). Contrary to defendant's contention, he was not denied effective assistance of counsel. The record as a whole establishes that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Contrary to defendant's further contention, the conviction is supported by legally sufficient evidence, including with respect to

the element of defendant's constructive possession of the gun (*see People v Farmer*, 136 AD3d 1410, 1411-1412; *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 reject defendant's contention that the verdict is against the weight of the evidence, specifically with respect to whether defendant had dominion and control over the gun or the area in which the gun was found sufficient to give him the ability to use or dispose of the gun (*see Farmer*, 136 AD3d at 1411-1412; *see also Bleakley*, 69 NY2d at 495; *see generally People v Mattison*, 41 AD3d 1224, 1225, *lv denied* 9 NY3d 924).

Defendant contends on appeal that the court erred in refusing to suppress the physical evidence on the ground that the officers who searched the house did not have a copy of the warrant with them and failed to show defendant a copy at his request (*see generally People v Ellison*, 46 AD3d 1341, 1343, *lv denied* 10 NY3d 862). Although defendant initially raised that ground in support of his suppression motion, he failed to address it at the suppression hearing or in his posthearing submission to the court, and the court thus did not address it in its written decision denying the suppression motion. We thus conclude that defendant abandoned that ground (*see People v Graves*, 85 NY2d 1024, 1027; *People v Perez*, 52 AD3d 1244, 1244-1245, *lv denied* 11 NY3d 928). Furthermore, in failing to address that ground at the suppression hearing, defendant failed to present us with a record adequate to enable us to review the contention (*see People v Kinchen*, 60 NY2d 772, 773-774; *People v Dixon*, 37 AD3d 1124, 1124, *lv denied* 10 NY3d 764; *People v Woods*, 303 AD2d 1031, 1032).

We have considered defendant's challenge to his sentence and conclude that it is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

759

KA 13-00720

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH L. WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered January 14, 2013. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the first degree and assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [3]) and assault in the second degree (§ 120.05 [2]), defendant contends that Supreme Court erred in permitting the victim to testify on redirect examination that he had made a pretrial photographic identification of defendant because such testimony constituted improper bolstering. We reject that contention. Here, "defense counsel 'open[ed] the door' to such testimony by creating a 'misimpression' about the witness's identification that was cured by testimony concerning the photo identification" (*People v Williams*, 286 AD2d 918, 920, *lv denied* 97 NY2d 763; *see People v Grimes*, 289 AD2d 1072, 1072-1073, *lv denied* 97 NY2d 755).

While we agree with defendant's further contention that the court erred in limiting his cross-examination of the victim (*see generally People v Wallace*, 60 AD3d 1268, 1269, *lv denied* 12 NY3d 922), we nevertheless conclude that the error is harmless beyond a reasonable doubt. The evidence of guilt is otherwise overwhelming, and " 'there is no reasonable possibility that [the] error[] might have contributed to defendant's conviction' " (*Wallace*, 60 AD3d at 1270, quoting *People v Crimmins*, 36 NY2d 230, 237).

We reject defendant's contention that the People failed to disclose certain *Brady* material, i.e., information underlying the

charges resolved by the victim's guilty plea (*see generally People v Vilardi*, 76 NY2d 67, 73; *People v Loftin*, 71 AD3d 1576, 1578). Absent a connection to the crimes charged, information concerning those underlying acts did not constitute *Brady* material, inasmuch as it was collateral and " 'was not otherwise the kind of material required by the courts to be supplied to defendant for use to impeach a witness' " (*People v Fyffe*, 249 AD2d 938, 939, *lv denied* 92 NY2d 897). We note in any event that the People provided defendant with the victim's prior criminal history before jury selection, and defendant was aware of the charges that were satisfied by the victim's guilty plea inasmuch as defense counsel had ordered the transcripts of the plea proceedings prior to trial (*see Loftin*, 71 AD3d at 1577).

Defendant contends that the court failed to comply with the procedure for disclosure of jury notes to counsel set forth in *People v O'Rama* (78 NY2d 270). We reject defendant's contention with respect to one of the two notes at issue. "[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161), and defendant has not established that the first jury note at issue was a substantive inquiry. Instead, the note only necessitated the ministerial action of informing the jury that a requested item was not in evidence (*see People v Ziegler*, 78 AD3d 545, 546, *lv denied* 16 NY3d 838; *see also People v Hammond*, 84 AD3d 1726, 1727, *lv denied* 17 NY3d 816). Defendant failed to preserve for our review his contention with respect to the second jury note at issue. Where, as here, "counsel has meaningful notice of a substantive jury note that has been read verbatim in open court, the court's failure to discuss the note or its intended response with counsel outside the presence of the jury is not a mode of proceedings error because counsel is not prevented from objecting or from participating meaningfully" (*People v Mack*, 27 NY3d 534, 542), and thus preservation is required. We decline to exercise our power to review defendant's contention with respect to the second jury note as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

761

CA 15-01794

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

IN THE MATTER OF CHRISTOPHER SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS AND
SKF USA INC., RESPONDENTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT SKF USA INC.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (MARILYN BALCACER OF COUNSEL), FOR RESPONDENT-APPELLANT NEW YORK STATE DIVISION OF HUMAN RIGHTS.

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

Appeals from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered May 7, 2015. The order granted the petition, vacated a determination of respondent New York State Division of Human Rights and remitted for a hearing pursuant to the Human Rights Law.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the petition is dismissed.

Memorandum: Petitioner commenced this proceeding pursuant to Executive Law § 298 challenging the determination of respondent New York State Division of Human Rights (Division) dismissing petitioner's employment discrimination complaint against respondent SKF USA Inc. (SKF) on the ground that there was no probable cause to believe that SKF unlawfully discriminated against petitioner when it terminated his employment. Supreme Court erred in granting the petition, vacating the determination and remitting the matter to the Division for a hearing. "Where, as here, 'a determination of no probable cause is rendered [by the Division] without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis' " (*Matter of Goston v American Airlines*, 295 AD2d 932, 932). We agree with respondents that the court erred in disturbing the Division's determination based, inter alia, upon its failure to conduct a hearing. "Courts give deference to [the Division] due to

its experience and expertise in evaluating allegations of discrimination" (*Matter of Curtis v New York State Div. of Human Rights*, 124 AD3d 1117, 1118), and such deference extends to the Division's decision whether to conduct a hearing. "It is within the discretion of [the Division] to decide the method to be used in investigating a claim" (*Matter of Gleason v Dean Sr. Trucking*, 228 AD2d 678, 679), and a hearing is not required in all cases (*see Matter of Giles v State Div. of Human Rights*, 166 AD2d 779, 780-781). Where, as here, the parties made extensive submissions to the Division, "petitioner was given an opportunity to present his case, and the record shows that the submissions were in fact considered, the determination cannot be arbitrary and capricious merely because no hearing was held" (*Gleason*, 228 AD2d at 679; *see Matter of Vora v New York State Div. of Human Rights*, 103 AD3d 739, 739).

In addition, we further agree with respondents that the court erred in disturbing the Division's determination of no probable cause on the ground that the submissions of petitioner and SKF raised issues of fact that required a hearing. "Probable cause exists only when, after giving full credence to [petitioner's] version of the events, there is some evidence of unlawful discrimination . . . There must be a *factual* basis in the evidence sufficient to warrant a cautious [person] to believe that discrimination had been practiced" (*Matter of Doin v Continental Ins. Co.*, 114 AD2d 724, 725). While petitioner's "factual showing must be accepted as true on a probable cause determination" (*Matter of Mambretti v New York State Div. of Human Rights*, 129 AD3d 1696, 1697, *lv denied* 26 NY3d 909), "full credence need not be given to [the] allegation[s] in [petitioner's] complaint that he was discriminated against on the basis of [disability, gender and/or gender stereotyping], for this is the ultimate conclusion, which must be determined solely by the [D]ivision based upon all of the facts and circumstances" (*Matter of Vadney v State Human Rights Appeal Bd.*, 93 AD2d 935, 936). We agree with respondents that a rational basis supports the Division's determination that, based upon all the facts and circumstances here, there was no reasonable ground for suspicion that SKF unlawfully discriminated against petitioner when it terminated his employment.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

762

CA 15-00284

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

IN THE MATTER OF THE APPLICATION OF SHOPPINGTOWN MALL NY LLC, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR, BOARD OF ASSESSORS AND BOARD OF ASSESSMENT OF TOWN OF DEWITT AND TOWN OF DEWITT, RESPONDENTS-RESPONDENTS.

JAMESVILLE DEWITT CENTRAL SCHOOL DISTRICT, INTERVENOR-RESPONDENT.

CRONIN, CRONIN, HARRIS & O'BRIEN, P.C., UNIONDALE (RICHARD P. CRONIN OF COUNSEL), FOR PETITIONER-APPELLANT.

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

BOND SCHOENECK & KING, PLLC, SYRACUSE (KATHLEEN M. BENNETT OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered December 10, 2014 in a proceeding pursuant to RPTL article 7. The order, among other things, dismissed the petition.

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

Memorandum: On appeal from an order dismissing the petition in this proceeding pursuant to RPTL article 7, petitioner contends that it may challenge the assessment as unconstitutional under the exception to RPTL 727 (1) set forth in *Susquehanna Dev. v Assessor of City of Binghamton* (185 Misc 2d 267), and thus that Supreme Court erred in granting the motion and cross motion to dismiss the petition as barred by the statute. Petitioner raises that contention for the first time on appeal, and it therefore is not properly before us (*cf. Matter of ELT Harriman, LLC v Assessor of Town of Woodbury*, 128 AD3d 201, 206, *lv denied* 26 NY3d 918; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

763

CA 15-02103

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

MARIA CARRIER, AS EXECUTRIX OF THE ESTATE OF SHIRLEY IANNARILLI, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

CORNING AMBULANCE SERVICE, INC., DOING BUSINESS AS RURAL METRO MEDICAL SERVICES, ET AL., DEFENDANTS, HORNBY VOLUNTEER FIRE COMPANY, INC., ALBERT ALLEN, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC., CHRISTOPHER VANDUSEN, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC., BREANNA TAGGART, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC., NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., ADAM NEHRING, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., JON HEVERLY, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., DAVID WYRE, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., AND AMANDA NEHRING, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., DEFENDANTS-RESPONDENTS.

