SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 22, 2017

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. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

944

KA 14-00643

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. TERBORG, DEFENDANT-APPELLANT.

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

JEFFREY J. TERBORG, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 28, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of stolen property in the fifth degree (Penal Law § 165.40). We reject defendant's contention in his main and pro se supplemental briefs that Supreme Court (Doyle, J.) abused its discretion in disqualifying his assigned counsel upon being informed that the Public Defender's Office had represented various individuals who were potential prosecution witnesses in one of several other pending prosecutions against defendant (*see People v Watson*, 26 NY3d 620, 624-625 [2016]; *People v Carncross*, 14 NY3d 319, 326-330 [2010]). We conclude that the court properly decided not to accept defendant's attempted waiver in these circumstances and instead chose to protect defendant's right to effective assistance of counsel in order to ensure a fair trial (*see Watson*, 26 NY3d at 627). The court also appropriately considered the interest of judicial economy and the integrity of the criminal process in determining that defendant should be represented by one attorney for all of the pending prosecutions to avoid conflicting advice and potential conflicts of interest (*see generally People v Tineo*, 64 NY2d 531, 537 [1985]; *People v Gayle*, 167 AD2d 927, 927 [4th Dept 1990], *lv denied* 77 NY2d 838 [1991]).

We reject defendant's further contention in his main and pro se

supplemental briefs that Supreme Court (Renzi, J.) abused its discretion in refusing to recuse itself from conducting the trial because it had presided over several prior criminal prosecutions of defendant and made negative comments about his character and criminality during one of those proceedings. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405 [1987]). Here, there was no legal disqualification, and defendant otherwise made no showing that the court's alleged bias affected the result of the trial (*see id.* at 407; *People v Nenni*, 269 AD2d 785, 786 [4th Dept 2000], *lv denied* 95 NY2d 801 [2000]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see People v Jackson*, 66 AD3d 1415, 1416 [4th Dept 2009]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see People v Ohse*, 114 AD3d 1285, 1286-1287 [4th Dept 2014], *lv denied* 23 NY3d 1041 [2014]; *see generally Bleakley*, 69 NY2d at 495).

Defendant's contention in his main brief that he was denied a fair trial by prosecutorial misconduct is unpreserved for our review inasmuch as the court sustained trial counsel's objections to the prosecutor's comments and gave curative instructions in two instances that, in the absence of further objection or a request for a mistrial, "must be deemed to have corrected the error[s] to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see People v Acosta*, 134 AD3d 1525, 1526 [4th Dept 2015], *lv denied* 27 NY3d 990 [2016]). In any event, we conclude that "[t]he alleged misconduct was 'not so egregious as to deprive defendant of a fair trial' " (*People v Astacio*, 105 AD3d 1394, 1396 [4th Dept 2013], *lv denied* 22 NY3d 1154 [2014]).

To the extent that defendant's contention in his main brief that he was denied effective assistance of counsel is based upon the alleged failure of one of his attorneys to inspect evidence, it is unreviewable on direct appeal because it involves matters outside the record and, therefore, must be raised by way of a motion pursuant to CPL article 440 (*see People v Ocasio*, 81 AD3d 1469, 1470 [4th Dept 2011], *lv denied* 16 NY3d 898 [2011], *cert denied* 565 US 910 [2011]). To the extent that defendant's claims of ineffective assistance of counsel are reviewable on the record before us, we conclude that they are without merit (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]). It is well settled that the "failure to 'make a motion or argument that has little or no chance of success' " is not ineffective (*Caban*, 5 NY3d at 152), and defendant otherwise has failed to show the absence of strategic or other legitimate explanations for his attorneys' alleged shortcomings (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]).

Defendant contends in his main brief that he was denied a fair trial by the cumulative effect of the alleged errors previously addressed herein, together with various other alleged errors that are not preserved for our review (*see* CPL 470.05 [2]). We reject defendant's contention with respect to the alleged errors previously reviewed, and we decline to exercise our power to review his contention with respect to the unpreserved alleged errors as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

999

CA 16-02122

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

IN THE MATTER OF BOARD OF MANAGERS, UNIQUEST DELAWARE, LLC, RESIDENTIAL CONDOMINIUM, ALSO KNOWN AS THE AVANT, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ASSESSOR, CITY OF BUFFALO, AND BOARD OF ASSESSMENT REVIEW OF CITY OF BUFFALO, COUNTY OF ERIE, STATE OF NEW YORK, RESPONDENTS-RESPONDENTS, AND COUNTY OF ERIE, INTERVENOR-RESPONDENT.

WOLFGANG & WEINMANN, LLP, BUFFALO (PETER ALLEN WEINMANN OF COUNSEL), FOR PETITIONER-APPELLANT.

BENNETT, DIFILIPPO & KURTZHALTS, LLP, EAST AURORA (MAURA C. SEIBOLD OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARGARET A. HURLEY OF COUNSEL), FOR INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered January 29, 2016 in a proceeding pursuant to RPTL article 7. The order denied the motion of petitioner for summary judgment on its petitions.

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

Memorandum: Petitioner operates a residential condominium in the City of Buffalo. Acting on behalf of its constituent unit owners, petitioner commenced the instant tax certiorari proceedings pursuant to RPTL article 7 to challenge multiple reassessments of the condominium. Petitioner subsequently moved for summary judgment on its petitions, contending that respondents violated RPTL 581 and Real Property Law § 339-y by reassessing the condominium based on the sale prices of individual units. Petitioner further contended that the challenged reassessments were unconstitutionally selective. In opposition, respondents contended that the reassessments did not violate RPTL 581 or Real Property Law § 339-y because they were based on physical improvements to various units, not on the sale prices of such units. Respondents also denied conducting impermissibly selective reassessments, and they submitted an affidavit from a municipal assessor who averred that it was “standard practice” in the City of Buffalo to reassess property upon physical improvements

thereto. Supreme Court denied petitioner's motion, and we now affirm.

We reject petitioner's contention that it is entitled to judgment as a matter of law on the basis of the claimed statutory violations. RPTL 581 has been "construed to mean that 'condominiums . . . [should] be assessed as if they were conventional apartment houses whose occupants were rent paying tenants' " (*Matter of Greentree At Lynbrook Condominium No. 1 v Board of Assessors of Vil. of Lynbrook*, 81 NY2d 1036, 1039 [1993], quoting *Matter of South Bay Dev. Corp. v Board of Assessors of County of Nassau*, 108 AD2d 493, 500 [2d Dept 1985]). Real Property Law § 339-y has been similarly interpreted (*see Matter of D. S. Alamo Assoc. v Commissioner of Fin. of City of N.Y.*, 71 NY2d 340, 345, 347 [1988]; *Matter of Board of Mgrs. of Harbor Condominiums v Board of Assessors of Vil. of Lake Placid*, 238 AD2d 825, 826 [3d Dept 1997], *lv denied* 91 NY2d 802 [1997]; *South Bay Dev. Corp.*, 108 AD2d at 496-497, 507-508). Thus, as petitioner correctly contends, municipal tax assessors may not ordinarily rely on market-sales data for individual units to valuate condominiums (*see South Bay Dev. Corp.*, 108 AD2d at 495-508; *cf. Matter of East Med. Ctr., L.P. v Assessor of Town of Manlius*, 16 AD3d 1119, 1120 [4th Dept 2005]).

Nevertheless, "when a taxpayer in a tax certiorari proceeding seeks summary judgment, it is necessary that the movant establish his [or her] cause of action . . . sufficiently to warrant the court as a matter of law in directing judgment in his [or her] favor" (*Matter of Crouse Health Sys., Inc. v City of Syracuse*, 126 AD3d 1336, 1337 [4th Dept 2015] [internal quotation marks omitted]), and here, petitioner's moving papers failed to establish, as a matter of law, that respondents actually relied on market-sales data for individual units in contravention of RPTL 581 and Real Property Law § 339-y (*see Board of Mgrs. of Harbor Condominiums*, 238 AD2d at 826-827; *cf. Matter of Central Westchester Tenants Corp. v Iagallo*, 136 AD2d 53, 55 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988], *appeal dismissed* 72 NY2d 954 [1988]). Indeed, on this record, it would be sheer speculation to conclude that respondents relied on market-sales data in reassessing petitioner's condominium. The fact "[t]hat the assessed values of some of the condominiums approximate recent sales prices of those units is not enough, without more, to warrant an inference that the assessments were derived solely or substantially from those prices" (*Board of Mgrs. of Harbor Condominiums*, 238 AD2d at 826). Petitioner's motion for summary judgment was therefore properly denied with respect to the alleged statutory violations (*see id.*; *see generally Crouse Health Sys., Inc.*, 126 AD3d at 1337-1338).

We also reject petitioner's contention that it is entitled to judgment as a matter of law on the ground that the challenged reassessments are unconstitutionally selective. "It is well settled that a system of selective reassessment that has no rational basis in law violates the equal protection provisions of the Constitutions of the United States and the State of New York. Nevertheless, reassessment upon improvement is not illegal in and of itself . . . *so long as the implicit policy is applied even-handedly to all similarly situated property*" (*Matter of Carroll v Assessor of City of Rye, N.Y.*,

123 AD3d 924, 925 [2d Dept 2014] [emphasis added and internal quotation marks omitted]). Here, the assessor's affidavit raises triable issues of fact as to whether the challenged reassessments were unconstitutionally "selective," i.e., not applied even-handedly to all similarly situated properties. Summary judgment was thus properly denied with respect to petitioner's selective reassessment claim (*see Matter of Resnick v Town of Canaan*, 38 AD3d 949, 953 [3d Dept 2007]).

Petitioner's remaining contentions are not properly before us because they were made for the first time either in its reply papers at Supreme Court (*see Jackson v Vatter*, 121 AD3d 1588, 1589 [4th Dept 2014]), or in its appellate brief in this Court (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1000

CA 17-00382

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

JO-LOUISE BAKER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN A. LISCONISH AND SANTO HEATING AND AIR CONDITIONING, INC., DEFENDANTS-RESPONDENTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (ADAM C. HOVER OF COUNSEL), FOR DEFENDANT-RESPONDENT JOHN A. LISCONISH.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP, ALBANY (CHRISTOPHER J. MARTIN OF COUNSEL), FOR DEFENDANT-RESPONDENT SANTO HEATING AND AIR CONDITIONING, INC.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered December 28, 2016. The order, inter alia, granted the motion of defendant Santo Heating and Air Conditioning, Inc., for summary judgment dismissing the complaint against it and denied the cross motion of plaintiff for partial summary judgment on the issue of liability.

It is hereby ORDERED that the order so appealed from is modified on the law by denying the motion of defendant Santo Heating and Air Conditioning, Inc. and reinstating the complaint against it and as modified the order is affirmed without costs.

Memorandum: Plaintiff suffered injuries when her car was struck by a vehicle driven by defendant John A. Lisconish on December 9, 2011. Defendant Santo Heating and Air Conditioning, Inc. (Santo) employed Lisconish and owned the vehicle that he was driving at the time of the accident. Plaintiff thereafter commenced this negligence action against defendants. Supreme Court, inter alia, granted Santo's motion for summary judgment dismissing the complaint against it and denied plaintiff's cross motion for partial summary judgment on the issue of liability, determining as a matter of law that Santo had no respondeat superior liability for Lisconish's negligence in connection with the accident and that Lisconish was not a permissive user of Santo's vehicle at the time thereof. Plaintiff appeals, and we now modify the order by denying Santo's motion and reinstating the complaint against it.

Initially, the court properly determined, as a matter of law, that Santo had no respondeat superior liability for Lisconish's negligence in connection with the accident. "Under the doctrine of *respondeat superior*, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his [or her] employment" (*Lundberg v State of New York*, 25 NY2d 467, 470 [1969], *rearg denied* 26 NY2d 883 [1970]). "An act is within the scope of employment when it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment . . . , or where the act has the purpose to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business . . . In contrast, where an employee's actions are taken for wholly personal reasons, which are not job related, his or her conduct cannot be said to fall within the scope of employment" (*Perez v City of New York*, 79 AD3d 835, 836 [2d Dept 2010] [internal quotation marks omitted]; *see Beauchamp v City of New York*, 3 AD3d 465, 466 [2d Dept 2004]). Here, it is undisputed that, at the time of the accident, Lisconish was driving to his girlfriend's house after having completed his last work appointment, received permission from his supervisor to leave for the day, purchased beer at a convenience store, and stopped at numerous bars along the way to drink alcohol. Indeed, Lisconish even acknowledged that he was driving on back roads at the time of the accident in order to avoid law enforcement. As such, Lisconish was not acting in the scope of his employment at the time of the accident, and Santo accordingly bears no respondeat superior liability in connection therewith (*see Marino v City of New York*, 95 AD3d 840, 841 [2d Dept 2012]; *Casimiro v Thayer*, 229 AD2d 958, 958 [4th Dept 1996]). Because Lisconish was not acting in the scope of his employment at the time of the accident, plaintiff's "reliance on the dual purpose doctrine is misplaced" (*Figura v Frasier*, 144 AD3d 1586, 1588 [4th Dept 2016], *lv denied* 28 NY3d 914 [2017]).

On the other hand, the court improperly determined, as a matter of law, that Lisconish was not a permissive user of Santo's vehicle at the time of the accident. "It is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary" (*Liberty Mut. Ins. Co. v General Acc. Ins. Co.*, 277 AD2d 981, 981-982 [4th Dept 2000] [internal quotation marks omitted]). Even in the case of substantial evidence to the contrary, the issue of implied permission is ordinarily a question of fact for a jury (*see Britt v Pharmacologic PET Servs., Inc.*, 36 AD3d 1039, 1040 [3d Dept 2007], *lv dismissed* 9 NY3d 831 [2007], citing *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see e.g. Lawrence v Myles*, 221 AD2d 913, 914 [4th Dept 1995]; *Wynn v Middleton*, 184 AD2d 1019, 1020 [4th Dept 1992]; *Ryder v Cue Car Rental*, 32 AD2d 143, 146-147 [4th Dept 1969]). The Court of Appeals in *Country-Wide* went so far as to state that "uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission will

not *necessarily* warrant a court in awarding summary judgment for the owner" (6 NY3d at 177; *see e.g. Talat v Thompson*, 47 AD3d 705, 705-706 [2d Dept 2008]; *Murphy v Carnesi*, 30 AD3d 570, 571-572 [2d Dept 2006]; *Mandelbaum v United States*, 251 F2d 748, 750-752 [2d Cir 1958]).

Here, Lisconish directly contradicted Santo's claim that Lisconish did not have permission to use the vehicle for non-work-related purposes. Unlike the dissent, we decline to ascribe dispositive significance to a written policy regarding non-work-related usage of its vehicles that Santo allegedly distributed to its employees on December 1, 2011. Indeed, Lisconish testified at his deposition that, even after the purported adoption of the written policy, it remained his understanding—based upon his prior experience and Santo's acquiescence—that he continued to have permission to use the van, as he always had, for non-work-related transportation. This conflicting evidence alone raises a triable issue of fact as to permissive use (*see e.g. Bernard v Mumuni*, 22 AD3d 186, 187-188 [1st Dept 2005], *affd* 6 NY3d 881 [2006]; *Tabares v Colin Serv. Sys.*, 197 AD2d 571, 572 [2d Dept 1993]).

In sum, given the strong statutory presumption of permissive use as well as the conflicting evidence in the record regarding Santo's policies and its adherence thereto, the issue of Lisconish's permissive use must be resolved at trial (*see Marino*, 95 AD3d at 841). The court therefore properly denied the cross motion, but erred in granting Santo's motion for summary judgment dismissing the complaint against it.

All concur except PERADOTTO and CURRAN, JJ., who dissent in part and vote to affirm in the following memorandum: We agree with our colleagues that defendant Santo Heating and Air Conditioning, Inc. (Santo) cannot be held vicariously liable for the actions of defendant John A. Lisconish under the doctrine of respondeat superior. Santo met its burden on its motion for summary judgment dismissing the complaint against it of establishing as a matter of law that, at the time of the accident, Lisconish was not acting within the scope of his employment and, thus, Santo was not exercising any control over his activities (*see Lundberg v State of New York*, 25 NY2d 467, 470-471 [1969], *rearg denied* 26 NY2d 883 [1970]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We disagree with the majority, however, that Supreme Court erred in determining as a matter of law that Lisconish was not a permissive user of Santo's vehicle at the time of the accident. In our view, the court properly granted the motion inasmuch as Santo submitted substantial evidence sufficient to rebut the statutory presumption set forth in Vehicle and Traffic Law § 388 (1). For that reason, we respectfully dissent.

"It is well settled that Vehicle and Traffic Law § 388 (1) creates a strong presumption that the driver of a vehicle is operating it with the owner's permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary" (*Liberty Mut. Ins. Co. v General Acc. Ins. Co.*, 277 AD2d 981, 981-982 [4th Dept 2000] [internal quotation marks omitted]).

Here, Santo effectively rebutted the presumption through the submission of a set of written employee rules, which had been put in place eight days before the accident. Santo held a mandatory employee meeting at which the employees were given the new rules. In addition, a consultant spoke to the employees at the meeting about the new rules, which prohibited the "[u]nauthorized use of company property or vehicles for anything other than company activities," "[o]perating any company vehicles or equipment while under the influence of drugs or alcohol" and "[w]orking under the influence of drugs or alcohol." Lisconish signed the new rules and certified that he had read and understood them and Santo's policies.

Lisconish further testified at his deposition that he believed that he had Santo's implied consent to use the vehicle for personal reasons, but we note that his subjective belief was based entirely on instances that took place prior to the implementation of the new employee rules. It is well settled that "an at-will employment relationship and the frequent contact between an employee and employer demand compliance with restrictions on vehicle operation placed on the employee. As a result of this relationship, it is reasonable for an employer to expect employees to comply with its use restrictions" (*Murzda v Zimmerman*, 99 NY2d 375, 381 [2003]). Therefore, after the policy was put in place, Lisconish was expected to abide by it. Moreover, Lisconish does not allege that Santo gave him consent on the day of the accident to use the vehicle for personal reasons.

Lisconish also testified at his deposition that he knew that, at all times during his employment, he was prohibited from operating the Santo vehicle after consuming alcohol. Lisconish nevertheless used Santo's vehicle to facilitate his bar-hopping and binge-drinking across a substantial portion of New York State, rendering himself so intoxicated that he did not recall the circumstances of the accident. Thereafter, Lisconish failed to report the accident to Santo until questioned about it a week later, thus evidencing his guilty knowledge that he did not have his employer's permission to use the vehicle for non-work-related activities during the relevant time period (*see id.* at 382 n 4).

For the above reasons, we conclude that Santo cannot be held liable for Lisconish's negligence on the day of the accident, and we would therefore affirm the order granting its motion for summary judgment dismissing the complaint against it.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1033

KA 12-02285

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

SHARAD JILES, DEFENDANT-APPELLANT.

EDELSTEIN & GROSSMAN, NEW YORK CITY (JONATHAN I. EDELSTEIN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered December 6, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree (two counts), robbery in the third degree (two counts) and criminal possession of a weapon in the second degree (two counts).

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

Opinion by WHALEN, P.J.: When citizens go about their lives with cell phones turned on, the phones can electronically register with the nearest cell tower every few seconds whether or not the phones are actively in use, and the business records of service providers can therefore contain information about the location of phones and their users at specific dates and times as the users travel the highways and byways of our state and nation (*see generally Zanders v Indiana*, 73 NE3d 178, 182 [Ind 2017]; *New Jersey v Earls*, 214 NJ 564, 576-577, 70 A3d 630, 637 [2013]). In this case, the People used historical cell site location information from service provider records to place defendant in the vicinity of a murder scene, and defendant unsuccessfully moved prior to trial to have the location information suppressed, claiming that the acquisition of that information was a search requiring a warrant supported by probable cause under both the Fourth Amendment to the United States Constitution and article I, § 12 of the New York Constitution. For the reasons that follow, we conclude that a warrant was not required under the circumstances here. We also reject defendant's further contention pursuant to *Batson v Kentucky* (476 US 79 [1986]). Accordingly, we conclude that the judgment of conviction should be affirmed.

I

Defendant's conviction arises from a robbery in which he and two unidentified accomplices held four men at gunpoint in an apartment and took money or property from at least two of the men. Another man came to the apartment while the robbery was in progress and refused to be tied up, and a struggle ensued during which that man sustained fatal gunshot wounds. One of the victims of the robbery told the police that defendant was one of the perpetrators, and that defendant had called him on the date of the incident. The People then obtained defendant's cell phone records for a four-day period beginning on the date of the robbery by means of a court order issued upon a showing of less than probable cause pursuant to the federal Stored Communications Act (*see* 18 USC § 2703 [c], [d]; *see generally Matter of 381 Search Warrants Directed to Facebook, Inc. [New York County Dist. Attorney's Off.]*, 29 NY3d 231, 241-242 [2017]). The records included location information establishing that defendant called the relevant robbery victim multiple times from the general vicinity of the crime scene shortly before the robbery occurred. Defendant moved to suppress the location information, but not the portions of the records establishing that he called the victim. County Court denied the motion, and the location information was presented to the jury at trial. The jury convicted defendant of, inter alia, two counts each of murder in the second degree (Penal Law § 125.25 [1], [3]) and robbery in the first degree (§ 160.15 [2]). Defendant appeals from the judgment of conviction.

II

We first address defendant's contention that the court erred in denying his *Batson* applications concerning the People's use of peremptory challenges to exclude two black prospective jurors. With respect to the first prospective juror, defendant pointed out that the People had not asked her any questions, and that she had said that her work on her dissertation as a graduate student would not interfere with her ability to serve as a juror. The prosecutor then stated, inter alia, that she challenged the first prospective juror because she was studying psychology. Defendant responded that the prospective juror's status as a student was "not an extraordinary factor," but the court nonetheless denied his *Batson* application. With respect to the second prospective juror, defendant asserted that the People were engaging in a pattern of discriminatory strikes, and that the prospective juror had "indicat[ed] no bias." The prosecutor explained that she challenged the second prospective juror because of an answer she had given to a question concerning accomplice liability, and the court again denied defendant's application.

Inasmuch as the prosecutor offered race-neutral reasons for the challenges and the court thereafter "ruled on the ultimate issue" by determining, albeit implicitly, that those reasons were not pretextual (*People v Smocum*, 99 NY2d 418, 423 [2003]; *see People v Dandridge*, 26 AD3d 779, 780 [4th Dept 2006], *lv denied* 9 NY3d 1032 [2008]), the issue of the sufficiency of defendant's prima facie showing of

discrimination at step one of the *Batson* analysis is moot (*see Smocum*, 99 NY2d at 423; *People v Mallory*, 121 AD3d 1566, 1567 [4th Dept 2014]; *cf. People v Bridgeforth*, 28 NY3d 567, 575-576 [2016]). With respect to the merits of defendant's contention, however, we conclude that the court did not abuse its discretion in crediting, as nonpretextual, reasons offered by the prosecutor for each of the challenges (*see People v Ramos*, 124 AD3d 1286, 1287 [4th Dept 2015], *lv denied* 25 NY3d 1076 [2015], *reconsideration denied* 26 NY3d 933 [2015]), i.e., the first prospective juror's status as a psychology student (*see People v Ross*, 83 AD3d 741, 742 [2d Dept 2011], *lv denied* 17 NY3d 800 [2011]; *People v Quiles*, 74 AD3d 1241, 1243-1244 [2d Dept 2010]; *see generally People v Wilson*, 43 AD3d 1409, 1411 [4th Dept 2007], *lv denied* 9 NY3d 994 [2007]), and the second prospective juror's accomplice-liability-related answer that the People considered unfavorable to their theory of the case (*see generally People v Hecker*, 15 NY3d 625, 650 [2010]).

Although defendant contends that the first prospective juror's status as a psychology student was a pretext for discrimination because it did not relate to the facts of the case, he failed to preserve that specific contention for our review (*see People v Holloway*, 71 AD3d 1486, 1486-1487 [4th Dept 2010], *lv denied* 15 NY3d 774 [2010]; *see generally Smocum*, 99 NY2d at 422). In any event, we conclude that defendant's contention is without merit. The lack of a relationship between a race-neutral reason for a peremptory challenge and the facts of a case does not automatically establish that the reason is pretextual (*see People v Black*, 15 NY3d 625, 664 [2010], *cert denied* 563 US 947 [2011]; *People v Harrison*, 124 AD3d 499, 499-500 [1st Dept 2015], *lv denied* 27 NY3d 998 [2016]; *Ross*, 83 AD3d at 741-742). We note that the record does not establish that the prosecutor engaged in disparate treatment of other panelists similarly situated to the first prospective juror (*see People v Toliver*, 102 AD3d 411, 412 [1st Dept 2013], *lv denied* 21 NY3d 1011 [2013], *reconsideration denied* 21 NY3d 1077 [2013]). Defendant's claim of pretext based on the allegedly disparate treatment of the second prospective juror and a panelist later seated as an alternate juror is unpreserved for our review because defendant did not renew his *Batson* application after the prosecutor failed to challenge the latter panelist (*see id.* at 412; *People v Hardy*, 61 AD3d 616, 616 [1st Dept 2009], *lv denied* 13 NY3d 744 [2009]), and we decline to exercise our power to review that claim as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

III

We now turn to defendant's cell site location information, and we conclude that the acquisition of that information was not a search requiring a warrant under either the federal or state constitution. As the People point out, this case involves only *historical* cell site location information, contained in the business records of defendant's service provider, which placed his phone within a certain cell site "sector" at the time he *used* the phone to make calls, send text messages, or receive calls or messages.

Under these circumstances, we conclude that the acquisition of the cell site location information was not a search under the Fourth Amendment to the federal constitution because defendant's use of the phone constituted a voluntary disclosure of his general location to his service provider, and a person does not have a reasonable expectation of privacy in information voluntarily disclosed to third parties (*see United States v Graham*, 824 F3d 421, 427-432 [4th Cir 2016]; *United States v Carpenter*, 819 F3d 880, 885-887 [6th Cir 2016], *cert granted* ___ US ___, 137 S Ct 2211 [2017]; *Matter of Application of United States for Historical Cell Site Data*, 724 F3d 600, 613-615 [5th Cir 2013]; *see also United States v Thompson*, 866 F3d 1149, 1155-1160 [10th Cir 2017]; *see generally Smith v Maryland*, 442 US 735, 741-745 [1979]; *People v Di Raffaele*, 55 NY2d 234, 241-242 [1982]). In contending otherwise, defendant relies on *United States v Jones* (565 US 400 [2012]) — particularly Justice Sotomayor's concurring opinion in that case (565 US at 413-418) — and *Riley v California* (___ US ___, 134 S Ct 2473 [2014]). In our view, that reliance is misplaced. *Jones* is distinguishable because it involved direct surveillance of the defendant by the police using a GPS device as opposed to information that the defendant had voluntarily disclosed to a third party (565 US at 403; *see Graham*, 824 F3d at 435; *Nebraska v Jenkins*, 294 Neb 684, 698-700, 884 NW2d 429, 441-442 [2016]). Notwithstanding Justice Sotomayor's suggestion that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties" (*Jones*, 565 US at 417 [Sotomayor, J., concurring]), we remain bound by the third-party doctrine when interpreting the Fourth Amendment "[u]ntil a majority of justices on the [Supreme] Court instructs us otherwise" (*Thompson*, 866 F3d at 1159). *Riley*, in turn, is distinguishable because it involved an inspection of the *contents* of the defendant's phone, rather than mere location information (___ US at ___; 134 S Ct at 2480-2481; *see Carpenter*, 819 F3d at 889; *Jenkins*, 294 Neb at 700-702, 884 NW2d at 442-443).

We recognize that certain other states have afforded cell site location information greater protection under their state constitutions than it is afforded under the federal constitution (*see e.g. Massachusetts v Augustine*, 467 Mass 230, 251-255, 4 NE3d 846, 863-866 [2014]; *Earls*, 214 NJ at 588-589, 70 A3d at 644),[1] and that the Court of Appeals has at times interpreted article I, § 12 of the New York Constitution more broadly than the identical language of the Fourth Amendment (*see e.g. People v Weaver*, 12 NY3d 433, 445-447 [2009]; *People v Torres*, 74 NY2d 224, 228-231 [1989]). We nonetheless conclude, consistent with the determination of the Court of Appeals with respect to roughly analogous telephone billing records, that there is "no sufficient reason" to afford the cell site location information at issue here greater protection under the state constitution than it is afforded under the federal constitution (*Di*

[1] We note that *Earls* involved location information obtained by the police in real time rather than historical cell site location information (*see Earls*, 214 NJ at 571, 70 A3d at 633-634).

Raffaele, 55 NY2d at 242; *see People v Guerra*, 65 NY2d 60, 63-64 [1985]; *People v Hall*, 86 AD3d 450, 451-452 [1st Dept 2011], *lv denied* 19 NY3d 961 [2012], *cert denied* 568 US 1163 [2013]). To the extent that "cell phone users may reasonably want their location information to remain private" under these circumstances, their recourse is "in the market or the political process" (*Application of United States for Historical Cell Site Data*, 724 F3d at 615).

IV

As a final matter, we agree with the People that any error in the court's refusal to suppress defendant's cell site location information is harmless. The evidence of defendant's identity as a participant in the crime is overwhelming, and there is no reasonable possibility that the verdict would have been different if the location information had been suppressed (*see generally People v Allen*, 24 NY3d 441, 450 [2014]; *People v Crimmins*, 36 NY2d 230, 237 [1975]). Both robbery victims were well acquainted with defendant and provided identification testimony at trial, and their testimony was corroborated by the portions of the phone records that defendant did not seek to suppress, which established his repeated calls to one of the victims on the date of the incident.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1056

CA 16-01856

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

IN THE MATTER OF THE APPLICATION OF CITY OF SYRACUSE INDUSTRIAL DEVELOPMENT AGENCY, PETITIONER-RESPONDENT, PURSUANT TO ARTICLE 4 OF THE EMINENT DOMAIN PROCEDURE LAW, TO ACQUIRE TITLE TO CERTAIN REAL PROPERTY GENERALLY IDENTIFIED AS 100-08 ONONDAGA STREET EAST & WARREN STREET IN THE CITY OF SYRACUSE, NEW YORK AND MORE PARTICULARLY IDENTIFIED AS SBL NO. 101.-09-01.0.

MEMORANDUM AND ORDER

AMADEUS DEVELOPMENT, INC., CLAIMANT-RESPONDENT, FINANCITECH, LTD., CLAIMANT-APPELLANT.

MAYNARD O'CONNOR SMITH & CATALINOTTO, LLP, ALBANY (JUSTIN W. GRAY OF COUNSEL), FOR CLAIMANT-APPELLANT.

ROBINSON BROG LEINWAND GREENE GENOVESE & GLUCK, P.C., NEW YORK CITY (ROGER A. RAIMOND OF COUNSEL), FOR CLAIMANT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (MARK R. MCNAMARA OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 25, 2016. The order granted the motions of claimant Amadeus Development, Inc. and petitioner for summary judgment, deemed null and void mortgages from GML Syracuse, LLC, to claimant Financitech, Ltd., and dismissed the claim of Financitech, Ltd. for just compensation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating from the first and second ordering paragraphs the language "null and void and extinguished of record" and substituting therefor the language "subordinate to the judgment lien of claimant Amadeus Development, Inc. against GML Syracuse, LLC," and denying the motion of petitioner and reinstating the claim of claimant Financitech, Ltd., and as modified the order is affirmed without costs.

Memorandum: This case arises out of the redevelopment of the historic Hotel Syracuse in downtown Syracuse, New York. In August 2008, claimant Financitech, Ltd. (Financitech) obtained two mortgages on the hotel property from the property's then owner, GML Syracuse, LLC (GML Syracuse), in the amount of $5,000,000 and $165,000. GML Syracuse conveyed the mortgages to Financitech and an affiliated

company, FNCTC Schiel, LLC (FNCTC), as security for a guaranty, also made by GML Syracuse, on certain financial obligations incurred by GML Syracuse's affiliate, Ameris Holdings, Ltd. (Ameris). Soon thereafter, Ameris defaulted on its financial obligations, and GML Syracuse failed to tender payment due as required by the guaranty.

In January 2013, Financitech commenced an action to foreclose the two subject mortgages. In that action, both GML Syracuse and claimant Amadeus Development, Inc. (Amadeus), a judgment creditor of GML Syracuse, were named as defendants. Financitech moved for summary judgment seeking, inter alia, foreclosure of the mortgages. As pertinent here, Amadeus opposed Financitech's motion on the ground that the mortgages constituted fraudulent conveyances pursuant to the Debtor and Creditor Law and thus should be considered null and void. Supreme Court denied Financitech's motion, determining, inter alia, that there were material issues of fact whether the mortgages were fraudulent conveyances.

While Financitech's appeal in the foreclosure action was pending, petitioner, City of Syracuse Industrial Development Agency (SIDA), commenced the instant proceeding to acquire the hotel property through the exercise of eminent domain. Because SIDA had acquired the hotel property, we dismissed Financitech's appeal in the foreclosure action as moot (*Financitech, Ltd. v GML Syracuse LLC*, 129 AD3d 1552 [4th Dept 2015]).

Based upon their respective interests in the mortgages and a judgment lien on the hotel property, Financitech and Amadeus were named as condemnees in this EDPL proceeding (*see* EDPL 103 [C]), and they filed claims for just compensation pursuant to EDPL 503 (B). Amadeus thereafter moved for summary judgment voiding Financitech's mortgages as fraudulent conveyances pursuant to the Debtor and Creditor Law or, alternatively, subordinating the mortgages to Amadeus's judgment lien against GML Syracuse, which was recorded after the subject mortgages. SIDA moved for summary judgment dismissing Financitech's claim for just compensation inasmuch as Financitech lacked standing in the EDPL proceeding because its mortgage interests were null and void. Financitech now appeals from an order that granted the motions, deemed Financitech's mortgages null and void, and dismissed Financitech's claim for just compensation.

At the outset, we reject Financitech's contention that Amadeus's motion for summary judgment is barred by the doctrine of res judicata. Although Amadeus raised the issue whether the mortgages constituted fraudulent conveyances pursuant to Debtor and Creditor Law §§ 273, 274, and 275 when it opposed Financitech's motion for summary judgment in the foreclosure action, there was not a final determination on the merits with respect to that issue (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]). The doctrine of res judicata is therefore inapplicable.

Contrary to Financitech's further contention, claims for fraudulent conveyances under Debtor and Creditor Law §§ 273, 274, and 275 "are not subject to the particularity requirement of CPLR 3016,

because they are based on constructive fraud" (*Ridinger v West Chelsea Dev. Partners LLC*, 150 AD3d 559, 560 [1st Dept 2017]; *see Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 149-150 [2d Dept 2009]). Also contrary to Financitech's contention, Amadeus's notice of appearance and demand for just compensation is sufficient inasmuch as it complies with EDPL 504 (*see Matter of Village of Haverstraw v Ray Riv. Co., Inc.*, 137 AD3d 800, 801 [2d Dept 2016]).