THE LAW OFFICE OF DAVID H. JACOBS, CORNING (DAVID H. JACOBS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (PAUL V. MULLIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS HORNBY VOLUNTEER FIRE COMPANY, INC., ALBERT ALLEN, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC., CHRISTOPHER VANDUSEN, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC., AND BREANNA TAGGART, A VOLUNTEER FIREFIGHTER WITH HORNBY VOLUNTEER FIRE COMPANY, INC.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR DEFENDANTS-RESPONDENTS NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., ADAM NEHRING, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., JON HEVERLY, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., DAVID WYRE, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC., AND AMANDA NEHRING, A VOLUNTEER FIREFIGHTER WITH NORTH CORNING VOLUNTEER FIRE DEPARTMENT, INC.

Appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered March 9, 2015. The order, among other things, granted the motions of defendants-respondents for summary judgment dismissing plaintiff's third amended complaint against them.

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: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

764

CA 15-00559

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

DAMING ZHU, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

YE CHENG, DEFENDANT-APPELLANT.

TULLY RINCKEY PLLC, ALBANY (HEATHER L. YOUNGMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THEODORE W. STENUF, ATTORNEY FOR THE CHILD, MINOA.

Appeal from a judgment of the Supreme Court, Onondaga County (Martha Walsh Hood, A.J.), entered December 15, 2014. The judgment, insofar as appealed from, awarded primary physical custody of the parties' minor child to plaintiff.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the fifth decretal paragraph is vacated and the matter is remitted to Supreme Court, Onondaga County, for a new custody hearing.

Memorandum: Defendant mother, as limited by her brief, appeals from a judgment that, inter alia, awarded plaintiff father primary physical custody of the parties' minor child. On the morning of trial, defendant's counsel withdrew from representation for nonpayment of legal fees, and defendant requested an adjournment to enable her to obtain new counsel and the testimony of witnesses. Supreme Court denied her request, and defendant thus was forced to proceed pro se.

We conclude that the court abused its discretion in denying defendant's request for an adjournment (*see Matter of Bobi Jo B. v Jerry L.W.*, 45 AD3d 1382, 1383; *cf. Matter of Grice v Harris*, 114 AD3d 1276, 1276). The record establishes that defendant's request was not a delay tactic and did not result from her lack of diligence (*see Bobi Jo B.*, 45 AD3d at 1383; *cf. Matter of Sophia M.G.-K. [Tracy G.-K.]*, 84 AD3d 1746, 1747). We also agree with defendant that the court's refusal to grant defendant an adjournment to obtain new counsel resulted in the absence of a full and complete record upon which the court could render an adequate and informed decision. "The custody determination of the trial court generally is entitled to great deference . . . , but [s]uch deference is not warranted . . . where the custody determination lacks a sound and substantial basis in the record" (*Matter of Amrane v Belkhir*, 141 AD3d 1074, 1075 [internal quotation marks omitted]).

We therefore reverse the judgment insofar as appealed from, vacate the fifth decretal paragraph, concerning custody, and remit the matter to Supreme Court for a new custody hearing. Pending the court's determination upon remittal, the custody and visitation provisions in the judgment appealed from shall remain in effect.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

766

CA 15-01978

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

MARGUERITE MITCHELL, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN K. MITCHELL, DECEASED, PLAINTIFF,

V MEMORANDUM AND ORDER

NRG ENERGY, INC. AND DUNKIRK POWER, LLC, DEFENDANTS.

NRG ENERGY, INC. AND DUNKIRK POWER, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

INTERNATIONAL CHIMNEY CORP., THIRD-PARTY DEFENDANT-RESPONDENT.

BAXTER SMITH & SHAPIRO, P.C., WHITE PLAINS (SIM R. SHAPIRO OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

MCGAW ALVENTOSA & ZAJAC, JERICHO (ANDREW ZAJAC OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered July 2, 2015. The order granted the motion of third-party defendant for summary judgment dismissing the third-party complaint and denied the cross motion of third-party plaintiffs for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the third-party complaint insofar as it seeks indemnification for damages sustained by plaintiff in the underlying action in excess of $1,000,000, and as modified the order is affirmed without costs.

Memorandum: Third-party plaintiffs, NRG Energy, Inc. and Dunkirk Power, LLC (collectively, NRG), appeal from an order that, inter alia, granted the motion of third-party defendant, International Chimney Corp. (ICC), for summary judgment dismissing the third-party complaint. We reject NRG's contention that the antisubrogation rule does not apply, for reasons stated in the decision at Supreme Court. We agree with NRG, however, that the court erred in granting ICC's motion in its entirety, rather than granting the motion only insofar

as the third-party complaint seeks indemnification for any damages up to the $1,000,000 covered by the commercial auto insurance policy issued to ICC by the Hanover Insurance Group (Hanover). We therefore modify the order accordingly.

The court properly concluded in its decision that Hanover, as the real party in interest in NRG's third-party action, may not seek indemnification from ICC because, under the antisubrogation rule, "an 'insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered . . . even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived' " (*ELRAC, Inc. v Ward*, 96 NY2d 58, 76, *rearg denied* 96 NY2d 855, quoting *Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 468). Conversely, where "the monetary limit of the insurance provided by the . . . policy is for a lesser sum than that sought by the plaintiff as damages, the motion [for summary judgment dismissing] the third-party complaint should have been granted only up to the applicable limits of that policy" (*Curran v City of New York*, 234 AD2d 254, 255; *see ELRAC, Inc.*, 96 NY2d at 78; *Pennsylvania Gen. Ins. Co.*, 68 NY2d at 473), because "[i]t is black letter law that New York law does not bar insurance companies from seeking indemnification for settlements or judgments that exceed the limits of an insurance policy" (*Allianz Global Corporate & Specialty, N.A. v Sacks*, 2010 WL 3733915, *5 [SD NY]).

Although ICC met its burden on its motion of establishing as a matter of law that it was entitled to summary judgment dismissing the third-party complaint insofar as it sought indemnification up to the $1,000,000 policy limit of the Hanover commercial auto policy (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324), it failed to meet that burden with respect to any amounts above that policy limit. ICC demonstrated that it had an umbrella policy with a limit of $25,000,000, but failed to establish that the policy afforded coverage in this instance or that NRG was covered by that policy, and thus failed to establish that the antisubrogation rule bars the third-party action for amounts above that limit. Thus, ICC's motion should have been denied insofar as the third-party complaint seeks indemnification for amounts in excess of $1,000,000, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

We have considered NRG's further contention and conclude that it is without merit.

Entered: September 30, 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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CA 15-02104

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

LOUANN REHWALDT, PLAINTIFF-APPELLANT,

V ORDER

KATHLEEN M. KOKOLUS, DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JILL Z. FLORKOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Michael L. D'Amico, A.J.), entered March 20, 2015. The judgment awarded plaintiff money damages upon a jury verdict.

Now, upon reading and filing the stipulation withdrawing and discontinuing appeal signed by the attorneys for the parties on August 30, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

768

CA 15-02003

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

IN THE MATTER OF CASSARA PROPERTIES, LLC, AND CASSARA MANAGEMENT GROUP, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

TOWN OF GREECE, TOWN BOARD OF TOWN OF GREECE, AND FULLER ROAD MANAGEMENT CORPORATION, NECESSARY PARTY, RESPONDENTS-RESPONDENTS.

MCCONVILLE, CONSIDINE, COOMAN & MORIN, P.C., ROCHESTER (PETER J. WEISHAAR OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BRIAN E. MARIANETTI, TOWN ATTORNEY, GREECE, FOR RESPONDENTS-RESPONDENTS TOWN OF GREECE AND TOWN BOARD OF TOWN OF GREECE.

WHITEMAN OSTERMAN & HANNA LLP, ALBANY (JOHN J. HENRY OF COUNSEL), FOR RESPONDENT-RESPONDENT FULLER ROAD MANAGEMENT CORPORATION, NECESSARY PARTY.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered April 7, 2015 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We add only that petitioners' contentions that respondent Town Board of the Town of Greece (Town Board) violated the Open Meetings Law by granting the application of respondent Fuller Road Management Corporation (FRMC) without considering, inter alia, the testimony from the public hearing, and that the Town Board acted in an arbitrary and capricious manner in granting FRMC's application by adopting the resolutions drafted by the attorney for respondent Town of Greece without first reviewing them are improperly raised for the first time on appeal (*see generally Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 AD3d 1351, 1351). In any event, those contentions are without merit.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

769

CA 15-01980

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

JOANNA BAKER, ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

ERIN SAVO, ET AL., DEFENDANTS.

ERIN SAVO, THIRD-PARTY PLAINTIFF-RESPONDENT,

V

KANDACE M. HURYSZ, THIRD-PARTY DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered March 30, 2015. The order denied the motion of third-party defendant for summary judgment dismissing the third-party complaint.

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

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by Joanna Baker (plaintiff) in a rear-end collision when a vehicle operated by third-party defendant (Hurysz), in which plaintiff was a passenger, was rear-ended by a vehicle operated by defendant-third-party plaintiff (Savo). Savo commenced a third-party action against Hurysz seeking indemnification and/or contribution. We agree with Hurysz that Supreme Court erred in denying her motion seeking summary judgment dismissing the third-party complaint.

"[A] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, [nonnegligent] explanation for the accident" (*Barron v Northtown World Auto*, 137 AD3d 1708, 1709 [internal quotation marks omitted]; *see Tate v Brown*, 125 AD3d 1397, 1398; *Ruzycki v Baker*, 301 AD2d 48, 49). In support of her motion, Hurysz submitted evidence that she had stopped her vehicle after a pickup truck stopped directly in front of her, and the collision occurred after Hurysz's vehicle had been stopped for at

least 15 seconds (*see Kovacic v Delmont*, 134 AD3d 1460, 1461). We therefore conclude that Hurysz established her entitlement to judgment as a matter of law (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). In opposition to the motion, Savo submitted the deposition testimony of the parties, which failed to provide a nonnegligent explanation for the rear-end collision and therefore failed to raise an issue of fact sufficient to defeat the motion (*see id.*).

Entered: September 30, 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 15-02181

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

IN THE MATTER OF STEVEN ANDERSON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

STEVEN ANDERSON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE 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, Oneida County [Patrick F. MacRae, J.], entered June 22, 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 so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination that found that petitioner violated inmate rule 101.10 (7 NYCRR 270.2 [B] [2] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier III hearing, that he violated inmate rules 101.10 (7 NYCRR 270.2 [B] [2] [i] [sexual act]) and 180.10 (7 NYCRR 270.2 [B] [26] [i] [facility visiting violation]). Petitioner pleaded guilty to violating inmate rule 180.10, and therefore his contention that the determination with respect to that inmate rule is not supported by substantial evidence is without merit (*see Matter of Liner v Fischer*, 96 AD3d 1416, 1417). In addition, inasmuch as petitioner admitted that violation, the procedural issues raised by petitioner regarding the hearing that was held with respect to the remaining violation "did not prejudice his defense" on inmate rule 180.10 (*Matter of Robles v Coughlin*, 191 AD2d 1037, 1038).

Respondent concedes that the determination finding that petitioner violated inmate rule 101.10 is not supported by substantial

evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that inmate rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Reid v Saj*, 119 AD3d 1445, 1446). Because the penalty has already been served and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

771

KA 14-00093

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAXWELL B. MOHAWK, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY, FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered July 1, 2013. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). As a preliminary matter, 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 him] in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice' " (*People v Benson*, 141 AD3d 1171, 1172; *see People v Cooper*, 136 AD3d 1397, 1398, *lv denied* 27 NY3d 1067). Defendant contends that the court abused its discretion in refusing to grant him youthful offender status. We note that we would address that contention even in the presence of a valid waiver of the right to appeal because the issue was specifically excluded from the purported waiver (*see People v Johnson*, 50 AD3d 1567, 1567). We nonetheless conclude that defendant's contention is without merit. The court properly considered the gravity of the offense, i.e., defendant shot the victim multiple times in the upper torso, which caused serious, life-threatening injuries, as well as defendant's lack of remorse (*see People v Gibson*, 134 AD3d 1517, 1518-1519, *lv denied* 27 NY3d 1069; *People v Driggs*, 24 AD3d 888, 889). Furthermore, upon our review of the record, we see no reason to exercise our own discretion in the interest of justice to adjudicate defendant a youthful offender (*cf. People v Amir W.*, 107 AD3d 1639, 1640-1641). Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

775

KA 12-00098

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLEMING W. ASHFORD, III, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 25, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress evidence obtained from defendant's person is granted, and the matter is remitted to Supreme Court, Monroe County, for further proceedings on the indictments.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (Penal Law § 160.15 [2]). Shortly after midnight, the police responded to a report of an armed robbery of a taxi cab driver. Less than 10 minutes later, the police found defendant, who matched the general description of the suspect given by the victim, running in proximity to the crime scene. Defendant ran away from the police, who pursued and detained him. An officer searched defendant and seized money, a phone, and a "do-rag" from the pockets of his jeans. A showup identification procedure was conducted, and the victim positively identified defendant as the perpetrator. Defendant was brought to the police station, where he gave statements after waiving his *Miranda* rights. In a courtyard near where defendant was apprehended, the police found and seized an item of clothing, a gun, and keys belonging to the victim.

Defendant contends that he was unlawfully arrested prior to the showup identification procedure and that all of the physical evidence, as well as the identification testimony and his statements, must be suppressed as fruit of the poisonous tree. We agree with defendant that the items seized from his person should have been suppressed because the police did not have probable cause at that time to arrest

him and conduct a search incident to an arrest. We conclude that the police had reasonable suspicion to pursue defendant and detain him for the purpose of the showup identification (*see People v Martinez*, 39 AD3d 1159, 1160, *lv denied* 9 NY3d 867; *People v Gatling*, 38 AD3d 239, 239-240, *lv denied* 9 NY3d 865; *see generally People v Hicks*, 68 NY2d 234, 239). But although the police were permitted at that time to conduct a pat frisk of defendant (*see Hicks*, 68 NY2d at 238; *People v Issac*, 107 AD3d 1055, 1057), they were not permitted to search him.

We reject defendant's contention, however, insofar as he asserts that the remaining evidence must be suppressed as fruit of the poisonous tree. It is well settled that "only evidence which is the 'fruit of the poisonous tree' should be excluded" (*People v Arnau*, 58 NY2d 27, 32). In other words, "only evidence which has been come at by exploitation of that illegality should be suppressed" (*id.* [internal quotation marks omitted]). Here, defendant did not meet his burden of establishing that the showup identification of him, his statements to the police, and the items seized in the courtyard, were causally related to his unlawful arrest prior to the showup identification procedure (*see People v Cooley*, 48 AD3d 1091, 1091, *lv denied* 10 NY3d 861; *see generally Arnau*, 58 NY2d at 32), i.e., that such evidence was " 'obtained by exploitation' " of the illegal arrest (*People v Holmes*, 63 AD3d 1649, 1650, *lv denied* 12 NY3d 926; *see generally People v Rogers*, 52 NY2d 527, 535, *rearg denied* 54 NY2d 753, *cert denied* 454 US 898, *reh denied* 459 US 898).

We therefore grant defendant's omnibus motion in part by suppressing the items seized from his person. " '[I]nasmuch as the erroneous suppression ruling may have affected defendant's decision to plead guilty,' " the plea must be vacated (*People v Glanton*, 72 AD3d 1536, 1538).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

778

KA 15-00437

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEORGE ALFRED, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 7, 2014. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree and kidnapping 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, murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court abused its discretion in denying his motion to withdraw his guilty plea without conducting an evidentiary hearing. " 'When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances' " (*People v Manor*, 27 NY3d 1012, 1013, quoting *People v Brown*, 14 NY3d 113, 116; *see People v Tinsley*, 35 NY2d 926, 927; *People v Green*, 122 AD3d 1342, 1343). Here, the motion to withdraw the guilty plea was supported by an affidavit from defendant detailing his claims, and the court permitted defense counsel to argue the motion. We therefore conclude that defendant was "afforded a reasonable opportunity to advance his claims" and that the court did not abuse its discretion in denying the motion without a hearing (*People v Witcher*, 222 AD2d 1016, 1016, *lv denied* 87 NY2d 1027; *see Manor*, 27 NY3d at 1013; *People v Zimmerman*, 100 AD3d 1360, 1362, *lv denied* 20 NY3d 1015). In any event, defendant's " 'conclusory and unsubstantiated assertion' " that his plea was coerced is belied by his statements during the plea proceedings (*People v McKinnon*, 5 AD3d 1076, 1076-1077, *lv denied* 2 NY3d 803; *see People v Quijada-Lopez*, 256

AD2d 478, 478, *lv denied* 93 NY2d 928).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

779

KA 14-00977

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRYSTIAN BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered May 21, 2014. 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: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court erred in refusing to suppress physical evidence and his statement to the police. We reject that contention.

According to the evidence presented by the People at the suppression hearing, a police officer driving a patrol vehicle on Main Street in Buffalo observed defendant standing outside a storefront by a "No Loitering" sign. The officer had seen defendant standing in front of the same storefront three hours before. Upon the approach of the officer's vehicle, defendant turned and walked quickly into the store. The officer parked and exited the vehicle, and followed defendant into the store, whereupon he observed defendant walking into a rear storage room while the store manager yelled for defendant to "get out." The officer then heard a "loud thump." Defendant emerged from the storage room only seconds later and explained that he had to use the bathroom. The officer searched the storage room and found a white sock concealing a gun. He then ordered a second officer on the scene to "cuff" defendant, who protested, "that's not my gun." At the central booking office of the police department, defendant allegedly stated: "[I]t's not a lot of hope for me, like you all, my life is over. It's a bad situation, you know?" The two police officers testified at the hearing that defendant was not under arrest until

after the gun was found and that, up until that point, he was free to leave the store.

Defendant contends that the court should have suppressed the gun because it was recovered as a result of illegal police pursuit. We reject that contention. The court properly determined that the officer was engaged merely in observation and was not in pursuit when he followed defendant into the store (*see People v Feliciano*, 140 AD3d 1776, 1777; *see generally People v Howard*, 50 NY2d 583, 592, *cert denied* 449 US 1023). The testimony at the suppression hearing established that defendant entered the store before the officer parked and exited his vehicle. Furthermore, the officer never activated his vehicle's overhead lights or siren, and did not engage defendant until after defendant emerged from the storage room. Before the gun was found, "the officer's conduct was unobtrusive and did not limit defendant's freedom of movement" (*Feliciano*, 140 AD3d at 1777) and, thus, the court properly determined that defendant did not discard the gun in response to any illegal police conduct.

Defendant further contends that the police arrested him before the gun was recovered, and thus they lacked probable cause to arrest him for criminal possession of a weapon. We likewise reject that contention. An arrest occurs when there is "a significant interruption of [a person's] liberty of movement as a result of police action," whether or not that person "submits to the authority of the badge or whether he succumbs to force" (*People v Cantor*, 36 NY2d 106, 111; *see People v Lee*, 96 AD3d 1522, 1527). The testimony at the suppression hearing established that, after defendant emerged from the storage room, the police did not issue any commands to him and did not restrain him in any way or otherwise prevent him from leaving the store. Rather, defendant remained in the store of his own accord. We thus conclude that, before the gun was recovered, a reasonable person in defendant's position, innocent of any crime, would not have believed that he was under arrest (*see People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851; *People v Vargas*, 109 AD3d 1143, 1143, *lv denied* 22 NY3d 1044).

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

783

CA 15-02057

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

BUFFALO BIODIESEL, INC., PLAINTIFF-APPELLANT,

V ORDER

TAJ MAHAL, INC., DEFENDANT-RESPONDENT.