We agree with Financitech that Supreme Court erred in determining that the mortgages constituted fraudulent conveyances pursuant to Debtor and Creditor Law § 275. We conclude that there are material issues of fact whether GML Syracuse "intended or believed that [it] would incur debts beyond [its] ability to pay" as the debts mature, which is a necessary element of a fraudulent conveyance under section 275 (*Taylor-Outten v Taylor*, 248 AD2d 934, 935 [4th Dept 1998]).

We further conclude, however, that the court properly determined that the mortgages constituted fraudulent conveyances pursuant to Debtor and Creditor Law §§ 273 and 274. As required by each of those sections, Amadeus established as a matter of law that the mortgages were given without fair consideration (*see* §§ 273, 274; *Board of Mgrs. of Loft Space Condominium v SDS Leonard, LLC*, 142 AD3d 881, 883 [1st Dept 2016]; *Joslin v Lopez*, 309 AD2d 837, 838-839 [2d Dept 2003]). "Fair consideration is given for property, or obligation, a. [w]hen in exchange for such property or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or b. [w]hen such property, or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained" (§ 272). The underlying purpose of New York's fraudulent conveyance statutes "is to enable a creditor to obtain his [or her] due despite efforts on the part of a debtor to elude payment" (*Hearn 45 St. Corp. v Jano*, 283 NY 139, 142 [1940]). Thus, when determining whether consideration given by a debtor to a third party or affiliate constitutes fair consideration, courts look to whether "the debtor's net worth has been preserved" (*Rubin v Manufacturers Hanover Trust Co.*, 661 F2d 979, 991 [2d Cir 1981]). Here, in exchange for the mortgages conveyed by GML Syracuse in the combined amount of $5.165 million, Financitech loaned GML Syracuse's affiliate, Ameris, $165,000, and FNCTC extended the maturity date of a $1.5 million loan to Ameris from August 28, 2008 to October 31, 2008. Although GML Syracuse may have received some indirect benefit as a result of the consideration received by Ameris inasmuch as Ameris held a 95% interest in GML Syracuse and was GML Syracuse's sole source of capital, we nevertheless conclude that the consideration received does not constitute fair consideration within the meaning of section 272. Nothing in this transaction had the effect of "conserving [GML Syracuse's] estate for the benefit of creditors" (*Rubin*, 661 F2d at 992).

Amadeus also established as a matter of law that GML Syracuse was insolvent within the meaning of Debtor and Creditor Law § 271, which is a "prerequisite[] to a finding of constructive fraud under section 273" (*Joslin*, 309 AD2d at 838). Amadeus submitted financial records

of GML Syracuse from the third quarter of 2008 and expert testimony that established that, at the time of the transaction, the "fair salable value of [GML Syracuse's] assets [was] less than the amount that [would] be required to pay [its] probable liability on [its] existing debts as they bec[a]me absolute and due" (§ 271 [1]). Similarly, Amadeus established through its submissions that the mortgages constituted fraudulent conveyances pursuant to section 274, which provides that "[e]very conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors . . . without regard to his actual intent" (§ 274; *see Matter of Chin*, 492 BR 117, 129 [Bankr ED NY 2013]). In opposition to Amadeus's motion, Financitech failed to raise a triable issue of fact (*see Cadle Co. v Organes Enters., Inc.*, 29 AD3d 927, 928-929 [2d Dept 2006]).

Although the court properly determined that the mortgages constituted fraudulent conveyances, we conclude that the remedies granted by the court, i.e., deeming the subject mortgages null and void and dismissing Financitech's claim for just compensation in the instant EDPL proceeding, were in error. As relevant here, Debtor and Creditor Law § 278 affords a creditor the ability to have a fraudulent "conveyance set aside . . . *to the extent necessary to satisfy his claim*" (§ 278 [1] [a] [emphasis added]). Fraudulent conveyances, however, "are binding on all non-creditors, including the transferor" (*Eberhard v Marcu*, 530 F3d 122, 131 [2d Cir 2008]). Thus, we conclude that, rather than deeming the mortgages null and void, the court should have granted the alternative relief sought by Amadeus and subordinated Financitech's mortgage interests to Amadeus's judgment lien, which, in this case, best advances the purpose of the fraudulent conveyance statutes (*see Hearn 45 St. Corp.*, 283 NY at 142; *see also Joslin*, 309 AD2d at 839). We therefore modify the order by vacating those parts of the order that voided the mortgages and instead directing that the mortgages are subordinate to Amadeus's judgment lien against GML Syracuse.

Thus, because Financitech's mortgages are valid, we further conclude that the court erred in granting SIDA's motion for summary judgment dismissing Financitech's claim inasmuch as Financitech has standing to assert a claim for just compensation in the instant EDPL proceeding (*see generally* EDPL 503 [B]; *Matter of Port of N.Y. Auth.*, 12 AD2d 18, 20 [1st Dept 1960]). We therefore further modify the order accordingly.

In light of our determinations, we need not address Financitech's remaining contentions.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1119

CA 16-02179

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

EUNICE M. CARACAUS, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

CONIFER CENTRAL SQUARE ASSOCIATES,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WALTER D. KOGUT, P.C., FAYETTEVILLE (WALTER D. KOGUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEGAL SERVICES OF CNY, INC., SYRACUSE (ERIC TOHTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Oswego County Court (Walter W. Hafner, Jr., J.), dated January 23, 2013. The order denied the motion of defendant to dismiss the amended complaint.

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

Opinion by NEMOYER, J.:

We hold that, after a tenant successfully defends an action commenced by his or her landlord, the tenant may commence a new plenary action against the landlord to recover the attorneys' fees to which he or she may be entitled under Real Property Law § 234.

FACTS

Defendant (hereafter, landlord) owns and operates a low-income apartment complex in the Village of Central Square, Oswego County. Plaintiff (hereafter, tenant) rented an apartment in this complex. The lease included the following clause:

> "If [landlord] is forced to evict [tenant], [tenant] shall pay [landlord] the expense incurred in obtaining possession of the apartment and all other damages sustained by [landlord], *including attorneys' fees*" (emphasis added).

It is undisputed that this clause triggered Real Property Law § 234, which confers upon tenants the "same benefit [to attorneys' fees as] the lease imposes in favor of the landlord" (*Matter of Duell v Condon*,

84 NY2d 773, 780 [1995]).[1]

The parties' relationship evidently soured, and the landlord commenced a summary eviction proceeding against the tenant in the Central Square Village Court. In the "wherefore" clause of her answer, the tenant included a boilerplate, one-line request for attorneys' fees, but she identified no legal theory for that request. The landlord concedes that this cursory request for attorneys' fees did not constitute a counterclaim under Real Property Law § 234. The Village Court conducted a hearing and rendered a judgment evicting the tenant, but the Oswego County Court (Hafner, J.) ultimately reversed and dismissed the eviction petition. No further proceedings were conducted in connection with this eviction petition.

Approximately one month after the reversal, the landlord filed a new summary eviction petition against the tenant in Village Court. The tenant again included a boilerplate, one-line request for attorneys' fees in the "wherefore" clause of her answer; the landlord again concedes that this cursory request for attorneys' fees did not constitute a counterclaim under Real Property Law § 234. The second petition was tried before a jury, which returned a verdict in the tenant's favor.

The tenant then commenced the instant action against the landlord in County Court, seeking $25,000 in attorneys' fees in connection with both eviction proceedings. In her amended complaint, the tenant explained that "[b]ringing such an action is preferable to a motion or proceeding in the Village Court . . . since the jurisdictional limit of the amount awardable in the Village Court might otherwise be held to bar much of the legitimate expense incurred herein and contemplated to be awardable by [section 234]" (*see* UJCA 202, 208 [monetary jurisdiction of Town and Village courts generally limited to $3,000]).

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[1] Section 234 provides as follows:

"Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant."

The landlord, citing *930 Fifth Corp. v King* (42 NY2d 886 [1977]), moved to dismiss the instant action under CPLR 3211 (a) (7), arguing that the New York courts have "long held . . . that attorneys' fees for one action may not be sought in a separate action such as this." "Pursuant to that Court of Appeals authority," the landlord reasoned, the amended complaint "fails to state a cause of action and . . . should [be] dismiss[ed], with prejudice."

County Court denied the landlord's motion to dismiss. "Contrary to [the landlord's] allegation," the court wrote, "the express language of Real Property Law § 234 does not require a tenant who prevails in an eviction proceeding to raise that issue [i.e., attorneys' fees] during the summary proceeding." *930 Fifth Corp.* is distinguishable, wrote County Court, because "[u]nlike the landlord in [that case], [the tenant] did request attorneys' fees in the action below [and thus] did not waive her statutory right for attorneys' fees under [section] 243 [sic]." The court further observed that the landlord's "interpretation of *930 Fifth* [*Corp.*] would completely negate the legislative intent of [section 234], which is to level the playing field between landlords and tenants[, because, under the landlord's] interpretation of [*930 Fifth Corp.*, the tenant's] award would be limited to the monetary jurisdiction of $3,000, even if the actual expenses were higher."

Three years later, the landlord moved to transfer the still-unresolved action to Village Court. The landlord cited no statutory or decisional authority for its motion to transfer, instead arguing only that the Village Court judge who heard the eviction cases was "in the best position to evaluate and resolve the [tenant]'s attorney fee request still pending before him in his court." County Court (Todd, J.) denied the landlord's motion to transfer, reasoning that it was effectively an improper effort to reargue and/or renew the prior dismissal motion decided by Judge Hafner.

The landlord now appeals from both Judge Hafner's order denying its motion to dismiss (appeal No. 1) and Judge Todd's order denying its motion to transfer (appeal No. 2). For the reasons that follow, both orders should be affirmed.

DISCUSSION

The Motion to Dismiss (Appeal No. 1)

We turn first to the landlord's appeal from the denial of its motion to dismiss. On that score, the landlord contends that the tenant's plenary action runs afoul of the rule against claim splitting and should therefore be dismissed. We disagree.

I

At a high level of generality, the "rule prohibiting claim splitting prohibits two actions on the same claim or parts thereof" (*Charles E. S. McLeod, Inc. v Hamilton Moving & Stor.*, 89 AD2d 863, 864 [2d Dept 1982]). The precise origins of the rule are lost to

history, but it was well established in New York by the early nineteenth century (*see e.g. Smith v Jones*, 15 Johns 229, 229-230 [Sup Ct 1818]). The claim splitting rule is best understood as a species of the genus *res judicata* (*see Matter of Reilly v Reid*, 45 NY2d 24, 27-31 [1978]; *Sannon-Stamm Assoc., Inc. v Keefe, Bruyette & Woods, Inc.*, 68 AD3d 678, 678 [1st Dept 2009]), and it thus derives its conceptual force from "the principle that the public interest demands that a party not be heard a second time on a cause of action or an issue which he has already had an opportunity to litigate" (*Kromberg v Kromberg*, 56 AD2d 910, 912 [2d Dept 1977], *affd* 44 NY2d 718 [1978]).

As a "narrow doctrine," the claim splitting rule is "most frequently invoked in landlord-tenant cases [involving] attorney's fees" (*Murray, Hollander, Sullivan & Bass v HEM Research*, 111 AD2d 63, 66 [1st Dept 1985]). The leading case in this context is *930 Fifth Corp.* (42 NY2d at 886). In *930 Fifth Corp.*, a co-op prevailed in a summary proceeding against a proprietary tenant in Civil Court; the co-op thereafter commenced a new plenary action against the proprietary tenant in Supreme Court to recover the attorneys' fees it allegedly incurred in connection with the prior summary proceeding. The Court of Appeals unanimously affirmed the dismissal of the plenary action, holding that the procedural course charted by the co-op amounted to the "splitting of a cause of action which is prohibited" (*id.* at 887). One year later, the Court of Appeals reiterated its holding in *930 Fifth Corp.* and held that a landlord who failed to seek attorneys' fees in a prior action against a tenant could not assert a counterclaim for such fees in a subsequent action by the tenant (*see Emery Roth & Sons v National Kinney Corp.*, 44 NY2d 912, 914 [1978], *rearg denied* 45 NY2d 776 [1978]).

Although the Court of Appeals has not spoken on this subject since the *Emery Roth & Sons* decision in 1978, the Appellate Divisions have, many times. A "separate, plenary action to recover [an] attorney's fee [incurred in a prior action] constitutes the splitting of a cause of action, which is prohibited," wrote a Second Department panel in dismissing a landlord's claim for counsel fees incurred in prior litigation with a tenant (*Landmark Props. v Olivo*, 62 AD3d 959, 961 [2d Dept 2009]). The First Department, similarly, wrote that "the prohibition against the splitting of causes of action requires that such fees be sought within the action in which they are incurred, and not in a subsequent action" (*Wavertree Corp. v 136 Waverly Assoc.*, 258 AD2d 392, 392 [1st Dept 1999] [refusing landlord's bid for counsel fees incurred in prior action against tenant]; *see also Lupoli v Venus Labs.*, 287 AD2d 488, 489 [2d Dept 2001] [deploying *Wavertree* formulation of claim splitting rule to same end]). And in a slightly different formulation of the claim splitting rule in this context, the Second Department affirmed the dismissal of a plenary action for attorneys' fees incurred in a prior action because such an "action, in which the plaintiff seeks . . . to recover legal fees and disbursements incurred in bringing a prior action and defending against the defendant's counterclaim in that action, constitutes the splitting of a cause of action, which is prohibited" (*222 Bloomingdale Rd. Assoc. v NYNEX Props. Co.*, 269 AD2d 525, 526 [2d Dept 2000]).

Each of the foregoing cases are alike in one key respect: they enforced the claim splitting rule against a landlord-plaintiff who sought attorneys' fees expended in *prosecuting* a prior action against the tenant-defendant. In other words, they each involve a landlord who successfully sued a tenant, and who later sued the same tenant for the attorneys' fees incurred in the prior action. The landlords were commencing new actions (or interposing new counterclaims) to secure additional relief that could have been obtained in their prior actions, and *that*, each of the foregoing cases held, was barred by the claim splitting rule.

This common thread makes good sense when considered in conjunction with the longstanding rationale for the claim splitting rule: " 'If a party will sue and recover for a portion, he shall be barred of the residue' " (*White v Adler*, 289 NY 34, 42 [1942], *rearg denied* 289 NY 647 [1942], quoting *Bendernagle v Cocks*, 19 Wend 207, 215 [Sup Ct 1838]). Viewed in that light, the claim splitting rule exists to prevent a *plaintiff* from harassing a defendant with multiple suits where one suit would have sufficed to afford the plaintiff full relief (*see id.* at 42-44; *Roe v Smyth*, 278 NY 364, 368-369 [1938]). To be sure, this rule has been extended to situations where the original defendant asserts a counterclaim, takes a partial recovery thereon, and then commences a plenary action for the balance of the counterclaim (*see Silberstein v Begun*, 232 NY 319, 323-324 [1922]; *see also Columbia Corrugated Container Corp. v Skyway Container Corp.*, 37 AD2d 845, 845-846 [2d Dept 1971], *affd* 32 NY2d 818 [1973]). But even in that scenario, the party subject to the claim splitting bar (i.e., the original defendant) acted as the plaintiff with respect to the particular claim being re-asserted in a plenary action.

The claim splitting rule thus applies only when a plaintiff commences a new action (or interposes a new counterclaim) to expand his or her recovery from a prior action, not when the defendant in a prior action commences a new action against the former plaintiff to vindicate his or her own affirmative claims. In the latter instance, the defendant-turned-plaintiff did not assert any claim until the new action, and thus could not have impermissibly "split" such a claim across multiple actions (*see Matter of East 51st St. Crane Collapse Litig.*, 103 AD3d 401, 403 [1st Dept 2013]). After all, a party must have asserted a claim in one action before he or she can be charged with splitting that claim in a subsequent action. Were this an incorrect statement of the law, the Court of Appeals would not have written long ago that "the rule against splitting does not forbid the use of part of a claim as a set-off, retaining the rest for later use [in a new action]" (*Blake v Weiden*, 291 NY 134, 140 [1943]). Quite the contrary, if the claim splitting rule bars claims asserted in a new action by the former defendant against the former plaintiff, the *Blake* court would have written precisely the opposite and prohibited the use of part of a claim as a set-off while retaining the rest for later use.

II

Applying the traditional understanding of the claim splitting rule discussed above and embodied in the landlord-tenant case law, the

landlord's bid for dismissal on claim splitting grounds must fail. It was the landlord, not the tenant, who instituted the two prior proceedings in Village Court. The tenant successfully defended herself against the landlord's claims, but she did not assert an affirmative claim until the instant plenary action. Indeed, the landlord's appellate brief explicitly concedes that the tenant did not interpose a Real Property Law § 234 counterclaim for attorneys' fees in either of the two prior proceedings. Thus, because the instant action is the tenant's first assertion of an affirmative claim for relief under section 234, the claim splitting rule poses no bar to her recovery. Put simply, the tenant cannot be guilty of claim splitting because, until the instant action, there was no claim to split.

III

We recognize that the First Department held otherwise in *O'Connell v 1205-15 First Ave. Assoc., LLC* (28 AD3d 233 [1st Dept 2006]), but we decline to follow that case. In *O'Connell*, a landlord commenced an action against a tenant seeking "use and occupancy, ejectment, damages for fraud, rescission of the lease based on fraud and a declaration that tenant's 'sweetheart lease' was void or voidable" (*id.* at 234). The landlord's action was dismissed on summary judgment, and the tenant then commenced a new action against the landlord for the attorneys' fees he incurred in defending the prior action. The First Department affirmed the subsequent dismissal of the tenant's action, reasoning that "the prohibition against the splitting of causes of action required [the tenant] to seek attorneys' fees within the action in which they were incurred, not a subsequent action" (*id.*). To support this holding, the First Department cited *Wavertree* and noted that *Wavertree* cited *930 Fifth Corp*.

As far as we can discern, *O'Connell* is the first and only appellate decision in this State to apply the claim splitting rule to bar a claim asserted for the first time in a new action by a former defendant against a former plaintiff. The *O'Connell* panel did not explain why the seemingly unremarkable facts in that case warranted such a significant expansion of the claim splitting rule, or how such an expansion could be squared with the Court of Appeals' description of the rule's purpose and scope in *White* and *Blake*. Nor did *O'Connell* cite any precedent supporting the result it reached. To the contrary, the only cases mentioned in the *O'Connell* memorandum (*Wavertree* and *930 Fifth Corp.*) were straightforward applications of the claim splitting rule, as traditionally understood, against landlord-plaintiffs who commenced new actions to recover counsel fees expended in *prosecuting* prior actions against the same tenant-defendants.

But more importantly, *O'Connell* ignores a unique facet of civil practice in this State: "New York does not have a compulsory counterclaim rule," and, thus, a "defendant who fails to assert a counterclaim is not barred . . . from subsequently commencing a new action on that claim" (*Wax v 716 Realty, LLC*, 151 AD3d 902, 904 [2d Dept 2017]; *see Henry Modell & Co. v Minister, Elders & Deacons of Ref. Prot. Dutch Church of City of N.Y.*, 68 NY2d 456, 461-462 [1986], *rearg denied* 69 NY2d 741 [1987]). Under the *O'Connell* panel's

holding, however, a defendant in one action must assert his own separate claim as a counterclaim in the plaintiff's action or be forever barred from raising it in a new action. And *that* is precisely what longstanding New York law does *not* require (*see Henry Modell & Co.*, 68 NY2d at 461-462; *see e.g. Security Trust Co. v Pritchard*, 122 Misc 760, 762 [Sup Ct, Monroe County 1924] ["A defendant, having a valid counterclaim against a plaintiff, is not required to set it up in his answer, but may begin an independent action"]).[2] Indeed, taking *O'Connell* to its logical conclusion, the claim splitting rule becomes the Trojan horse by which New York's permissive counterclaim policy is sacked and replaced with a compulsory counterclaim policy. It comes as little surprise, then, that *O'Connell* has never been cited for the result it reached, and we reject the landlord's plea to do so now.[3]

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[2] There is a narrow exception to the permissive counterclaim rule which forbids the original defendant from commencing a subsequent plenary action on a preexisting claim that would "impair the rights or interests established in the first action" (*Wax*, 151 AD3d at 904; *see Henry Modell & Co.*, 68 NY2d at 462 n 2). In that event, the claim must be presented as a counterclaim in the first action. But this exception has no applicability here. As the First Department recently recognized, a subsequent plenary "action [for] attorneys' fees incurred in [defending a prior] action[] would not 'impair the rights or interests' established in the [prior] action" for purposes of New York's permissive counterclaim rule (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 141 AD3d 464, 467 [1st Dept 2016], *lv granted* 28 NY3d 909 [2016]; *compare 67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888, 890 [2d Dept 2006] [exception to permissive counterclaim rule applied where, under unique procedural history of that case, "consideration of the [plaintiff's plenary] claim for attorneys' fees [incurred in defending prior action commenced by defendant] would require the reconsideration of the issues raised in the prior action"]).

[3] The impact of *O'Connell*'s expansion of the claim splitting rule falls with particular inequity on tenants residing in Towns and Villages not served by a District Court (i.e., all Towns and Villages outside Nassau County and the western half of Suffolk County). Unlike counterclaims filed in the New York City Civil Court (*see* CCA 208 [b]), the District Court (*see* UDCA 208 [b]), and the City Courts outside New York City (*see* UCCA 208 [b]), counterclaims in Town and Village Courts are subject to a $3,000 jurisdictional cap (*see* UJCA 208). Thus, if a tenant must – per *O'Connell* – join any claim for reciprocal attorneys' fees as a counterclaim in the landlord's principal action, then a tenant whose landlord elects to file an eviction petition in a Town or Village Court is effectively limited to spending $3,000 in his or her own defense. That is because, unless the tenant is savvy enough to move to transfer the entire action to a superior court, any amount expended above the cap could not be recovered either in the principal action (by virtue of UJCA 208) or in a new

IV

Finally, we decline the landlord's alternative invitation to treat the boilerplate, one-line requests for attorneys' fees in the tenant's answers in Village Court as the equivalent of a "claim" that triggered the claim splitting rule. As noted above, the landlord explicitly concedes that the tenant's requests for attorneys' fees in her Village Court answers did *not* constitute counterclaims under Real Property Law § 234 (*see generally* CPLR 3019), and it is unclear how, as a formalistic matter, something that is not a counterclaim, a cross claim, or an affirmative cause of action by a plaintiff could ever constitute a "claim" for purposes of the claim splitting rule. Cognizable claims, after all, have ascertainable elements, and the tenant's Village Court answers do not purport to identify any elements or articulate any legal theory under which the Village Court could have awarded her attorneys' fees in the summary proceedings. In our estimation, the bare mention of "attorneys' fees" in the tenant's Village Court answers is nothing more than a disregardable anomaly with "very little tangible existence" (*Cunningham v Platt*, 82 Misc 486, 490 [Sup Ct, Erie County 1913]; *see e.g. Vertical Computer Sys., Inc. v Ross Sys., Inc.,* 59 AD3d 205, 206 [1st Dept 2009] ["appellant's claim for attorney fees, set forth only in its wherefore clause and not in any counterclaims to which it could be deemed an integral part . . . , was not adequately pleaded"]; *compare Marotta v Blau*, 241 AD2d 664, 664-665 [3d Dept 1997] [request for attorneys' fees in "wherefore" clause sufficient to award such fees in connection with distinct counterclaim that was actually pleaded in answer]).

In any event, the claim splitting rule "is one made by judges to promote the public policy of the State [and] should not be applied to frustrate the purpose of its laws or to thwart public policy" (*White*, 289 NY at 44-45 [internal quotation marks omitted]). The Legislature has clearly decreed that tenants shall have a substantive right to attorneys' fees to the same extent as that enjoyed by landlords under a lease (*see* Real Property Law § 234; *Duell*, 84 NY2d at 780). Applying the claim splitting rule to bar an otherwise meritorious Real Property Law § 234 claim simply because the tenant made a fleeting reference to "attorneys' fees" in her Village Court answers would exemplify the sort of rigid, inflexible application of the claim splitting rule that the *White* court cautioned against. The landlord has "not been vexed or harassed, unreasonably, by a multiplicity of actions brought to enforce the liability imposed upon [it] by law," and "in these circumstances the reason for the [claim splitting] rule fails" (*White*, 289 NY at 44).

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action (by virtue of *O'Connell*). It would be particularly unwise, in our view, to hand landlords such a potent weapon: the unilateral power to hamstring their tenants' ability to defend themselves in court. In short, the *O'Connell* rule eviscerates the power-leveling function of Real Property Law § 234 for tenants in Towns and Villages outside Nassau County and the western half of Suffolk County.

* * *

In light of the foregoing, we conclude that Judge Hafner properly denied the landlord's motion to dismiss on claim splitting grounds.[4]

The Motion to Transfer (Appeal No. 2)

We turn now to the landlord's appeal from Judge Todd's denial of its motion to transfer this action from the Oswego County Court to the Central Square Village Court. As a threshold matter, we agree with the landlord that its motion to transfer was not masquerading as an improper motion to reargue or renew its prior motion to dismiss. Although not labeled as such, the landlord's motion to transfer was plainly a motion under article VI, § 19 (b) of the New York Constitution, which provides that, with certain inapplicable exceptions, the "county court may transfer any action or proceeding . . . to any court, other than the supreme court, having jurisdiction of the subject matter within the county provided that such other court has jurisdiction over the classes of persons named as parties" (*see e.g. Matter of Clute v McGill*, 229 AD2d 70, 71-72 [3d Dept 1997], *lv denied* 90 NY2d 803 [1997]; *Spycher v Andrew*, 55 AD2d 715, 716 [3d Dept 1976]). The landlord's motion to dismiss, in contrast, was made under CPLR 3211 (a) (7). It is thus evident that the motion to transfer was not properly denied on the grounds articulated by Judge Todd, i.e., that it was improperly successive.

We nevertheless conclude that the transfer motion was meritless. The Village Court "lack[s] subject matter jurisdiction" over the instant action because "the amount sought [i.e., $25,000] exceed[s] the [Village] court's monetary limits" (*Burke v Aspland*, 56 AD3d 1001, 1002 [3d Dept 2008], *lv denied* 12 NY3d 709 [2009]; *see* UJCA 202 [Town and Village courts "shall have jurisdiction of actions . . . for the recovery of money . . . where the amount sought to be recovered . . . does not exceed $3000"]). As such, this action could not be transferred pursuant to article VI, § 19 (b) of the New York Constitution because the receiving court would not "hav[e] jurisdiction of the subject matter" thereof. On this distinct ground alone we affirm Judge Todd's order denying the landlord's motion to transfer.

CONCLUSION

Accordingly, the orders of the Oswego County Court in each appeal

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[4] Notwithstanding our affirmance of Judge Hafner's order, we reject the tenant's argument that Real Property Law § 234 explicitly permits a party to engage in otherwise prohibited claim splitting. To the contrary, section 234 says that any attorneys' fees obtainable thereunder may only be recovered "as provided by law" (including the claim splitting rule), and the statutory reference to "an action commenced against the landlord" simply clarifies that a tenant's substantive right to attorneys' fees extends to both affirmative and defensive litigation.

should be affirmed.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1120

CA 17-00135

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

EUNICE M. CARACAUS, PLAINTIFF-RESPONDENT,

V OPINION AND ORDER

CONIFER CENTRAL SQUARE ASSOCIATES,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WALTER D. KOGUT, P.C., FAYETTEVILLE (WALTER D. KOGUT OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEGAL SERVICES OF CNY, INC., SYRACUSE (ERIC TOHTZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Oswego County Court (Donald E. Todd, J.), entered January 10, 2017. The order denied the motion of defendant to transfer the action to Central Square Village Court.

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

Same Opinion by NEMOYER, J., as in *Caracaus v Conifer Cent. Sq. Assoc.* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1160

KA 15-00794

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

SCOTT E. BLAUVELT, KYLE C. NORCROSS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

ADAM H. VANBUSKIRK, AUBURN, FOR DEFENDANT-RESPONDENT SCOTT E. BLAUVELT.

GREEN & BRENNECK, SYRACUSE (SCOTT A. BRENNECK OF COUNSEL), FOR DEFENDANT-RESPONDENT KYLE C. NORCROSS.

Appeal from an order of the Cayuga County Court (Elma A. Bellini, J.), entered July 2, 2014. The order granted defendants' motions to dismiss the indictment.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice by granting the People leave to re-present the charges to another grand jury and as modified the order is affirmed.

Memorandum: In this prosecution arising from an altercation that allegedly resulted in serious physical injury to one person (hereafter, victim) and damage to another person's vehicle, the People obtained an indictment charging defendants Scott E. Blauvelt and Kyle C. Norcross with gang assault in the second degree (Penal Law § 120.06), charging Blauvelt with criminal mischief in the third degree (§ 145.05 [2]), and charging Norcross and a third defendant with criminal mischief in the fourth degree (§ 145.00 [3]). County Court granted defendants' motions to dismiss the indictment, concluding in relevant part that there was legally insufficient evidence of serious physical injury to support the gang assault counts and that the conduct of the prosecutor impaired the integrity of the grand jury proceeding. The People appeal with respect to Blauvelt and Norcross. At the outset, we decline to grant Blauvelt's request that we exercise our discretion to dismiss the People's appeal based on their delay in perfecting it (*see* CPL 470.60 [1]; *cf. People v Calaff*, 103 AD3d 500, 500 [1st Dept 2013], *affd* 23 NY3d 89, 101 [2014], *cert denied* ___ US ___, 135 S Ct 273 [2014]). We also note that, on this

appeal by the People, we have no authority to consider the alternative ground for affirmance raised by Blauvelt in his brief, which does not involve an error or defect that "may have adversely affected the appellant" (CPL 470.15 [1]; *see People v Karp*, 76 NY2d 1006, 1008-1009 [1990]; *People v Woodruff*, 4 AD3d 770, 773 [4th Dept 2004]).

We agree with the People that the evidence before the grand jury was legally sufficient to establish that the victim sustained a serious physical injury. While the medical records introduced in evidence were uncertified and were thus hearsay, the victim himself was competent to testify to "readily apparent external physical injuries of which he obviously [had] personal knowledge" (*People v Brandon*, 102 AD2d 832, 833 [2d Dept 1984]), and his testimony concerning the leg injury he sustained in the altercation, i.e., that the injury required surgery, that he took narcotic pain medication for two months, and that he was still using a crutch and experiencing pain and range of motion limitations at the time of the grand jury proceeding more than seven months after the incident, was sufficient to establish a protracted impairment of health and a protracted impairment of the function of his leg (*see* Penal Law § 10.00 [10]; *People v Heyliger*, 126 AD3d 1117, 1119 [3d Dept 2015], *lv denied* 25 NY3d 1165 [2015]; *People v Pittman*, 253 AD2d 694, 694 [1st Dept 1998], *lv denied* 92 NY2d 1052 [1999]; *People v Garcia*, 202 AD2d 189, 190 [1st Dept 1994], *lv denied* 83 NY2d 1003 [1994]; *see generally People v Sponburgh*, 61 AD3d 1415, 1416 [4th Dept 2009], *lv denied* 12 NY3d 929 [2009]).

We agree with the court, however, that the prosecutor engaged in a pervasive pattern of improper conduct at the grand jury proceeding that warranted dismissal of the indictment on the ground that the integrity of the proceeding was impaired (*see People v Thompson*, 22 NY3d 687, 699 [2014], *rearg denied* 23 NY3d 948 [2014]; *see generally* CPL 210.20 [1] [c]; 210.35 [5]; *People v Huston*, 88 NY2d 400, 408-409 [1996]). The prosecutor acted improperly in repeatedly asking leading questions of his witnesses (*see generally People v Ballerstein*, 52 AD3d 1192, 1194 [4th Dept 2008]; *People v Bhupsingh*, 297 AD2d 386, 387-388 [2d Dept 2002]), and in introducing hearsay evidence (*see Huston*, 88 NY2d at 406-407; *People v Pelchat*, 62 NY2d 97, 106 [1984]; *People v Gordon*, 101 AD3d 1473, 1474-1476 [3d Dept 2012]). During his cross-examination of defendants, the prosecutor improperly asked them whether other witnesses were lying (*see People v Washington*, 89 AD3d 1516, 1517 [4th Dept 2011], *lv denied* 18 NY3d 963 [2012]), and he asked Blauvelt, without any evident good faith basis, whether defendants used illegal drugs on the night of the altercation and whether they used steroids in general (*see generally People v De Vito*, 21 AD3d 696, 700-701 [3d Dept 2005]; *People v Ramos*, 139 AD2d 775, 776-777 [2d Dept 1988], *appeal dismissed* 73 NY2d 866 [1989]). "Most egregiously," as described by the court, the prosecutor acted as an unsworn witness by stating personal opinions relevant to material issues during his instructions to the grand jury, i.e., that younger people are more likely than older people to start fights, and that the victim's injuries must have resulted from "a substantial beating" (*see Huston*, 88 NY2d at 407-408; *see generally People v Batashure*, 75 NY2d

306, 307-308 [1990]; *People v Paperno*, 54 NY2d 294, 300-301 [1981]). We remind the People that a prosecutor owes "a duty of fair dealing to the accused" at a grand jury proceeding and, more generally, that a prosecutor "serves a dual role as advocate and public officer," and must "not only . . . seek convictions but [must] also . . . see that justice is done" (*Pelchat*, 62 NY2d at 105; *see Thompson*, 22 NY3d at 697-698; *People v Santorelli*, 95 NY2d 412, 420-421 [2000]; *People v Mott*, 94 AD2d 415, 418 [4th Dept 1983]).

Although we thus conclude that the indictment was properly dismissed, we further conclude, in the exercise of our discretion, that the People should be granted leave to resubmit the charges to another grand jury (*see* CPL 210.20 [4]; *People v Loomis*, 70 AD3d 1199, 1201-1202 [3d Dept 2010]; *see also Huston*, 88 NY2d at 411; *People v Barabash*, 18 AD3d 474, 474 [2d Dept 2005]), and we modify the order accordingly. We note that the prosecutor has offered to recuse himself and seek the appointment of a special prosecutor to handle the resubmission.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1177

KA 15-01256

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEON SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered May 21, 2015. 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 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]). We agree with defendant that his waiver of the right to appeal was not valid because, during the plea colloquy, County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474 [1st Dept 2011], *affd* 19 NY3d 914 [2012]; *see People v Harris*, 125 AD3d 1506, 1506 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]). The court indicated that the waiver of the right to appeal was "[o]ne other condition," and that statement "was immediately preceded by a colloquy concerning the rights automatically forfeited by a guilty plea" (*People v Homer*, 151 AD3d 1949, 1949 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *see People v Sanborn*, 107 AD3d 1457, 1458 [4th Dept 2013]; *see generally People v Lopez*, 6 NY3d 248, 256-257 [2006]). In addition, the court further muddied the distinction by indicating that the waiver of the right to appeal "is separate and part [sic] from your plea of guilty," rather than indicating that it was a condition of the guilty plea but separate from the rights that defendant automatically forfeited by the plea (*see generally Lopez*, 6 NY3d at 256-257). Consequently, " 'the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Cooper*, 136 AD3d 1397, 1398 [4th Dept 2016], *lv denied* 27 NY3d 1067 [2016]; *see Martin*, 88 AD3d at

474). Nevertheless, contrary to defendant's contention, we conclude that the sentence is not unduly harsh or severe.

All concur except PERADOTTO and CURRAN, JJ., who concur in the result in the following memorandum: We respectfully disagree with our colleagues that the waiver of the right to appeal was not valid. In our view, County Court's oral colloquy, coupled with the written waiver of the right to appeal, was adequate to ensure that the waiver of the right to appeal was a knowing and voluntary choice, and we conclude that the valid waiver encompasses defendant's challenge to the severity of the sentence.

At the plea proceeding, the court reviewed the rights that defendant was automatically giving up by pleading guilty, i.e., the right to a jury trial, the right to require the People to prove his guilt beyond a reasonable doubt, and the right to testify or call witnesses on his behalf. After defendant confirmed that he understood the rights being forfeited by the guilty plea, the court asked defendant if he "also [u]nderstood that pleading guilty is the same as being found guilty after a trial," to which defendant responded, "Yes."

The court then explained to defendant: "*One other condition, which is separate and part* [sic] *from your plea of guilty*, and that is that you waive or give up your right to appeal. What that means . . . is what you're doing today is final. This felony plea and conviction will always be on your record, you will have to serve the three-and-one-half years in state prison with two years of post-release supervision we've talked about, and *there is nothing that you or your attorney will ever be able to do in the future to open this case up or to try and start it over again*" (emphasis added). The court then asked defendant, "Do you understand that, sir?" and defendant responded, "Yes, I do."

The court thereafter inquired whether defendant "had any questions about waiving or giving up his right to appeal" and confirmed that defendant was agreeing to waive or give up his right to appeal "on condition that I give you the sentence we've outlined." Further, the court asked defendant to affirm that he had signed the written waiver of the right to appeal "here in court today after reviewing it with [his] attorney." The written waiver of the right to appeal covers issues concerning both the sentence and conviction. In our view, the court's waiver colloquy is adequate to establish that defendant validly waived his right to appeal and that the waiver encompasses defendant's challenge to the severity of the sentence (*see People v Davis*, 153 AD3d 1617, 1617-1618 [4th Dept 2017]; *People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

We respectfully disagree with our colleagues that the court conflated the rights that defendant automatically forfeited upon a plea of guilty with the waiver of the right to appeal. As mentioned above, the court confirmed with defendant that he understood the rights being forfeited by the guilty plea, then made an additional

inquiry to confirm defendant's understanding that the guilty plea was the equivalent of a guilty verdict following trial, and only thereafter explained that "one other condition, which is separate and part [sic] from your plea of guilty" was the waiver of the right to appeal. In our view, the court's separate treatment and prefatory explanation of the waiver of the right to appeal appropriately signaled to defendant that such a waiver was a specific condition of the plea and not a consequence thereof, and "the record reflects that defendant understood that the waiver of the right to appeal was separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v McCarthy*, 83 AD3d 1533, 1534 [4th Dept 2011], *lv denied* 17 NY3d 819 [2011] [internal quotation marks omitted]). Indeed, this Court has upheld colloquies using nearly identical language (*see People v Dames*, 122 AD3d 1336, 1336 [4th Dept 2014], *lv denied* 25 NY3d 1162 [2015]; *People v Barber*, 117 AD3d 1430, 1430 [4th Dept 2014], *lv denied* 24 NY3d 1081 [2014]; *People v Ware*, 115 AD3d 1235, 1235 [4th Dept 2014]).

For the above reasons, we conclude that the waiver of the right to appeal was valid and that it encompasses defendant's challenge to the severity of the sentence.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1180

KA 13-01709

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TANISHA M. DAVIS, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, SULLIVAN & CROMWELL, LLP, NEW YORK CITY (ZACHARY G. MARKARIAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 18, 2013. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, the verdict is not against the weight of the evidence when viewed in light of the elements of the crime as charged to the jury (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, we conclude that she received meaningful representation (*see generally People v Benevento*, 91 NY2d 708, 711-714 [1998]; *People v Baldi*, 54 NY2d 137, 147 [1981]). We conclude that the sentence is not unduly harsh or severe. Defendant failed to preserve her remaining contentions for our review (*see generally* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1184

CAF 16-01308

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

IN THE MATTER OF SEAN P.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

BRANDY P., RESPONDENT-APPELLANT,
AND SEAN P., RESPONDENT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

LAURA ESTELA CARDONA, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 7, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondents had neglected the subject child.

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

Memorandum: In this proceeding pursuant to article 10 of the Family Court Act, respondent mother appeals from an order in which Family Court determined that she neglected the subject child. In reviewing the propriety of the order, we note that petitioner's burden was to "demonstrate by a preponderance of the evidence 'first, that [the] child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent . . . to exercise a minimum degree of care in providing the child with proper supervision or guardianship' " (*Matter of Ilona H. [Elton H.]*, 93 AD3d 1165, 1166 [4th Dept 2012], quoting *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]; *see* §§ 1012 [f] [i] [B]; 1046 [b] [i]). We further note that the court's "findings of fact are accorded deference and will not be disturbed unless they lack a sound and substantial basis in the record" (*Matter of Kaleb U. [Heather V.—Ryan U.]*, 77 AD3d 1097, 1098 [3d Dept 2010]; *see Matter of Arianna M. [Brian M.]*, 105 AD3d 1401, 1401 [4th Dept 2013], *lv denied* 21 NY3d 862 [2013]).

We conclude that there is a sound and substantial basis in the

record supporting the court's determination that petitioner met its burden of establishing the mother's neglect of the child, i.e., that "the child was in imminent danger of impairment as a result of [the mother's] failure to exercise a minimum degree of care" (*Matter of Paul U.*, 12 AD3d 969, 971 [3d Dept 2004]; *see Matter of Claudina E.P. [Stephanie M.]*, 91 AD3d 1324, 1324 [4th Dept 2012]; *see generally Nicholson*, 3 NY3d at 368-370). The evidence supporting the court's determination includes the testimony and notes of petitioner's caseworker, as well as neonatal hospital records, which outline the mother's difficulties in caring for the child during the first four days of his life.

We reject the mother's contention that the finding of neglect was based solely on her mental illness. " 'While evidence of mental illness, alone, does not support a finding of neglect, such evidence may be part of a neglect determination when the proof further demonstrates that a respondent's condition creates an imminent risk of physical, mental or emotional harm to a child' " (*Matter of Anthony TT. [Philip TT.]*, 80 AD3d 901, 902 [3d Dept 2011], *lv denied* 17 NY3d 704 [2011]; *see generally Matter of Joseph MM. [Clifford MM.]*, 91 AD3d 1077, 1079 [3d Dept 2012], *lv denied* 18 NY3d 809 [2012]). Petitioner presented testimony and documentary evidence establishing that the mother's mental illness and intellectual disabilities rendered her unable to feed the child properly or to support the child's head, even while under hospital supervision. Thus, there was a sound and substantial basis supporting the court's determination that the child would be harmed if the mother were allowed to control his feeding schedule or to hold the child unsupervised.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1185

CAF 15-01571

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

IN THE MATTER OF NEVEAH G. AND NAYAIREE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JAHKEYA A., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

ROSEMARY L. BAPST, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 11, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to 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 terminating her parental rights with respect to the subject children pursuant to Social Services Law § 384-b (4) (c). We affirm.

Contrary to the mother's contention, petitioner demonstrated by clear and convincing evidence that she is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [her] child[ren]" (Social Services Law § 384-b [4] [c]). After interviewing both the mother and the children's father, observing their interactions with the subject children, reviewing extensive background information, and speaking with other interested parties, petitioner's expert psychologist diagnosed both the mother and the father with antisocial personality disorder (ASPD). According to the expert, ASPD is effectively resistant to treatment, has a very remote chance of being cured, and is characterized by criminal and/or antisocial behavior that suggests a lack of internalization of societal norms and appropriate moral development. Those afflicted with ASPD, the expert further noted, tend toward reckless or impulsive behavior that prioritizes their individual desires over those of others, particularly young and vulnerable children. The expert opined, to a reasonable degree of

clinical certainty and without contradiction, that any child in the care of either the mother or the father would be at imminent risk of harm both now and for the foreseeable future.

The reliability of the expert's diagnosis and prognosis is underscored by various tragedies that befell other children of these parents. One child suffocated to death because of a dangerous sleeping arrangement, even though the parents were previously warned of the danger of that very arrangement. These parents also failed to obtain prompt medical treatment for another child after he fell down the stairs at a subway station and fractured his skull. The above evidence is "clearly sufficient to support . . . Family Court's findings" that termination is warranted under Social Services Law § 384-b (4) (c) (*Matter of Rashawn L.B.*, 8 AD3d 267, 269 [2d Dept 2004]; *see Matter of Donovan Jermaine R. [Leatrice B.]*, 137 AD3d 448, 448-449 [1st Dept 2016]; *Matter of Adrianahmarie SS. [Harold SS.]*, 99 AD3d 1072, 1074-1075 [3d Dept 2012]).

In light of the overwhelming evidence of the mother's mental illness and her resulting inability to parent the subject children adequately, any improperly admitted hearsay is harmless (*see Matter of Akayla M. [Marie M.]*, 151 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]). The mother's remaining contention is unpreserved for our review.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1186

CAF 15-01718

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

IN THE MATTER OF NEVEAH G. AND NAYAIREE G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ANTHONY G., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

ROSEMARY L. BAPST, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered September 11, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject children.

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

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject children pursuant to Social Services Law § 384-b (4) (c). We affirm. In light of the overwhelming evidence of the father's mental illness and his resulting inability to parent the subject children adequately (*see Matter of Neveah G. [Jahkeya A.]*, ___ AD3d ___, ___ [Dec. 22, 2017] [4th Dept 2017]), any improperly admitted hearsay is harmless (*see Matter of Akayla M. [Marie M.]*, 151 AD3d 1684, 1685 [4th Dept 2017], *lv denied* 30 NY3d 901 [2017]; *Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]). The father lacks standing to raise his remaining contention (*see Matter of Andrew Z.*, 41 AD3d 912, 913 [3d Dept 2007]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1193

CA 16-02034

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

KANDIS TIRADO AND DOUGLAS TIRADO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SARA H. KORITZ, M.D., AND HAMBURG OB/GYN GROUP, P.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

RICOTTA & VISCO, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered May 4, 2016. The order, inter alia, denied that part of the motion of defendants for summary judgment dismissing the complaint with respect to the medical malpractice cause of action.

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

Memorandum: These consolidated appeals arise from a medical malpractice action in which plaintiffs seek damages under several legal theories for, inter alia, bowel perforation injuries allegedly arising from an operation performed upon Kandis Tirado (plaintiff). In appeal No. 1, defendants appeal from an order that, inter alia, granted that part of their motion for summary judgment dismissing the complaint only with respect to the cause of action for "assault and/or battery" and denied that part of their motion with respect to the medical malpractice cause of action based on lack of informed consent. In appeal No. 2, defendants appeal from a subsequent order granting plaintiffs' motion for leave to reargue with respect to the cause of action for "assault and/or battery" and, upon reargument, vacating that part of the order in appeal No. 1 dismissing that cause of action, and reinstating it.

Addressing first the issues in appeal No. 2, we note at the outset that defendants do not address on appeal the assault claim that Supreme Court reinstated and, consequently, have abandoned any contentions with respect to that claim (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Defendants contend with respect to the battery claim that the court erred in reinstating that claim because plaintiffs cannot state a claim for battery under the circumstances presented. We reject that contention. It is "well settled that a medical professional may be deemed to have committed battery, rather than malpractice, if he or she carries out a procedure or treatment to which the patient has provided 'no consent at all' " (*VanBrocklen v Erie County Med. Ctr.*, 96 AD3d 1394, 1395 [4th Dept 2012]; *see Levin v United States*, 568 US 503, 512-513 [2013]; *Matter of Small Smiles Litig.*, 125 AD3d 1287, 1288 [4th Dept 2015]). Here, plaintiffs allege in the complaint that "defendant physician knew that . . . she was exceeding the scope of . . . plaintiff's consent by performing a medical procedure that . . . plaintiff had not authorized" (*Ponholzer v Simmons*, 78 AD3d 1495, 1496 [4th Dept 2010], *lv dismissed* 16 NY3d 886 [2011]) and, inasmuch as defendants do not challenge the battery claim with respect to the element of causation, we conclude that plaintiffs have stated such a claim.

Defendants further contend in appeal No. 2 that the court erred, upon reargument, in denying that part of their motion for summary judgment dismissing the battery claim. We likewise reject that contention and conclude that defendants failed to meet their initial burden with respect to that part of the motion, thereby requiring denial of the motion to that extent "regardless of the sufficiency of the opposi[ng] papers" (*Bongiovanni v Cavagnuolo*, 138 AD3d 12, 17 [2d Dept 2016]; *see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Specifically, defendants failed to meet their burden of establishing that defendant doctor did not know that "she was exceeding the scope of . . . plaintiff's consent by performing a medical procedure that . . . plaintiff had not authorized" (*Ponholzer*, 78 AD3d at 1496; *see generally Wiesenthal v Weinberg*, 17 AD3d 270, 270-271 [1st Dept 2005]).

In appeal No. 1, defendants contend that the court erred in denying that part of their motion for summary judgment dismissing the medical malpractice cause of action for lack of informed consent. We reject that contention. It is well settled that, in order "[t]o succeed in a medical malpractice cause of action premised on lack of informed consent, a plaintiff must demonstrate that (1) the practitioner failed to disclose the risks, benefits and alternatives to the procedure or treatment that a reasonable practitioner would have disclosed and (2) a reasonable person in the plaintiff's position, fully informed, would have elected not to undergo the procedure or treatment" (*Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; *see* Public Health Law § 2805-d [1], [3]). In the relevant part of the complaint, plaintiffs allege that defendants failed to warn plaintiff of the risk of injury to her bowel. Defendants therefore were required to establish on their motion that, "prior to the procedure, . . . plaintiff had been told to consider [a risk of injury to her bowel] as being among the reasonably foreseeable risks of the proposed procedure" (*Colon v Klindt*, 302 AD2d 551, 553 [2d Dept 2003] [internal quotation marks omitted]; *see Wilson-Toby v Bushkin*, 72 AD3d 810, 811 [2d Dept 2010]). In our view, defendants failed to meet that burden.

We reject defendants' contention that they met their burden by submitting an affidavit of a medical expert who opined that defendants provided sufficient warnings to plaintiff of the risk of injury to her bowel. It is well settled that a defendant's "burden is not met if the defendant's expert renders an opinion that is . . . unsupported by competent evidence" (*Bongiovanni*, 138 AD3d at 17; *see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). Furthermore, it is equally well settled that "opinion evidence must be based on facts in the record or personally known to the witness" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984] [internal quotation marks omitted]; *see Sample v Yokel*, 94 AD3d 1413, 1414 [4th Dept 2012]). Here, in addition to the expert's affidavit, defendants submitted plaintiff's deposition testimony, in which plaintiff stated that she directed defendant doctor, "don't touch my bowel," and that the doctor told her, "Honey, I promise you nothing will happen to your bowel," and "[i]f anything is close to your bowel, I will not touch it." The expert had no personal knowledge of the operative facts. Rather he based his opinion on, inter alia, his conclusion that "[t]here is no deposition testimony from the patient that she specifically instructed Dr. Koritz not to touch her bowel." Because the expert's opinion is directly contradicted by the facts upon which he purportedly based that opinion, "there was no basis for any opinion and the attempted opinion was worthless as evidence" (*Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). Thus, "inasmuch as the expert affidavit[] tendered by defendant[s] 'do[es] not establish that the cause of action has no merit so as to entitle defendant[s] to summary judgment,' [their] motion was properly denied" (*Jones v G & I Homes, Inc.*, 86 AD3d 786, 789 [3d Dept 2011]).

In addition, although defendants introduced evidence that defendant doctor provided warnings to plaintiff, as noted above, defendants also introduced plaintiff's testimony to the contrary, as well as plaintiff's medical records, which are rife with examples of plaintiff's prior bowel difficulties and her expressions of her strong desire that she not undergo any further procedures that could impact her bowel. Therefore, because "defendants' submissions included . . . plaintiff's deposition testimony, they failed to establish, prima facie, that there were no triable issues of fact with respect to the cause of action alleging lack of informed consent" (*Thaw v North Shore Univ. Hosp.*, 129 AD3d 937, 939 [2d Dept 2015]), and the court was required to deny the motion "regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see Bongiovanni*, 138 AD3d at 17).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1194

CA 16-02035

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

KANDIS TIRADO AND DOUGLAS TIRADO,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SARA H. KORITZ, M.D. AND HAMBURG OB/GYN
GROUP, P.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

RICOTTA & VISCO, BUFFALO (KATHERINE V. MARKEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered June 16, 2016. The order granted plaintiffs' motion seeking leave to reargue with respect to the cause of action for "assault and/or battery" and, upon reargument, vacated that part of a prior order dismissing that cause of action, and reinstated it.

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

Same memorandum as in *Tirado v Koritz* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1198

CA 17-00833

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

CRAIG TSCHETTER AND PARK HOMES & DEVELOPMENT, INC., PLAINTIFFS,

V MEMORANDUM AND ORDER

SAM LONGS' LANDSCAPING, INC., DEFENDANT-APPELLANT, AND GRAND ISLAND CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

RUPP BAASE PFALZGRAF CUNNINGHAM COPPOLA LLC, BUFFALO (SEAN W. COSTELLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WEBSTER SZANYI, LLP, BUFFALO (JEREMY A. COLBY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 6, 2017. The order, among other things, denied those parts of the motion of defendant Sam Longs' Landscaping, Inc. for summary judgment seeking indemnification from defendant Grand Island Central School District and dismissing the District's cross claim against it for indemnification.

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

Memorandum: In 2009, defendants, Grand Island Central School District (District) and Sam Longs' Landscaping, Inc. (SLL), entered into an agreement whereby SLL was to excavate and repair a drainage ditch that was causing flooding in one of the District's school buildings. The agreement provided, inter alia, that SLL would obtain any "necessary permits" for the work. The work was completed by SLL, and the District paid the agreed-upon price.

Thereafter, plaintiffs commenced the instant action against, inter alia, the District and SLL, alleging that a portion of the drainage ditch was located on their property and altered without their knowledge or consent. They further alleged that the change in the drainage ditch resulted in damages to them.

After discovery, SLL moved for summary judgment seeking indemnification from the District, as well as for leave to amend its answer to "re-assert" its cross claim for indemnification against the District in the event that Supreme Court deemed such amendment necessary. SLL also sought summary judgment dismissing the District's

cross claim against it for indemnification. SLL argued that the District was the party actively at fault and should indemnify SLL for any damages flowing from any trespass that occurred at its request, was for its benefit, and was necessary to complete the contract. The District cross-moved for summary judgment on its cross claim against SLL for indemnification, arguing that SLL was the party required under the agreement to acquire permission to do the work on plaintiffs' property. The court granted only that part of SLL's motion seeking leave to amend its answer and otherwise denied the motion. The court also denied the District's cross motion. SLL appeals from the order insofar as it denied those parts of its motion seeking indemnification against the District and dismissal of the District's cross claim for indemnification.

We conclude that the court properly denied the motion of SLL insofar as it sought indemnification from the District and dismissal of the District's cross claim for indemnification. In addition, although the District has not appealed from the order insofar as the court denied its cross motion, the District asks us to search the record and grant the cross motion (*see Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111 [1984]), which we decline to do.

The general rule in New York is that a party who retains an independent contractor is not liable for the independent contractor's negligent acts (*see Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]). "The primary justification for this rule is that 'one who employs an independent contractor has no right to control the manner in which the work is to be done and, thus, the risk of loss is more sensibly placed on the contractor' " (*Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251, 257-258 [2008], quoting *Kleeman*, 81 NY2d at 274). There are various exceptions to that general rule including, as relevant to the instant case, that an owner may be liable for trespass if the owner directs the trespass or a trespass is necessary to complete the contract (*see Gracey v Van Camp*, 299 AD2d 837, 838 [4th Dept 2002]; *Axtell v Kurey*, 222 AD2d 804, 805 [3d Dept 1995], *lv denied* 88 NY2d 802 [1996]).

SLL's submissions in support of its motion and in opposition to the District's cross motion established that the District, not SLL, decided the work that needed to be performed, that the District knew that the work required going beyond the District's property line, that the District did not have a property right permitting it to clean the ditch on plaintiffs' property, and that the District did not inform SLL that performing the work would result in a trespass. On the other hand, the District's submissions in support of its cross motion and in opposition to SLL's motion established that SLL, as an independent contractor, determined what work needed to be done on the ditch to remedy the situation, and that SLL identified in a written cost estimate the area of the ditch that needed to be cleaned and the proposed scope of the work. The District also submitted evidence that it did not direct the performance of any of the work, and it highlights that part of the agreement providing that SLL was required to obtain any necessary permits to perform the work. Given the above

submissions, we conclude that it cannot be determined as a matter of law whether the District directed SLL to do the work on plaintiffs' property and whether a trespass was necessary to complete the contract. Thus, neither party is entitled to summary judgment on its respective indemnification claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *cf. Brown v Arcady Realty Corp.*, 1 AD3d 753, 756 [3d Dept 2003], *lv denied* 3 NY3d 606 [2004]).

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1210

KA 14-02144

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN FIGUEROA, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CRAIG P. SCHLANGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

EDWIN FIGUEROA, 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 (Anthony F. Aloi, J.), rendered October 8, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance 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, after a jury trial, of criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]), defendant contends in his main brief that County Court erred in refusing to suppress his statements to the police inasmuch as he was subjected to custodial interrogation and thus *Miranda* warnings were required. We reject that contention. "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he [or she] been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012], quoting *People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]). Here, the record establishes that defendant was stopped by the police in a public place and was not restrained in any way. Defendant was asked two simple questions and the encounter lasted a short amount of time. Consequently, we conclude that a reasonable person, innocent of any crime, would not have thought that he was in custody and thus *Miranda* warnings were not necessary (*see People v Bennett*, 70 NY2d 891, 893-894 [1987]; *People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27 NY3d 1007 [2016], *cert denied* ___ US ___, 137 S Ct 298 [2016]; *Kelley*, 91 AD3d at 1319).

We also reject defendant's contention in his main brief that the court erred in refusing to suppress all evidence arising from his allegedly improper stop by the police. We conclude that the police had reasonable suspicion to stop defendant when he exited a bus based on information that they received from a confidential informant, who said that defendant had traveled to New York City, purchased a kilo of cocaine, and was returning to Syracuse via bus, and the confirmatory observations of New York City police officers. Thus, the stop was lawful inasmuch as "sufficient information in the record supports the lower court['s] determination 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 [controlled substance] to create reasonable suspicion" (*People v Argyris*, 24 NY3d 1138, 1140-1141 [2014], *rearg denied* 24 NY3d 1211 [2015], *cert denied* ___ US ___, 136 S Ct 793 [2016]; *see People v Torres*, 125 AD3d 1481, 1482 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). We have considered defendant's remaining contentions in his pro se supplemental brief with respect to the suppression ruling and conclude that they are without merit.

We reject defendant's contention in his main brief that he was denied effective assistance of counsel. We conclude that "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]). Moreover, defendant's contention in his main brief that his attorney failed to make effective use of certain discovery materials while cross-examining the People's witnesses at the suppression hearing concerns matters outside the record on appeal, and it must therefore be raised by way of a motion pursuant to CPL 440.10 (*see People v Sanford*, 138 AD3d 1435, 1436 [4th Dept 2016]; *see generally People v Cyrus*, 48 AD3d 150, 152-154 [1st Dept 2007], *lv denied* 10 NY3d 763 [2008]).

We reject defendant's contentions raised in his pro se supplemental brief that the evidence before the grand jury was legally insufficient and that the grand jury was improperly instructed on the law inasmuch as those contentions are " 'not reviewable upon an appeal from an ensuing judgment of conviction based upon legally sufficient trial evidence' " (*People v Baker*, 67 AD3d 1446, 1447 [4th Dept 2009], *lv denied* 14 NY3d 769 [2010]; *see* CPL 210.30 [6]; *People v Miles*, 236 AD2d 786, 787 [4th Dept 1997], *lv denied* 90 NY2d 861 [1997]). Finally, we have reviewed defendant's remaining contentions in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1212

KA 17-00656

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAUN ROGERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered August 15, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act 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 criminal sexual act in the first degree (Penal Law § 130.50 [4]), defendant contends that Supreme Court erred in refusing to rule on his request to strike improper material from the presentence report (PSR). Contrary to the People's contention, we conclude that the issue is preserved for our review (*cf. People v Richardson*, 142 AD3d 1318, 1319 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Sumpter*, 286 AD2d 450, 452 [2d Dept 2001], *lv denied* 97 NY2d 658 [2001]). We further conclude, however, that there is no basis to disturb the judgment. The sentencing court not only afforded defendant ample opportunity to address the purported inaccuracies in the PSR (*see People v Harris*, 121 AD3d 1423, 1424 [3d Dept 2014], *lv denied* 25 NY3d 989 [2015]; *cf. People v James*, 114 AD3d 1312, 1312 [4th Dept 2014]) but, in addition, the court appended to the PSR documents submitted by defendant that were relevant to sentencing. Moreover, the court stated that it was not relying on the challenged statements in the PSR when it sentenced defendant in accordance with the plea agreement (*see People v Russell*, 133 AD3d 1199, 1200 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *People v Serrano*, 81 AD3d 753, 754 [2d Dept 2011], *lv denied* 17 NY3d 801 [2011]), and thus defendant was not prejudiced by the inclusion of those statements (*see People v Redman*, 148 AD2d 966, 967 [4th Dept 1989], *lv denied* 74 NY2d 745 [1989]). "To the extent that those statements could cause any prejudice to the defendant subsequent to

the sentencing proceeding, the relief granted in response to his [request] was sufficient to prevent such prejudice" (*Serrano*, 81 AD3d at 754).

Defendant correctly contends that he had a right to be notified no less than seven days prior to sentencing that the victim's father intended to make a statement at sentencing (*see* CPL 380.50 [2] [b]), and it is undisputed that defendant was not so notified. We conclude that "[t]he error [is] harmless, however, since the oral statement was not so inflammatory that it rendered the sentencing flawed" (*People v Branshaw*, 177 AD2d 1028, 1028 [4th Dept 1991], *lv denied* 79 NY2d 918 [1992]; *see also People v Croskery* [appeal No. 1], 210 AD2d 872, 872 [4th Dept 1994], *lv denied* 85 NY2d 907 [1995]).

Finally, the sentence is not unduly harsh or severe.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1216

CA 17-00861

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

CHRISTINE PRALL, NOW KNOWN AS CHRISTINE DOUCETTE,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

RYAN PRALL, DEFENDANT-RESPONDENT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (TIMOTHY J. FENNELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LYNCH LAW OFFICE, PLLC, SYRACUSE (RYAN L. ABEL OF COUNSEL), FOR DEFENDANT-RESPONDENT.

CHRISTINA CAGNINA, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered August 23, 2016. The order modified the custody and visitation provisions of the parties' judgment of divorce by, inter alia, awarding the parties joint legal custody of the subject children, with residential custody to defendant and visitation to plaintiff.

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

Memorandum: Plaintiff mother appeals from an order that modified the custody and visitation provisions of the parties' judgment of divorce by, inter alia, awarding the parties joint legal custody of the subject children, with residential custody with defendant father and visitation with the mother. The prior custody arrangement, which was set forth in a stipulation that was incorporated but not merged into the parties' judgment of divorce, provided that the father had residential custody of the children in Syracuse, New York, and that the mother's appointment to a semi-permanent station with her job in the United States Air Force would constitute a change in circumstances warranting an inquiry into whether a change in custody would be in the best interests of the children. After the mother received a three-year assignment in California, she moved to modify the prior custody arrangement, seeking residential custody of the children.

We reject the mother's contention that Supreme Court erred in awarding residential custody to the father inasmuch as the children would live with their half brother if the mother were awarded residential custody. "[T]he presence of half siblings of the

child[ren] in [the mother's] home is not dispositive, although it is a factor to be considered in making custody determinations" (*Matter of Slade v Hosack*, 77 AD3d 1409, 1409 [4th Dept 2010]). Here, the children have never resided with their half brother, outside of the times when they visited with the mother throughout the year. Thus, this is not a situation in which the children would be removed from a home with half siblings to live in a home without those siblings (*cf. Matter of Walker v Cameron*, 88 AD3d 1307, 1308 [4th Dept 2011]).

We further conclude that the court properly determined that it is in the children's best interests to remain in the residential custody of the father. "The determination of the trial court, which heard and observed the witnesses, is entitled to great deference and should not be disturbed where, as here, it has a sound and substantial basis in the record" (*Salerno v Salerno*, 273 AD2d 818, 818 [4th Dept 2000]). The record establishes that the children share a close bond with the maternal and paternal grandmothers, as well as the mother's brother and his children, all of whom live near the father, and that the mother will be able to maintain her relationship with the children through nightly telephone contact, as well as visitation during school breaks and the summer. We therefore conclude that there is a sound and substantial basis in the record supporting the court's determination (*see Slade*, 77 AD3d at 1409).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1218

CA 16-01953

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

KENNETH M. YOUNG, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MADISON-ONEIDA BOARD OF COOPERATIVE EDUCATIONAL SERVICES, JACKLIN G. STARKS, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, SUSAN CARR, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT SUPERINTENDENT FOR INSTRUCTION, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANT.

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

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (CHARLES C. SPAGNOLI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered June 15, 2016. The order granted the motion of defendants for summary judgment dismissing the amended complaint.

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

Memorandum: Plaintiff was formerly employed by defendant Madison-Oneida Board of Cooperative Educational Services (BOCES) as Assistant Director of Alternative Education, a probationary, nontenured administrative position. When the term of his appointment expired, plaintiff was not reappointed to his position. He commenced this action alleging, inter alia, unlawful retaliatory action under Labor Law § 740 (2), the "whistle-blowers' statute," by BOCES and the individual defendants, who were BOCES employees during the period of plaintiff's employment there.

Supreme Court properly granted defendants' motion seeking summary judgment dismissing the amended complaint. To prevail on his Labor Law § 740 (2) cause of action, plaintiff had the burden of proving that defendants retaliated against him because he "disclose[d] or threaten[ed] to disclose to a supervisor or to a public body an activity, policy or practice of [BOCES] that [was] in violation of law, rule or regulation which violation creat[ed] and present[ed] a substantial and specific danger to the public health or safety" (§ 740

[2] [a]), or because he "object[ed] to, or refuse[d] to participate in any such activity, policy or practice in violation of a law, rule or regulation" (§ 740 [2] [c]). Defendants, however, established as a matter of law that the conduct on their part that was alleged by plaintiff did not amount to violation of law, rule or regulation under the statute. Defendants' alleged practice of enrolling students before receiving the students' individual education plans (IEPs) or behavioral intervention plans (BIPs), even if proven, did not constitute an "actual violation of law to sustain a cause of action" under Labor Law § 740 (2) (*Bordell v General Elec. Co.*, 88 NY2d 869, 871 [1996]). Even assuming, arguendo, that defendants violated BOCES intake procedures by enrolling students before receiving their IEPs or BIPs, we conclude that those internal procedures do not qualify as a law, rule or regulation under the statute (*see Cohen v Hunter Coll.*, 80 AD3d 452, 452 [1st Dept 2011]). Finally, plaintiff cannot premise his whistle-blower claim upon defendants' alleged conduct in deceptively miscoding Violent and Disruptive Incident Reports (VADIRs) (*see* 8 NYCRR 100.2 [gg]). Plaintiff conceded that he was unaware of the VADIRs prior to the commencement of this action, and thus he cannot claim the protection of Labor Law § 740 for disclosing or threatening to disclose the alleged deceptive miscoding of VADIRs, or in objecting to or refusing to participate therein.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1219

CA 17-00797

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

KENNETH HARRIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DIRECT GENERAL INSURANCE COMPANY, DEFENDANT,
AND MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION, DEFENDANT-APPELLANT.

BRUNO, GERBINO & SORIANO, LLP, MELVILLE (NATHAN M. SHAPIRO OF COUNSEL), FOR DEFENDANT-APPELLANT.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), dated February 15, 2017. The order, among other things, denied the motion of defendant Motor Vehicle Accident Indemnification Corporation seeking, in effect, a declaration that plaintiff is not entitled to no-fault insurance benefits from it.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, a declaration that Motor Vehicle Accident Indemnification Corporation (defendant) is required to provide him with no-fault insurance benefits. Defendant now appeals from an order that, inter alia, denied its motion for summary judgment seeking, in effect, a declaration that plaintiff is not entitled to such benefits from defendant (*see e.g. Leo v New York Cent. Mut. Fire Ins. Co.*, 136 AD3d 1333, 1333 [4th Dept 2016], *lv denied* 28 NY3d 902 [2016]; *Ward v County of Allegany*, 34 AD3d 1288, 1289 [4th Dept 2006]). We affirm.

Contrary to defendant's contention, it failed to meet its burden on the motion of establishing as a matter of law that plaintiff was not entitled to no-fault insurance benefits. Insofar as relevant here, the Insurance Law provides that no-fault benefits are to be given "to a qualified person for basic economic loss arising out of the use or operation . . . of an uninsured motor vehicle" (Insurance Law § 5221 [b] [1]) and, in pertinent part, the statute defines a qualified person as "a resident of this state, other than an insured or the owner of an uninsured motor vehicle" (§ 5202 [b] [i]). Vehicle and Traffic Law § 128 defines an owner as, inter alia, "[a] person . . . having the property in or title to a vehicle or vessel." We have

previously stated that, "[g]enerally, 'ownership is in the registered owner of the vehicle or one holding the documents of title[,] but a party may rebut the inference that arises from these circumstances' " (*Martin v Lancer Ins. Co.*, 133 AD3d 1219, 1220 [4th Dept 2015]).

Here, in support of its motion, defendant submitted plaintiff's testimony that he was the co-owner of the vehicle, and that he and his fiancée paid for the vehicle, its maintenance, and a Florida insurance policy that did not cover plaintiff. Nevertheless, defendant also submitted the registration, title, and insurance documents for the vehicle, all of which list plaintiff's father as the owner. Consequently, Supreme Court properly determined that, inasmuch as "there is conflicting evidence of ownership, the issue must be resolved by a trier of fact" (*id.*). Because defendant did not meet its initial burden on the motion for summary judgment, "the burden never shifted to [plaintiff], and denial of the motion was required 'regardless of the sufficiency of the opposing papers' " (*Scruton v Acro-Fab Ltd.*, 144 AD3d 1502, 1503 [4th Dept 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1222

CA 17-00256

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

LACEY MARIE BETTS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOHN RALPH BETTS, JR., DEFENDANT-RESPONDENT.