LAW OFFICE OF JOSEPH G. MAKOWSKI, LLC, BUFFALO (APRIL J. ORLOWSKI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF ANDREW J. STIMSON, BUFFALO (ANDREW J. STIMSON OF COUNSEL), AND CHRISTOPHER D. SMITH & ASSOCIATES, BLASDELL, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered August 19, 2015. The order and judgment, inter alia, granted that part of the motion of defendant seeking dismissal of the complaint.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

785

CA 15-00410

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

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

V MEMORANDUM AND ORDER

CHRISTOPHER BUSHEY, RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (BRYCE R. THERRIEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered January 28, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, determined that respondent is a dangerous sex offender requiring confinement and committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order determining that he is a dangerous sex offender requiring confinement and committing him to a secure treatment facility (*see* Mental Hygiene Law § 10.01 *et seq.*). Respondent failed to preserve for our review his contentions that the evidence is not legally sufficient to establish that he has a mental abnormality or that he has an inability to control his sexual misconduct inasmuch as he did not move for a directed verdict or otherwise challenge the sufficiency of the evidence on those points (*see Matter of Vega v State of New York*, 140 AD3d 1608, 1609). In any event, respondent's contentions lack merit. Petitioner presented a "detailed psychological portrait of a sex offender [that] would doubtless allow an expert to determine the level of control the offender has over his sexual conduct" (*Matter of State v Donald DD.*, 24 NY3d 174, 188; *see generally Matter of State of New York v Dennis K.*, 27 NY3d 718, 734-735). Here, petitioner's two expert witnesses testified that: respondent suffers from pedophilia and antisocial personality disorder with psychopathic traits; respondent refused to admit that he was sexually attracted to children and, as a result, his sex offender treatment program was not geared toward his particular conditions; respondent failed to develop a relapse prevention program; and respondent presents a significant risk of committing sex offenses in the future. We therefore conclude that petitioner met its burden

of establishing by clear and convincing evidence that respondent has "a congenital or acquired condition, disease or disorder that affects [his] emotional, cognitive, or volitional capacity . . . in a manner that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [him] having serious difficulty in controlling such conduct" (§ 10.03 [i]; *see Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1473, *lv denied* 17 NY3d 702; *see generally Dennis K.*, 27 NY3d at 734-735). We further conclude that petitioner met its burden of establishing by clear and convincing evidence that respondent "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]; *see Matter of Billinger v State of New York*, 137 AD3d 1757, 1758).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

789

CA 15-01752

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

JASON FAWCETT AND CYNTHIA FAWCETT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FRANKLYN COLE STEARNS, DEFENDANT-RESPONDENT.

BROWN CHIARI LLP, LANCASTER (ERIC SHELTON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (PAUL D. MCCORMICK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Paul Wojtaszek, J.), entered May 15, 2015. The order, inter alia, granted that part of the motion of defendant for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims and denied the cross motion of plaintiffs for partial summary judgment on the issue of liability under Labor Law § 240 (1).

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

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries sustained by Jason Fawcett (plaintiff) when he fell from a roof while renovating a cottage owned by defendant and located within the grounds of the Chautauqua Institution (Institution). Plaintiffs contend that Supreme Court erred in granting that part of defendant's motion for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims on the basis that defendant is exempt from liability as the owner of a single-family dwelling, and that the court should have granted their cross motion for partial summary judgment on the issue of liability under section 240 (1). We conclude that the court properly granted that part of defendant's motion and denied plaintiffs' cross motion.

Both Labor Law §§ 240 (1) and 241 exempt from liability "owners of one[-] and two-family dwellings who contract for but do not direct or control the work" (*see Byrd v Roneker*, 90 AD3d 1648, 1649; *Dineen v Rechichi*, 70 AD3d 81, 83, *lv denied* 14 NY3d 703). The homeowner exemption was added to Labor Law §§ 240 (1) and 241 in 1980, and "was 'intended by the Legislature to shield homeowners from the harsh consequences of strict liability under the provisions of the Labor Law [and] reflect[s] the legislative determination that the typical

homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection' " (*Dineen*, 70 AD3d at 83-84, quoting *Bartoo v Buell*, 87 NY2d 362, 367). "[T]he existence of both residential and commercial uses on a property does not automatically disqualify a dwelling owner from invoking the exemption. Instead, whether the exemption is available to an owner in a particular case turns on the site and purpose of the work" (*Cannon v Putnam*, 76 NY2d 644, 650). "[T]he 'site and purpose' test 'must be employed on the basis of the homeowners' intentions at the time of the injury underlying the action' " (*Dineen*, 70 AD3d at 85).

Contrary to plaintiffs' contention, we conclude that defendant met his burden of establishing the applicability of the homeowner exemption (*see Cansdale v Conn*, 63 AD3d 1622, 1623; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Defendant's submissions in support of his motion, including his deposition testimony, establish that he purchased the cottage with the intention of renovating it so that he and his wife could use it "as a getaway, second home" and eventually as a retirement property. Inasmuch as the cottage is located within the grounds of the Institution, defendant also intended to rent the property. One of the upgrades to the cottage that defendant and his wife decided to make was to install dormers in order to make the second floor more accommodating because the sloping ceilings were very steep and left little headroom in the bedrooms and bathroom. Defendant testified that his wife did not want to spend time at the cottage unless the second floor was comfortable and livable, and defendant acknowledged that adding dormers would serve the further purpose of making the property more attractive to renters. It is undisputed that defendant subsequently hired plaintiff's employer to install the dormers and that plaintiff was injured while performing that work, which defendant did not direct or control. Consistent with his intentions at the time of plaintiff's accident, defendant thereafter rented the cottage for eight of the nine weeks during the summer season at the Institution, while he and his wife stayed there for one week during the season and almost every weekend during the following off-season. Defendant also winterized the cottage, which was consistent with his intention to use it as a year-round getaway rather than merely a summer rental property. Based on the foregoing, we conclude that defendant established that the work performed by plaintiff directly related to the intended residential use of the cottage by defendant and his wife as a second home even though it also served the commercial purpose of making the property more attractive to renters and, as a consequence, defendant "is shielded by the homeowner exemption from the absolute liability of Labor Law §§ 240 and 241" (*Bartoo*, 87 NY2d at 368; *see Farias v Simon*, 122 AD3d 466, 467; *Stephens v Tucker*, 184 AD2d 828, 829).

We further conclude that plaintiffs failed to raise a triable issue of fact in opposition (*see generally Zuckerman*, 49 NY2d at 562). The record does not support plaintiffs' assertion that defendant intended to use the cottage exclusively for commercial purposes or that the renovation work was unrelated to the residential use of the property (*see Farias*, 122 AD3d at 467-468; *Jimenez v Pacheco*, 73 AD3d

1129, 1130). Contrary to plaintiffs' further contention, inasmuch as the record establishes that defendant used the cottage for both commercial rental and residential purposes, he is still entitled to the exemption despite the fact that he reported on his federal tax return that he received income from renting the property (*see Crowningshield v Kim*, 19 AD3d 975, 977, *lv denied* 5 NY3d 711). Finally, to the extent that plaintiffs contend that defendant does not fall within the class of persons that the homeowner exemption is designed to protect because he is an insurance professional with a legal education who demonstrated business acumen by renting the cottage, we conclude that plaintiffs' contention is without merit inasmuch as "there is no separate degree of sophistication analysis under Labor Law §§ 240 and 241" (*Dineen*, 70 AD3d at 87 [internal quotation marks omitted]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

793

KA 15-01606

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARC MCCABE, DEFENDANT-APPELLANT.

LAW OFFICE OF MARK A. YOUNG, ROCHESTER (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (KATHERINE BOGAN OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Orleans County Court (James P. Punch, J.), dated June 4, 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: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court's written order did not comply with the statutory requirement to set forth findings of fact and conclusions of law on which the court's determination was based (*see* § 168-n [3]), and that the court improperly granted an automatic override instead of determining whether an upward departure was warranted (*see generally People v Moore*, 115 AD3d 1360, 1360-1361), and thus failed to apply the correct burden of proof for an upward departure from defendant's presumptive risk level. We reject those contentions.

With respect to his first contention, defendant is correct that the written order did not set forth sufficiently detailed conclusions of law (*see* Correction Law § 168-n [3]). Nevertheless, we conclude that the court's written findings of fact, coupled with its "oral findings and conclusions[,] . . . are clear, supported by the record and sufficiently detailed to permit intelligent review" of the court's determination (*People v Labrake*, 121 AD3d 1134, 1135 [internal quotation marks omitted]; *see People v Young*, 108 AD3d 1232, 1233, *lv denied* 22 NY3d 853, *rearg denied* 22 NY3d 1036).

We reject defendant's second contention that the court improperly granted an automatic override and thus applied an incorrect burden of proof for an upward departure to a level two risk. Although the court

incorrectly described its determination as an override, rather than using the proper nomenclature, i.e., indicating that it was "depart[ing upward] from the presumptive risk level" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary [Guidelines], at 4 [2006]), the record establishes that the court granted an upward departure and applied the correct burden of proof in making its determination (*see People v Howe*, 49 AD3d 1302, 1302; *cf. Moore*, 115 AD3d at 1360-1361).

Contrary to defendant's additional contention, "[t]he court's discretionary upward departure [to a level two risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537, *lv denied* 15 NY3d 707; *see People v Tidd*, 128 AD3d 1537, 1537, *lv denied* 25 NY3d 913). Although defendant is correct that the risk assessment guidelines "assess 20 points if the victim was 11 through 16 years old and 30 points if the victim was 10 years old or younger" (Guidelines, at 11), in this case there is clear and convincing evidence that those aggravating factors are present to a degree not otherwise taken into account by the risk assessment guidelines, specifically, the quantity and nature of the child pornography used by defendant, the lengthy period of time over which he collected and viewed it, and the extremely young children depicted therein (*see generally People v Burke*, 139 AD3d 1268, 1270; *People v Rotunno*, 117 AD3d 1019, 1019, *lv denied* 24 NY3d 902). Here, the People presented evidence that defendant collected more than 600 images depicting sexual activity involving children as young as three years old, he had been collecting those images over several years, and he admitted that he viewed images depicting sexual activity with children so young that they were still wearing diapers.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

796

KA 14-01731

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUILLE HUNTER, DEFENDANT-APPELLANT.

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

MICHAEL J. FLAHERTY, JR., ACTING DISTRICT ATTORNEY, BUFFALO (JAMES M. MARRA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered September 8, 2014. The judgment convicted defendant, upon a nonjury verdict, of 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 a nonjury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [b]). Viewing the evidence in light of the elements of the two counts of robbery in the second degree in this nonjury trial (*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). "In a bench trial, no less than a jury trial, the resolution of credibility issues by the trier of fact and its determination of the weight to be accorded the evidence presented are entitled to great deference" (*People v Ghent*, 132 AD3d 1275, 1275, *lv denied* 26 NY3d 1145 [internal quotation marks omitted]; *see People v McCoy*, 100 AD3d 1422, 1422). The victim's testimony was not incredible as a matter of law (*see People v Ptak*, 37 AD3d 1081, 1082, *lv denied* 8 NY3d 949), and County Court was entitled to accept the victim's testimony and reject the testimony of defendant and his codefendant that there was no robbery and that they were playing a practical joke on the victim. "[U]pon our review of the record, we cannot say that the court failed to give the evidence the weight that it should be accorded" (*People v Britt*, 298 AD2d 984, 984, *lv denied* 99 NY2d 556).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

797

KA 11-02369

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDDIE R. PALMER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (MARY P. DAVISON 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 (Francis A. Affronti, J.), rendered June 14, 2011. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of stolen property in the fourth degree and unauthorized use of a vehicle in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a nonjury trial of criminal possession of stolen property in the fourth degree (Penal Law § 165.45 [1]) and unauthorized use of a vehicle in the second degree (§ 165.06). Defendant was convicted of possessing and operating a motorized wheelchair that was taken from a patient in a hospital.

We reject defendant's contention that the conviction is not supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495; *People v Pichardo*, 34 AD3d 1223, 1224, *lv denied* 8 NY3d 926). At trial, a hospital security officer testified that, at approximately 3:30 a.m., she was watching security cameras and saw defendant driving a motorized wheelchair away from the hospital. The security officer further testified that she saw defendant operating the wheelchair at a high rate of speed on hospital grounds, rummaging through a hospital-issued patient belongings bag, putting on an article of clothing that he had removed from the bag, discarding some of the bag's contents into nearby bushes, and driving the wheelchair away from the hospital, where he was stopped by security personnel. Another security officer testified that, after defendant was stopped, he stated that he was visiting a friend, who was not the victim, and that he was taking the motorized wheelchair off the hospital grounds to charge the battery. A hospital employee

and the victim's wife testified that the wheelchair belonged to the victim, who was deceased at the time of trial.

With respect to the conviction of criminal possession of stolen property in the fourth degree, we conclude that the evidence is legally sufficient to establish that defendant knowingly possessed stolen property with "intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof" (Penal Law § 165.45; *see* § 165.55 [1]). A defendant's " 'knowledge that property is stolen may be proven circumstantially, and the unexplained or falsely explained recent exclusive possession of the fruits of a crime allows a [trier of fact] to draw a permissible inference that defendant knew the property was stolen' " (*People v Waterford*, 124 AD3d 1246, 1246-1247, *lv denied* 26 NY3d 972). We reject defendant's contention that the evidence regarding the value of the wheelchair is legally insufficient to establish that its value exceeded $1,000, an element of criminal possession of stolen property in the fourth degree (§ 160.45 [1]). The testimony of a retailer regarding the value of the wheelchair is " 'a reasonable basis for inferring, rather than speculating, that the value of the [wheelchair] exceeded the statutory threshold' " (*People v Szyszkowski*, 89 AD3d 1501, 1502).

With respect to the conviction of unauthorized use of a vehicle in the second degree, we conclude that the circumstantial evidence adduced at trial is sufficient to establish that defendant knew that he did not have the consent of the owner to operate the wheelchair (*see* Penal Law §§ 165.05 [1]; 165.06). Also, viewing the evidence in light of the elements of the crimes in this nonjury trial (*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 Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the People did not commit a *Brady* violation by failing to disclose additional security footage. That security footage did not constitute *Brady* material inasmuch as it was in the exclusive possession of the hospital and was never in the People's possession or control (*see People v Walloe*, 88 AD3d 544, 544, *lv denied* 18 NY3d 963; *People v Thomas*, 38 AD3d 1134, 1136-1137, *lv denied* 9 NY3d 852; *People v Terry*, 19 AD3d 1039, 1039-1040, *lv denied* 5 NY3d 833).

Finally, by failing to object to his appearance in prison garb during the nonjury trial, "defendant failed to preserve for our review his contention that he was thereby denied a fair trial" (*People v McNitt*, 96 AD3d 1641, 1641, *lv denied* 19 NY3d 998), 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]).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

798

KA 14-00208

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY A. JONES, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFREY L. TAYLOR OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered January 2, 2013. The judgment convicted defendant, upon a jury verdict, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [7]), defendant contends that County Court erred in denying his request for a jury charge on the defense of justification. We reject that contention.

It is well settled that "[a] trial court must charge the factfinder on the defense of justification 'whenever there is evidence to support it' . . . Viewing the record in the light most favorable to the defendant, a court must determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified. If such evidence is in the record, the court must provide an instruction on the defense" (*People v Petty*, 7 NY3d 277, 284; *see People v Cox*, 92 NY2d 1002, 1004). Furthermore, a defendant is justified in "us[ing] physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself, or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person" (Penal Law § 35.15 [1]; *see People v Goetz*, 68 NY2d 96, 105-106). Here, there was no reasonable view of the evidence supporting a justification charge because "[t]he threatened harm must be *imminent*" (*People v Victor*, 176 AD2d 769, 769, *lv denied* 79 NY2d 833), and here it was not (*see People v Taylor*, 134 AD3d 739, 740-741, *lv denied* 26 NY3d 1150; *Victor*, 176 AD2d at 769).

Defendant further contends that the prosecutor improperly bolstered the victim's testimony by eliciting testimony from an investigator regarding why the victim may have been reluctant to provide testimony describing the amount of pain he experienced after defendant punched him several times. Defendant did not object to the investigator's testimony on that ground, and thus defendant's contention is not preserved for our review (*see generally People v Osuna*, 65 NY2d 822, 824). In any event, the investigator's testimony did not in fact bolster the victim's testimony, but rather it impeached the victim's credibility by suggesting that the victim minimized the extent of his injuries. Furthermore, "to the extent that the People's evidence included improper bolstering testimony, any error in admitting that testimony is harmless" (*People v Gibson*, 137 AD3d 1657, 1658, *lv denied* 27 NY3d 1151; *see generally People v Crimmins*, 36 NY2d 230, 241-242). Indeed, defendant was acquitted of the assault charge that required proof that the victim sustained substantial pain.

Viewing the evidence in light of the elements of attempted assault in the second degree 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).

Finally, the sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

806

CA 15-02109

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

MELISSA LAZAR, PLAINTIFF-RESPONDENT,

V ORDER

BARRY D. LAZAR, DEFENDANT-APPELLANT.

SHELDON B. BENATOVICH, WILLIAMSVILLE (JAMES P. RENDA OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 25, 2015. The order, among other things, modified the amount of monthly maintenance to be paid by defendant.

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

809

CA 15-02157

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

CRANE-HOGAN STRUCTURAL SYSTEMS, INC., AND
DANIEL C. HOGAN, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARY ELLEN BELDING, DEFENDANT-APPELLANT.

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP, ROCHESTER (SHARON P. STILLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ADAMS BELL ADAMS, P.C., ROCHESTER (RICHARD T. BELL, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered September 2, 2015. The order, among other things, denied defendant's pre-answer motion to dismiss the complaint and for sanctions.

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 complaint insofar as it alleged defamation per se under the serious crime category, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this defamation action seeking compensatory and punitive damages based on statements contained in a letter that defendant sent to a federal judge regarding the sentencing of plaintiff Crane-Hogan Structural Systems, Inc. upon its plea of guilty of a violation of the federal Clean Water Act (33 USC § 1251 *et seq.*). We agree with defendant that Supreme Court erred in denying that part of her pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) insofar as the complaint alleged that defendant committed defamation per se by "charging plaintiff[s] with a serious crime" (*Liberman v Gelstein*, 80 NY2d 429, 435). We conclude that certain statements in the letter alleging criminal conduct on the part of plaintiffs do not constitute defamation per se because "reference to extrinsic facts is necessary to give them a defamatory import" (*Aronson v Wiersma*, 65 NY2d 592, 594-595), and that other statements, e.g., accusing plaintiffs of terrorism, do not constitute defamation per se because they are "likely to be perceived as 'rhetorical hyperbole [or] a vigorous epithet' " (*LeBlanc v Skinner*, 103 AD3d 202, 213, quoting *Greenbelt Coop. Publ. Assn., Inc. v Bresler*, 398 US 6, 14; *see Lukashok v Concerned Residents of N. Salem*, 160 AD2d 685, 686). We otherwise affirm the order for reasons stated in the

decision at Supreme Court.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

810

CA 16-00023

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

IN THE MATTER OF THE GUARDIANSHIP OF
ALISSA JOY MCDONALD.
---------- ORDER
DAVID B. LANZONE, PETITIONER-APPELLANT,

CHRISTOPHER S. MCDONALD, PETITIONER-RESPONDENT.

BOND, SCHOENECK & KING, PLLC, ROCHESTER (NICOLE M. MARRO OF COUNSEL), AND COHEN & GRIGSBY, P.C., PITTSBURGH, PENNSYLVANIA (CHRISTINA MCKINLEY OF COUNSEL), FOR PETITIONER-APPELLANT.

DAVIDSON FINK LLP, ROCHESTER (ROBERT G. GREENE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 13, 2015. The order, among other things, denied the petition of David B. Lanzone for property guardianship of Alissa Joy McDonald.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on August 23, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

814

CA 15-01361

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

IN THE MATTER OF CHRISTOPHER SEIFERT,
PETITIONER-APPELLANT,

V ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH 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 February 27, 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 for reasons stated in the decision at Supreme Court.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

815

KA 14-00729

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JAIMEN POMALES, ALSO KNOWN AS JAIME POMALES,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 3, 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 for reasons stated in the decision at suppression court.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

821

KA 13-00582

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD L. DAVIS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 31, 2013. 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 modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of incarceration of seven years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of weapon in the second degree (Penal Law § 265.03 [3]). County Court sentenced defendant to a 12-year term of incarceration plus five years of postrelease supervision. We reject defendant's contention that the court erred in summarily denying that part of his omnibus motion seeking to suppress, as the products of an unlawful search and seizure, a gun that defendant had discarded while he was fleeing from the police and his subsequent statements to the police. It is well settled that a motion to suppress evidence on such a ground may be summarily denied if defendant does not allege a proper legal basis for suppression or if the "sworn allegations of fact do not as a matter of law support the ground alleged" (CPL 710.60 [3] [b]; *see People v Mendoza*, 82 NY2d 415, 421). "Hearings are not automatic or generally available for the asking by boilerplate allegations. Rather, . . . factual sufficiency [is to] be determined with reference to the face of the pleadings, the context of the motion and defendant's access to information" (*Mendoza*, 82 NY2d at 422; *see People v Jones*, 95 NY2d 721, 725).