ADAM H. VANBUSKIRK, AUBURN, FOR PLAINTIFF-APPELLANT.

Appeal from a judgment of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered February 1, 2016 in a divorce action. The judgment, inter alia, distributed the marital assets, ordered defendant to pay plaintiff a distributive award of $5,000, and ordered plaintiff to pay child support.

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

Memorandum: In this action for divorce and ancillary relief, plaintiff wife appeals from a judgment of divorce that, inter alia, distributed the marital assets, ordered defendant husband to pay the wife a distributive award of $5,000, and ordered the wife to pay child support. We conclude that Supreme Court properly determined that the wife was the noncustodial parent for purposes of calculating the child support obligation and thus ordered her to pay child support to the husband. Contrary to the wife's contention, the court did not abuse its discretion in imputing $32,000 of income to the husband for 2013 and $33,500 of income to the husband for 2014. The income imputed to the husband is based upon his employment history and earning capacity as a truck driver (*see generally Vokerick v Vokerick*, 153 AD3d 885, 886 [2d Dept 2017]; *Balaj v Balaj*, 136 AD3d 672, 673-674 [2d Dept 2016]; *Matter of Figueroa v Figueroa*, 134 AD3d 1592, 1592 [4th Dept 2015]), and is supported by the record (*see Lauzonis v Lauzonis*, 105 AD3d 1351, 1351 [4th Dept 2013]). We reject the wife's contention that the court should have imputed additional income to the husband inasmuch as such imputation is not supported by the record and would be speculative (*see McAuliffe v McAuliffe*, 70 AD3d 1129, 1133 [3d Dept 2010]; *Rosenberg v Rosenberg*, 44 AD3d 1022, 1025 [2d Dept 2007]). The wife's income was established at trial and is higher than that imputed to the husband. Where, as here, "neither parent has the child[ren] for a majority of the time, the parent with the higher income, who bears the greater share of the child support obligation, should be deemed the noncustodial parent for the purposes of child support" (*Matter of Conway v Gartmond*, 144 AD3d 795, 796 [2d Dept 2016]; *see Ball v Ball*, 150 AD3d 1566, 1567 [3d Dept 2017]; *Eberhardt-Davis v*

Davis, 71 AD3d 1487, 1487-1488 [4th Dept 2010]; *see generally* Domestic Relations Law § 240 [1-b]).

Contrary to the wife's further contention, the court did not abuse its discretion in its equitable distribution of the marital property. Although the wife contends that the award that she was granted should be greater because she made contributions during the marriage to the husband's separate property, i.e., the husband's farm property and business, the wife did not meet her burden of establishing the manner in which her contributions resulted in an increase in value of the separate property or the amount of any increase that was attributable to her efforts (*see Seale v Seale*, 149 AD3d 1164, 1168 [3d Dept 2017]; *Elmaleh v Elmaleh*, 184 AD2d 544, 545 [2d Dept 1992]; *see generally Price v Price*, 69 NY2d 8, 11-12 [1986]). We conclude that the court, in distributing the marital assets and determining the value of the distributive award granted to the wife, did not abuse its discretion in fashioning an "appropriate decree based on what is view[ed] to be fair and equitable under the circumstances" (*Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 420 [2009]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1227

KA 15-02179

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAIWAN BALDWIN, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MICHAEL J. HILLERY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered June 12, 2015. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). During the early morning hours of May 18, 2013, an anonymous and as-yet unidentified woman located at a specific address on Latour Street in Buffalo called 911 and reported that defendant and a woman were on the porch of the house located at that address. Defendant reportedly had a shotgun and had been kicking at the door. The caller identified defendant by name and described him as a black man in a grey jacket. Two patrol officers with the Buffalo Police Department responded to a radio dispatch in their patrol vehicle and found defendant walking down the sidewalk with a woman. Defendant was subsequently arrested, and the police recovered a sawed-off shotgun and a live shell in a grassy area along the sidewalk.

We conclude that County Court properly denied defendant's motion to suppress the physical evidence, as well as defendant's postverdict motion pursuant to CPL 330.30 insofar as it challenged that ruling. "Police pursuit is regarded as significantly impeding a person's freedom of movement, thus requiring justification by reasonable suspicion that a crime has been, is being, or is about to be committed" (*People v Foster*, 302 AD2d 403, 404 [2d Dept 2003], *lv denied* 100 NY2d 581 [2003] [internal quotation marks omitted]; *see People v Holmes*, 81 NY2d 1056, 1057 [1993]). "However, the police may

observe a defendant 'provided that they do so unobtrusively and do not limit defendant's freedom of movement by so doing' " (*Foster*, 302 AD2d at 404, quoting *People v Howard*, 50 NY2d 583, 592 [1980], *cert denied* 449 US 1023 [1980]; *see People v Rozier*, 143 AD3d 1258, 1259 [4th Dept 2016]).

It is well settled that "the propriety of the denial of a suppression motion must be judged on the evidence before the suppression court and that evidence subsequently admitted at the trial cannot be used to support the suppression court's denial" (*People v Wilkins*, 65 NY2d 172, 180 [1985]). Here, the suppression court heard the testimony of one of the two responding officers. According to his testimony, the officers received a radio dispatch concerning a black man in a grey jacket with a shotgun and a woman on Latour Street. The officers were nearby and responded to the call within approximately one minute. When their patrol vehicle turned onto Latour Street, the testifying officer observed a man matching defendant's description walking down the sidewalk with a woman. The officers then approached defendant in their patrol vehicle while its overhead lights and siren were off. Defendant looked over his shoulder toward the patrol vehicle, walked to the grassy area, and made a shaking motion with his arm as if to discard an object. Thereafter, the testifying officer stopped the vehicle, exited it, drew his weapon, and commanded defendant to stop. After defendant was arrested, the testifying officer returned to the spot where he had observed defendant shaking his arm, and found the sawed-off shotgun in that exact spot. Another officer found the live shell nearby at approximately the same time. Contrary to defendant's contention, the foregoing testimony establishes that the officers " 'were engaged merely in observation,' not pursuit" when defendant discarded the shotgun and the live shell (*Rozier*, 143 AD3d at 1259; *see generally Howard*, 50 NY2d at 592). Thus, those items were properly seized by the police inasmuch as defendant did not discard them in response to unlawful police conduct (*see People v Feliciano*, 140 AD3d 1776, 1777 [4th Dept 2016], *lv denied* 28 NY3d 1027 [2016]; *see also Rozier*, 143 AD3d at 1259).

We further conclude that the conviction is based on legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Additionally, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Contrary to defendant's contention, the testimony of the officer at the suppression hearing and the testimony of another officer at the felony hearing were consistent in all relevant respects with the trial testimony of both of those officers.

Defendant further contends that the court changed its ruling with respect to the admissibility of the audio recording of the 911 call after the close of evidence, thereby prejudicing him. We reject that contention. Upon the People's pretrial application, the court ruled that the recording was admissible under the excited utterance and present sense impression exceptions to the rule prohibiting the admission of hearsay statements. Although defendant also contended

that the recording constituted evidence of prior bad acts and should be precluded under *People v Molineux* (168 NY 264 [1901]), the court rejected that contention. After defendant made his postverdict motion pursuant to CPL 330.30, the court informed the parties that it used the audio recording of the 911 call only to complete the narrative of events (*see generally People v Gross*, 26 NY3d 689, 695 [2016]; *People v Casado*, 99 AD3d 1208, 1211 [4th Dept 2012], *lv denied* 20 NY3d 985 [2012]). The court stated that it did not use the audio recording as evidence of the truth of the matters asserted therein or as evidence of prior bad acts. Furthermore, in its written decision and order denying the CPL 330.30 motion, the court noted that "nothing was presented during the trial to alter" its determination. That determination manifestly favored defendant. Thus, even assuming, arguendo, that the court changed its ruling after the close of proof, we conclude that defendant suffered no prejudice as a result (*cf. People v Minus*, 126 AD3d 474, 476 [1st Dept 2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1232

CAF 16-00712

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

IN THE MATTER OF RONALD E. PEAY, JR.,
PETITIONER-RESPONDENT-RESPONDENT,

V MEMORANDUM AND ORDER

MICHELLE L. PEAY, RESPONDENT-PETITIONER-APPELLANT.
(APPEAL NO. 1.)

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

CHRISTOPHER BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 20, 2016. The order, among other things, found respondent-petitioner in contempt of court and denied her petition to modify a prior stipulated order of custody and visitation.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by inserting after the first ordering paragraph the following: "ORDERED that Michelle L. Peay's conduct was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies of Ronald E. Peay, Jr., and it is hereby" and as modified the order is affirmed without costs.

Memorandum: In these consolidated appeals, respondent-petitioner mother appeals from two orders that, inter alia, found her in contempt of court and denied her petition to modify a prior stipulated order of custody and visitation. The prior stipulated order, inter alia, granted the mother custody of the subject children with visitation to petitioner-respondent father on two evenings per week. The mother sought to modify the prior stipulated order to require the father's visitation with the children to be supervised. The father opposed supervised visitation and commenced a proceeding to hold the mother in contempt for refusing to comply with the prior stipulated order on 21 specific dates.

Preliminarily, we note that the orders in appeal Nos. 1 and 2, which were entered on the same date, contain identical findings of fact and identical ordering paragraphs, and thus are duplicative of each other. It is well settled that an appeal does not lie from a duplicative order (*see generally Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]), and we therefore dismiss the appeal from the order in appeal No. 2.

Contrary to the mother's contention, the father established by clear and convincing evidence that "a lawful court order clearly expressing an unequivocal mandate was in effect, that the [mother] . . . had actual knowledge of its terms, and that the violation . . . defeated, impaired, impeded, or prejudiced the rights of [the father]" (*Matter of Howell v Lovell*, 103 AD3d 1229, 1230 [4th Dept 2013] [internal quotation marks omitted]; *see* Judiciary Law § 753 [A] [3]). The father testified that the mother failed to bring one or more of the children for visitation on four scheduled dates in 2015, i.e., May 16, May 27, June 10, and June 13. The mother admitted to those failures. Indeed, it was undisputed that the father did not see the children between June 6, 2015 and March 8, 2016, the date of the hearing. In its decision, Family Court found the mother in contempt of court based on her refusal to allow visitation on the above dates, and it emphasized that the father had "not seen the children since June 6, 2015" despite the existence of the prior stipulated order. We note, however, that the court did not expressly find that the contemptuous acts were "calculated to, or actually did, defeat, impair, impede, or prejudice the [father's] rights or remedies" (*see* § 770). Inasmuch as the finding of contempt is supported by the record, we may correct the order to add that language (*see Biggio v Biggio*, 41 AD3d 753, 754 [2d Dept 2007]; *cf. Matter of Wilce v Scalise*, 81 AD3d 1407, 1407-1408 [4th Dept 2011]). We therefore modify the order by adding an ordering paragraph containing the requisite recital.

To the extent that the mother contends that the court inappropriately imposed a suspended jail sentence, we conclude that her contention is moot inasmuch as that portion of the order has expired according to its own terms (*see Matter of Dubois v Piazza*, 107 AD3d 1587, 1588 [4th Dept 2013]).

The mother further contends that the court abused its discretion in precluding her from testifying about a statement that the parties' son made concerning alleged abuse at the father's home. The mother failed to preserve that contention for our review (*see Matter of William O. v John A.*, 151 AD3d 1203, 1205 [3d Dept 2017]; *Mohamed v Cellino & Barnes*, 300 AD2d 1116, 1116 [4th Dept 2002], *lv denied* 99 NY2d 510 [2003]). We note that the court held a *Lincoln* hearing and spoke directly and extensively with the son about the alleged incident.

Contrary to the mother's final contention, we conclude that the court properly dismissed her petition seeking to modify the prior stipulated order. A party seeking to modify an existing custody arrangement must demonstrate a change in circumstances sufficient to warrant an inquiry into whether a change in custody is in the best interests of the children (*see Matter of Yaddow v Bianco*, 67 AD3d 1430, 1430 [4th Dept 2009]; *see also Matter of Gross v Gross*, 119 AD3d 1453, 1453 [4th Dept 2014]). The court's determination that the mother failed to demonstrate the necessary change in circumstances is supported by a sound and substantial basis in the record (*see Matter of Joyce S. v Robert W.S.*, 142 AD3d 1343, 1344 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *cf. Matter of Chapman v Tucker*, 74 AD3d

1905, 1906 [4th Dept 2010]). The mother alleged that there was a change in circumstances because the parties' son sustained a bruise while in the father's care. The father testified that the son was fighting outside with his sister, so the father placed the son inside the house on a couch. The paternal grandmother, who was present for the incident, gave testimony consistent with the father's testimony. In addition, the court spoke to the son in camera. Based on the evidence before it, the court found that the father handled the son roughly, but did not intend to hurt him, and that the children were not in any danger while in the father's care. Thus, the court properly concluded that the facts of the incident did not demonstrate the requisite change in circumstances (*cf. Chapman*, 74 AD3d at 1906).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1233

CAF 16-00713

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

IN THE MATTER OF MICHELLE L. PEAY,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RONALD E. PEAY, JR., RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

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

CHRISTOPHER BRECHTEL, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered April 20, 2016. The order, among other things, found petitioner in contempt of court and denied her petition to modify a prior stipulated order of custody and visitation.

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

Same memorandum as in *Matter of Peay v Peay* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1240

CA 17-00828

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

CYNTHIA L. CHAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ONYX CAPITAL, LLC, DEFENDANT.

SRP 2012-4, AS SUCCESSOR IN INTEREST TO
DEFENDANT ONYX CAPITAL, LLC, APPELLANT.

RICHLAND & FALKOWSKI, PLLC, ASTORIA (DANIEL H. RICHLAND OF COUNSEL), FOR APPELLANT.

WESTERN NEW YORK LAW CENTER, INC., BUFFALO (KEISHA A. WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Henry J. Nowak, Jr., J.), entered November 1, 2016. The order, insofar as appealed from, denied the motion of SRP 2012-4, LLC, as successor in interest to defendant Onyx Capital, LLC, to, inter alia, vacate the default judgment and to dismiss the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, the order dated September 23, 2013 is vacated, and the complaint is dismissed in accordance with the following memorandum: Plaintiff commenced this action pursuant to RPAPL 1501 (4) seeking to discharge a mortgage on her property on the ground that the applicable six-year statute of limitations for a foreclosure action had passed. Defendant failed to answer the complaint or otherwise appear, and Supreme Court granted plaintiff's motion for a default judgment. SRP 2012-4, LLC (SRP), as successor in interest to defendant, moved pursuant to, inter alia, CPLR 5015 (a) (4) to vacate the default judgment, and pursuant to CPLR 306-b and 3211 (a) (8) to dismiss the complaint. The court denied the motion, and we now reverse the order insofar as appealed from.

We agree with SRP that plaintiff failed to comply strictly with Limited Liability Company Law § 304 and thus the court did not have jurisdiction over defendant. Pursuant to that statute, "[f]irst, service upon the unauthorized foreign limited liability company may be made by personal delivery of the summons and complaint, with the appropriate fee, to the Secretary of State (*see* Limited Liability Company Law § 304 [b])" (*Global Liberty Ins. Co. v Surgery Ctr. of Oradell, LLC*, 153 AD3d 606, 606 [2d Dept 2017]). That was done by

plaintiff in this case. "Second, in order for the personal delivery to the Secretary of State to be 'sufficient,' the plaintiff must also give the defendant direct notice of its delivery of the process to the Secretary of State, along with a copy of the process" (*id.*; *see* § 304 [c]). The direct notice may be given to the defendant personally (*see* § 304 [c] [1]). That was attempted by plaintiff, but the process server was unable to make personal service inasmuch as the property was "unoccupied." In the alternative, "[t]he direct notice may be sent to the defendant by registered mail, return receipt requested" (*Global Liberty Ins. Co.*, 153 AD3d at 606; *see* § 304 [c] [2]). That was attempted by plaintiff in this case, but the mail was returned to plaintiff as undeliverable.

In the final step, plaintiff must file an affidavit of compliance (*see* Limited Liability Company Law § 304 [e]). Where, as here, "a copy of the process is mailed in accordance with this section, there shall be filed with the affidavit of compliance either the return receipt signed by such foreign limited liability corporation or other proof of delivery or, if acceptance was refused by it, the original envelope with a notation by the postal authorities that acceptance was refused" (*id.*).

It is well settled that "[s]trict compliance with Limited Liability Company Law § 304 is required, including as to the filing of an 'affidavit of compliance' " (*Global Liberty Ins. Co.*, 153 AD3d at 607; *see Interboro Ins. Co. v Tahir*, 129 AD3d 1687, 1689 [4th Dept 2015]). The Court of Appeals in *Flick v Stewart-Warner Corp.* (76 NY2d 50 [1990], *rearg denied* 76 NY2d 846 [1990]) analyzed Business Corporation Law § 307, which is substantively identical to Limited Liability Company Law § 304. The Court explained that "the statute contains procedures calculated to assure that the foreign corporation, in fact, receives a copy of the process" (*Flick*, 76 NY2d at 56). The Court held that "[t]he proof called for in the affidavit of compliance is that the required actual notice has been given either by personal service or by registered mail . . . These are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice" (*id.*).

In this case, as outlined above, plaintiff failed to comply with step two of Limited Liability Company Law § 304. We reject plaintiff's contention that nothing more was required of her after the registered mail was returned as undeliverable. Inasmuch as plaintiff failed to comply with step two, she necessarily also failed to comply with step three, which would show that a party complied with the service requirements of section 304. Initially, we note that plaintiff filed an affidavit of service showing personal service upon the Secretary of State and a notation that service was made upon defendant by registered mail, return receipt requested, but she did not file an affidavit of compliance (*see Flannery v General Motors Corp.*, 86 NY2d 771, 773 [1995]; *VanNorden v Mann Edge Tool Co.*, 77 AD3d 1157, 1159 [3d Dept 2010]; *Smolen v Cosco, Inc.*, 207 AD2d 441, 441-442 [2d Dept 1994]). Moreover, because plaintiff did not comply with step two, she was unable to file a return receipt signed by

defendant "or other official proof of delivery" (§ 304 [e]; *see Lansdowne Fin. Servs. v Binladen Telecommunications Co.*, 95 AD2d 711, 712 [1st Dept 1983]). Purportedly attached to the affidavit of service filed by plaintiff was a copy of the envelope mailed to defendant by registered mail and returned to plaintiff as undeliverable. Rather than showing proof of delivery, plaintiff showed just the opposite, i.e., that the process was not delivered to defendant. We therefore conclude that the motion to vacate the default judgment on the ground of lack of jurisdiction should have been granted (*see Alostar Bank of Commerce v Sanoian*, 153 AD3d 1659, 1660 [4th Dept 2017]; *VanNorden*, 77 AD3d at 1159). Further, "[b]ecause the court never acquired personal jurisdiction over defendant, we dismiss the . . . complaint . . . , without prejudice" (*Alostar Bank of Commerce*, 153 AD3d at 1660-1661).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1241

CA 17-00141

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

MANUFACTURERS AND TRADERS TRUST COMPANY,
PLAINTIFF,

V MEMORANDUM AND ORDER

CLIENT SERVER DIRECT, INC., ET AL., DEFENDANTS.

CLIENT SERVER DIRECT, INC., ACN PROPERTIES, LLC, JEFFREY T. DRILLING, HOLLY DRILLING AND LEAP ANALYTIX, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

M&T BANK CORPORATION, ET AL., THIRD-PARTY DEFENDANTS,
AND MICHAEL (MICK) WHIPPLE, THIRD-PARTY DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PARLATO LAW, WILLIAMSVILLE, CHAITMAN LLP, NEW YORK CITY (HELEN D. CHAITMAN OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

PERSONIUS MELBER LLP, BUFFALO (RODNEY O. PERSONIUS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 10, 2016. The order denied the motion of third-party plaintiffs for partial summary judgment on the issue of liability with respect to their claims against third-party defendant Michael (Mick) Whipple.

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

Same memorandum as in *Manufacturers & Traders Trust Co. v Client Server Direct, Inc.* ([appeal No. 2] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1242

CA 16-01441

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

MANUFACTURERS AND TRADERS TRUST COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CLIENT SERVER DIRECT, INC., ACN PROPERTIES, LLC,
JEFFREY T. DRILLING, HOLLY DRILLING,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CLIENT SERVER DIRECT, INC., ACN PROPERTIES, LLC,
JEFFREY T. DRILLING, HOLLY DRILLING AND LEAP
ANALYTIX, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

M&T BANK CORPORATION, MICHAEL (MICK) WHIPPLE,
ALFRED F. LUHR, III, AND MARK MARTIN,
THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

PARLATO LAW, WILLIAMSVILLE, CHAITMAN LLP, NEW YORK CITY (HELEN D. CHAITMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (ROBERT J. FLUSKEY, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANTS-RESPONDENTS M&T BANK CORPORATION, ALFRED F. LUHR, III AND MARK MARTIN.

PERSONIUS MELBER LLP, BUFFALO (RODNEY O. PERSONIUS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT MICHAEL (MICK) WHIPPLE.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered June 27, 2016. The order, inter alia, granted in part the motion of plaintiff and third-party defendants M&T Bank Corporation, Alfred F. Luhr, III, and Mark Martin for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of the motion for a protective order with respect to demand No. 9, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff-third-party defendant Manufacturers

and Traders Trust Company/M&T Bank Corporation (bank) commenced this action against defendants-third-party plaintiffs Jeffrey T. Drilling and Holly Drilling and their business entities, Client Server Direct, Inc. (CSD) and ACN Properties, LLC (ACN), to collect on two legitimate debt obligations issued by the bank upon which CSD and ACN allegedly defaulted. Defendants-third-party plaintiffs interposed counterclaims against the bank and, together with third-party plaintiff Leap Analytix, LLC (collectively, Drilling Parties), made third-party claims against third-party defendants Alfred F. Luhr, III and Mark Martin, i.e., two bank officers (collectively with the bank, M&T), and third-party defendant Michael (Mick) Whipple, a former loan officer with the bank. The Drilling Parties alleged that they suffered damages as a result of a fraudulent lending scheme in which Whipple, in the course of his employment with the bank, provided fraudulent loans to unrelated third parties using the credit and identity of the Drilling Parties and other nonparty entities.

Preliminarily, we note that the Drilling Parties filed a notice of appeal in appeal No. 1 from an order denying their motion for partial summary judgment on the issue of liability with respect to their claims against Whipple. The Drilling Parties elected not to perfect that appeal and, therefore, it is deemed abandoned and dismissed for failure to perfect it in a timely fashion (*see* 22 NYCRR 1000.12 [b]; *Wright v Shapiro*, 101 AD3d 1682, 1682 [4th Dept 2012], *lv denied* 21 NY3d 858 [2013]).

The remaining appeals relate to discovery issues. Turning first to the order in appeal No. 3, the Drilling Parties contend that Supreme Court erred in denying their motion to unseal the record. At the outset, we agree with the Drilling Parties that the court improperly denied the motion on the ground that it was an untimely motion for leave to reargue (*see* CPLR 2221 [d] [3]). Contrary to M&T's contention, in issuing that part of its prior order sealing the record in response to a motion to compel and a cross motion for a protective order, the court, without notice to the parties, granted relief that was not requested and, therefore, that part of the prior order was issued sua sponte (*see Northside Studios v Treccagnoli*, 262 AD2d 469, 469 [2d Dept 1999]; *see also USAA Fed. Sav. Bank v Calvin*, 145 AD3d 704, 706 [2d Dept 2016]; *Soggs v Crocco* [appeal No. 1], 184 AD2d 1021, 1021 [4th Dept 1992]). Inasmuch as there was no prior motion to seal the record, the Drilling Parties' subsequent motion seeking to unseal the record cannot be construed as a motion for leave to reargue and, indeed, the Drilling Parties appropriately did not identify it as such (*see* CPLR 2221 [d] [1]). We therefore conclude that the court erred in determining that the Drilling Parties' motion was an untimely motion for leave to reargue (*see Cheri Rest., Inc. v Eoche*, 144 AD3d 578, 579 [1st Dept 2016]).

We nonetheless conclude that the court, in rendering a determination in the alternative, properly denied the Drilling Parties' motion on the merits. It is well established that "[t]here is a presumption that the public has [a] right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the 'bright light cast upon the judicial process by public observation

diminishes the possibilities for injustice, incompetence, perjury, and fraud' " (*Mancheski v Gabelli Group Capital Partners*, 39 AD3d 499, 501 [2d Dept 2007]; *see Maxim Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016]; *Fordham-Coleman v National Fuel Gas Distrib. Corp.*, 42 AD3d 106, 115 [4th Dept 2007]; *Danco Labs. v Chemical Works of Gedeon Richter*, 274 AD2d 1, 7 [1st Dept 2000]). Inasmuch as "confidentiality is the exception and not the rule . . . , 'the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access' " (*Maxim Inc.*, 145 AD3d at 517). In conformance with those principles, the Uniform Rules for Trial Courts provide, in relevant part, that "a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties" (22 NYCRR 216.1; *see Fordham-Coleman*, 42 AD3d at 115). Although the term "good cause" is not defined in the rule, courts have held that "a sealing order should clearly be predicated upon a sound basis or legitimate need to take judicial action" (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322, 325 [1st Dept 2006]; *see Mosallem v Berenson*, 76 AD3d 345, 349 [1st Dept 2010]; *Fordham-Coleman*, 42 AD3d at 115). Inasmuch as "there is no absolute definition, a finding of good cause, in essence, 'boils down to . . . the prudent exercise of the court's discretion' " (*Applewood Pictures LLC v Perelman*, 80 AD3d 181, 192 [1st Dept 2010]; *see Mancheski*, 39 AD3d at 502).

Here, in its written finding of good cause, the court found that the documents produced by M&T during discovery that the Drilling Parties sought to unseal included Whipple's entire email account, which contained thousands of confidential customer documents unrelated to the scheme underlying the claims in this action; bank account statements, financial statements, and loan and credit files of the bank's customers; and confidential credit analyses of such customers. In considering the interests of the bank, the court properly noted that, where, as here, third-party bank customer information is at issue, sealing orders are appropriate inasmuch as "[t]here [is] a compelling interest in sealing . . . third-party financial information since disclosure could impinge on the privacy rights of third parties who clearly are not litigants" (*Mancheski*, 39 AD3d at 502).

With respect to the Drilling Parties' interests, the court properly concluded that the sealing order does not affect their ability to defend against M&T's claims or pursue their own claims in the action. Instead, the record supports M&T's assertion that the Drilling Parties sought to unseal the record for purposes that included bringing collateral pressure upon the bank with respect to matters unrelated to the merits of their claims by, for example, potentially engaging in online publication of record information. We conclude that the court did not err in determining, under the circumstances of this case, that such purposes were "outweighed by ensuring that the highly confidential . . . [i]nformation remain[ed] confidential" (*cf. Mosallem*, 76 AD3d at 351). Indeed, access to court

records has been properly denied where, as here, "court files might . . . become a vehicle for improper purposes" (*Matter of WNYT-TV v Moynihan*, 97 AD2d 555, 556 [3d Dept 1983], citing *Nixon v Warner Communications*, 435 US 589, 598 [1978]). In addition, while there is no doubt that a fraudulent lending scheme occurring in a major local bank is of public concern (*see Mosallem*, 76 AD3d at 350), the court properly determined that the contention of the Drilling Parties that there is an overwhelming and urgent need to disclose *nonconfidential* information about the scheme to the public is undermined by the existence of an extensive public record of the scheme and the fact that the Drilling Parties did not challenge the initial sealing order and delayed 10 months before seeking to unseal the record. On the record before us, we cannot conclude that the court abused its discretion in denying the Drilling Parties' motion (*see Mancheski*, 39 AD3d at 502).

With respect to the order in appeal No. 2, the Drilling Parties contend that the court erred in granting that part of M&T's motion for a protective order regarding three supplemental document demands. We agree with the Drilling Parties with respect to demand No. 9. In general, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]). Nonetheless, "privileged matter shall not be obtainable" when there is an "objection by a person entitled to assert the privilege" (CPLR 3101 [b]; *see generally Rawlins v St. Joseph's Hosp. Health Ctr.*, 108 AD3d 1191, 1191-1192 [4th Dept 2013]), and a court has the discretion pursuant to CPLR 3103 (a) to "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device."

Here, in demand No. 9 of their supplemental document demands, the Drilling Parties requested "[a]ll documents evidencing or relating to the duties imposed on M&T personnel to ensure compliance with the Bank Secrecy Act." With respect to the subject demands, including demand No. 9, the Board of Governors of the Federal Reserve System (Board) invoked the bank examination privilege, which "is a qualified rather than [an] absolute privilege [that] accords agency opinions and recommendations and banks' responses thereto protection from disclosure" (*In re Bankers Trust Co.*, 61 F3d 465, 471 [6th Cir 1995], *cert dismissed* 517 US 1205 [1996]; *see Wultz v Bank of China Ltd.*, 61 F Supp 3d 272, 281-283 [SD NY 2013]). As relevant here, the Board asserted that demand No. 9 sought privileged "[c]onfidential supervisory information" (12 CFR 261.2 [c] [1]), and that the Drilling Parties had not exhausted their administrative remedies. The Drilling Parties conceded that they would have to proceed with administrative remedies to the extent that they were pursuing any such documentation arguably within the bank examination privilege, but asserted that their demands were, in fact, limited only to those materials categorically exempt from the definition of "[c]onfidential supervisory information," i.e., "documents prepared by a supervised financial institution for its own business purposes and that are in its possession" (12 CFR 261.2 [c] [2]). Inasmuch as there may be documents responsive to demand No. 9 that were prepared by the bank for its own business purposes and are in its possession (*see id.*), we

conclude that the court abused its discretion in granting the protective order without first reviewing documents responsive to that demand. We nonetheless reject the Drilling Parties' contention regarding the other two demands. We therefore modify the order in appeal No. 2 by denying that part of M&T's motion seeking a protective order regarding demand No. 9, and we remit the matter to Supreme Court to determine that part of the motion following an in camera review of the allegedly privileged documents responsive to that request as limited by the Drilling Parties (*see generally Rawlins*, 108 AD3d at 1195; *Baliva v State Farm Mut. Auto. Ins. Co.*, 275 AD2d 1030, 1031 [4th Dept 2000]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1243

CA 17-00142

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

MANUFACTURERS AND TRADERS TRUST COMPANY,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CLIENT SERVER DIRECT, INC., ACN PROPERTIES, LLC,
JEFFREY T. DRILLING, HOLLY DRILLING,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

CLIENT SERVER DIRECT, INC., ACN PROPERTIES, LLC,
JEFFREY T. DRILLING, HOLLY DRILLING AND LEAP
ANALYTIX, LLC, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

M&T BANK CORPORATION, MICHAEL (MICK) WHIPPLE,
ALFRED F. LUHR, III, AND MARK MARTIN,
THIRD-PARTY DEFENDANTS-RESPONDENTS.
(APPEAL NO. 3.)

PARLATO LAW, WILLIAMSVILLE, CHAITMAN LLP, NEW YORK CITY (HELEN D. CHAITMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS AND THIRD-PARTY PLAINTIFFS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (ROBERT J. FLUSKEY, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND THIRD-PARTY DEFENDANTS-RESPONDENTS M&T BANK CORPORATION, ALFRED F. LUHR, III, AND MARK MARTIN.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered October 17, 2016. The order denied the motion of defendants-third-party plaintiffs Client Server Direct, Inc., ACN Properties, LLC, Jeffrey T. Drilling and Holly Drilling and of third-party plaintiff Leap Analytix, LLC to unseal the record.

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

Same memorandum as in *Manufacturers & Traders Trust Co. v Client Server Direct, Inc.* ([appeal No. 2] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1244

CA 17-00764

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

GREAT LAKES MOTOR CORP., DOING BUSINESS AS MERCEDES-BENZ OF BUFFALO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

PATRICK J. JOHNSON, DEFENDANT-RESPONDENT.

BOND SCHOENECK & KING, PLLC, BUFFALO (SHARON M. PORCELLIO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, BUFFALO (WARREN B. ROSENBAUM OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered July 1, 2016. The order denied that part of the motion of plaintiff for leave to amend the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and that part of the motion seeking leave to amend the complaint is granted in accordance with the following memorandum: Defendant purchased a vehicle from plaintiff and, at the time of the purchase, executed a Nonexport Agreement in which he agreed that he would not personally export the vehicle or transfer the vehicle "to any party for export outside North America." In addition, the Nonexport Agreement provided that "[t]he parties agree that it would be impractical or difficult to fix the actual damages" if the vehicle were exported in violation of the agreement and, therefore, if the vehicle were so exported, defendant would be obligated to pay plaintiff liquidated damages in the amount of $20,000. Some time after defendant purchased the vehicle, he transferred ownership of the vehicle to Superior Auto Sales, Inc. (Superior) and, less than one month after the vehicle was sold to defendant, it was exported to China. Plaintiff thereafter commenced this action seeking damages related to defendant's alleged breach of the Nonexport Agreement.

Following joinder of issue but prior to discovery, defendant moved for summary judgment dismissing the complaint, contending, inter alia, that the liquidated damages clause was unenforceable. On a prior appeal, we affirmed Supreme Court's order denying that motion, concluding that "defendant failed to meet his initial burden of establishing as a matter of law that the amount of liquidated damages does not bear a reasonable relation to plaintiff's actual damages" (*Great Lakes Motor Corp. v Johnson*, 132 AD3d 1390, 1391 [4th Dept

2015]).

During the ensuing discovery, plaintiff was provided with a copy of an agreement between defendant and Superior (Nominee Agreement), pursuant to which defendant agreed to buy vehicles for Superior, which was unable to do so itself as a result of "certain restrictive trade practices engaged in by the manufacturers and distributors of motor vehicles." Defendant agreed to be "a bare Nominee" with no actual interest in the vehicles purchased, and further agreed to transfer those vehicles immediately to Superior. Defendant was thus a " 'straw buyer' " of the vehicle (*United States v Any and All Funds on Deposit in Account No. 0139874788, at Regions Bank, Held in the Name of Efans Trading Corp.*, 2015 WL 247391, *1 [SD NY 2015]). The Nominee Agreement further provided that Superior agreed to indemnify and hold harmless defendant "against any and all liability with respect to the purchase of the [vehicles] purchased by Superior in the name of [defendant]." In addition, defendant appointed Superior "to act as his . . . lawful attorney . . . in connection with the purchase of the motor vehicles." It is thus undisputed that Superior is representing defendant's interests.

Plaintiff thereafter moved for, inter alia, leave to amend its complaint to add Superior as a defendant and to assert causes of action for breach of contract and tortious interference with a contract against Superior as well as a cause of action for civil conspiracy against both defendant and Superior. We agree with plaintiff that the court erred in denying that part of plaintiff's motion.

"Leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit" (*McFarland v Michel*, 2 AD3d 1297, 1300 [4th Dept 2003] [internal quotation marks omitted]; *see* CPLR 3025 [b]; *Holst v Liberatore*, 105 AD3d 1374, 1374 [4th Dept 2013]). Although defendant contends that plaintiff was required to " 'make an evidentiary showing that the claim[s] [could] be supported' " (*Farrell v K.J.D.E. Corp.*, 244 AD2d 905, 905 [4th Dept 1997]; *see Di Matteo v Grey*, 280 AD2d 929, 930 [4th Dept 2001]; *Mathews v Visual Thermoforming*, 187 AD2d 964, 964-965 [4th Dept 1992]), or to submit an affidavit of merit (*see Weller v Colleges of the Senecas*, 261 AD2d 852, 852-853 [4th Dept 1999], *lv denied* 93 NY2d 817 [1999]), plaintiff correctly relies on the more recent cases from this Court, which provide that "[a] court should *not* examine the merits or legal sufficiency of the proposed amendment unless the proposed pleading is clearly and patently insufficient on its face" (*Landers v CSX Transp., Inc.*, 70 AD3d 1326, 1327 [4th Dept 2010] [emphasis added and internal quotation marks omitted]; *see Holst*, 105 AD3d at 1374-1375; *see generally Lucido v Mancuso*, 49 AD3d 220, 224-230 [2d Dept 2008]).

Here, defendant has failed to demonstrate that the proposed amendments were "palpably insufficient or patently devoid of merit" (*Holst*, 105 AD3d at 1374). In any event, the original complaint, exhibits and documents attached to the motion "provided the necessary

evidentiary support for the motion" (*id.* at 1375).

Defendant contends that all of the proposed amendments are "without merit" because plaintiff "did not and cannot prove it suffered any damages." We reject that contention. "In [the] proposed amended complaint, plaintiff alleges that, as a result of [the conduct of defendant and Superior], [plaintiff] was damaged. On this record, we cannot conclude that plaintiff's allegation of damages is patently lacking in merit" (*Duszynski v Allstate Ins. Co.*, 107 AD3d 1448, 1450 [4th Dept 2013]). Moreover, although plaintiff did not suffer any "chargeback[s]" from Mercedes-Benz, USA (MBUSA), deposition testimony of "the export sales compliance specialist" for MBUSA established that there were many other items of "financial loss" suffered by dealers as a result of the violation of Nonexport Agreements (*see Holloway Auto. Group v Giacalone*, 169 NH 623, 625-626, 154 A3d 1246, 1248 [2017]). In denying that part of the motion seeking leave to amend the complaint, the court concluded that plaintiff could not demonstrate any actual damages as a result of the breach of the Nonexport Agreement. We agree with plaintiff that the court improperly decided the merits of a disputed issue of fact in the context of a motion seeking leave to amend the complaint (*see Caruso, Caruso & Branda, P.C. v Hirsch*, 41 AD3d 407, 409 [2d Dept 2007]; *Curiale v Weicholz & Co.*, 192 AD2d 339, 339 [1st Dept 1993]; *see generally Lucido*, 49 AD3d at 224-230).

Contrary to defendant's further contention, the proposed causes of action for civil conspiracy and tortious interference with a contract are not patently lacking in merit. Although "New York does not recognize civil conspiracy to commit a tort as an *independent* cause of action" (*Matter of Hoge [Select Fabricators, Inc.]*, 96 AD3d 1398, 1400 [4th Dept 2012] [emphasis added and internal quotation marks omitted]; *see Transit Mgt., LLC v Watson Indus., Inc.*, 23 AD3d 1152, 1155-1156 [4th Dept 2005]), such a "claim" or "cause of action" may be asserted where, as here, there are allegations of a " 'primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury' " (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]; *see Perez v Lopez*, 97 AD3d 558, 560 [2d Dept 2012]). Here, plaintiff alleged a primary tort of tortious interference with a contract (*see generally NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]), and the allegations supporting that tort as well as the cause of action for civil conspiracy are not "palpably insufficient or patently devoid of merit" (*Holst*, 105 AD3d at 1374).

With respect to the proposed cause of action for breach of contract against Superior, we conclude that the allegations supporting that cause of action are likewise not patently devoid of merit. "The general rule is recognized that an undisclosed principal is liable to third parties on contracts made in his behalf by his agent acting within his actual authority" (*Industrial Mfrs., Inc. v Bangor Mills, Inc.*, 283 App Div 113, 116 [1st Dept 1953], *affd* 307 NY 746 [1954]).

Here, plaintiff alleges that defendant was an agent of Superior, i.e., the undisclosed principal, and that he acted within his actual authority when he purchased the vehicle on behalf of Superior.

Finally, defendant contends that the tort causes of action are now barred by the statute of limitations inasmuch as the limitations period expired during the pendency of this appeal. We decline to address the merits of that contention, which is raised for the first time on appeal, inasmuch as it is a contention that could be " 'obviated or cured by factual showings or legal countersteps' " in the motion court (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1253

KA 09-01810

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY TUFF, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered August 7, 2009. The judgment convicted defendant, upon a jury verdict, of criminal sale of a controlled substance in the third degree, criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree (two counts), criminally using drug paraphernalia in the second degree (two counts), unlawful possession of marihuana and intimidating a victim or witness in the third 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 directing that the sentences imposed on counts one and two shall run concurrently with the sentences imposed on counts three through seven and as modified the judgment is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of various charges, including criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), criminal possession of a controlled substance in the first degree (§ 220.21 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]). On a prior appeal, this Court affirmed the judgment of conviction (*People v Tuff*, 90 AD3d 1645 [4th Dept 2011], *lv denied* 19 NY3d 968 [2012]). We subsequently granted defendant's motion for a writ of error coram nobis, however, on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., whether the verdict is against the weight of the evidence (*People v Tuff*, 107 AD3d 1646 [4th Dept 2013]), and we vacated our prior order. We now consider the appeal de novo.

Defendant contends that the conviction is not supported by legally sufficient evidence. As defendant correctly concedes, he failed to preserve his contention for our review (*see generally People*

v Gray, 86 NY2d 10, 19 [1995]). We nevertheless exercise our power to review the contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), and we conclude that the contention lacks merit.

Before trial, County Court consolidated two indictments that contained charges related to three separate and distinct incidents. One indictment charged defendant with one count each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]), and criminal possession of a controlled substance in the third degree (§ 220.16 [1]) related to an alleged sale of a controlled substance to a confidential informant on September 9, 2008 (sale offenses). The other indictment charged defendant with criminal possession of a controlled substance in the first degree (§ 220.21 [1]), criminal possession of a controlled substance in the third degree (§ 220.16 [1]), unlawful possession of marihuana (§ 221.05) and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]) related to his alleged possession of those items, which were recovered during the execution of a search warrant at the residence of defendant's sister on September 25, 2008 (possession offenses). That indictment also charged defendant with intimidating a victim or witness in the third degree (§ 215.15 [1]) based on allegations that, on October 26, 2008, he threatened his sister's boyfriend with physical injury should he cooperate with the police or give testimony against defendant.

Contrary to the contention of defendant, the conviction of the sale offenses is supported by legally sufficient evidence, i.e., the eyewitness testimony of the informant who participated in the controlled purchase of cocaine from defendant and the New York State Police investigator who supervised that controlled purchase, along with the forensic testimony establishing the weight and identity of the cocaine (*see People v Brown*, 2 AD3d 1423, 1424 [4th Dept 2003], *lv denied* 1 NY3d 625 [2004]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). We reject defendant's contention that the testimony of the informant was incredible as a matter of law, i.e., "manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Ponzo*, 111 AD3d 1347, 1348 [4th Dept 2013] [internal quotation marks omitted]; *see People v Barr*, 216 AD2d 890, 890 [4th Dept 1995], *lv denied* 86 NY2d 790 [1995]). Viewing the evidence in light of the elements of the sale offenses as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's additional contention that the verdict with respect to those counts is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Addressing next the single count of intimidating a victim or witness, we conclude that the testimony of the sister's boyfriend that defendant came to his home and threatened him with physical injury should he cooperate with law enforcement or testify against defendant at trial is legally sufficient to establish defendant's guilt of that offense (*see Bleakley*, 69 NY2d at 495). In addition, viewing the evidence in light of the elements of that crime as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict on that

count is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495). "[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 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]).

The closer issues are whether the evidence is legally sufficient to support the conviction of the possession offenses or whether the verdict on those counts is against the weight of the evidence, the latter issue being the basis upon which we granted an appeal de novo. Having reviewed the record de novo, we conclude that those issues lack merit.

" 'Constructive possession can be established by evidence that the defendant had dominion and control over the [drugs and drug paraphernalia] or the area in which [they were] found' . . . 'Exclusive access, however, is not required to sustain a finding of constructive possession' " (*People v Victor*, 139 AD3d 1102, 1105 [3d Dept 2016], *lv denied* 28 NY3d 1076 [2016]; *see People v Carvajal*, 14 AD3d 165, 170 [1st Dept 2004], *affd* 6 NY3d 305 [2005]). Here, the drugs and drug paraphernalia were recovered from various locations inside a residence in which defendant's sister, her boyfriend and her children resided. It is undisputed that defendant did not reside in that residence. Nevertheless, there was ample evidence that defendant constructively possessed the contraband.

Throughout the summer of 2008, both before and after the sale, defendant was under surveillance, and he was observed entering the sister's residence numerous times. On September 9, 2008, defendant sold cocaine to an informant at the sister's residence, and his presence at the residence during the sale was confirmed by the investigator. There was significant evidence supporting the inference that defendant was a major drug dealer, which included evidence that $17,000 in cash was recovered from defendant's residence, bound in $1,000 increments, also known as "G packets." The informant, who was also an admitted drug dealer, testified that dealers often used "stash" houses belonging to friends or relatives to keep their drugs out of their own residences.

During the execution of the search warrant at the sister's residence, her boyfriend stated that they were "going down for [defendant's] [actions]." Indeed, the boyfriend testified at trial that the cocaine in the attic of his residence belonged to defendant. Defendant had come to the residence 30 minutes before the raid and had gone to the back of the house where the door to the attic was located. Some time later, defendant called the boyfriend and asked him to move the cocaine to the garage outside of the residence.

Although there was a question whether defendant had a key to the residence at the time the search warrant was executed, the sister's boyfriend and the informant, who spent a lot of time with defendant, testified that defendant had access to the residence. He could go there "any time he wanted" and "could go in and out as he please[d]."

After the search warrant was executed, defendant admitted to two of his relatives that the cocaine found in the residence belonged to him. He also admitted to the informant, before he knew that the informant was cooperating with law enforcement, that the cocaine at the sister's residence had belonged to him and that the boyfriend was "stupid" for failing to move it.

Unlike other constructive possession cases, where the testimony at trial is limited to physical evidence linking a defendant to a location and possession of the drugs must be inferred from the defendant's ties to the residence (*see e.g. People v Slade*, 133 AD3d 1203, 1205 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016]; *People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]; *People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; *People v Patterson*, 13 AD3d 1138, 1139 [4th Dept 2004], *lv denied* 4 NY3d 801 [2005]; *People v Eldridge*, 173 AD2d 975, 976 [3d Dept 1991]), here there was testimony that defendant on three occasions admitted that the drugs in the house belonged to him, and the sister's boyfriend testified that the drugs in his residence belonged to defendant. Moreover, the evidence established that defendant had sold cocaine from that residence less than three weeks before the search warrant was executed.

We thus conclude that the evidence is legally sufficient to support the conviction of the possession offenses (*see Bleakley,* 69 NY2d at 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), including the charge that possession may be joint, we conclude that "there was ample evidence that regardless of where he was situated, defendant at all times exercised continued dominion and control over the drugs [and paraphernalia] that were ultimately seized and the locations where the subject drugs [and paraphernalia] were discovered" (*Carvajal*, 14 AD3d at 171). As a result, we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied his right to present a defense when the court refused to allow him to call a witness who had indicated, outside the presence of the jury, that she would invoke her privilege against self-incrimination. We reject that contention. Even assuming, arguendo, that defendant preserved his contention for our review by an appropriate objection raised during an untranscribed bench conference, we nevertheless conclude that it lacks merit. "[T]he decision whether to permit defense counsel to call a particular witness solely 'to put him [or her] to his [or her] claim of privilege against self[-]incrimination in the presence of the jury' rests within the sound discretion of the trial court" (*People v Thomas*, 51 NY2d 466, 472 [1980]; *see People v Grimes*, 289 AD2d 1072, 1073 [4th Dept 2001], *lv denied* 97 NY2d 755 [2002]). We see no basis upon which to disturb the court's decision.

We further reject defendant's contention that he was denied his right to present a defense when the court refused to permit a defense witness to testify about alleged out-of-court statements made by the

sister's boyfriend wherein he allegedly admitted that the cocaine seized from his residence belonged to him. The testimony was hearsay and, although the boyfriend's statements could be deemed a declaration against penal interest, the hearsay exception for such statements does not apply because he testified at trial and the "unavailability of the declarant is a required element for the introduction of a declaration against penal interest" (*People v Smith*, 147 AD3d 1527, 1529 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *see generally People v Brensic*, 70 NY2d 9, 15 [1987], *remittitur amended* 70 NY2d 722 [1987]). Moreover, the "exclusion of the statement did not 'infringe[] on defendant's weighty interest in presenting exculpatory evidence' " (*Smith*, 147 AD3d at 1529). "While a defendant has a constitutional right to present a defense, [t]he right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence" (*People v Hayes*, 17 NY3d 46, 53 [2011], *cert denied* 565 US 1095 [2011] [internal quotation marks omitted]).

During defendant's trial, the prosecutor repeatedly referred to defendant by his nickname, "BOLO," and elicited that nickname from witnesses. Defendant contends that the use of his nickname constituted prosecutorial misconduct depriving him of a fair trial. Defendant, however, did not object to the use of his nickname and thus failed to preserve his contention for our review (*see People v Caver*, 302 AD2d 604, 604 [2d Dept 2003], *lv denied* 99 NY2d 653 [2003]). In any event, we conclude that the references to defendant by his nickname were not so prejudicial as to deny him a fair trial (*see People v Hernandez*, 89 AD3d 1123, 1125-1126 [3d Dept 2011], *lv denied* 20 NY3d 1099 [2013]; *cf. People v Collier*, 114 AD3d 1136, 1137 [4th Dept 2014]; *People v Lauderdale*, 295 AD2d 539, 540 [2d Dept 2002]). Defendant's remaining contentions of prosecutorial misconduct on summation are likewise not preserved for our review (*see People v Simmons*, 133 AD3d 1227, 1228 [4th Dept 2015]; *see generally* CPL 470.05 [2]), and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Before trial, defendant attempted to submit a pro se motion to suppress evidence, which the court rejected. He contends that this rejection, coupled with the cumulative effect of the alleged errors previously discussed, denied him a fair trial. We reject that contention. Defendant was represented by counsel at the time the court rejected his pro se motion and, "[b]ecause a defendant has no constitutional right to hybrid representation, the decision to allow such representation lies within the sound discretion of the trial court" (*People v Rodriguez*, 95 NY2d 497, 502 [2000]). Contrary to defendant's further contention, he was not denied a fair trial by the cumulative effect of the alleged errors.

Defendant was represented by two separate attorneys, and he contends that he was denied effective assistance of counsel when the first attorney failed to move to suppress the items seized during the execution of the search warrant. Contrary to defendant's contention, however, defense counsel had a "strategic or other legitimate explanation[]" for not making that motion (*People v Rivera*, 71 NY2d

705, 709 [1988]), inasmuch as defendant lacked standing to challenge a search conducted at his sister's residence (*see generally People v Ramirez-Portoreal*, 88 NY2d 99, 108-109 [1996]). It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Defendant further contends that the second attorney was ineffective in failing to make a proper *Batson* challenge and to make a record concerning alleged misconduct of a prosecution witness. Those contentions, however, are based on matters outside the record on appeal and therefore must be raised by way of a motion pursuant to CPL 440.10 (*see generally People v Kirk*, 96 AD3d 1354, 1355 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]).

Defendant contends that the second attorney also was ineffective based on his allegedly inadequate motion to suppress, his failure to object to the use of defendant's nickname, and his generic motion for a trial order of dismissal. Those contentions lack merit. Viewing the evidence, the law and the circumstances of the case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that he was penalized for asserting his right to a trial (*see People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]; *People v Williams*, 125 AD3d 1300, 1302 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]). In any event, we conclude that the contention lacks merit.

We nevertheless conclude that the sentence is unduly harsh and severe and should be modified. The court ordered the sentences on the possession offenses to run consecutively to the sentences imposed on the sale offenses. The court further ordered the sentence imposed on the intimidating a witness count to run consecutively to all other sentences. The aggregate sentence of incarceration thus totaled 25⅓ to 28 years, which in our view is excessive for a nonviolent drug dealer, and even for one who is a repeat offender, such as defendant. We thus conclude that the sentences for the sale offenses and the possession offenses should run concurrently to each other (*see e.g. People v Morman*, 145 AD3d 1435, 1439 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]; *People v Hernandez*, 295 AD2d 989, 990 [4th Dept 2002], *lv denied* 98 NY2d 711 [2002]). We therefore, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), modify the judgment by directing that the sentences imposed on counts one and two run concurrently with the sentences imposed on counts three through seven. The sentence imposed on count eight shall still run consecutively to the sentences imposed on all other counts.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1257

KA 14-00969

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERROL POTTINGER, DEFENDANT-APPELLANT.

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

ERROL POTTINGER, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Victoria M. Argento, J.), entered December 31, 2013. The order denied without a hearing the motion of defendant pursuant to CPL 440.10 to vacate a judgment convicting him upon a jury verdict of, inter alia, assault in the first degree (two counts) and robbery in the first degree (two counts).

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from an order that denied without a hearing his motion pursuant to CPL 440.10 to vacate the judgment convicting him upon a jury verdict of, inter alia, two counts each of assault in the first degree (Penal Law § 120.10 [1], [4]) and robbery in the first degree (§ 160.15 [1], [2]). This Court previously affirmed the judgment of conviction (*People v Pottinger*, 71 AD3d 1492 [4th Dept 2010], *lv denied* 15 NY3d 755 [2010]).

We agree with the contention of defendant in his main and supplemental pro se briefs that he was entitled to a hearing on his claims of ineffective assistance of counsel and actual innocence. With respect to defendant's claim of ineffective assistance of counsel, we conclude that nonrecord facts may support defendant's contention that his trial counsel failed to investigate two potential alibi witnesses and was ineffective in failing to present the testimony of one or both of those witnesses. It is well settled that "[a] defendant's right to effective assistance of counsel includes defense counsel's reasonable investigation and preparation of defense witnesses" (*People v Jenkins*, 84 AD3d 1403, 1408 [2d Dept 2011], *lv*

denied 19 NY3d 1026 [2012]; *see People v Mosley*, 56 AD3d 1140, 1140-1141 [4th Dept 2008]). Here, defendant's CPL 440.10 motion was supported by the police investigation report, which demonstrated that the alibi witnesses had been interviewed by the police and made statements supporting defendant's alibi. We note that the police report was annexed to the People's CPL 710.30 notice.

In addition, defendant submitted his own affidavit and an affidavit from one of the alibi witnesses likewise asserting facts supporting defendant's alibi claim. While a hearing may ultimately reveal that "counsel made reasonably diligent efforts to locate the [alibi] witness[es]" and present their testimony at trial (*People v Gonzalez*, 25 AD3d 357, 358 [1st Dept 2006], *lv denied* 6 NY3d 833 [2006]), or that there was a strategic reason for the failure to do so (*see People v Coleman*, 10 AD3d 487, 488 [1st Dept 2004]), we agree with defendant that his submissions raised factual issues requiring a hearing (*see generally People v Frazier*, 87 AD3d 1350, 1351 [4th Dept 2011]).

Additionally, we conclude that County Court erred in denying defendant's motion without holding a hearing to address defendant's claim that the judgment of conviction should be vacated pursuant to CPL 440.10 (1) (h) based on his actual innocence of the crimes of which he was convicted (*see People v Hamilton*, 115 AD3d 12, 15 [2d Dept 2014]). We conclude that defendant made a prima facie showing of actual innocence sufficient to warrant a hearing on the merits (*see Hamilton*, 115 AD3d at 27). Specifically, in support of his claim of actual innocence, he submitted competent evidence establishing an alibi through, inter alia, witnesses who, although identified before trial in a police report attached to the People's 710.30 notice, did not testify at trial.

Finally, we reject the People's contention that defendant's motion papers did not contain "sworn allegations substantiating or tending to substantiate all the essential facts" (CPL 440.30 [4] [b]).

We therefore reverse the order and remit the matter to County Court to conduct a hearing in accordance with our decision herein.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1264

CA 17-00174

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

DONNA HAHER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. PELUSIO, SR., ALBERT M. PELUSIO, ROCHESTER LINOLEUM & CARPET CENTER, INC., AND PELUSIO FAMILY PARTNERS, L.L.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS BELL ADAMS, P.C., ROCHESTER (JARED K. COOK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 15, 2016. The order, inter alia, determined that the parties had a binding contract and directed defendants to resume making certain payments to plaintiff under the contract.

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

Memorandum: Plaintiff is the sister of defendants David J. Pelusio, Sr. and Albert M. Pelusio, and together they operated various family businesses. Plaintiff commenced this action seeking, inter alia, an order for specific performance of her agreement with defendants pursuant to which they were to make payments to her in connection with their purchase of plaintiff's interests in the family businesses. By the order in appeal No. 1, Supreme Court determined, inter alia, that the parties had a binding contract, that defendants shall resume payments to plaintiff under the contract and that, if defendants are unable to pay, they may make an application to suspend those payments. By the order and underlying decision in appeal No. 2, the court, inter alia, denied defendants' motion to suspend their payments based on lack of funds but directed the parties to complete discovery immediately so that a hearing could be scheduled within 60 days to determine, among other things, defendants' financial ability to pay under the contract. We granted defendants' motion to consolidate the appeals, and we now affirm in both appeals.

With respect to the order in appeal No. 1, we note that the court

in its underlying decision wrote that it was "undisputed that the parties partially performed some of their respective obligations under the agreement" and partial performance can establish a binding agreement where one does not otherwise exist (*see generally Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229, 235 [1999]). On appeal, defendants contend that the agreement is not sufficiently definite to be enforceable and that it is void because it was entered into under mutual mistake. Defendants did not, however, address the issue of partial performance in their main brief on appeal and, in their reply brief, defendants contend that they performed under the contract because they were under duress. In our view, by failing to address the basis for the court's decision in their main brief, defendants cannot be heard on their other contentions that were not the dispositive basis for the court's decision, and they therefore have effectively abandoned any issue concerning partial performance on appeal (*see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]). Furthermore, we note that the basis for their duress contention was not raised before Supreme Court until their reply papers associated with their motion at issue in appeal No. 2.

With respect to appeal No. 2, we reject defendants' contention that the court erred in denying their motion to suspend payments. In our view, the court properly concluded that defendants failed to establish conclusively in support of their motion that they were financially unable to make the payments contemplated by the agreement, and therefore a hearing is necessary (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1265

CA 17-00466

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

DONNA HAHER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DAVID J. PELUSIO, SR., ALBERT M. PELUSIO, ROCHESTER LINOLEUM & CARPET CENTER, INC., AND PELUSIO FAMILY PARTNERS, L.L.C., DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

CULLEY, MARKS, TANENBAUM & PEZZULO, LLP, ROCHESTER (GLENN E. PEZZULO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ADAMS BELL ADAMS, P.C., ROCHESTER (JARED K. COOK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered January 25, 2017. The order, inter alia, denied the motion of defendants to suspend certain payments required to be made to plaintiff under the parties' agreement based upon lack of funds.

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

Same memorandum as in *Haher v Pelusio* ([appeal No. 1] __ AD3d __ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1267

CA 17-00722

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

JAMES P. LOMBARDO, JR., PLAINTIFF-RESPONDENT,

V ORDER

CHRISTINA A. AGOLA, DEFENDANT-APPELLANT.

CHRISTINA A. AGOLA, DEFENDANT-APPELLANT PRO SE.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MATTHEW T. MOSHER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 13, 2016. The judgment, among other things, adjudged that defendant had breached the terms of her lease agreement with plaintiff and awarded plaintiff damages.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1271

KA 16-00440

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAMIRO ARMENDARIZ, DEFENDANT-APPELLANT.

JOSHUA P. BANNISTER, HERKIMER, FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (JACQUELINE MCCORMICK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered January 26, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the third 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 jury verdict, of rape in the third degree (Penal Law § 130.25 [2]) and endangering the welfare of a child (§ 260.10 [1]). The conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, when the evidence is viewed in light of the elements of the crimes as charged to the jury, the verdict is not against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Contrary to defendant's contention, his "statement of his [date of birth] given to a police officer who elicited pedigree information" constitutes legally sufficient evidence that defendant was over 21 years old when he engaged in sexual intercourse with the 16-year-old victim (*People v White*, 149 AD2d 939, 939 [4th Dept 1989], *lv denied* 74 NY2d 821 [1989]; *see generally People v Perryman*, 178 AD2d 916, 917 [4th Dept 1991], *lv denied* 79 NY2d 1005 [1992]). Contrary to defendant's further contention, the victim's functionally interchangeable descriptions of the length of her sexual encounter with defendant are not internally inconsistent, and they do not persuade us that the verdict is against the weight of the evidence.

Defendant received effective assistance of counsel (*see generally People v Clark*, 28 NY3d 556, 562-563 [2016]). The alleged improprieties in the prosecutor's summation were not so egregious that counsel was ineffective by failing to object (*see People v Koonce*, 111 AD3d 1277, 1278-1279 [4th Dept 2013]). Moreover, "although it was

improper for the prosecutor to question prospective jurors about their attitudes towards the laws of New York pertaining to [statutory rape] . . . , defendant has failed to show the absence of a strategic reason for counsel's failure to object[so] as to support a finding of ineffective assistance of counsel" (*People v LaDuke*, 140 AD3d 1467, 1470 [3d Dept 2016])

Defendant's remaining contentions are unpreserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, we note that the certificate of conviction contains several errors regarding the sentences imposed, and it must be amended to reflect the correct sentences of 120 days of incarceration and 10 years of probation on count one, and three years of probation on count two (*see generally People v Kemp*, 112 AD3d 1376, 1377 [4th Dept 2013]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1274

KA 13-01173

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TRELLIS L. PRESSLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 15, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and criminal sexual act 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 a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]), defendant contends that Supreme Court violated his right to a fair trial by advising the jury, during the court's preliminary instructions, that defendant was in custody and unable to post bail. Defendant made no objection to the preliminary instructions and thus failed to preserve that contention for our review (*see People v Cooke*, 24 NY3d 1196, 1197 [2015], *cert denied* ___ US ___, 136 S Ct 542 [2015]; *see also People v Griggs*, 27 NY3d 602, 606 [2016], *rearg denied* 28 NY3d 957 [2016]). In any event, that contention lacks merit. The court instructed the jury that it was to draw no unfavorable inferences from the fact that defendant was in custody and unable to make bail, and the jury is presumed to have followed that instruction (*see People v Spears*, 140 AD3d 1629, 1630 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016]). We reject defendant's further contention that he was prejudiced by the positioning of a Deputy Sheriff at the defense table (*see People v Gamble*, 18 NY3d 386, 396-397 [2012], *rearg denied* 19 NY3d 833 [2012]), or by the court's identification of that Deputy Sheriff by name during its preliminary instructions.

We agree with defendant that the court erred in requiring him to proceed pro se at the *Huntley* hearing inasmuch as defendant did not waive his right to counsel at the hearing (*see generally People v*

Smith, 92 NY2d 516, 520 [1998]), nor did defendant's conduct support a finding that he forfeited his right to counsel (*see People v Bullock*, 75 AD3d 1148, 1149-1150 [4th Dept 2010]; *cf. People v Isaac*, 121 AD3d 816, 817-818 [2d Dept 2014], *lv denied* 24 NY3d 1220 [2015]). The error, however, does not warrant remittal for a new *Huntley* hearing. Even assuming, arguendo, that defendant would have prevailed at the hearing if he were represented by counsel, we conclude that the evidence of guilt apart from defendant's statements is overwhelming and that the error is harmless beyond a reasonable doubt (*see People v Wardlaw*, 6 NY3d 556, 561 [2006]).

Contrary to defendant's contentions, we conclude that assigned counsel provided meaningful representation at trial (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]), there was no indication of any conflict of interest, and the court properly denied defendant's requests for substitute counsel (*see People v Sapienza*, 75 AD3d 768, 771 [3d Dept 2010]).

We reject defendant's contention that the court violated the requirements of CPL 310.30 and *People v O'Rama* (78 NY2d 270 [1991]) in connection with the jury's request for exhibits. The jury's request was ministerial in nature and thus the *O'Rama* procedure was not implicated (*see People v Nealon*, 26 NY3d 152, 155-156 [2015]; *People v Ziegler*, 78 AD3d 545, 546 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]).

The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant engaged in sexual intercourse with the victim by forcible compulsion (*see People v Bones*, 309 AD2d 1238, 1238 [4th Dept 2003], *lv denied* 1 NY3d 568 [2003]). In addition, viewing the evidence in light of the elements of the crime of rape in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Strauss*, 147 AD3d 1426, 1426 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017], *reconsideration denied* 30 NY3d 953 [2017]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his challenge to the court's finding that he is a persistent felony offender (*see People v Roberts*, 121 AD3d 1530, 1532 [4th Dept 2014], *lv denied* 24 NY3d 1122 [2015]; *see generally* CPL 400.20), as well as a persistent violent felony offender (*see* CPL 470.05 [2]; *see generally* CPL 400.16). We decline to exercise our authority to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1275

KA 13-02115

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. SANTIAGO, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, NEW YORK STATE DEFENDERS ASSOCIATION, ALBANY (ALFRED O'CONNOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered September 24, 2013. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), arising from allegations that he shot a man on a street in Rochester. Defendant contends that Supreme Court erred in permitting a witness to describe the perpetrator at trial, because that witness had previously viewed a photo array and identified defendant as the perpetrator to the police, and the People failed to provide a CPL 710.30 notice of the procedure.

We agree with defendant that, under the circumstances presented, the court erred in permitting the witness to describe the perpetrator and state that he resembled a particular popular musician, thereby implicitly identifying defendant as the perpetrator. The People admittedly did not provide the notice required by CPL 710.30 former (1) (b), and they failed to establish that the witness provided a description of the perpetrator before the identification procedure was conducted (*cf. People v Myrick*, 66 NY2d 903, 904 [1985]; *People v Sanders*, 66 NY2d 906, 908 [1985]; *People v Jones*, 163 AD2d 911, 912 [4th Dept 1990], *lv denied* 76 NY2d 941 [1990]). Furthermore, although it appears that the witness had some familiarity with defendant, the court failed to hold a hearing at which the People could establish

that "the witness is so familiar with the defendant that there is 'little or no risk' that police suggestion could lead to a misidentification" (*People v Rodriguez*, 79 NY2d 445, 450 [1992]).

Nevertheless, we conclude that, because "the proof of defendant's guilt is overwhelming, and there is no significant probability that the error might have contributed to defendant's conviction[,] . . . the error is harmless beyond a reasonable doubt" (*People v Peterkin*, 245 AD2d 1050, 1051 [4th Dept 1997], *lv denied* 91 NY2d 1011 [1998]; *see People v Thomas*, 58 AD3d 645, 645 [2d Dept 2009], *lv denied* 12 NY3d 921 [2009]; *People v Murphy*, 28 AD3d 1096, 1096 [4th Dept 2006], *lv denied* 7 NY3d 760 [2006]; *see generally People v Johnson*, 57 NY2d 969, 970 [1982]). Several other witnesses provided nearly identical descriptions of the perpetrator and his clothing, and defendant was apprehended a short distance away, very close to the murder weapon, and inside a locked yard into which the witnesses said the perpetrator had fled. Furthermore, he was wearing pants that matched the description that the witnesses gave of the perpetrator's pants, and he was holding a hat and had a T-shirt at his feet, both of which matched the witnesses' description of those parts of the perpetrator's clothing. Finally, immediately after being shot, the victim told a friend that defendant had shot him. Thus, "[e]ven in the absence of [the witness's implicit] identification testimony, the evidence at trial overwhelmingly established that defendant was the [perpetrator]" (*People v Pacquette*, 25 NY3d 575, 580 [2015]).

We reject defendant's further contention that the People committed a *Brady* violation by refusing to disclose the name of a confidential informant. It is well settled that a confidential informant's identity must be disclosed where his or her role in the matter was significant, such as where he or she was an eyewitness or participant in the crime, or was " 'an active participant in setting the stage' " (*People v Goggins*, 34 NY2d 163, 170 [1974]). "When however [the informant] has played a marginal part by, for instance, merely furnishing a tip or some information to the police, the privilege should prevail absent an extremely strong showing of relevance" (*id.*; *see People v Wade*, 38 AD3d 1315, 1315 [4th Dept 2007], *lv denied* 8 NY3d 992 [2007]).

Defendant failed to make such a showing here, and we therefore reject his contention that reversal is required because of the court's refusal to require the People to disclose the informant's identity. The record establishes that the People provided the defense with a police report indicating that the informant, who was not present at the crime scene, had heard from an unknown source that a woman had removed something from the scene prior to the arrival of police officers. The report also indicated that the informant had heard that the victim had a weapon and fired back at defendant after defendant shot the victim. Thus, inasmuch as the confidential informant's hearsay information "made it appear as if the victim acted in self-defense and not the other way around" (*People v Fisher*, 28 NY3d 717, 722 [2017]), "there is [no] reasonable probability that[,] had it been disclosed to the defense, the result would have been different—i.e., a probability sufficient to undermine [this Court's]

confidence in the outcome of the trial" (*People v Bryce*, 88 NY2d 124, 128 [1996]; *see People v Hunter*, 11 NY3d 1, 5 [2008]).

Contrary to defendant's further contention, the court did not abuse its discretion in admitting, as an excited utterance, a statement made by the victim to a friend in the immediate aftermath of the shooting. The victim told a friend, before police officers and emergency medical personnel arrived, that defendant shot him. It is well settled that, "under certain circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control . . . [An excited] utterance is 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 [2003] [internal quotation marks omitted]). In determining whether a statement is an excited utterance, "the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" (*People v Edwards*, 47 NY2d 493, 497 [1979]). Furthermore, that determination is "entrusted in the first instance to the trial court" (*id.*), and it is well settled that "[t]rial courts are accorded wide discretion in making evidentiary rulings and, absent an abuse of discretion, those rulings should not be disturbed on appeal" (*People v Carroll*, 95 NY2d 375, 385 [2000]). Here, we find no abuse of discretion in the court's determination that the victim's statement was an excited utterance (*see People v Brown*, 70 NY2d 513, 520 [1987]; *People v Medina*, 53 AD3d 1046, 1047 [4th Dept 2008], *lv denied* 11 NY3d 856 [2008]).