Here, defendant failed to include in his motion papers sworn allegations of fact taking issue with the People's assertion that the attempted stop of defendant was predicated on the officers'

observation that he was riding a bicycle without a bell or other audible signal device, in violation of Vehicle and Traffic Law § 1236 (b) (*see generally People v Robinson*, 97 NY2d 341, 348-349; *People v Ingle*, 36 NY2d 413, 419-420). Moreover, despite being afforded the opportunity to supplement his motion papers, defendant also failed to address the People's assertions that the officers' subsequent pursuit and arrest of defendant was lawful given that defendant, upon being approached by the officers, dropped his bicycle and fled through some adjoining residential yards, thereby elevating the suspicion of the police; that, during the ensuing lawful pursuit by the police, defendant discarded the gun that he was carrying, thereby abandoning the gun for the purpose of Fourth Amendment analysis; and that the police, almost immediately after apprehending and detaining defendant for the traffic violation, discovered and seized the gun, thereby acquiring probable cause to arrest defendant (*see generally People v Sierra*, 83 NY2d 928, 929-930; *People v Martinez*, 80 NY2d 444, 447-448; *People v Simmons*, 133 AD3d 1275, 1276-1277, *lv denied* 27 NY3d 1006; *People v Wilson*, 49 AD3d 1224, 1224-1225, *lv denied* 10 NY3d 966). Inasmuch as defendant and his counsel merely set forth conclusory allegations of defendant's lawful behavior and of the absence of any justification for the police to stop, pursue, and arrest defendant, the defense failed to raise any factual issue requiring a suppression hearing (*see Mendoza*, 82 NY2d at 426-433; *People v King*, 137 AD3d 1572, 1573, *lv denied* 27 NY3d 1134; *People v Battle*, 109 AD3d 1155, 1157, *lv denied* 22 NY3d 1038; *People v Caldwell*, 78 AD3d 1562, 1563, *lv denied* 16 NY3d 796).

We agree with defendant, however, that the imposition of a determinate term of incarceration of 12 years is unduly harsh and severe under the circumstances of this case. We note that our "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*People v Delgado*, 80 NY2d 780, 783), and that we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86; *see People v Johnson*, 136 AD3d 1417, 1418, *lv denied* 27 NY3d 1134). We conclude that a reduction in the sentence is appropriate and, as a matter of our discretion in the interest of justice, we modify the judgment by reducing the sentence to a determinate term of incarceration of seven years (*see* CPL 470.20 [6]; *Johnson*, 136 AD3d at 1418), to be followed by the five years of postrelease supervision imposed by the court.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

822

KA 14-02103

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANSON SPATES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 23, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). Contrary to defendant's contention, Supreme Court did not abuse its discretion in denying his motion to withdraw the plea (*see People v Watkins*, 107 AD3d 1416, 1416, *lv denied* 22 NY3d 959; *People v Wolf*, 88 AD3d 1266, 1266-1267, *lv denied* 18 NY3d 863). Defendant contended in support of his motion that the plea was not knowing, voluntary, and intelligent based upon what defendant believed was an erroneous "threat of 50 years" in prison if he did not plead guilty and his assertion that he did not have enough time to consider the offer. Inasmuch as the court made clear at the time of the plea that the maximum sentence was 25 years and defendant agreed at the time of the plea that he had discussed the matter with his attorney and never indicated that he needed more time, defendant's contention is " 'belied by the record of the plea proceeding' . . . , which establishes that defendant understood the nature of the proceedings" (*Watkins*, 107 AD3d at 1417), and is " 'refuted by his statements during the plea proceedings' " (*People v McKinnon*, 5 AD3d 1076, 1076, *lv denied* 2 NY3d 803).

Defendant's contention that his guilty plea was not knowing, voluntary, and intelligent because the court failed to elicit an affirmative factual recitation directly from him is 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 Kosty*, 122 AD3d 1408, 1408, *lv denied* 24 NY3d 1220; *see also People v Hicks*, 128 AD3d 1358, 1359, *lv denied* 27 NY3d 999; *People v Irvine*, 42 AD3d 949, 950, *lv denied* 9 NY3d 962).

Finally, while we agree that defendant's waiver of his right to appeal does not encompass his challenge to the severity of his sentence inasmuch as "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal with respect to his conviction that he was also waiving his right to appeal any issue concerning the severity of the sentence" (*People v Ayala*, 117 AD3d 1447, 1448, *lv denied* 23 NY3d 1033 [internal quotation marks omitted]), we nevertheless conclude that defendant's sentence is not unduly harsh or severe.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

823

KA 13-01651

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANIBAL SANTIAGO, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 4, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the third degree (Penal Law § 265.02 [1]), defendant contends that County Court erred in refusing to suppress evidence seized by the police, including the firearm that he was charged with possessing. We reject that contention inasmuch as the police had reasonable suspicion to stop defendant based on a confidential informant's tip and their own confirmatory observations. "Specifically, because [the evidence in the record establishes] that the tip was reliable under the totality of the circumstances, satisfied the two-pronged *Aguilar-Spinelli* test for the reliability of hearsay tips in this particular context and contained sufficient information about defendant['s] unlawful possession of a weapon to create reasonable suspicion," we conclude that the stop was legal (*People v Argyris*, 24 NY3d 1138, 1140-1141, *rearg denied* 24 NY3d 1211, *cert denied* ___US ___, 136 S Ct 793). Contrary to defendant's contention, the confidential informant's basis of knowledge was sufficiently established at the in camera *Darden* hearing (*see People v Darden*, 34 NY2d 177). Having reviewed the *Darden* hearing testimony, we conclude that the information from the informant, "in its totality, provided ample basis to conclude that the informant had a basis for his or her knowledge that defendant was in possession of a weapon" (*People v Knight*, 94 AD3d 1527, 1528-1529, *lv denied* 19 NY3d 998 [internal quotation marks omitted]). In addition, the court made available to defendant its "Summary Report" with

respect to the existence of the informant and the communications made by the informant to the police, and that report established that the information provided by the informant had "sufficient indicia of reliability" to allow the officer to credit it (*People v Gonzalez*, 63 AD3d 1609, 1609, *lv denied* 13 NY3d 796). The People further established that the informant was reliable inasmuch as he "had provided accurate information to the police on many occasions in the past" (*Knight*, 94 AD3d at 1529).

We reject defendant's further contention that the information provided by the confidential informant was insufficient to support the stop and detention. We conclude that, at a minimum, the officers had reasonable suspicion to stop and detain defendant forcibly based on the totality of the circumstances, including the call from the confidential informant providing a general description of the perpetrator of the crime, the proximity of defendant to the site of the crime, the brief period of time between the crime and the discovery of defendant near the location of the crime, and the officers' observations of defendant, who matched the description provided by the confidential informant (*see id.*). Defendant's flight in response to the officers' attempts to stop him further established the informant's reliability, and provided at least a reasonable suspicion justifying the pursuit and forcible detention of defendant (*see id.*; *see generally People v Woods*, 98 NY2d 627, 628-629; *People v De Bour*, 40 NY2d 210, 223). In light of the foregoing, we do not address the propriety of the court's alternative basis for denying that part of defendant's omnibus motion seeking to suppress evidence seized by the police.

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

826

KA 14-02057

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CLEOPHIS HARRIS, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, ACTING DISTRICT ATTORNEY, MAYVILLE (LYNN S. SCHAFFER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered July 14, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention, County Court did not ignore his oral motion to withdraw his plea or fail to set forth for judicial review any decision with respect thereto. Instead, the court explicitly and properly denied defendant's oral motion to withdraw the plea based upon the absence of any record support for defendant's conclusory assertion that his guilty plea had been coerced (*see People v Allen*, 99 AD3d 1252, 1252). Furthermore, the court accorded defendant a reasonable opportunity to present his contentions and did not "abuse its discretion in concluding that no further inquiry was necessary" (*People v Strasser*, 83 AD3d 1411, 1411; *cf. People v Days*, 125 AD3d 1508, 1508-1509).

Contrary to his further contention, defendant was not "deprived of effective assistance of counsel at sentencing based on his attorney's refusal to incorporate the arguments raised by defendant at sentencing into [a] written motion to withdraw defendant's plea" (*People v Green*, 132 AD3d 1268, 1269, *lv denied* 27 NY3d 1069). Furthermore, "defense counsel's failure to join in [defendant's oral] motion did not constitute ineffective assistance" (*People v Weinstock*,

129 AD3d 1663, 1664, *lv denied* 26 NY3d 1012).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

828

CAF 15-01161

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

IN THE MATTER OF KELIANN M. ELNISKI, ALSO KNOWN AS KELIANN M. ARGY,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT M. JUNKER,
RESPONDENT-PETITIONER-RESPONDENT.

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

MATTINGLY CAVAGNARO LLP, BUFFALO (MELISSA A. CAVAGNARO OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

PAMELA THIBODEAU, ATTORNEY FOR THE CHILD, WILLIAMSVILLE.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered June 27, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, modified a prior consent order by awarding respondent-petitioner primary residential custody of the parties' child with visitation to petitioner-respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner-respondent mother appeals from an order that, inter alia, modified a prior consent order by awarding respondent-petitioner father primary residential custody of the parties' child with visitation to the mother, and otherwise continued joint legal custody. Contrary to the mother's contention, we conclude that the father met his burden of establishing a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the child (*see Matter of Tuttle v Tuttle*, 137 AD3d 1725, 1725; *Matter of Brewer v Soles*, 111 AD3d 1403, 1403-1404; *Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405-1406, *lv denied* 22 NY3d 864; *Matter of Simonds v Kirkland*, 67 AD3d 1481, 1482). We also conclude, contrary to the mother's contention, that there is a sound and substantial basis in the record to support Family Court's determination that it was in the child's best interests to award the father primary residential custody (*see Matter of Mercado v Frye*, 104 AD3d 1340, 1342, *lv denied* 21 NY3d 859).

We reject the mother's further contentions that the Attorney for

the Child (AFC) was biased against her, and that the AFC failed to provide meaningful representation and act in the child's best interests. Those contentions are not preserved for our review because the mother made no motion to remove the AFC (*see Matter of Juliet M.*, 16 AD3d 211, 212; *Matter of Nicole VV.*, 296 AD2d 608, 613, *lv denied* 98 NY2d 616) and, in any event, they are without merit (*see Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862; *Matter of Aaliyah Q.*, 55 AD3d 969, 971; *see generally* 22 NYCRR 7.2 [d]).

Finally, we reject the mother's contention that she was denied effective representation. The mother failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings," and the record reflects that her counsel provided meaningful representation (*People v Benevento*, 91 NY2d 708, 712; *see Matter of Brandon v King*, 137 AD3d 1727, 1728-1729, *lv denied* 27 NY3d 910).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

831

CA 15-02110

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

BRYAN W. CUMMINGS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DOO WHA SUNG, DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, ALBANY (JONATHAN H. BARD OF COUNSEL), FOR DEFENDANT-APPELLANT.

MARTIN J. ZUFFRANIERI, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 22, 2015. The order denied the motion of defendant for summary judgment dismissing the complaint and granted the cross motion of plaintiff for partial summary judgment on the issue of defendant's liability under Labor Law §§ 200 and 241 (6).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiff's cross motion and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for the amputation of his thumb while using a table saw at defendant's house. At the time of the accident, plaintiff was working as a laborer on defendant's renovation project. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint. With regard to the third cause of action, which alleges a violation of Labor Law § 241 (6), we conclude that defendant failed to meet his burden of establishing as a matter of law that he is entitled to the benefit of the statutory homeowner's exemption from liability, and we further conclude, in any event, that plaintiff raised a triable issue of fact. On this record, it cannot be determined as a matter of law whether defendant directed or controlled the method and manner of the work being done on the house, including the work being carried out by plaintiff at the time of the accident (*see Rodriguez v Gany*, 82 AD3d 863, 864-865; *Acosta v Hadjigavriel*, 18 AD3d 406, 406-407; *see also Pavon v Koral*, 113 AD3d 830, 831).

We likewise conclude that defendant failed to meet his burden of establishing his entitlement to judgment as a matter of law with respect to the first and second causes of action, which allege defendant's common-law negligence and violation of Labor Law § 200 in failing to provide plaintiff with a safe place to work. There are

triable issues of fact concerning whether defendant lacked the authority to direct, supervise, or control plaintiff and his work and whether defendant was free from negligence in the occurrence of the accident (*see Biscup v E.W. Howell, Co., Inc.*, 131 AD3d 996, 998; *see generally Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352-353; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877).

In light of the triable issues of fact noted above, we further conclude that the court erred in granting plaintiff's cross motion for partial summary judgment on the issue of defendant's liability under Labor Law §§ 200 and 241 (6), and we modify the order accordingly. With respect to the latter cause of action, we note that "the violation of a specific provision of the Industrial Code, even if admitted by defendant, 'does not establish negligence as a matter of law' " (*Fisher v Brown Group*, 256 AD2d 1069, 1069), but is "merely some evidence to be considered on the question of a defendant's negligence" *(Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 522, *rearg denied* 65 NY2d 1054; *see Rizzuto*, 91 NY2d at 349). Further, the record evinces triable issues of fact concerning whether there was culpable conduct on the part of plaintiff and whether any violation of the Industrial Code was a proximate cause of the accident (*see Puckett v County of Erie*, 262 AD2d 964, 965; *see generally Calderon v Walgreen Co.*, 72 AD3d 1532, 1534, *appeal dismissed* 15 NY3d 900).

Conflicting evidence also precludes partial summary judgment in plaintiff's favor on the section 200 cause of action. Indeed, we note that "[n]egligence actions do not ordinarily lend themselves to summary disposition" (*Chilberg v Chilberg*, 13 AD3d 1089, 1090, citing *Ugarizza v Schmieder*, 46 NY2d 471, 475). Whether a defendant's conduct fell short of the standard of ordinary care is an issue that " 'can rarely be decided as a matter of law' " (*Ugarizza*, 46 NY2d at 475, quoting *Andre v Pomeroy*, 35 NY2d 361, 364).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

833

CA 15-02143

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

STEVEN E. NORTHMAN, PLAINTIFF-RESPONDENT,

V ORDER

SAM-SON DISTRIBUTION CENTER, INC., SAM-SON DISTRIBUTION CENTER WEST, INC., DEFENDANTS-APPELLANTS, CALYPSO DEVELOPMENT OF WESTERN NEW YORK, INC., ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL J. GALLAGHER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, BUFFALO (WILLIAM F. SAVINO OF COUNSEL), AND BARCLAY DAMON LLP, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered February 27, 2015. The order, among other things, stayed the pending arbitration between the parties.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on June 29, 2016, and filed in the Erie County Clerk’s Office on June 30, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

834

CA 15-01566

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

SUSAN KOZLOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

UNILAND DEVELOPMENT COMPANY, DEFENDANT-APPELLANT,
ADF CONSTRUCTION CORPORATION, ET AL., DEFENDANTS.

BROWN & KELLY LLP, BUFFALO (H. WARD HAMLIN, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (BRIAN R. HOGAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered April 2, 2015. The order, among other things, granted plaintiff's cross motion for a protective order.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on April 20, 2016, and filed in the Erie County Clerk's Office on April 29, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

836

CA 15-01091

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

IN THE MATTER OF EARL REYES, 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 (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 5, 2015 in a proceeding pursuant to CPLR article 78. The judgment granted the motion of respondent to dismiss the amended petition.

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

Memorandum: Petitioner, a prison inmate, commenced this CPLR article 78 proceeding to challenge respondent's handling of grievances concerning his medical treatment, and he now appeals from a judgment granting respondent's motion to dismiss the amended petition for his failure to exhaust administrative remedies. Supreme Court properly dismissed the amended petition. Although petitioner contends that grievances concerning denials of medical treatment filed by him on April 25 and May 2, 2014 were improperly denied, "an affidavit from the inmate grievance program supervisor confirms that petitioner never filed formal grievances corresponding to those dates," as required by 7 NYCRR 701.5 (a) (1) (*Matter of Bookman v Fischer*, 99 AD3d 1127, 1128; *see Matter of Muniz v David*, 16 AD3d 939, 939-940). "Thus, petitioner 'failed to exhaust the administrative remedies through the available grievance procedures or establish any exceptions thereto[,]' and dismissal of the [amended] petition was . . . proper on that basis" (*Muniz*, 16 AD3d at 939-940).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

837

CA 15-01489

PRESENT: PERADOTTO, J.P., CARNI, NEMOYER, AND CURRAN, JJ.

PINNACLE INVESTMENTS, LLC, PLAINTIFF-APPELLANT,

V ORDER

ESPSCO SYRACUSE, LLC, DEFENDANT,
PATRICK DESSEIN, BRETT GREENKY, M.D., RICHARD
ESPOSITO AND JOHN SACCO, M.D.,
DEFENDANTS-RESPONDENTS.

WHITE AND WILLIAMS LLP, NEW YORK CITY (BRIAN M. OUBRE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PATRICK DESSEIN, DEFENDANT-RESPONDENT PRO SE.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS BRETT GREENKY, M.D. AND RICHARD ESPOSITO.

MELVIN & MELVIN, PLLC, SYRACUSE (MATTHEW VAN RYN OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN SACCO, M.D.

Appeal from an order of the Supreme Court, Onondaga County (Hugh A. Gilbert, J.), entered May 21, 2015. The order, inter alia, denied the motion of the plaintiff for further discovery and granted the motions of defendants Brett Greenky, M.D., Richard Esposito and John Sacco, M.D., to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 14, 2016, and by defendant Patrick Dessein on September 15, 2016,

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

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

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

843

KA 14-01967

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORDARISE HOUSTON, DEFENDANT-APPELLANT.

ROBERT M. GRAFF, LOCKPORT, FOR DEFENDANT-APPELLANT.

CORDARISE HOUSTON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 30, 2014. The judgment convicted defendant, upon a jury verdict, of 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 modified on the law by directing that all of the sentences imposed shall run concurrently and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), assault in the first degree (§ 120.10 [1]), and criminal possession of a weapon in the second degree (§ 265.03 [3]). The victim called 911 to report that he had been shot in the chest at his home, and he identified defendant, his close friend for many years, as the shooter to both the 911 operator and to a police officer at the scene. The victim sustained at least six gunshot wounds and was left paralyzed from the waist down. At trial, he confirmed that a recording of his 911 call and statements at the scene depicted his voice, but he testified that he had no memory of the shooting.

We reject defendant's contention that County Court erred in admitting the victim's statements to the 911 operator and police officer as excited utterances. The record establishes that the victim made the statements very shortly after the shooting and repeatedly said that he was dying, and we are satisfied that he spoke under the stress of the excitement caused by being shot and severely injured, while " 'his reflective capacity was stilled' " (*People v Cantave*, 21

NY3d 374, 381, *clarification denied* 21 NY3d 1070; *see People v Mulligan*, 118 AD3d 1372, 1372-1373, *lv denied* 25 NY3d 1075; *People v Kelley*, 46 AD3d 1329, 1330-1331, *lv denied* 10 NY3d 813).

Defendant further contends that the admission of the victim's statements to the police officer violated his constitutional right of confrontation because those statements were testimonial in nature (*see generally Crawford v Washington*, 541 US 36, 50-54). Even assuming, arguendo, that the victim's alleged memory loss rendered the statements at issue inadmissible if testimonial notwithstanding that defendant had the opportunity to cross-examine the victim at trial (*cf. United States v Owens*, 484 US 554, 557-560; *People v Linton*, 21 AD3d 909, 910, *lv denied* 5 NY3d 853), we reject defendant's contention. The record supports the court's determination that the statements were not testimonial, i.e., that the "primary purpose" of the victim's conversation with the officer was to enable the police to address an ongoing emergency, rather than to generate information for use in a future prosecution (*Davis v Washington*, 547 US 813, 822; *see Michigan v Bryant*, 562 US 344, 371-378; *People v Nieves-Andino*, 9 NY3d 12, 15-16; *People v Anderson*, 114 AD3d 1083, 1084-1085, *lv denied* 22 NY3d 1196; *cf. People v Clay*, 88 AD3d 14, 21-24, *lv denied* 17 NY3d 952).