Finally, the court properly redacted from the victim's medical records his statement that he did not know who shot him. Defendant contended that the statement was admissible under the business records exception to the hearsay rule (*see* CPLR 4518 [a]). "In order for a statement contained in a hospital record to be admissible under [that] exception, it must be germane to the medical diagnosis or treatment of the patient" (*People v Bailey*, 252 AD2d 815, 815-816 [3d Dept 1998], *lv denied* 92 NY2d 922 [1998]; *see People v Emanuel*, 89 AD3d 1481, 1482 [4th Dept 2011], *lv denied* 18 NY3d 882 [2012]), and defendant failed to establish that the statement in question had any relevance to the victim's diagnosis or treatment.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1279

CAF 16-00343

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

IN THE MATTER OF AYDEN W. AND MALAKAI W.

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

JOHN W., RESPONDENT-APPELLANT.

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

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

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered February 5, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject children.

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

Memorandum: Respondent father appeals from an order that terminated his parental rights with respect to the subject children on the grounds of mental illness and intellectual disability. Contrary to the father's contention, petitioner met its burden of establishing by clear and convincing evidence that he is "presently and for the foreseeable future unable, by reason of mental illness or intellectual disability, to provide proper and adequate care for [the] child[ren]" (Social Services Law § 384-b [4] [c]; *see Matter of Henry W.*, 31 AD3d 940, 941 [3d Dept 2006], *lv denied* 7 NY3d 711 [2006]). The testimony and report of petitioner's expert psychologist established that the father's capacity to care for the children was substantially impaired as the result of both his limited intellectual functioning (*see Matter of Destiny V. [Lynette V.]*, 106 AD3d 1495, 1495-1496 [4th Dept 2013]; *Matter of Cayden L. R. [Jayme R.]*, 83 AD3d 1550, 1550 [4th Dept 2011]), and his antisocial personality disorder (*see Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188 [4th Dept 2013]; *Matter of Kaylene S. [Brauna S.]*, 101 AD3d 1648, 1648-1649 [4th Dept 2012], *lv denied* 21 NY3d 852 [2013]). Petitioner's expert further concluded that the father's conditions were not amenable to treatment, and thus the father's inability to care for the children extended into the foreseeable future (*see Destiny V.*, 106 AD3d at

1496; *Kaylene S.*, 101 AD3d at 1649).

The father did not object to the testimony or report of the expert psychologist on the ground that his methods should have been subjected to a *Frye* hearing, and thus the father failed to preserve that contention for our review (*see Matter of Nadya S. [Brauna S.]*, 133 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 919 [2016]; *Matter of York v Zullich*, 89 AD3d 1447, 1448 [4th Dept 2011]). The father also failed to preserve for our review his challenge to the admission in evidence of several exhibits consisting of case notes and progress notes, inasmuch as he did not object to those exhibits on the ground presently raised on appeal, i.e., that petitioner failed to establish a proper foundation for their admission (*see Matter of Samantha M. [Allison Y.]*, 112 AD3d 421, 422 [1st Dept 2013]; *Matter of Cassie L. K.*, 225 AD2d 550, 550 [2d Dept 1996]). In any event, any error in admitting those exhibits was harmless (*see Matter of Skye N. [Carl N.]*, 148 AD3d 1542, 1544 [4th Dept 2017]; *Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1280

CA 16-01649

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

JAQUANDA NERO, INFANT, BY HER PARENT AND
NATURAL GUARDIAN, FELICIA NERO,
PLAINTIFF-APPELLANT,
ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

ISAAC KENDRICK, ELIZABETH KENDRICK,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANT.

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

BURGIO, KITA, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered April 15, 2016. The judgment and order, insofar as appealed from, granted that part of the motion of defendants Isaac Kendrick and Elizabeth Kendrick for partial summary judgment dismissing all claims for injuries allegedly sustained by plaintiff Jaquanda Nero after April 8, 1992.

It is hereby ORDERED that the judgment and order insofar as appealed from is unanimously reversed on the law without costs, the motion with respect to claims for injuries allegedly sustained by plaintiff Jaquanda Nero after April 8, 1992 is denied, and those claims are reinstated.

Memorandum: Plaintiffs, by their parent and natural guardian, commenced this action seeking damages for injuries they allegedly sustained as the result of their exposure to lead at premises owned by defendants. Jaquanda Nero (plaintiff), as limited by her brief, contends that Supreme Court erred in granting that part of the motion of Isaac Kendrick and Elizabeth Kendrick (defendants) for partial summary judgment dismissing all claims for injuries allegedly sustained by her after April 8, 1992. Insofar as relevant here, defendants sought partial summary judgment dismissing those claims because defendants had lost title to the property by order of foreclosure entered on that date. We agree with plaintiff that the court erred in granting that part of defendants' motion.

Although defendants established in support of that part of their

motion that a judgment of foreclosure had been entered, it is well settled that " '[t]he entry of a judgment of foreclosure and sale does not divest the mortgagor of its title and interest in the property until [a] sale is actually conducted' " (*Koch v Drayer Mar. Corp.*, 118 AD3d 1300, 1301 [4th Dept 2014]; *see Prudence Co. v 160 W. 73rd St. Corp.*, 260 NY 205, 210-211 [1932]). It is undisputed that the actual sale of the property did not take place until April 1993, after plaintiff had allegedly been exposed to lead paint, and thus defendants failed to meet their burden on that part of their motion.

Finally, we decline defendants' request that we search the record and grant summary judgment in their favor on plaintiff's remaining claims.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1282

CA 16-02123

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

ANTHONY P. COMUSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JAY A. SUPNICK AND LAW ENFORCEMENT PSYCHOLOGICAL ASSOCIATES ("L.E.P.A."), DEFENDANTS-RESPONDENTS.

ANTHONY P. COMUSO, PLAINTIFF-APPELLANT PRO SE.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (JOSEPH W. DUNBAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 8, 2016. The order, inter alia, granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Supreme Court properly granted defendants' motion for summary judgment dismissing plaintiff's complaint for psychological malpractice. Defendants met their initial burden by establishing as a matter of law that, as a psychologist hired by plaintiff's employer for the sole purpose of assessing plaintiff's continued fitness for duty, defendant Jay A. Supnick did not have a doctor-patient relationship with plaintiff (*see Gedon v Bry-Lin Hosps.*, 286 AD2d 892, 893-894 [4th Dept 2001], *lv denied* 98 NY2d 601 [2002]; *Lee v City of New York*, 162 AD2d 34, 36-38 [2d Dept 1990], *lv denied* 78 NY2d 863 [1991]; *see generally Forrester v Zwanger-Pesiri Radiology Group*, 274 AD2d 374, 374 [2d Dept 2000]). Plaintiff failed to raise a triable issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Moreover, plaintiff makes no claim that Supnick affirmatively treated, advised, or injured him during the assessment (*cf. Bazakos v Lewis*, 12 NY3d 631, 634-635 [2009]; *Heller v Peekskill Community Hosp.*, 198 AD2d 265, 266 [2d Dept 1993]). Thus, we conclude that "a cause of action sounding in [psychological] malpractice may not be maintained against the defendants" (*Lee*, 162 AD2d at 38; *see Gedon*, 286 AD2d at 893-894).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1296

KA 15-00096

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO MARTIN-BROWN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 4, 2014. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of murder in the second degree (Penal Law § 125.25 [1]) and petit larceny (§ 155.25). Defendant failed to preserve for our review his contention that Supreme Court erred in granting the People's application to have defendant examined by a psychiatrist pursuant to CPL 250.10 (3) after defendant gave notice of his intention to present psychiatric evidence in connection with the affirmative defense of extreme emotional disturbance (*see* CPL 470.05 [2]). In any event, we conclude that the court did not abuse its discretion in granting the application (*see generally People v Diaz*, 15 NY3d 40, 47 [2010]), and we further conclude that defendant was not denied effective assistance of counsel on the ground that defense counsel failed to oppose the application for an examination by a psychiatrist (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). Defendant also contends that the court erred in allowing the People's expert to testify on rebuttal regarding credibility issues. We conclude that the expert testimony did not " 'exceed[] the foundation necessary to establish the basis for the expert's opinion' " (*Diaz*, 15 NY3d at 48). To the extent that the expert offered inadmissible testimony on defendant's credibility, we conclude that there is no basis for reversal inasmuch as the trial judge, as the trier of fact, indicated that he would disregard the witness's credibility determinations (*see People v Pabon*, 28 NY3d 147, 158 [2016]).

To the extent that defendant contends that the evidence is legally insufficient to support the conviction of murder in the second degree because he established the defense of extreme emotional disturbance by a preponderance of the evidence, that contention is not preserved for our review (*see People v Ashline*, 124 AD3d 1258, 1260 [4th Dept 2015], *lv denied* 27 NY3d 1128 [2016]). In any event, we conclude that the contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in the light of the elements of that crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Ashline*, 124 AD3d at 1260-1261; *see generally Bleakley*, 69 NY2d at 495). It is well established that "a brutal assault [does] not itself suffice to demonstrate extreme emotional disturbance" (*People v McKenzie*, 19 NY3d 463, 467 [2012]). Here, defendant's " 'behavior immediately before and after the killing was inconsistent with the loss of control associated with the affirmative defense' " (*People v Jarvis*, 60 AD3d 1478, 1479 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]), inasmuch as defendant admitted that he returned to the crime scene shortly after he initially fled in order to remove incriminating evidence.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1299

KA 15-01820

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOAN A. GLIWSKI, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 30, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of stolen property in the third degree.

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

Memorandum: On appeal from a judgment convicting her upon a jury verdict of criminal possession of stolen property in the third degree (Penal Law § 165.50), defendant contends that County Court erred in admitting evidence of her affair with a codefendant. Contrary to the People's contention, the issue is preserved for our review inasmuch as the court expressly decided the issue in its written decision (*see People v Jackson*, 29 NY3d 18, 23 [2017]). We conclude, however, that the court did not err. It is well settled that "evidence of uncharged crimes is inadmissible where its purpose is only to show a defendant's bad character or propensity towards crime" (*People v Morris*, 21 NY3d 588, 594 [2013]). However, motive is a "well-recognized, nonpropensity purpose[] for which uncharged crimes may be relevant" (*id.*). Here, defendant's adultery was an uncharged crime (*see* § 255.17), and it was admissible to show defendant's motive to store merchandise that her codefendant had stolen from his FedEx truck instead of delivering it to various outlet stores (*see Morris*, 21 NY3d at 594).

Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction, i.e., there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial"

(*People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to infer that the value of the stolen property exceeded $3,000, inasmuch as defendant admitted to the police that she possessed at least 20 leather jackets and the undisputed testimony established that the total value of the jackets was at least $3,600. With respect to knowledge, her codefendants' testimony that defendant knew the goods to be stolen was corroborated by, among other things, her own admissions to the police (*see People v Reome*, 15 NY3d 188, 191-192 [2010]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Finally, the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1300

KA 15-02145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TONY ROOKARD, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered October 30, 2015. The judgment convicted defendant, after a nonjury trial, of criminal possession of a controlled substance in the fifth degree.

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 criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). As defendant correctly concedes, he failed to preserve for our review his challenge to the legal sufficiency of the evidence inasmuch as he failed to renew his motion for a trial order of dismissal after presenting evidence (*see People v Huitt*, 149 AD3d 1481, 1482 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Washington*, 60 AD3d 1454, 1455 [4th Dept 2009], *lv denied* 12 NY3d 922 [2009]). In any event, we conclude that defendant's contention lacks merit. The evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to establish that defendant committed the crime of criminal possession of a controlled substance in the fifth degree (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, the evidence is legally sufficient to establish defendant's constructive possession of the crack cocaine (*see People v Holley*, 67 AD3d 1438, 1439 [4th Dept 2009], *lv denied* 14 NY3d 801 [2010]; *People v Fuller*, 168 AD2d 972, 974 [4th Dept 1990], *lv denied* 78 NY2d 922 [1991]). The police officers encountered defendant in the kitchen of the residence, where the crack cocaine, a scale, a plate, and a razorblade were in open view. We therefore conclude that, based upon Penal Law § 220.25 (2), the factfinder was entitled to presume that defendant knowingly possessed the crack cocaine. We further conclude that, "[i]nasmuch as

the conviction is supported by legally sufficient evidence, defense counsel was not ineffective in failing to preserve defendant's legal sufficiency challenge for our review" (*People v Hill*, 147 AD3d 1501, 1502 [4th Dept 2017], *lv denied* 29 NY3d 1080 [2017]; *see People v Goley*, 113 AD3d 1083, 1085 [4th Dept 2014]).

Viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although defendant testified that the drugs did not belong to him and that he had minimal ties to the residence where they were found, "[g]reat deference is to be accorded to the [factfinder's] resolution of credibility issues based upon its superior vantage point and its opportunity to view witnesses, observe demeanor and hear the testimony" (*People v Martin*, 122 AD3d 1424, 1425 [4th Dept 2014], *lv denied* 25 NY3d 951 [2015] [internal quotation marks omitted]), and we perceive no reason to disturb County Court's credibility determinations.

Contrary to defendant's contention, the court properly refused to suppress his statements to the police. Defendant's statements were not rendered involuntary by the fact that he may have overheard officers in another room discuss the possibility of involving Child Protective Services when they found defendant's three-year-old child in a residence with a loaded handgun and crack cocaine (*see People v Brown*, 39 AD3d 886, 887 [3d Dept 2007], *lv denied* 9 NY3d 873 [2007]). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1305

CA 17-00326

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

JOANNE MORELAND, BOTH INDIVIDUALLY AND DERIVATIVELY AS A MEMBER OF PCL, LLC, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DAVID HUCK AND PCL, LLC, DEFENDANTS-RESPONDENTS.

SCHRÖDER, JOSEPH & ASSOCIATES, LLP, BUFFALO (JENNIFER L. FRIEDMAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 14, 2016. The order, inter alia, granted the motion of defendants for summary judgment dismissing the amended complaint, and denied the cross motion of plaintiff to strike the affidavits of three witnesses, which were submitted by defendants in support of their motion.

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

Memorandum: Plaintiff appeals from an order that, inter alia, granted defendants' motion for summary judgment dismissing the amended complaint and denied plaintiff's cross motion to strike the affidavits of three witnesses, which were submitted by defendants in support of their motion for summary judgment.

We affirm the order for reasons stated in the decision at Supreme Court. We write only to address plaintiff's contention that the court should have granted her cross motion to strike the affidavits of the three subject witnesses because defendants failed to provide timely expert witness disclosure for those witnesses pursuant to CPLR 3101 (d) (1) (i). We reject that contention. Even assuming, arguendo, that each of the three witnesses provided expert testimony in his affidavit, we note that CPLR 3212 (b) provides in relevant part that, "[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101 (d) (1) (i)] was not furnished prior to the submission of the

affidavit."

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1314

KA 16-00468

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATISA MAXWELL, ALSO KNOWN AS LATISHA MAXWELL,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered December 2, 2015. The judgment convicted defendant, upon her plea of guilty, of kidnapping in the second degree (three counts) and criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, and the matter is remitted to Erie County Court for further proceedings on the indictment.

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of three counts of kidnapping in the second degree (Penal Law § 135.20) and one count of criminal possession of a weapon in the second degree (§ 265.03 [3]). During the plea colloquy, County Court indicated that it would sentence defendant to concurrent indeterminate terms of 3 to 6 years pursuant to Penal Law § 60.12. Section 60.12 allows a court to impose indeterminate terms of imprisonment for certain defendants who are facing determinate terms of sentences under section 70.02 if the defendant has been the victim of domestic abuse. The court here in fact imposed concurrent, indeterminate terms of 3 to 6 years pursuant to section 60.12 (2) (a) for the kidnapping counts, but imposed a concurrent determinate sentence of 3½ years with 5 years of postrelease supervision on the weapon count pursuant to sections 70.02 (3) (b) and 70.45 (2) (f).

The People correctly concede that the court failed to fulfill its obligation to advise defendant at the time of her plea that the sentence imposed upon her conviction of the weapon count would include a period of postrelease supervision (*see People v Catu*, 4 NY3d 242, 244-245 [2005]). We therefore reverse the judgment and vacate

defendant's plea (*see People v Cornell*, 16 NY3d 801, 802 [2011]). Contrary to the People's contention, under the circumstances of this case, the entire plea must be vacated and not merely the plea on the weapon count. The entire plea agreement was infected by the court's error in failing to advise defendant of postrelease supervision, and this is not a case in which the counts may be treated separately (*cf. People v Rush*, 77 AD3d 1361, 1362 [4th Dept 2010], *lv denied* 15 NY3d 955 [2010]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1316

KA 16-01082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. VETTER, JR., DEFENDANT-APPELLANT.

MICHAEL J. STACHOWSKI, P.C., BUFFALO (MICHAEL J. STACHOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered August 5, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the third 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 his plea of guilty of robbery in the third degree (Penal Law § 160.05) and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that Supreme Court improperly enhanced his sentence. A court may enhance an agreed-upon sentence after it is established that the defendant violated a condition of the plea agreement (*see People v Parker*, 271 AD2d 63, 68-69 [4th Dept 2000], *lv denied* 95 NY2d 967 [2000]). Here, a condition of the plea agreement, set by the court, and agreed to by defendant, was that defendant would be subjected to the possibility of an enhanced sentence if he were to violate an order of protection. Defendant violated an order of protection when he placed approximately 260 telephone calls from jail to his former girlfriend.

Defendant contends that the court should have afforded him the opportunity to withdraw his plea before enhancing his sentence. That contention is without merit. " 'It is well settled that a sentencing court may not impose a sentence other than the one agreed to as part of the plea agreement unless it informs the defendant, at the time of the plea, of the possibility of an enhanced sentence if he or she fails to meet specific conditions or the defendant is given an opportunity to withdraw his or her plea' " (*People v Lewis*, 98 AD3d 1186, 1186 [3d Dept 2012]; *see People v Lindsey*, 80 AD3d 1005, 1006 [3d Dept 2011]). Here, the court had previously informed defendant of

the specific conditions that would subject him to the possibility of an enhanced sentence, including the violation of any order of protection.

Finally, we reject defendant's further contention that the court erred in failing to conduct a hearing on his violation. Prior to the imposition of the enhanced sentence, defendant admitted to placing the telephone calls in violation of the order of protection (*see People v Valencia*, 3 NY3d 714, 716 [2004]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1318

KA 14-01083

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. TRAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LORENZO NAPOLITANO, ROCHESTER, 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 May 1, 2014. The judgment convicted defendant, upon his plea of guilty, of failure to register as a sex offender.

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

Memorandum: Defendant was convicted in 2012 upon his plea of guilty of failure to register as a sex offender (Correction Law §§ 168-f [4]; 168-t), and he was sentenced, inter alia, to a term of probation. The conditions of defendant's probation required defendant to notify his probation officer prior to any change in his residence and to avoid contact with children. In 2014, defendant's probation officer filed an information for delinquency alleging that defendant had violated his probation conditions by moving from his approved residence, to the residence of a family with a young child, without prior approval of his probation officer. In appeal No. 2, defendant appeals from a judgment, entered after a violation of probation hearing, revoking the sentence of probation on the 2012 conviction and sentencing him to an indeterminate term of incarceration.

In addition to the violation of probation, defendant was also indicted upon another charge of failure to register as a sex offender, arising from the same factual allegations as those that formed the basis for the violation of probation. In appeal No. 1, he appeals from a judgment convicting him upon his plea of guilty of failure to register as a sex offender in 2014.

Addressing first the issues raised in appeal No. 2, we note that it is well settled that " '[a] violation of probation proceeding is summary in nature and a sentence of probation may be revoked if the defendant has been afforded an opportunity to be heard' " (*People v*

Wheeler, 99 AD3d 1168, 1169 [4th Dept 2012], *lv denied* 20 NY3d 989 [2012]). It is similarly well settled that the People bore the burden of establishing by a preponderance of the evidence that defendant violated a condition of his probation (*see* CPL 410.70 [3]; *People v Dettelis*, 137 AD3d 1722, 1722 [4th Dept 2016]).

We reject defendant's contention in appeal No. 2 that the People failed to establish by a preponderance of the evidence that he violated a condition of probation. Defendant contends that a witness testified falsely at the hearing in order to exact revenge against defendant because defendant made a referral to Child Protective Services in which he alleged that the witness's child was neglected. Although defendant introduced evidence in support of that contention, County Court rejected that evidence and credited the witness's testimony. It is well settled that, in reviewing a finding after a violation of probation hearing, we give "the court's credibility determination[s] . . . great deference" (*People v Perna*, 74 AD3d 1807, 1807 [4th Dept 2010], *lv denied* 17 NY3d 716 [2011]; *see also People v Eggsware*, 125 AD3d 1057, 1058 [3d Dept 2015], *lv denied* 25 NY3d 1162 [2015]), and we perceive no reason to reject the court's credibility determinations here (*see generally People v Crandall*, 51 AD2d 841, 842 [3d Dept 1976]).

We reject defendant's further contention in appeal No. 2 that he was denied effective assistance of counsel at the violation of probation hearing. 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 [hearing], does not suffice" (*People v Benevento*, 91 NY2d 708, 713 [1998] [internal quotation marks omitted]; *see People v Flores*, 84 NY2d 184, 187 [1994]). Here, " 'the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation' " (*People v Bergman*, 56 AD3d 1225, 1225 [4th Dept 2008], *lv denied* 12 NY3d 756 [2009], quoting *People v Baldi*, 54 NY2d 137, 147 [1981]).

In appeal No. 1, defendant contends that his waiver of the right to appeal is not valid. We reject that contention, and we conclude that the "[c]ourt's plea colloquy, together with the written waiver of the right to appeal, adequately apprised defendant that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty," and that the valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*People v Braxton*, 129 AD3d 1674, 1675 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015] [internal quotation marks omitted]; *see People v Graham*, 140 AD3d 1686, 1687 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]; *People v Weinstock*, 129 AD3d 1663, 1663 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]).

Finally, with respect to the plea in appeal No. 1, "[b]ecause we affirm the judgment of conviction in appeal No. [2], we need not address whether defendant's plea should be vacated because it was

inextricably intertwined with that conviction" (*People v Ollman*, 309 AD2d 1241, 1242 [4th Dept 2003], *lv denied* 1 NY3d 541 [2003]; *see People v Stanley*, 161 AD2d 1146, 1147 [4th Dept 1990], *lv denied* 76 NY2d 865 [1990]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1319

KA 14-01084

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN K. TRAVIS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LORENZO NAPOLITANO, ROCHESTER, 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 May 1, 2014. The judgment, entered after a violation of probation hearing, revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Same memorandum as in *People v Travis* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1322

CAF 16-02137

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

IN THE MATTER OF JAMIE T. CLAUSELL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

FLOR A. SALAME, RESPONDENT-APPELLANT.

THE LEGAL AID SOCIETY OF ROCHESTER, ROCHESTER (LEIGH ANN CHUTE OF COUNSEL), FOR RESPONDENT-APPELLANT.

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.H.O.), entered April 27, 2016 in a proceeding pursuant to Family Court Act article 8. The order, inter alia, required respondent to remain at least 500 feet from 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 8, respondent appeals from an order of protection requiring her, inter alia, to remain at least 500 feet from petitioner at all times and to refrain from any communication with petitioner. Initially, we agree with respondent that Family Court erred in disposing of the matter on the basis of respondent's purported default. " 'A party who is represented at a scheduled court appearance by an attorney has not failed to appear' " (*Matter of Isaiah H.*, 61 AD3d 1372, 1373 [4th Dept 2009]). Here, while respondent was not present at the hearing, her counsel participated in the hearing by, inter alia, cross-examining petitioner. We therefore deem it appropriate to address respondent's substantive contentions raised on appeal (*see generally Matter of Cameron B. [Nicole C.]*, 149 AD3d 1502, 1503 [4th Dept 2017]).

We reject respondent's contention that the court abused its discretion in denying her request for an adjournment of the hearing. The decision whether to grant a request for an adjournment rests in the sound discretion of the court (*see Matter of Steven B.*, 6 NY3d 888, 889 [2006]; *Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]). The record reflects that respondent was avoiding service of the summons to appear in the proceeding, thereby rendering it necessary for the court to ask the police to serve respondent therewith. Moreover, on the morning of the scheduled hearing, respondent conveyed misleading information to the court and gave inconsistent excuses why she could not be present. Under those circumstances, we cannot

conclude that the court abused its discretion in refusing to adjourn the hearing (*see Steven B.*, 6 NY3d at 889; *Anthony M.*, 63 NY2d at 283-284). Respondent's claim that the court was acting out of bias when it refused to grant the adjournment is not preserved for our review (*see Matter of Bowe v Bowe*, 124 AD3d 645, 646 [2d Dept 2015]).

Finally, we conclude that petitioner established by a preponderance of the evidence that respondent committed the family offense of aggravated harassment in the second degree (*see Matter of Whitney v Judge*, 138 AD3d 1381, 1383 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]; *see also* Penal Law § 240.30 [1] [a]). The record evidence, consisting of the testimony of petitioner and petitioner's mother, established that respondent "communicate[d] . . . threat[s] [of] physical harm to" petitioner (§ 240.30 [1] [a]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1326

CA 17-00651

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

LAWRENCE TUZZOLINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIANNE TUZZOLINO, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (James J. Piampiano, J.), entered July 18, 2016 in a divorce action. The judgment, insofar as appealed from, incorporated the parties' written separation agreement of October 30, 2013 and modification agreement of July 7, 2014 and ordered the parties to comply with those agreements.

It is hereby ORDERED that the judgment insofar as appealed from is unanimously reversed on the law without costs, the motion is granted, the second and third decretal paragraphs are vacated, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: The parties were married in 1978 and entered into a separation agreement on October 30, 2013 and a modification agreement on July 7, 2014. In October 2015, plaintiff husband commenced this action seeking a divorce and to have the agreements set aside. Plaintiff also filed a motion seeking that same relief. In appeal No. 2, plaintiff appeals from an order denying his motion and, in appeal No. 1, he appeals from a judgment of divorce signed on the same date that incorporated the agreements. We note at the outset that appeal No. 2 must be dismissed inasmuch as the order in that appeal is subsumed in the final judgment of divorce (*see Rooney v Rooney* [appeal No. 3], 92 AD3d 1294, 1295 [4th Dept 2012] *lv denied* 19 NY3d 810 [2012]; *see also Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]).

We agree with plaintiff that the agreements are unfair and unconscionable and should be set aside. Separation agreements are subject to closer judicial scrutiny than other contracts because of the fiduciary relationship between spouses (*see Christian v Christian*, 42 NY2d 63, 72 [1977]; *Gibson v Gibson*, 284 AD2d 908, 909 [4th Dept 2001]). A separation agreement should be set aside as unconscionable where it is "such as no person in his or her senses and not under delusion would make on the one hand, and as no honest and fair person

would accept on the other . . . , the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Christian*, 42 NY2d at 71 [internal quotation marks and brackets omitted]; *see Dawes v Dawes*, 110 AD3d 1450, 1451 [4th Dept 2013]; *Skotnicki v Skotnicki*, 237 AD2d 974, 975 [4th Dept 1997]). We note that the unconscionability or inequality of a separation agreement may be the result of overreaching by one party to the detriment of another (*see Tchorzewski v Tchorzewski*, 278 AD2d 869, 870 [4th Dept 2000]).

Here, at the time the parties entered into the agreements, defendant wife was represented by counsel but plaintiff was not, which, while not dispositive, is a significant factor for us to consider (*see Gibson*, 284 AD2d at 909; *Tchorzewski*, 278 AD2d at 870; *Skotnicki*, 237 AD2d at 975). Another factor to consider is that the agreements did not make a full disclosure of the finances of the parties (*see Tchorzewski*, 278 AD2d at 870-871). In particular, defendant, who had a master's degree in business administration and was a professor at a SUNY college, would receive two pensions upon retirement, neither of which was valued. The separation agreement did not provide for any maintenance for plaintiff despite the gross disparity in incomes and the length of the marriage and, while the modification agreement provided maintenance for plaintiff, it also required plaintiff to transfer his interest in the marital residence to defendant. In opposition to the motion, defendant averred that the parties "wanted an agreement whereby [plaintiff] would keep his income and retirement assets and I would keep mine." As shown by their statements of net worth, which were prepared after the agreements were executed, plaintiff's assets totaled approximately $77,000 whereas defendant's assets, which included the marital residence, totaled approximately $740,000. Based on our consideration of all the factors, we conclude that the agreements here are unconscionable and were the product of overreaching by defendant and thus should be set aside (*see Dawes*, 110 AD3d at 1451; *Gibson*, 284 AD2d at 909; *Tchorzewski*, 278 AD2d at 871). We therefore reverse the judgment in appeal No. 1 insofar as appealed from, grant the motion, vacate the second and third decretal paragraphs, and we remit the matter to Supreme Court to determine the issues of equitable distribution and maintenance.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1327

CA 17-00668

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

LAWRENCE TUZZOLINO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIANNE TUZZOLINO, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUSAN GRAY JONES, CANANDAIGUA, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (James J. Piampiano, J.), entered July 18, 2016 in a divorce action. The order denied the motion of plaintiff to set aside the parties' written separation agreement of October 30, 2013 and modification agreement of July 7, 2014.

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

Same memorandum as in *Tuzzolino v Tuzzolino* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1328

CA 17-00844

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

MICHAEL P. MALONEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BAUDILIO RODRIGUEZ, DEFENDANT,
CITY OF BUFFALO AND CITY OF BUFFALO POLICE
DEPARTMENT, DEFENDANTS-APPELLANTS.

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

LAW OFFICE OF SAMUEL R. MISERENDINO, ESQ., BUFFALO (SAMUEL R. MISERENDINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered July 18, 2016. The order denied the motion of defendants City of Buffalo and City of Buffalo Police Department 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 1st through 10th causes of action insofar as asserted against defendants City of Buffalo and City of Buffalo Police Department, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against the City of Buffalo and the City of Buffalo Police Department (City defendants) and defendant Baudilio Rodriguez seeking damages for, inter alia, negligence, assault, and false imprisonment. According to plaintiff, Rodriguez was acting within the scope of his employment as a City of Buffalo police officer when Rodriguez and plaintiff had a verbal and physical encounter outside a bar where Rodriguez was employed in a security position while off-duty from his police employment. Plaintiff was arrested by two City of Buffalo police officers who were called to the scene by an unidentified third person. The 1st through 10th causes of action of the complaint allege that Rodriguez was acting within the scope of his employment with the City of Buffalo Police Department during the encounter.

The City defendants moved for summary judgment dismissing the complaint against them on the ground that Rodriguez was off-duty and not acting within the scope of employment as a City of Buffalo police officer at the time of the encounter. We conclude that Supreme Court erred in denying the motion with respect to the 1st through 10th

causes of action. In our view, the City defendants established as a matter of law that they cannot be held liable based on the theory of vicarious liability or respondeat superior, and we therefore modify the order by granting the motion in part and dismissing those causes of action against them.

We begin by observing that, where there are no material disputed facts and there is no question that the employee's acts fall outside the scope of his or her employment, the determination is one of law for the court and not one of fact for the jury (*see Nicollette T. v Hospital for Joint Diseases/Orthopaedic Inst.*, 198 AD2d 54, 54 [1st Dept 1993]). A municipality may be held vicariously liable for the conduct of a member of its police department if the officer was engaged in the performance of police business (*see Joseph v City of Buffalo*, 83 NY2d 141, 145-146 [1994]). Here, in support of their motion, the City defendants established that Rodriguez was at all relevant times off-duty, was engaged in other employment as a private citizen, was not in uniform, did not arrest plaintiff, and did not display his police badge. We thus conclude that the City defendants met their prima facie burden of establishing that Rodriguez was not acting within the scope of his employment as a police officer during the encounter with plaintiff (*see generally Perez v City of New York*, 79 AD3d 835, 836-837 [2d Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We reject plaintiff's contention that Rodriguez's identification of himself as a police officer during the encounter raised an issue of fact sufficient to defeat the motion with respect to the issue of scope of employment (*see White v Thomas*, 12 AD3d 168, 168 [1st Dept 2004]; *Schilt v New York City Tr. Auth.*, 304 AD2d 189, 195 [1st Dept 2003]; *see generally Campos v City of New York*, 32 AD3d 287, 291-292 [1st Dept 2006], *lv denied* 8 NY3d 816 [2007], *appeal dismissed* 9 NY3d 953 [2007]).

We note that the City defendants submitted no proof on their motion with respect to the 11th through 13th causes of action, which allege direct claims against them not based upon the theory of vicarious liability or respondeat superior. We therefore conclude that the court properly denied the motion with respect to those causes of action. The City defendants' contention that plaintiff's notice of claim did not assert the direct claims is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]; *see also* General Municipal Law § 50-e [2]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1330

CA 17-00247

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

IN THE MATTER OF THE ARBITRATION BETWEEN
LACKAWANNA PROFESSIONAL FIRE FIGHTERS
ASSOCIATION, LOCAL 3166, IAFF, AFL-CIO,
PETITIONER-APPELLANT,

AND MEMORANDUM AND ORDER

CITY OF LACKAWANNA AND GEOFFREY M. SZYMANSKI,
AS MAYOR, RESPONDENTS-RESPONDENTS.
(PROCEEDING NO. 1.)

IN THE MATTER OF THE ARBITRATION BETWEEN CITY
OF LACKAWANNA, PETITIONER-RESPONDENT,

AND

LACKAWANNA PROFESSIONAL FIRE FIGHTERS
ASSOCIATION, LOCAL 3166, IAFF, AFL-CIO,
RESPONDENT-APPELLANT.
(PROCEEDING NO. 2.)

LAW OFFICES OF TERRY M. SUGRUE, BUFFALO (TERRY M. SUGRUE OF COUNSEL), FOR PETITIONER-APPELLANT AND RESPONDENT-APPELLANT.

COUGHLIN & GERHART, LLP, BINGHAMTON (KEITH A. O'HARA OF COUNSEL), FOR RESPONDENTS-RESPONDENTS AND PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 9, 2016. The order denied the petition of petitioner-respondent to confirm an arbitration award and granted the petition of respondent-petitioner to vacate the award.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition of petitioner-respondent is granted, the petition of respondent-petitioner City of Lackawanna is denied, and the arbitration award is confirmed.

Memorandum: In these CPLR article 75 proceedings, petitioner-respondent, Lackawanna Professional Fire Fighters Association, Local 3166, IAFF, AFL-CIO (petitioner), appeals from an order denying its petition to confirm an arbitration award and granting the petition of respondent-petitioner City of Lackawanna (respondent) to vacate the award.

This case arose from a dispute over the terms of the collective bargaining agreement (CBA) between the parties. Article XV of the CBA pertains to health insurance. Section 1 of that article provides that, "on behalf of each full-time bargaining unit employee who is eligible for and elects coverage, [respondent] will contribute for family or single coverage, as applicable," under a certain health maintenance organization (HMO) or its equivalent. Section 2 of that article provides that "employees hired after August 1, 1994, will pay fifteen (15%) percent of the premium of selected coverage." Article XVI of the CBA pertains to retirement benefits and provides that respondent will "provide complete medical insurance coverage in the form of HMO's offered to an active employee for all hereafter retiring." Article XVI does not contain any terms with respect to contribution. With respect to the arbitration procedure agreed-upon by the parties, article XVIII confers upon an arbitrator the authority to apply the CBA's provisions, but prohibits him or her from amending, modifying, or deleting its provisions.

The grievant herein retired in 2014, thus becoming the first of petitioner's members hired after August 1, 1994 to retire. After his retirement, respondent continued to require him to contribute 15% of the premium for his health insurance pursuant to article XV, section 2 of the CBA. Petitioner filed a grievance on his behalf and contended that the contribution requirements set forth in the CBA pertain only to active employees, not retirees. The grievance proceeded to arbitration. The arbitrator ultimately concluded that the CBA provided retirees with " 'complete' " health insurance coverage and did not require them to contribute a percentage toward their premiums. Applying well-established canons of contract interpretation, the arbitrator reasoned that the absence of a provision in article XVI requiring contribution meant that retirees were not subject to the contribution requirements.

Supreme Court vacated the arbitration award on the ground that the arbitrator exceeded her authority. The court reasoned that the arbitrator did not properly interpret the CBA, and thus "effectively amended" it. That was error. "It is well settled that judicial review of arbitration awards is extremely limited" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006], *cert dismissed* 548 US 940 [2006]; *see Schiferle v Capital Fence Co., Inc.*, 155 AD3d 122, ___ [Oct. 6, 2017] [4th Dept 2017]). The court must vacate an arbitration award where the arbitrator exceeds a limitation on his or her power as set forth in the CBA (*see* CPLR 7511 [b] [1] [iii]; *Schiferle*, 155 AD3d at 122). The court, however, lacks the authority to "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City Sch. Dist. of City of N.Y.*, 1 NY3d 72, 83 [2003] [internal quotation marks omitted]).

Here, the arbitrator merely interpreted and applied the provisions of the CBA, as she had the authority to do. The court is powerless to set aside that interpretation merely because the court disagrees with it, and we may not countenance such an action. In any

event, we conclude that the plain language of the CBA supports the arbitrator's reasoning. Article XV, section 1 establishes the form of the health insurance offered to active employees. Article XV, section 2 establishes the proportion of the cost for which active employees are responsible. Article XVI provides that retirees are entitled to "complete . . . coverage in the form of HMO's offered to active employees." Nothing in the CBA suggests that the contribution requirement applies to retirees so as to render that language ambiguous. If the parties had wished to create such a requirement, they could have done so. Indeed, the record establishes that respondent previously proposed adding such a requirement to the CBA, but that proposal was rejected through collective bargaining. By vacating the arbitration award, the court effectively amended the CBA by adding a provision that the parties previously declined to adopt. We therefore reverse the order, grant the petition to confirm the arbitration award, deny the petition to vacate the award, and confirm the award.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1335

CA 16-01817

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

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHANNON B. MEEGAN, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered January 19, 2016. The order, among other things, canceled of record the notice of pendency filed by plaintiff and determined that defendant had clear title to 1197 Harris Road, Webster, New York.

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

Memorandum: In May 2013, defendant signed a contract to purchase plaintiff's residence (hereafter, property) at 1197 Harris Road in Webster, New York. The purchase contract provided that plaintiff would give defendant $11,000 in seller's concessions, as well as a gift of equity in the home of $56,600. The remaining price of the property was financed by defendant through a mortgage. Defendant signed the contract both as the buyer and as the seller through the power of attorney (POA) granted to her by plaintiff on January 2, 2013. A second POA was executed by plaintiff on May 27, 2013, and it included a statutory gift rider in which plaintiff authorized defendant to make major gifts to herself, as well as to various other individuals. After the parties' relationship ended, they entered into a mediated settlement agreement (agreement) whereby defendant agreed to sell the property back to plaintiff for the same price for which she purchased it, thereby effectively reversing the sale. Plaintiff agreed to secure a mortgage or to assume defendant's mortgage, and to have arrangements in place to transfer the property within 90 days of signing the agreement. The agreement also provided that plaintiff would "forego collection [and] enforcement of either civil or criminal matters for assets while under the control of [defendant, as POA for plaintiff,] in any and all court proceedings." Plaintiff was not able to obtain the funds to purchase the property within 90 days and, therefore, defendant entered into a contract to sell the property to a

third party.

Thereafter, plaintiff acting pro se commenced this action seeking damages for money and property that defendant allegedly stole from him while acting pursuant to her POA. Additionally, plaintiff sought an imposition of a constructive trust on the property, and he filed a notice of pendency, requesting that Supreme Court prohibit the sale, transfer, or disposal of the property by defendant. In response, defendant filed a motion to dismiss pursuant to, inter alia, CPLR 3211 (a) (1), asserting that she was the rightful owner of the property and alleging that the agreement barred plaintiff's suit. Defendant also requested that the court cancel plaintiff's notice of pendency. Shortly thereafter, defendant obtained a bona fide purchaser for the property and proceeded by order to show cause to request that the court cancel plaintiff's notice of pendency prior to the return date of the motion to dismiss.

In appeal No. 1, plaintiff appeals from an order that, among other things, canceled of record the notice of pendency filed by plaintiff and determined that defendant had clear title to the property. In appeal No. 2, plaintiff appeals from a separate order that, among other things, dismissed the complaint.

Turning to appeal No. 2 first, we conclude that the court properly dismissed the complaint pursuant to CPLR 3211 (a) (1). "It is well established that, [w]hen a court rules on a CPLR 3211 motion to dismiss, it must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the] plaintiff[] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory . . . A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]" (*Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017] [internal quotation marks omitted]). Here, defendant submitted documentary evidence, namely, the agreement, establishing that there were no issues of fact, and that the agreement conclusively disposed of plaintiff's claims. Thus, the court properly dismissed the complaint (*see Pine v Coppola N.Y.C.*, 299 AD2d 227, 227 [1st Dept 2002]; *see also Jackson v Gross*, 150 AD3d 710, 711 [2d Dept 2017]; *Vitullo v New York Cent. Mut. Fire Ins. Co.*, 148 AD3d 1773, 1774-1775 [4th Dept 2017]; *M.D.T. 1984 Duplications v Mark IV Indus.*, 283 AD2d 1001, 1002 [4th Dept 2001]). We have considered plaintiff's contentions concerning the enforceability of the agreement and conclude that they are without merit.

With respect to the cancellation of record of plaintiff's notice of pendency in appeal No. 1, we conclude that, inasmuch as the agreement bars plaintiff's suit, "plaintiff does not have a valid claim against [defendant,] and the notice of pendency was properly cancelled" (*Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465, 465 [1st Dept 2010], citing CPLR 6514 [b]; *see Maiorino v Galindo*, 65 AD3d 525, 527 [2d Dept 2009]; *Fleming-Jackson v*

Jackson, 41 AD3d 175, 176 [1st Dept 2007]; *Nastasi v Nastasi*, 26 AD3d 32, 41-42

[2d Dept 2005]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1336

CA 17-00055

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

STEPHEN T. DIVITO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHANNON B. MEEGAN, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

FRANK A. ALOI, ROCHESTER, FOR PLAINTIFF-APPELLANT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (PETER J. GLENNON OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered August 4, 2016. The order, among other things, granted defendant's motion to dismiss the complaint.

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

Same memorandum as in *Divito v Meegan* ([appeal No. 1] ___ AD3d ___ [Dec. 22, 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1344

CAF 16-00594

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

IN THE MATTER OF BROOKE T.

JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JUSTIN T., RESPONDENT-APPELLANT.

SALVATORE F. LANZA, FULTON, FOR RESPONDENT-APPELLANT.

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

LYDIA YOUNG, ATTORNEY FOR THE CHILD, LOWVILLE.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered March 28, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had severely abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father appeals from an order that, among other things, adjudicated the subject child severely abused on the ground that the father committed felony sex offenses against her (*see* §§ 1012 [e] [iii] [A]; 1051 [e]; Social Services Law § 384-b [8] [a] [ii]).

Contrary to the father's contention, we conclude that Family Court's finding that the child is a severely abused child is supported by clear and convincing evidence (*see Matter of Chelsey B. [Michael W.]*, 89 AD3d 1499, 1499-1500 [4th Dept 2011], *lv denied* 18 NY3d 807 [2012]; *see also* Family Ct Act §§ 1046 [b] [ii]; 1051 [e]; Social Services Law § 384-b [8] [d]). "It is axiomatic that the determination of Family Court is entitled to great weight and should not be disturbed unless clearly unsupported by the record" (*Chelsey B.*, 89 AD3d at 1500 [internal quotation marks omitted]), and here the court's determination is supported by the record. Petitioner proved by clear and convincing evidence that the father committed felony sex offenses against the child in violation of Penal Law §§ 130.50 (3) and 130.65 (3) (*see* Social Services Law § 384-b [8] [a] [ii]). Contrary to the father's contention, the child's disclosures of sexual abuse were sufficiently corroborated by, among other things, the testimony of validation experts, a school psychologist, investigators, and the child's counselor, as well as the child's age-inappropriate knowledge

of sexual matters (*see* Family Ct Act § 1046 [a] [vi]; *Matter of Breanna R.*, 61 AD3d 1338, 1340 [4th Dept 2009]). Furthermore, the child gave multiple, consistent descriptions of the abuse and, "[a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements" (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490-1491 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011] [internal quotation marks omitted]).

We reject the father's further contention that petitioner was required to show diligent efforts to encourage and strengthen the parental relationship in order to establish severe abuse. Family Court Act § 1051 (e) was amended prior to the filing of the petition in this matter such that "a 'diligent efforts' finding is no longer a required element of a finding of severe abuse in the context of a Family Court Act article 10 proceeding" (*Matter of Amirah L. [Candice J.]*, 118 AD3d 792, 794 [2d Dept 2014]; *see* § 1051 [e], as amended by L 2013, ch 430, § 1; *Matter of Mason F. [Katlin G.—Louis F.]*, 141 AD3d 764, 765 n 5 [3d Dept 2016], *lv denied* 28 NY3d 905 [2016]; *cf. Matter of Dashawn W. [Antoine N.]*, 21 NY3d 36, 50-54 [2013]).

We also reject the father's contention that he was denied effective assistance of counsel. Contrary to the father's contention, "the failure to call particular witnesses does not necessarily constitute ineffective assistance of counsel—particularly where[, as here,] the record fails to reflect that the desired testimony would have been favorable" (*Matter of Pfalzer v Pfalzer*, 150 AD3d 1705, 1706 [4th Dept 2017], *lv denied* 29 NY3d 918 [2017] [internal quotation marks omitted]). In addition, the father's claim that he was denied effective assistance of counsel by his attorney's failure to retain and call a second psychologist "is 'impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on his behalf' " (*Matter of Amodea D. [Jason D.]*, 112 AD3d 1367, 1368 [4th Dept 2013]; *see Matter of Destiny C. [Goliath C.]*, 127 AD3d 1510, 1513-1514 [3d Dept 2015], *lv denied* 25 NY3d 911 [2015]). Finally, with respect to the father's remaining claims of ineffective assistance of counsel, we conclude that the father failed to "demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brandon v King*, 137 AD3d 1727, 1729 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016] [internal quotation marks omitted]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1347

CA 17-00826

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

JAMES MALEK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VILLAGE OF DEPEW, DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (A. PETER SNODGRASS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered December 7, 2016. The order denied defendant's motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for leave to amend the bill of particulars.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained when his foot fell through the pavement adjacent to a storm drain that was located in defendant Village of Depew. At the outset, we note that plaintiff was entitled to amend his bill of particulars once as of course before the filing of a note of issue (*see* CPLR 3042 [b]), and thus his cross motion for leave to amend the bill of particulars "should have been denied as unnecessary" (*Leach v North Shore Univ. Hosp. at Forest Hills*, 13 AD3d 415, 416 [2d Dept 2004]).

Nevertheless, we agree with defendant that Supreme Court erred in denying its motion for summary judgment dismissing the complaint. "Prior written notice of a defective or unsafe condition of a road or bridge is a condition precedent to an action against a municipality that has enacted a prior notification law" (*Hawley v Town of Ovid*, 108 AD3d 1034, 1034-1035 [4th Dept 2013]; *see Amabile v City of Buffalo*, 93 NY2d 471, 474 [1999]). There is no dispute that defendant established that it lacked prior written notice, thus shifting the burden to plaintiff to demonstrate that an exception to the general rule is applicable (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Hawley*, 108 AD3d at 1035). Such an exception exists where "the municipality affirmatively created the defect through an act of

negligence" (*Hawley*, 108 AD3d at 1035; *see Yarborough*, 10 NY3d at 728). That exception, however, applies only "to work by the [municipality] that *immediately* results in the existence of a dangerous condition" (*Oboler v City of New York*, 8 NY3d 888, 889 [2007] [internal quotation marks omitted]; *see Hawley*, 108 AD3d at 1035). Here, plaintiff failed to raise an issue of fact because his expert opined that the dangerous condition developed over time as a result of the intake of storm water, not that the dangerous condition was the immediate result of allegedly negligent work (*see Bielecki v City of New York*, 14 AD3d 301, 301-302 [1st Dept 2005]). Defendant is therefore entitled to summary judgment dismissing the complaint (*see Yarborough*, 10 NY3d at 728; *see generally Bielecki*, 14 AD3d at 302).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1356

CA 16-01612

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

GLASCO WRIGHT, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126445.)

GLASCO WRIGHT, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. LANDERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered August 1, 2016. The order denied the motion of claimant for leave to renew that part of his prior motion seeking to treat the notice of intention as a claim.

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

Memorandum: In this medical malpractice action, claimant seeks to recover damages for injuries that he allegedly sustained in 2013 during treatment for an eye injury. Claimant served a notice of intention to file a claim upon the Attorney General on June 12, 2015, and thereafter filed a claim in which he alleged that he received treatment on December 17, 2013, and further treatment during the next 12 months. He did not allege that he received treatment on any dates after December 17, 2014. Defendant served an answer asserting an affirmative defense that the notice of intention and the claim were untimely under the 90-day statute of limitations (*see* Court of Claims Act § 10 [3]). Claimant thereafter moved, inter alia, to treat the notice of intention as a claim (*see* § 10 [8] [a]). The Court of Claims denied that part of his motion on the ground that the notice of intention was untimely. Claimant then moved for leave to renew that part of his prior motion seeking to treat the notice of intention as a claim. In support of his motion, claimant submitted new evidence that he received additional medical treatment for his eye injury through June 11, 2015 or later, and he contended that his notice of intention was timely because the continuous treatment doctrine tolled the time in which to bring his medical malpractice claim (*see generally McDermott v Torre*, 56 NY2d 399, 405 [1982]). Claimant now appeals from the order denying his motion for leave to renew his prior motion.

The court properly denied claimant’s motion for leave to renew.

Insofar as is relevant here, "[a] motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination . . . and . . . shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [2], [3]). It is well established that "a motion for leave to renew 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation' " (*Heltz v Barratt*, 115 AD3d 1298, 1300 [4th Dept 2014], *affd* 24 NY3d 1185 [2014]). Although claimant provided the court with a medical record purportedly documenting a medical appointment scheduled for June 11, 2015, he failed to provide a reasonable justification for his failure to present that medical record or the facts contained therein on the initial motion (*see id.* at 1299-1300).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1360

TP 17-00887

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

IN THE MATTER OF BASHAN RUDOLPH, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 15, 2017) to annul a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey direct order]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). Contrary to petitioner's contention, the determination is supported by substantial evidence, including the misbehavior report and the testimony of the correction officer who wrote it (*see Matter of Medina v Fischer*, 137 AD3d 1584, 1585 [4th Dept 2016]; *Matter of Spears v Fischer*, 103 AD3d 1135, 1135-1136 [4th Dept 2013]; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139-140 [1985]), notwithstanding that the videotape of the incident is inconclusive in certain respects (*see generally Matter of Hutchinson v Annucci*, 149 AD3d 1443, 1443 [3d Dept 2017]). The testimony of petitioner and the other inmates who testified at the hearing merely raised credibility issues that the Hearing Officer was entitled to resolve against petitioner (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Matter of Heath v Walker*, 255 AD2d 1006, 1006 [4th Dept 1998]), as did the alleged inconsistencies in the testimony of the correction officer who witnessed the incident (*see Matter of Headley v Annucci*, 150 AD3d 1513, 1514 [3d Dept 2017]; *see also Matter*

of Griffin v Goord, 266 AD2d 830, 830 [4th Dept 1999]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1361

KA 16-00784

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA R. SNYDER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered December 10, 2015. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sexual act in the first 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 attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [3]). Contrary to defendant's contention, the record establishes that County Court did not conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea (*see People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]). The court " 'expressly ascertained from defendant that, as a condition of the plea, [she] was agreeing to waive [her] right to appeal' " (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1362

KA 15-02005

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY BASIL, DEFENDANT-APPELLANT.

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

JEFFREY BASIL, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered July 22, 2015. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention in his main and supplemental pro se briefs, we conclude that he "knowingly, intelligently and voluntarily" waived his right to appeal (*People v Lopez*, 6 NY3d 248, 256 [2006]), and that he "ha[d] 'a full appreciation of the consequences' of such waiver" (*People v Bradshaw*, 18 NY3d 257, 264 [2011]). We further conclude, "[b]ased on the combination of a lengthy oral colloquy, a written waiver wherein defendant 'expressly waived [his] right to appeal without limitation,' and an acknowledgment of that written waiver during the oral colloquy . . . , that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence" (*People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). We have reviewed defendant's remaining contentions regarding the waiver of the right to appeal and conclude that they are without merit.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1363

KA 13-01186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW L. DAYMON, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered February 27, 2013. The judgment convicted defendant, upon a jury verdict, of offering a false instrument for filing in the first degree, falsifying business records in the first degree (three counts) and insurance fraud in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of falsifying business records in the first degree (Penal Law § 175.10), and one count of insurance fraud in the fifth degree (§ 176.10). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence with respect to the element of intent to defraud (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Defendant's remaining contentions are without merit.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1365

KA 09-02123

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSIE J. BARNES, DEFENDANT-APPELLANT.

D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO 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 (Richard A. Keenan, J.), rendered August 31, 2009. The judgment convicted defendant upon a jury verdict of, inter alia, burglary in the second degree (three counts) and reckless endangerment in the first 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 imposed for burglary in the second degree under count one of the indictment to an indeterminate term of imprisonment of 18 years to life, reducing the sentences imposed for burglary in the second degree under counts two and three of the indictment to indeterminate terms of imprisonment of 17 years to life, and directing that the sentences imposed on counts two through five shall run concurrently, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, three counts of burglary in the second degree (Penal Law § 140.25 [2]) and one count of reckless endangerment in the first degree (§ 120.25). The conviction arises from defendant's commission of three home burglaries and his efforts to avoid apprehension following the third burglary. The reckless endangerment count is based on defendant's conduct in leaving the site of the third burglary by driving his car across the front yard "directly at" a police sergeant, who testified that he "would have been hit" if he had not jumped out of the way when the car was about 10 feet from him.

We reject defendant's contention that County Court erred in failing to substitute counsel in place of his second assigned attorney. His requests for that attorney to be relieved consisted of conclusory assertions of disagreements concerning strategy and of ineffectiveness of counsel, as well as assertions that the attorney

had not spoken to him often enough about the case, and the requests were thus insufficient to require any inquiry by the court (*see People v Porto*, 16 NY3d 93, 100-101 [2010]; *People v Lewicki*, 118 AD3d 1328, 1329 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]; *People v Benson*, 265 AD2d 814, 814-815 [4th Dept 1999], *lv denied* 94 NY2d 860 [1999], *cert denied* 529 US 1076 [2000]; *cf. People v Smith*, ___ NY3d ___, ___ [Nov. 21, 2017]; *People v Sides*, 75 NY2d 822, 824-825 [1990]). We also reject defendant's contention that he should have been allowed to represent himself, inasmuch as the record does not establish that he made an unequivocal request to do so (*see People v Gillian*, 8 NY3d 85, 87-88 [2006]; *People v Morgan*, 72 AD3d 1482, 1482-1483 [4th Dept 2010], *lv denied* 15 NY3d 854 [2010]; *see generally People v McIntyre*, 36 NY2d 10, 17 [1974]). Although defendant stated at the end of one pretrial court appearance that he did not want a lawyer and that he wanted to "do [his] own case," we conclude that those remarks, "when viewed in [their] immediate context as well as in light of the entire record, cannot be interpreted as [an unequivocal] request for self-representation" (*People v Santos*, 243 AD2d 334, 334 [1st Dept 1997], *lv denied* 91 NY2d 880 [1997]; *see People v Carter*, 299 AD2d 418, 418-419 [2d Dept 2002], *lv denied* 99 NY2d 615 [2003]). Even assuming, arguendo, that defendant preserved for our review his further contention that the court erred in failing to recuse itself (*cf. People v Wyzykowski*, 120 AD3d 1603, 1603 [4th Dept 2014], *lv denied* 24 NY3d 1090 [2014]), we conclude that the record does not support his claim of bias on the part of the court and, thus, recusal was not required (*see People v Maxam*, 301 AD2d 791, 793 [3d Dept 2003], *lv denied* 99 NY2d 617 [2003]; *see generally People v Moreno*, 70 NY2d 403, 405-406 [1987]; *People v McCray*, 121 AD3d 1549, 1551 [4th Dept 2014], *lv denied* 25 NY3d 1204 [2015]).

Defendant's contention that the evidence is legally insufficient to support his conviction of reckless endangerment in the first degree is not preserved for our review, both because his trial order of dismissal motion did not raise the specific grounds he advances on appeal, and because he did not renew the motion after presenting evidence (*see People v Roman*, 85 AD3d 1630, 1630 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]; *see generally People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Gray*, 86 NY2d 10, 19 [1995]). In any event, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish that defendant committed reckless endangerment in the first degree. Based on the evidence that defendant drove at the sergeant "relatively fast," forcing the sergeant to jump out of the way to avoid being hit, it was rational for the jury to find that defendant acted recklessly under circumstances evincing a depraved indifference to human life and created a grave risk of death to the sergeant (*see People v Robinson*, 16 AD3d 768, 769-770 [3d Dept 2005], *lv denied* 4 NY3d 856 [2005]; *People v Tunstall*, 197 AD2d 791, 792 [3d Dept 1993], *lv denied* 83 NY2d 811 [1994]; *People v Senior*, 126 AD2d 740, 741-742 [2d Dept 1987]). *People v VanGorden* (147 AD3d 1436, 1439-1440 [4th Dept 2017], *lv denied* 29 NY3d 1037 [2017]), relied upon by defendant, is distinguishable because the defendant in that case drove into a

stopped police vehicle (*id.* at 1437), and the risk of death if a vehicle accelerating from a stop were to strike a person on foot is significantly greater than the risk of death from a collision with another vehicle under comparable circumstances. Viewing the evidence in light of the elements of reckless endangerment in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict with respect to that crime is not against the weight of the evidence (*see Robinson*, 16 AD3d at 770; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Moorer*, 137 AD3d 1711, 1711 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]). Even assuming, arguendo, that an acquittal of the counts charging burglary in the second degree would not have been unreasonable (*see Danielson*, 9 NY3d at 348), we conclude that the verdict with respect to those counts, when viewed in light of the elements of the crime as charged to the jury, is likewise not against the weight of the evidence based on, inter alia, the evidence that property stolen in each of the burglaries was found in defendant's car or his home (*see People v Carmel*, 138 AD3d 1448, 1449 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Davidson*, 121 AD3d 612, 612-613 [1st Dept 2014], *lv denied* 25 NY3d 988 [2015]; *see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, the court did not abuse its discretion in having him removed from the courtroom when he became disruptive during the testimony of one of the burglary victims, inasmuch as he had previously received adequate warnings that such disruptive conduct could lead to his removal (*see* CPL 260.20; *People v Branch*, 35 AD3d 228, 229 [1st Dept 2006], *lv denied* 8 NY3d 919 [2007]; *see generally People v Byrnes*, 33 NY2d 343, 349-350 [1974]; *People v Mercer*, 66 AD3d 1368, 1369 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]).

Defendant received effective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). In particular, counsel was not ineffective in failing to support defendant's pro se motions (*see People v Blackwell*, 129 AD3d 1690, 1691 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]), failing to preserve any legal sufficiency issues (*see People v Cole*, 111 AD3d 1301, 1302 [4th Dept 2013], *lv denied* 23 NY3d 1019 [2014], *reconsideration denied* 23 NY3d 1060 [2014]), or failing to withdraw from representing defendant (*People v Gibson*, 95 AD3d 1033, 1034 [2d Dept 2012], *lv denied* 19 NY3d 996 [2012]). Moreover, defendant was not deprived of a fair trial by the cumulative effect of errors allegedly committed by the court and defense counsel.

Defendant was properly determined to be a persistent violent felony offender. Persistent violent felony offender status is based on recidivism alone (*see* Penal Law § 70.08 [1] [a]; *People v Myers*, 33 AD3d 822, 822-823 [2d Dept 2006], *lv denied* 7 NY3d 927 [2006]), and thus matters such as defendant's history and character were not relevant (*cf.* § 70.10 [2]). We agree with defendant, however, that the aggregate sentence of 82 years to life in prison imposed by the court is unduly harsh and severe, and we therefore modify the judgment

as a matter of discretion in the interest of justice by reducing the sentence imposed for burglary in the second degree under count one of the indictment to an indeterminate term of imprisonment of 18 years to life, reducing the sentences imposed for burglary in the second degree under counts two and three of the indictment to indeterminate terms of imprisonment of 17 years to life, and directing that the sentences imposed on counts two through five shall run concurrently, for an aggregate sentence of 35 years to life (*see* CPL 470.15 [6] [b]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1366

KA 15-01204

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARY MEYER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 8, 2014. The judgment convicted defendant, upon her plea of guilty, of grand larceny in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of grand larceny in the second degree (Penal Law § 155.40 [1]). We agree with defendant that the waiver of the right to appeal is invalid because "the minimal inquiry made by County Court was insufficient to establish that the court engage[d] the defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hassett*, 119 AD3d 1443, 1443-1444 [4th Dept 2014], *lv denied* 24 NY3d 961 [2014] [internal quotation marks omitted]). In addition, "there is no basis [in the record] upon which to conclude that the court ensured '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 Jones*, 107 AD3d 1589, 1590 [4th Dept 2013], *lv denied* 21 NY3d 1075 [2013], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]).

Defendant contends that there is no basis in the record supporting the amount of restitution and that the court should have conducted a hearing before determining the amount thereof. Defendant failed to preserve that contention for our review by failing to object to the imposition of restitution at sentencing or to request a hearing (*see People v M&M Med. Transp., Inc.*, 147 AD3d 1313, 1314-1315 [4th Dept 2017]; *People v Lewis*, 114 AD3d 1310, 1311 [4th Dept 2014], *lv denied* 22 NY3d 1200 [2014]; *People v Spossey*, 107 AD3d 1420, 1420 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]). In any event, that

contention is without merit inasmuch as defendant "concede[d] the facts necessary to establish the amount of restitution as part of [the] plea allocution" (*People v Consalvo*, 89 NY2d 140, 145 [1996]; *see People v Price*, 277 AD2d 955, 955-956 [4th Dept 2000]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1369

KA 15-00979

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEROY T. REYNOLDS, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered March 4, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that his waiver of the right to appeal was not knowingly, voluntarily, and intelligently entered because Supreme Court did not expressly inform him that a successful appeal of the court's adverse suppression determination would result in complete dismissal of the indictment. We reject that contention. It is well settled that " '[n]o particular litany is required for an effective waiver of the right to appeal' " (*People v Fisher*, 94 AD3d 1435, 1435 [4th Dept 2012], *lv denied* 19 NY3d 973 [2012]; *see People v Kemp*, 94 NY2d 831, 833 [1999]). We conclude that defendant's responses during the plea colloquy and waiver colloquy establish that the waiver of the right to appeal was voluntarily, knowingly, and intelligently entered (*see People v Griner*, 50 AD3d 1557, 1558 [4th Dept 2008], *lv denied* 11 NY3d 737 [2008]). We further conclude that defendant's valid waiver of the right to appeal encompasses his challenge to the court's suppression ruling (*see Kemp*, 94 NY2d at 833; *People v Graham*, 140 AD3d 1686, 1687 [4th Dept 2016], *lv denied* 28 NY3d 930 [2016]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1370

OP 17-00885

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

IN THE MATTER OF FRANK J. MARIANACCI, INC., AND FRANK J. MARIANACCI AND BRYAN MARIANACCI, AS AN OFFICER AND/OR SHAREHOLDER OF FRANK J. MARIANACCI, INC., PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

ROBERTA REARDON, COMMISSIONER OF LABOR, RESPONDENT-RESPONDENT, ET AL., RESPONDENTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (ANDREW J. RYAN OF COUNSEL), FOR PETITIONERS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MING-QI CHU OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to Labor Law § 220 [8] to annul the determination of respondent Roberta Reardon, Commissioner of Labor. The determination adjudged, inter alia, that petitioner Frank J. Marianacci, Inc. failed to pay prevailing wages and wage supplements to certain of its employees on a public work project.

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

Memorandum: In this original CPLR article 78 proceeding commenced in this Court pursuant to Labor Law § 220 (8), petitioners challenge the determination of respondent Roberta Reardon, Commissioner of Labor (Commissioner), that, inter alia, petitioner Frank J. Marianacci, Inc. (FJM) failed to pay prevailing wages and wage supplements to certain of its employees on a public work project. " 'Judicial review of an administrative determination following a hearing required by law is limited to whether the determination is supported by substantial evidence' " (*Matter of Johnson v Town of Amherst*, 74 AD3d 1896, 1897 [4th Dept 2010], *lv denied* 15 NY3d 712 [2010]; *see* CPLR 7803 [4]). Contrary to petitioners' contention, substantial evidence supports the Commissioner's determination that the Department of Labor (Department) ascertained the appropriate classifications for the disputed work (*see Matter of Lantry v State of New York*, 6 NY3d 49, 54 [2005]). Such "classifications for work embraced by Labor Law § 220 are a matter given to the expertise of the

Department . . . and courts are strongly disinclined to disturb them, absent a clear showing that a classification does not reflect 'the nature of the work actually performed' " (*Matter of General Elec. Co. v New York State Dept. of Labor*, 154 AD2d 117, 120 [3d Dept 1990], *affd* 76 NY2d 946 [1990], quoting *Matter of Kelly v Beame*, 15 NY2d 103, 109 [1965]). We reject petitioners' contention that the Department improperly relied upon collective bargaining agreements in making its classifications (*see* § 220 [5]; *Lantry*, 6 NY3d at 52). Indeed, it is well established that the Department may rely on such agreements in making trade classifications under the prevailing wage laws (*see Matter of CNP Mech., Inc. v Angello*, 31 AD3d 925, 927 [3d Dept 2006], *lv denied* 8 NY3d 802 [2007]). Here, the record establishes that the Department "gave due consideration to the nature of the work performed and [the] relevant collective bargaining agreements" (*Matter of R.I., Inc. v New York State Dept. of Labor*, 72 AD3d 1098, 1099 [2d Dept 2010], *lv denied* 17 NY3d 703 [2011]), and we decline to disturb the Commissioner's determination. The record does not support the contention of petitioners that the burden of proof was improperly shifted to them. To the extent that the Hearing Officer's report and recommendation suggests that petitioners bore any burden to present evidence, such burden was placed on them only after the Hearing Officer concluded that the Department had met its burden.

Substantial evidence also supports the Commissioner's determination that the violation of Labor Law § 220 was willful on the part of FJM and petitioner Bryan Marianacci. The record establishes that "petitioners are experienced contractors, that they were aware of the prevailing wage laws, and that [FJM and Bryan Marianacci] deliberately attempted to circumvent the application of those laws" to the employees at issue (*R.I., Inc.*, 72 AD3d at 1099).

Finally, FJM and Bryan Marianacci contend that they were improperly debarred from future public work projects because there was no evidence of a prior prevailing wage law violation by Bryan Marianacci and because the prior willful violation by FJM was more than six years prior to the instant violation (*see* Labor Law § 220-b [3] [b] [1]). The Commissioner does not dispute that contention and, indeed, asserts that she did not request debarment of either petitioner. We recognize that the report and recommendation of the Hearing Officer, which was adopted by the Commissioner, is ambiguous on the question of debarment, but we infer, based upon the Commissioner's position in this proceeding, that debarment was neither sought nor imposed. With that interpretation in mind, we confirm the determination and dismiss the petition.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1371

CA 17-01140

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

SUI-HSU HSIEH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

YEN-TUNG TENG, ALSO KNOWN AS ANDY TENG,
DEFENDANT-APPELLANT.

UNDERBERG & KESSLER LLP, ROCHESTER (RONALD G. HULL OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVETT CRISTO P.C., ROCHESTER (JAMES A. VALENTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 20, 2016. The order denied the motion of defendant to, inter alia, vacate a judgment of divorce with respect to the division of assets and his obligation to pay maintenance and child support.

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

Memorandum: Pursuant to a judgment of divorce entered in 2008, defendant husband was ordered to pay plaintiff wife a distributive award, maintenance, and child support. Shortly thereafter, defendant relocated to Taiwan and failed to comply with the judgment or with subsequent judgments ordering him to pay money to plaintiff. According to defendant, he learned in early 2016 that, during the marriage, plaintiff acquired property in Taiwan that she failed to disclose in her statement of net worth. As a result, in August 2016, defendant moved, inter alia, to vacate the judgment of divorce regarding the division of assets and his obligation to pay maintenance and child support.

Supreme Court did not abuse its discretion in denying the motion based on the doctrine of unclean hands. "A trial court may relieve a party from the terms of a judgment of divorce on the grounds of fraud or mispresentation (*see* CPLR 5015 [a] [3]), but the decision to grant such motion rests in the trial court's discretion" (*VanZandt v VanZandt*, 88 AD3d 1232, 1233 [3d Dept 2011]). The doctrine of unclean hands is an equitable defense and is applicable to the equitable relief sought by defendant, i.e., vacatur of the equitable distribution, maintenance, and child support provisions of the judgment of divorce (*see generally Wells Fargo Bank v Hodge*, 92 AD3d

775, 776 [2d Dept 2012], *lv dismissed* 23 NY3d 1012 [2014]). We reject defendant's contention that the doctrine of unclean hands is not applicable or that there is an exception where there is a fraud perpetrated on the court; the federal cases cited by defendant do not support that proposition.