Defendant concedes that the evidence is legally sufficient to support his conviction if the victim's identifying statements were properly admitted, and we reject his contention that the verdict is against the weight of the evidence with respect to the issue of identification (*see generally People v Bleakley*, 69 NY2d 490, 495). "The jury's resolution of credibility and identification issues is entitled to great weight" (*People v Mobley*, 49 AD3d 1343, 1345, *lv denied* 11 NY3d 791 [internal quotation marks omitted]), and the exculpatory scenarios proposed by defendant on appeal are merely speculative (*see People v Rodriguez*, 125 AD3d 472, 472, *lv denied* 26 NY3d 971; *see generally People v Bouwens*, 128 AD3d 1393, 1393-1394).

Contrary to defendant's contention, he was not entitled to a complete circumstantial evidence charge inasmuch as "[t]he excited utterances of a victim identifying the shooter constitute direct evidence of guilt" (*People v Vigliotti*, 270 AD2d 904, 905, *lv denied* 95 NY2d 839, *reconsideration denied* 95 NY2d 970; *see generally People v Daddona*, 81 NY2d 990, 992). Defendant did not object to the prosecutor's allegedly improper remarks on summation, and he thus failed to preserve for our review his contention that those remarks denied him a fair trial (*see* CPL 470.05 [2]; *People v Rumph*, 93 AD3d 1346, 1347, *lv denied* 19 NY3d 967). In any event, the remarks in question constituted fair comment on the content of the victim's statements (*see People v Albaladejo*, 10 AD3d 582, 582, *lv denied* 4 NY3d 740), and we reject defendant's further contention that defense counsel's failure to object to them deprived him of effective assistance of counsel (*see People v Isaac*, 137 AD3d 1164, 1165, *lv denied* 27 NY3d 1134; *People v Hendrix*, 132 AD3d 1348, 1348, *lv denied* 26 NY3d 1145).

Defendant also contends that he was denied due process at sentencing by the court's consideration of speculation by the prosecutor concerning the motive for the shooting (*see generally People v Naranjo*, 89 NY2d 1047, 1049). That contention is not preserved for our review because defendant made no relevant objection at sentencing (*see People v Colome-Rodriguez*, 120 AD3d 1525, 1525-1526, *lv denied* 25 NY3d 1161; *People v Byrd*, 116 AD3d 875, 876-877, *lv denied* 24 NY3d 1001), 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 also conclude that defendant has not shown that he was denied effective assistance of counsel at sentencing (*see People v Orengo*, 97 NY2d 739, 739-740; *People v Saladeen*, 12 AD3d 1179, 1180, *lv denied* 4 NY3d 767).

We agree with defendant, however, that the sentence is illegal insofar as the court directed that the sentence imposed on the count charging criminal possession of a weapon run consecutively to the sentences imposed on the other counts, and we note that this contention does not require preservation (*see People v Fuentes*, 52 AD3d 1297, 1300-1301, *lv denied* 11 NY3d 736). The People had the burden of establishing that consecutive sentences were legal, i.e., that the crimes were committed through separate acts (*see People v Rodriguez*, 25 NY3d 238, 244; *see generally* Penal Law § 70.25 [2]), and they failed to meet that burden. There was no evidence presented at trial that defendant's act of possessing a loaded firearm "was separate and distinct from" his act of shooting the victim (*People v Harris*, 115 AD3d 761, 762-763, *lv denied* 23 NY3d 1062, *reconsideration denied* 24 NY3d 1084; *cf. People v Evans*, 132 AD3d 1398, 1398-1399, *lv denied* 26 NY3d 1087; *see generally People v Brown*, 21 NY3d 739, 750-752). We therefore modify the judgment by directing that all of the sentences run concurrently. The sentence, as so modified, is not unduly harsh or severe.

Finally, the various contentions in defendant's pro se supplemental brief concerning the court's dismissal of a sworn juror are unpreserved for our review (*see People v Hicks*, 6 NY3d 737, 739; *People v Astacio*, 105 AD3d 1394, 1395-1396, *lv denied* 22 NY3d 1154; *People v Rodriguez*, 2 AD3d 1359, 1360, *lv denied* 1 NY3d 633, *reconsideration denied* 2 NY3d 805), we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that defendant was not denied effective assistance of counsel by his attorney's handling of the juror's dismissal (*see People v Clark*, 139 AD3d 1368, 1371; *see generally People v Colon*, 90 NY2d 824, 825-826).

Entered: September 30, 2016

Frances E. Cafarell
Clerk of the Court

MOTION NO. (225/89) KA 02-00347. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL RHYMES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (649/91) KA 02-00858. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIAM J. BARNES, JR., DEFENDANT-APPELLANT. -- Motion for reconsideration denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1200/02) KA 01-01201. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DENNIS TIMMONS, 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 court erred when it failed to comply with CPL 310.30 in regard to Court Exhibit No. 3. Upon our review of the motion papers, we conclude that the issue may have merit. The order of November 15, 2002 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 December 29, 2016. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, TROUTMAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1403/04) KA 02-00984. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RICKY ORTA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, DEJOSEPH, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (7/08) KA 06-00538. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V RANDY HALL, 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 issues on direct appeal, specifically, whether the court placed on the record a reasonable basis for restraining defendant before the jury and whether the court complied with CPL 310.30 in regard to Court Exhibit #11, a note from the jury during its deliberations. Upon our review of the motion papers, we conclude that these issues may have merit. Therefore, the order of February 1, 2008 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 December 29, 2016. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (544/08) KA 05-00859. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO D. COOLEY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (708/09) KA 06-02790. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL D. SEELER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (114/10) KA 08-02140. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO D. RUTLEDGE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, TROUTMAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (447/14) KA 12-02292. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V PARISH M. STREETER, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (631/14) KA 10-01782. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN M. FISHER, ALSO KNOWN AS BRYAN MAURICE FISHER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CARNI, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1226/14) KA 12-01612. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EMARIO C. ALLEN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1242/14) KA 13-00408. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ALLEN J. BURNS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (1291/14) KA 11-01988. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ERIC BLACKSHEAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (295/15) KA 13-01211. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V KELVIN VIERA-MORALES, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (995/15) KA 10-00808. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JUAN C. MEDINA, DEFENDANT-APPELLANT. -- Motion to dismiss appeal granted. PRESENT: WHALEN, P.J., SMITH, LINDLEY, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (230/16) CA 15-01344. -- MICHAEL C. KERWIN, PLAINTIFF-RESPONDENT, V JOSEPH FUSCO, ET AL., DEFENDANTS, AND BH DECKER, INC., DEFENDANT-APPELLANT. JOSEPH FUSCO, ET AL., THIRD-PARTY PLAINTIFFS, V SUNSTREAM CORPORATION, THIRD-PARTY DEFENDANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (254/16) CA 15-00328. -- KENNETH P. GOLDEN, PLAINTIFF-APPELLANT, ET AL., PLAINTIFF, V SASHA PAVLOV-SHAPIRO, M.D., ASSOCIATED MEDICAL PROFESSIONALS OF NY, PLLC, JEFFREY M. DESIMONE, M.D., CENTRAL NEW YORK SURGICAL PHYSICIANS, PC, AND UPSTATE UNIVERSITY HOSPITAL AT COMMUNITY GENERAL, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (281/16) CA 15-00398. -- DARLENE M. LOHNAS, PLAINTIFF-RESPONDENT, V FRANK A. LUZI, JR., M.D., AND NORTHTOWNS ORTHOPEDICS, P.C., DEFENDANTS-APPELLANTS. (APPEAL NO. 2.) -- Motion for reargument denied. Motion for leave to appeal to the Court of Appeals granted. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (302/16) CA 15-01563. -- JEREMIAH CULLEN, PLAINTIFF-RESPONDENT, V AT&T, INC. AND AMERICAN TOWER, L.P., DEFENDANTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (412/16) KA 14-00659. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TRACY L. BROOKS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (448/16) CA 15-01764. -- ERIC WHITE AND NATIVE OUTLET, PLAINTIFFS-APPELLANTS, V ERIC T. SCHNEIDERMAN, NEW YORK STATE ATTORNEY GENERAL, IN HIS OFFICIAL CAPACITY, AND THOMAS H. MATTOX, COMMISSIONER, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, IN HIS OFFICIAL CAPACITY, DEFENDANTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CARNI, NEMOYER, TROUTMAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (505/16) CA 15-01523. -- IN THE MATTER OF ELAM SAND & GRAVEL CORP., AND GARY EVANS, PLAINTIFFS-PETITIONERS-APPELLANTS, V TOWN OF WEST BLOOMFIELD, TOWN BOARD OF TOWN OF WEST BLOOMFIELD, TOWN OF WEST BLOOMFIELD PLANNING BOARD, SUE S. STEWART, NEIGHBORS TO SUPPORT WEST BLOOMFIELD AND CITIZENS TO SUPPORT WEST BLOOMFIELD, DEFENDANTS-RESPONDENTS-RESPONDENTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (514/16) KA 14-00658. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE LAWRENCE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (547/16) CA 15-01795. -- PATRICIA KAREN KILLIAN, PLAINTIFF-APPELLANT, V CAPTAIN SPICER'S GALLERY, LLC, SPICER HOLDINGS, LLC, KENNETH A. HOOSON AND GREGORY K. HOOSON, DEFENDANTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (549/16) CA 15-00810. -- IN THE MATTER OF DON M. MOORE, PETITIONER-APPELLANT, V THE CENTRAL NEW YORK VOLLEYBALL OFFICIALS CORPORATION, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

MOTION NO. (559/16) KA 15-02114. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MICHAEL TYO, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

MOTION NOS. (980-981/16) KA 14-02216. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WATSON M. COOPER, DEFENDANT-APPELLANT. KA 14-02217. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WATSON M. COOPER, DEFENDANT-APPELLANT. -- Motion to relieve counsel of assignment dismissed as premature and the appeals are dismissed. Memorandum: The matters are remitted to Cattaraugus County Court to vacate the judgments of conviction and dismiss the Indictment and Superior Court Information either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745). PRESENT: WHALEN, P.J., PERADOTTO, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 30, 2016.)

KA 15-01970. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DISHAWN L. INFINGER, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

KA 15-01681. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JASON R. PHILLIPS, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)

KA 15-01967. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTHONY TORRES, DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38). (Appeal from a Judgment of Wyoming County Court, Michael M. Mohun, J. - Attempted Promoting Prison Contraband, 1st Degree). PRESENT: WHALEN, P.J., SMITH, NEMOYER, CURRAN, AND SCUDDER, JJ. (Filed Sept. 30, 2016.)