Defendant contends in the alternative that the court erred in denying his motion based on the doctrine of unclean hands because his misconduct was not directly related to the subject matter of the litigation (*see Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]; *Welch v Di Blasi*, 289 AD2d 964, 965 [4th Dept 2001]). We reject that contention. Specifically, defendant did not comply with any of the monetary provisions of the judgment of divorce; he did not pay the spousal support, distributive award, arrears, child support, or 50% of the children's college-related expenses. His motion sought to vacate the provisions of the judgment of divorce pertaining to equitable distribution, maintenance, and child support, all of which are components of the subject matter of the litigation (*cf. Agati v Agati*, 92 AD2d 737, 737-738 [4th Dept 1983], *affd* 59 NY2d 830 [1983]). We therefore perceive no abuse of discretion by the court in denying the motion based on the doctrine of unclean hands.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1374

CA 17-01176

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

ALEXA FIDEN, PLAINTIFF-RESPONDENT,

V ORDER

WILLIAMSVILLE CENTRAL SCHOOL DISTRICT AND
WILLIAMSVILLE SOUTH HIGH SCHOOL,
DEFENDANTS-APPELLANTS.

HURWITZ & FINE, P.C., BUFFALO (JODY E. BRIANDI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered February 24, 2017. The order denied the motion of defendants for summary judgment dismissing 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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1375

CA 17-00943

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

IN THE MATTER OF PROBATE OF THE LAST WILL AND TESTAMENT OF CHARLOTTE S. VANLOAN, DECEASED.

ORDER

EDWARD C. VANLOAN, JR., AND KAREN DUFFY, PETITIONERS-RESPONDENTS;

ROBIN V. JONES, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

LAW OFFICES OF HARIRI & CRISPO, NEW YORK CITY (RONALD D. HARIRI OF COUNSEL), FOR RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN M. DELANEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered September 13, 2016. The order, among other things, granted the motion of petitioners for summary judgment dismissing respondent's objections to probate.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1376

CA 17-00948

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

IN THE MATTER OF PROBATE OF THE LAST WILL AND TESTAMENT OF CHARLOTTE S. VANLOAN, DECEASED.

EDWARD C. VANLOAN, JR., AND KAREN DUFFY, PETITIONERS-RESPONDENTS;

ROBIN V. JONES, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

LAW OFFICES OF HARIRI & CRISPO, NEW YORK CITY (RONALD D. HARIRI OF COUNSEL), FOR RESPONDENT-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (JOHN M. DELANEY OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a decree of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered September 21, 2016. The decree, among other things, admitted the Last Will and Testament of decedent Charlotte S. VanLoan to probate.

It is hereby ORDERED that the decree is unanimously affirmed without costs.

Memorandum: We affirm the decree for reasons stated in the decision at Surrogate's Court. We write only to note that respondent's contention that the Surrogate erred in granting petitioners' motion for summary judgment dismissing her objections to probate because petitioners failed to attach a copy of the pleadings to the motion papers "is raised for the first time on appeal and thus is not properly before us" (*Chapman v Pyramid Co. of Buffalo*, 63 AD3d 1623, 1624 [4th Dept 2009]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1377

CA 16-01936

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF SINCERE M., CONSECUTIVE NO. 145151, FROM CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO MENTAL HYGIENE LAW SECTION 10.09, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, ROCHESTER (MICHAEL F. HIGGINS OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered August 24, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, determined that petitioner is a dangerous sex offender requiring confinement.

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

Memorandum: Petitioner appeals from an order, entered after an annual review hearing pursuant to Mental Hygiene Law § 10.09 (d), determining that he is a dangerous sex offender requiring confinement and directing that he continue to be confined to a secure treatment facility (*see* §§ 10.03 [e]; 10.09 [h]).

We reject petitioner's contention that the evidence is legally insufficient to establish that his continued confinement is required. Respondents presented the testimony of two psychologists who opined that petitioner suffers from pedophilic disorder and antisocial personality disorder, as well as the "additional condition" of psychopathy, and that those conditions render him unable to control his sex-offending behavior. The psychologists' opinions were based on, inter alia, petitioner's history of sex offenses, his scores on risk assessment instruments, and his "minimal progress" in treatment programs, including his continuing denial that he committed the

underlying offenses. Viewing the evidence in the light most favorable to respondents (*see Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014]), we conclude that they met their burden of establishing by clear and convincing evidence that petitioner suffers from a mental abnormality "involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (Mental Hygiene Law § 10.03 [e]; *see* § 10.07 [f]; *Matter of State of New York v Bushey*, 142 AD3d 1375, 1376-1377 [4th Dept 2016]; *Matter of Billinger v State of New York*, 137 AD3d 1757, 1758 [4th Dept 2016], *lv denied* 27 NY3d 911 [2016]; *Matter of Sincere KK. v State of New York*, 129 AD3d 1254, 1254-1255 [3d Dept 2015], *lv denied* 26 NY3d 906 [2015]). Contrary to petitioner's contention, the absence of evidence that he has engaged in sexual misconduct while confined does not render the evidence legally insufficient to warrant his continued confinement (*see generally Matter of State of New York v Robert V.*, 111 AD3d 541, 542 [1st Dept 2013], *lv denied* 23 NY3d 901 [2014]).

We reject petitioner's further contention that Supreme Court's confinement determination is against the weight of the evidence (*see Matter of Vega v State of New York*, 140 AD3d 1608, 1608-1609 [4th Dept 2016]; *Billinger*, 137 AD3d at 1758-1759). Although petitioner was 63 years old at the time of the hearing and has serious medical problems that allegedly limit his mobility, "we see no reason to disturb the court's decision to credit the testimony of respondents' [witnesses] that petitioner remains a dangerous sex offender requiring confinement" (*Matter of Pierce v State of New York*, 148 AD3d 1619, 1622 [4th Dept 2017]; *see Matter of William II. v State of New York*, 110 AD3d 1282, 1283 [3d Dept 2013]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1378

OP 17-00987

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

IN THE MATTER OF GARY POOLER, PETITIONER,

V MEMORANDUM AND ORDER

HON. JOHN J. ARK, RESPONDENT.

ERNSTROM & DRESTE, LLP, ROCHESTER (TIMOTHY D. BOLDT OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to vacate and set aside an order of respondent. The order granted a monetary judgment against petitioner.

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

Memorandum: Petitioner commenced this original proceeding in this Court pursuant to CPLR article 78 seeking to vacate and set aside an order of respondent that granted a monetary judgment against him. The order was entered against him in connection with a lawsuit brought against a corporation of which petitioner was the president and sole shareholder. Petitioner alleged that he was not named as a party in that lawsuit and was not summoned before Supreme Court, and thus respondent had no power to grant relief against him (*see generally Oakley v Albany Med Ctr.*, 39 AD3d 1016, 1017 [3d Dept 2007]; *Hartloff v Hartloff*, 296 AD2d 849, 849-850 [4th Dept 2002]).

We conclude that petitioner is seeking relief in the nature of prohibition, but he has not demonstrated the requisite clear legal right to that relief (*see Matter of Pirro v Angiolillo*, 89 NY2d 351, 356 [1996]). Such relief is available when a court "acts or threatens to act either without jurisdiction or in excess of its authorized powers" (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]; *see Pirro*, 89 NY2d at 355), and "[t]he extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, however grievous" (*La Rocca v Lane*, 37 NY2d 575, 579 [1975], *cert denied* 424 US 968 [1976]). Prohibition is "ordinarily unavailable if a 'grievance can be redressed by ordinary proceedings at law or in equity or merely to prevent an error which

may be readily corrected on appeal' " (*Matter of Echevarria v Marks*, 14 NY3d 198, 221 [2010], *cert denied* 562 US 947 [2010]). The decision whether to grant prohibition is within the discretion of the court (*see Matter of Soares v Herrick*, 20 NY3d 139, 145 [2012]; *Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]).

Petitioner contends that respondent lacked *personal* jurisdiction to issue the January order against him, not that respondent lacked subject matter jurisdiction or the power to issue the order (*see Matter of Hirschfeld v Friedman*, 307 AD2d 856, 858 [1st Dept 2003]), and thus prohibition does not lie. Furthermore, we decline to exercise our discretion to grant the requested relief because there exist other remedies by which petitioner may seek the same relief (*see id.* at 858-859; *see generally Echevarria*, 14 NY3d at 221). Namely, petitioner could appeal directly from the order, even as a nonparty (*see Stewart v Stewart*, 118 AD2d 455, 458-459 [1st Dept 1986]), or he could move to vacate the order and appeal from any subsequent order denying that relief (*see* CPLR 5015 [a] [4]; *Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457, 460 [2d Dept 2006]; *Hartloff*, 296 AD2d at 849-850).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1380

CA 14-01794

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

ANTOINE MARTIN, II, PLAINTIFF-APPELLANT,

V OPINION AND ORDER

WALTER WITKOWSKI, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered January 17, 2014. The order granted the motion of defendant to dismiss the complaint.

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

Opinion by NeMoyer, J.:

This appeal raises an age-old dilemma: how should the law distinguish between a father and son of the same name? Under the circumstances presented here, we hold that plaintiff properly commenced a single action against Walter Witkowski, Jr. notwithstanding plaintiff's initial and ineffective attempt to serve Witkowski, Jr. at the home of his father, Walter Witkowski, Sr.

FACTS

Plaintiff was injured in a two-car accident in the City of Buffalo on November 4, 2010. It is undisputed that the driver of the other car was one Walter Witkowski, Jr. (hereafter, Junior). Following the crash, Junior identified himself only as "Walter Witkowski," and did not disclose that he shared his father's name.

Plaintiff subsequently commenced this personal injury action by e-filing a summons and complaint on October 22, 2013. The caption on the summons and complaint named "Walter Witkowski" —no suffix—as the lone defendant. Within the caption of both documents, plaintiff wrote that the defendant Witkowski lived at "121 Pearl Street" in Buffalo.

On October 30, 2013, a process server went to 121 Pearl Avenue in the Village of Blasdell, Erie County, and delivered a copy of the summons and complaint to one Matthew Putnam, who the process server would later identify in his affidavit of service as the "co-tenant" and "grandson" of the defendant Witkowski.[1] Two days later, on November 1, 2013, the process server mailed a copy of the commencement papers to the address in Blasdell. The affidavit of service was then e-filed on November 6, 2013. We will call this series of events the "October 2013 service."

As it turns out, however, Junior did not reside at 121 Pearl Avenue in Blasdell. Instead, his father, Walter Witkowski, Sr. (hereafter, Senior) resided at that address. Matthew Putnam, who also resided at 121 Pearl Avenue in Blasdell at the time, is Senior's grandson and Junior's nephew.

On November 20, 2013, Junior's attorney e-filed an answer on behalf of "Walter Witkowski," no suffix.[2] In the answer, Junior interposed the following affirmative defense: "this answering defendant is not subject to the jurisdiction of this Court as he was never properly served." The answer did not, however, interpose any defense or affirmative defense based on improper joinder.

Shortly thereafter, on November 23, 2013, a different process server went to Junior's actual residence in the Town of Aurora, Erie County, and delivered a copy of the summons and complaint to Junior's wife. On November 27, 2013, the process server mailed a packet to Junior's residence in Aurora; although not explicitly stated in the affidavit of service, it is uncontested that this packet contained a copy of the commencement papers. The affidavit of service was e-filed on December 3, 2013. We will call this series of events the "November 2013 service."

Perhaps realizing that the November 2013 service was effectuated after the statute of limitations had run, Junior adopted a new legal strategy: he began to argue that the attempted service on Junior at Senior's home in October 2013 constituted proper service on Senior, and that plaintiff had actually been suing Senior the whole time. In furtherance of this strategy, Junior rejected numerous discovery demands on the ground that he was not a party to the lawsuit.

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[1] According to his affidavit of service, the process server gave the commencement papers to Matthew Putnam at "121 Pearl Street" in Blasdell, but it is undisputed that no such address exists and that the process server actually went to "121 Pearl Avenue" in Blasdell.

[2] Although both Junior and Senior have previously taken the position that Junior's attorney answered the complaint on Senior's behalf, Junior's attorney conceded at oral argument before us that he has never represented Senior. We therefore deem the answer filed by Junior's attorney to have been tendered on Junior's behalf.

Junior, purportedly as a nonparty, then moved to dismiss the complaint. Citing CPLR 1003 and CPLR 3211, Junior argued generally that Senior was the actual named defendant and that Supreme Court lacked personal jurisdiction over Junior due to improper service and improper joinder. Plaintiff opposed the motion, arguing that Junior was and always had been the lone defendant in this action, and that service upon Junior was properly effectuated within 120 days of commencement pursuant to CPLR 306-b.

The court granted Junior's motion. In its written decision, the court agreed with Junior's interpretation of the record and held that Senior was the actual defendant all along. Therefore, the court reasoned, Junior was never properly served or joined in this action.

Plaintiff appeals, and we now reverse.

DISCUSSION

On appeal, plaintiff argues that the court misconstrued the record in determining that Junior was not properly joined and served. We agree. Our conclusion rests on a single foundational aspect of this case: Junior is, and has always been, the sole defendant in this action. Part I of our analysis will delve into that particular topic and will show why, under these circumstances, Junior is the correct and only defendant. Part II of our analysis will then show why that finding is fatal to Junior's claims of improper service and improper joinder.

I. Junior is the one and only defendant.

A

The law is well acquainted with the confusion engendered by an identically named father-son pair, and it has devised a framework for addressing the issue whenever it arises. The rule was laid down authoritatively by Chancellor Walworth in the Court of Errors[3] over 175 years ago:

> "The addition of *senior* or *junior* to a name is mere matter of description, and forms no part of the name. It is generally to distinguish between a father and a son of the same name . . . but the addition is useless, and the omission thereof furnishes no ground of objection . . . , where there is *any other addition or description by which the real party intended can be ascertained*" (*Fleet v Youngs*, 11 Wend 522, 524 [Ct Errors 1833] [emphasis added]; *see also Padgett v Lawrence*, 10 Paige Ch 170, 177 [Ch Ct 1843]).

[3] As the predecessor to the Court of Appeals, the decisions of the Court of Errors are binding to the same extent as the decisions of the Court of Appeals.

In *Fleet*, the plaintiff in error (Arnold Fleet) sued out a writ against one "Samuel Youngs," without specifying whether it was returnable on Samuel Youngs, Sr. or Samuel Youngs, Jr. Notably, however, the writ did indicate that the "Samuel Youngs" in suit was the overseer of highways for the Town of Oyster Bay, which was then in Queens County. Moreover, the writ was sued out in connection with a prior action in which Youngs Junior—in his capacity as highway overseer—had successfully prosecuted Fleet for obstructing a road.

Despite his obvious identity as the proper defendant in error, Youngs Junior moved to quash the writ, arguing, inter alia, that it was actually taken against his father (Youngs Senior) because Fleet had not appended the suffix "Jr." to the defendant's name. Chancellor Walworth, speaking for all 16 judges on this issue, was decidedly unimpressed. "The objection on the ground of [name] variance is certainly not well taken," the Chancellor wrote, because Fleet's recitation "of [the defendant's] name of office, by which he was described in the record of the supreme court [as the overseer of highways], would be sufficient to identify him as the party to that record" and hence as the defendant in error. That was so, the Chancellor continued, "even if it appeared that [Youngs Junior] had a father by that same name residing in the town of Oysterbay [sic], unless it also appeared that the father was an overseer of highways, and that he had likewise recovered a judgment . . . against Fleet" (*id.* at 524-525). Indeed, the writ's "reference to the [underlying] judgment, in the condition of the bond for costs, is sufficient to identify [Youngs Junior as] the person intended as the [defendant in error]" (*id.* at 525).

Put in more contemporary language, it was undisputed that Youngs Junior was the overseer of highways and had prosecuted Fleet in that capacity in the underlying action. The Court of Errors therefore held that, by describing the defendant "Samuel Youngs" in those very terms, Fleet's writ contained ample "description by which the real party intended [i.e., Youngs Junior] can be ascertained" (*id.* at 524). Consequently, Fleet's failure to specify the defendant's suffix in the writ "furnishe[d] no ground of objection" (*id.*).

This logic applies with equal force here. The summons and complaint in this case named "Walter Witkowski" as the one and only defendant. It could not be plainer from the complaint that the "Walter Witkowski" being sued is the "Walter Witkowski" who had a car accident with plaintiff on November 4, 2010 in the City of Buffalo. And as all parties agree, *that* Witkowski is Junior, not Senior. There is no meaningful difference between the argument of Youngs Junior in *Fleet* and the argument of Witkowski Junior in this case.

Modern case law is consistent with *Fleet*. In *Kiaer v Gilligan* (63 AD3d 1009 [2d Dept 2009]), the plaintiff sued one "John Gilligan" (no suffix) for injuries sustained in a car accident. Evidently unbeknownst to the plaintiff, however, there was both a John Gilligan, Jr. and a John Gilligan, Sr. Plaintiff served only Gilligan Junior and insisted at all times that he (Gilligan Junior) was the intended defendant. Nevertheless, Gilligan Senior appeared, claimed to own the

involved car, and moved to dismiss for lack of service upon him (Gilligan Senior). The motion court treated Gilligan Senior as the correct defendant and dismissed the action for inadequate service.

The Appellate Division reversed. Taking a practical, common-sense view of the record, the panel found that "it is clear, as the plaintiff contends, that Gilligan Junior was the intended defendant" (*id.* at 1011). Among the case-specific indicia upon which the panel relied for its finding was the "undisputed" fact that, "at the time of the accident, Gilligan Senior . . . had been, for at least 1½ years, a resident of Ireland" (*id.*). "Supreme Court [therefore] erred in concluding that Gilligan Senior was the defendant and in granting his motion to dismiss [for lack of service upon him]," held the *Kiaer* panel (*id.* at 1010).

Our facts are easily analogized to *Kiaer* and militate in favor of the same result. As in *Kiaer*, the complaint here does not explicitly indicate whether the defendant is Junior or Senior. Nevertheless, as in *Kiaer*, a common-sense and practical view of this record leads to the inescapable conclusion that the son, not the father, is actually the correct defendant. After all, it is undisputed both (1) that Junior was involved in the car accident underlying the complaint, and (2) that plaintiff is suing the individual involved in the car accident. The *Kiaer* panel, of course, rested its conclusion on factors unique to that case, but both sets of factors (*Kiaer*'s and ours) ultimately end up in the same place: a compelling demonstration by the plaintiff that the nonsuffixed references to a particular defendant in the summons and complaint were actually references to the son, not the father.

B

Not so fast, says Junior. His brief identifies two distinct reasons for treating Senior, and not Junior, as the correct defendant here. First, Junior cites the fact that plaintiff initially delivered the commencement papers to Senior's house. Second, Junior claims that plaintiff's summons and complaint identified the Witkowski being sued as the Witkowski who resided at Senior's address. We are unpersuaded.

First, the fact that plaintiff initially delivered the commencement papers to Senior's house in October 2013 does not logically demonstrate that Senior was the intended defendant all along. Rather, the October 2013 service attempt shows only that plaintiff tried to serve Junior at Senior's house, and that this effort was defective because Junior did not live at Senior's house (*see* CPLR 308 [2]).[4] The actual occupants of Senior's house are

[4] Contrary to Junior's contention, it is immaterial that the October 2013 process server wrote in his affidavit of service that Matthew Putnam was the "grandson" of the defendant Witkowski (*see State of N.Y. Higher Educ. Servs. Corp. v Sparozic*, 35 AD3d 1069, 1070 [3d Dept 2006], *lv dismissed* 8 NY3d 958 [2007] ["Defendant's reliance on the fact that the affidavit of service

irrelevant so long as Junior was not among them, and it defies reason to convert a defective service upon Junior into an effective service upon Senior by the mere fortuity of its location, i.e., the fact that the defective service occurred at Senior's house. Indeed, under Junior's reasoning, an identically named nonparty residing at the incorrectly-served address would somehow transmogrify into the defendant simply by virtue of having the same name as the real defendant.

And second, it cannot be said that the summons and complaint definitively identified the Witkowski being sued as the Witkowski who resided at Senior's address. According to the summons and complaint, the Witkowski being sued resided at 121 Pearl *Street* in the *City of Buffalo*. Admittedly, that is not Junior's correct address. But neither is it Senior's correct address; after all, Senior resided at 121 Pearl *Avenue* in the *Village of Blasdell*, a distinct municipality not even adjacent to Buffalo. Thus, while the address in the summons and complaint does not, standing alone, identify Junior as the named "Walter Witkowski," it also does not definitively identify Senior as the named "Walter Witkowski." The erroneous address in the caption should therefore be disregarded under CPLR 2001 (*cf. Matter of Rue v Hill*, 287 AD2d 781, 782-783 [3d Dept 2001], *lv denied* 97 NY2d 602 [2001]). Indeed, there is no legal obligation to identify the defendant's address in a summons and/or complaint (*compare* CPLR 305 [a] [requiring pleading of the plaintiff's address in certain circumstances]), and disregarding this de minimis defect puts Junior in no worse position than if plaintiff had simply omitted the defendant's address in the first place.[5]

C

In light of the foregoing, we hold that Junior is, and always has been, the only defendant in this case. We emphasize, however, that our conclusion is based in no part on the rule of *Stuyvesant v Weil* (167 NY 421, 425-426 [1901]), which "has been consistently interpreted as allowing a *misnomer* in the description of a party defendant to be cured by amendment [so long as] (1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment" (*Ober v Rye Town Hilton*, 159 AD2d 16, 19-20

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indicates that her last name is 'Sparozio' rather than 'Sparozic' also is unavailing, as a misstatement on the affidavit of service goes only to the evidentiary value of the affidavit and does not impact the court's jurisdiction over defendant"]).

[5] Even assuming, arguendo, that the summons and complaint had listed Senior's correct address as the residence of the Witkowski being sued, it would be only one factor in favor of treating Senior as the proper defendant. And this one factor would be decisively outweighed by the undisputed fact that Senior was not the Witkowski who got into a car accident with plaintiff, i.e., the person that plaintiff was suing.

[2d Dept 1990] [emphasis added]; *see Bracken v Niagara Frontier Transp. Auth.*, 251 AD2d 1068, 1068 [4th Dept 1998]). The *Stuyvesant* rule, which has been codified and subsumed within CPLR 305 (c), applies when there has been a "misnomer" in describing the defendant in the summons and/or complaint, and that simply did not occur here. Junior was not "misnamed" as defendant "Walter Witkowski." To the contrary, although this description is perhaps an *imprecise* recitation of the *defendant's* name, it is not in any sense an *inaccurate* recitation of *Junior's* name. Whatever else he might choose to be called, Junior is unquestionably a "Walter Witkowski." And as then Chief Justice Kent observed over two centuries ago, the suffix "*junior* is no part of the name . . . It is a casual and temporary designation. It may exist one day, and cease the next" (*People ex rel. Bush v Collins*, 7 Johns 549, 553 [Sup Ct 1811]). The *Stuyvesant* rule therefore has no application here; put simply, there was no "misnomer" that required correction by amendment.

II. Junior's status as the only defendant is necessarily fatal to his motion to dismiss.

Junior's various claims of improper service and improper joinder necessarily fail under the weight of our conclusion that he is and always has been the only defendant in this case. We will examine service and joinder separately.

Service

CPLR 306-b requires service of the summons and complaint upon the defendant—i.e., Junior and only Junior—"within [120] days after the commencement of the action." And that is precisely what occurred here. Junior freely concedes that he was served with the summons and complaint in November 2013, well within the statutory deadline for effecting service (which would have expired in February 2014). Moreover, there is no dispute that the November 2013 service constituted good and valid service under CPLR 308 (2). Junior—the only defendant in the case—was thus properly served (*see Sorrento v Rice Barton Corp.*, 286 AD2d 873, 874 [4th Dept 2001]).

True, it took plaintiff two separate tries to properly serve Junior. As noted above, plaintiff's first attempt at serving Junior in October 2013 was admittedly defective under CPLR 308 (2) because the commencement papers were delivered to an address where Junior did not reside (i.e., Senior's house). But this is inconsequential. Plaintiff cured his defective service by effecting unquestionably proper service within 120 days of commencement, and it is black letter law that "plaintiff had the absolute statutory right to effect valid service at any point within the 120-day period [afforded by CPLR 306-b]" (*Bank of N.Y. Mellon v Scura*, 102 AD3d 714, 715 [2d Dept 2013], citing *Gelbard v Northfield Sav. Bank*, 216 AD2d 267, 267-268 [2d Dept 1995]). Accordingly, the November 2013 "re-service was entirely appropriate and served to cure the jurisdictional defects of which [Junior] complained" (*Helfand v Cohen*, 110 AD2d 751, 751 [2d Dept 1985]; *see e.g. Bank of Am., N.A. v Valentino*, 127 AD3d 904, 904 [2d

Dept 2015]; *IBJ Schroder Bank & Trust Co. v Zaitz*, 170 AD2d 579, 579 [2d Dept 1991]). Service, after all, is not a "one strike and you're out" game.

Joinder

With respect to joinder, Junior argues that plaintiff's November 2013 service—even if valid for purposes of CPLR 306-b and CPLR 308 (2)—nevertheless violated CPLR 1003 because it effectively "added" Junior as a defendant in this action without judicial permission. CPLR 1003 obligates the plaintiff to obtain leave of court in certain circumstances before "adding" a defendant not originally named in the complaint. As Junior notes, a violation of CPLR 1003 is a jurisdictional defect that requires dismissal, even if the affected service is otherwise compliant with law (*see Crook v du Pont de Nemours Co.*, 81 NY2d 807, 809 [1993], *affg on op below* [appeal No. 2] 181 AD2d 1039 [4th Dept 1992]). Junior, however, "failed to raise [his] defense of improper joinder in a timely, pre-answer motion to dismiss the complaint, and also failed to assert such defense in [his November 20, 2013] answer. Accordingly, [he] waived the defense" (*He-Duan Zheng v American Friends of the Mar Thoma Syrian Church of Malabar, Inc.*, 67 AD3d 639, 640 [2d Dept 2009]).[6]

In any event, Junior's joinder argument is fundamentally flawed, for it necessarily assumes that Senior was the original defendant and that plaintiff thereafter "added" Junior to the action by serving him in November 2013. And as we explained in Part I, this assumption is simply wrong. Junior was always the lone defendant; Senior has never been a party to this action. As such, plaintiff could not have improperly "added" Junior as an additional defendant in November 2013, for there was no preexisting defendant in the action. Rather, plaintiff's service upon Junior in November 2013 simply corrected his defective service attempt upon Junior in October 2013. This re-service was "entirely proper" and "did not constitute the commencement of a second action" (*Heusinger v Russo*, 96 AD2d 883, 883 [2d Dept 1983]). CPLR 1003 is thus categorically inapplicable to this case, for there was no "addition" of a party within the meaning of that provision (*compare e.g. Jordan v Lehigh Constr. Group*, 259 AD2d 962, 962 [4th Dept 1999] [plaintiff violated CPLR 1003 by naming and serving one corporate defendant and thereafter serving a separate and distinct company without securing judicial permission to amend the summons and complaint to add the separate and distinct company]).

CONCLUSION

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[6] A purported "amended answer" subsequently filed by *Senior's* attorney on *Senior's* behalf did contain some language that could be construed as an improper-joinder defense, but this purported "amended answer" is a nullity inasmuch as it was filed on behalf of a nonparty (i.e., Senior) who had neither a right to intervene pursuant to CPLR 1012 nor leave to intervene pursuant to CPLR 1013.

Contrary to Junior's argument and the court's determination, this is not a case in which either the "wrong party was sued" or the "wrong party was served." The right party (Junior) was sued from the outset, and the right party (Junior) was eventually served with the commencement papers in full compliance with the CPLR. The process was not hiccup-free, of course. When examined in a vacuum, the defendant's name on the summons and complaint was facially ambiguous; the summons and complaint stated that the defendant resided at an address other than Junior's; and plaintiff's initial attempt to serve the summons and complaint was defective. But the facially ambiguous name on the summons and complaint is easily and permissibly clarified by looking at the substantive allegations in the complaint; the erroneous address is insubstantial and caused no prejudice, and can therefore be disregarded under CPLR 2001; and the defective service attempt was cured within the appropriate time. The court therefore erred in dismissing the action on grounds of improper service and improper joinder. Accordingly, the order appealed from should be reversed, Junior's motion to dismiss denied, and the complaint reinstated.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1381

CA 14-01795

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

ANTOINE MARTIN, II, PLAINTIFF-APPELLANT,

V ORDER

WALTER WITKOWSKI, DEFENDANT-RESPONDENT.

DEBORAH A. PUTNAM, AS ADMINISTRATRIX OF THE ESTATE OF WALTER WITKOWSKI, SR., DECEASED, RESPONDENT.
(APPEAL NO. 2.)

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

NASH CONNORS, P.C., BUFFALO (JAMES J. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

LAW OFFICES OF GIALLEONARDO & HARTFORD, GETZVILLE (JENNIFER V. SCHIFFMACHER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered April 14, 2014. The order, among other things, denied the motion of plaintiff seeking leave to renew and reargue his opposition to defendant's motion to dismiss the complaint and seeking leave to amend the complaint.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Abasciano v Dandrea*, 83 AD3d 1542, 1545 [4th Dept 2011]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1383

TP 17-01062

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

IN THE MATTER OF ANTOINE PORTER, PETITIONER,

V MEMORANDUM AND ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 5, 2017) to annul a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated several inmate rules, including assault on an inmate in violation of inmate rule 100.10 (7 NYCRR 270.2 [B] [1] [i]). Contrary to petitioner's contention, the determination is supported by substantial evidence.

It is well settled that misbehavior reports may constitute substantial evidence to support a determination (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]). Where, as here, "the misbehavior report was not written by a correction officer who witnessed the conduct in question, the record must contain facts establishing some indicia of reliability to the hearsay before the report may be considered sufficiently relevant and probative to constitute substantial evidence" (*Matter of McIntosh v Coughlin*, 155 AD2d 762, 763 [3d Dept 1989]). Furthermore, where, as here, the misbehavior report is based on information provided by an inmate informant, "any reasonable method for establishing the informant's reliability will suffice" to establish the informant's credibility (*Matter of Abdur-Raheem v Mann*, 85 NY2d 113, 121 [1995]).

Consequently, a hearing officer may properly determine that an informant's credibility is established "where the information provided by the informant [to the author of the report] is 'sufficiently detailed' to enable a hearing officer to assess the informant's reliability . . . , or the information provided to the hearing officer establishes that the informant provided the information based on personal knowledge" (*Matter of Brown v Fischer*, 91 AD3d 1336, 1337 [4th Dept 2012]).

Here, the Hearing Officer had a sufficient basis upon which to assess the credibility of the informant inasmuch as the information provided to her "established that the confidential account was detailed and specific; that there were valid reasons to conclude that the informant was reliable; and that there was no reason to think that the informant was motivated by a promise of reward from the prison officials or a personal vendetta against petitioner" (*Matter of Williams v Fischer*, 18 NY3d 888, 890 [2012]). Consequently, we conclude that the misbehavior report, the testimony of a correction officer, and information received from a confidential informant constitute substantial evidence to support the determination that petitioner violated the applicable inmate rules (*see Matter of Green v Sticht*, 124 AD3d 1338, 1339 [4th Dept 2015], *lv denied* 26 NY3d 906 [2015]). Petitioner's contention that he did not assault the victim or order another inmate to attack the victim merely created a credibility issue for the Hearing Officer to resolve (*see Matter of Watson v Fischer*, 108 AD3d 1006, 1007 [3d Dept 2013]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1384

TP 17-01112

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

IN THE MATTER OF EDWARD ALEXANDER, PETITIONER,

V ORDER

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

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered June 8, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1385

KA 16-02166

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ARTHUR LEWIS, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), dated June 6, 2016. 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 he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that County Court improperly assessed 10 points against him under the risk factor for use of "forcible compulsion," inasmuch as forcible compulsion is not an element of any of the crimes of which he was convicted, including the crime of forcible touching (Penal Law § 130.52 [1]). We reject that contention. Although defendant is correct that the term "forcible compulsion" as defined in Penal Law § 130.00 (8) is not an element of the crime of forcible touching (§ 130.52 [1]), " 'the court was not limited to considering only the crime of which the defendant was convicted in making its determination' " (*People v Martinez*, 125 AD3d 735, 736 [2d Dept 2015], *lv denied* 25 NY3d 906 [2015]). Here, as in *Martinez*, the People established by the requisite clear and convincing evidence that defendant pushed the smaller victim against a wall, pinning her there and preventing her from moving away from him, which enabled him to commit the crime of forcible touching (*see id.* at 736-737).

Defendant further contends that the court improperly assessed 10 points against him under risk factor 13 for unsatisfactory conduct while confined. Even assuming, arguendo, that defendant's contention has merit, we conclude that subtracting the points assigned for that risk factor "would not alter the defendant's presumptive risk level"

(*People v Perez*, 115 AD3d 919, 920 [2d Dept 2014]).

Finally, we reject defendant's contention that the court abused its discretion in denying his request for a downward departure inasmuch as defendant failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines (*see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). Contrary to defendant's contention, the fact that he may have scored as a lower risk on the Static-99R does not justify a downward departure inasmuch as "[t]he Static-99R does not take into account the nature of the sexual contact with the victim[s] or the degree of harm that would potentially be caused in the event of reoffense" (*People v Roldan*, 140 AD3d 411, 412 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]; *see People v Rodriguez*, 145 AD3d 489, 490 [1st Dept 2016], *lv denied* 28 NY3d 916 [2017]). We have reviewed defendant's remaining contention concerning a downward departure and conclude that it lacks merit.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1386

KA 16-00536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFERY WILLIAMS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 15, 2015. 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: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that he did not validly waive his right to appeal and thus that he is not precluded from challenging the severity of his sentence because, inter alia, the consideration for his plea was "illusory." Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id*. at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1387

KA 15-00528

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER RODRIGUEZ, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 26, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree (three counts) and attempted 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 three counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count of attempted assault in the first degree (§§ 110.00, 120.10 [1]). Contrary to defendant's contention, he knowingly, intelligently, and voluntarily waived the right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]). County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]). The valid waiver of the right to appeal encompasses defendant's challenge to the factual sufficiency of the plea allocution (*see McCrea*, 140 AD3d at 1655), and, in any event, that challenge is not preserved for our review because defendant did not move to withdraw the plea or to vacate the judgment of conviction (*see id.* at 1655-1656; *see generally People v Lopez*, 71 NY2d 662, 665 [1988]).

To the extent that defendant challenges the voluntariness of his plea, that contention, although not precluded by the valid waiver of the right to appeal (*see People v Neal*, 148 AD3d 1699, 1699-1700 [4th

Dept 2017], *lv denied* 29 NY3d 1084 [2017]), is similarly unpreserved for our review "inasmuch as defendant did not move to withdraw the plea or vacate the judgment of conviction (*see* CPL 220.60 [3]; *see also* CPL 440.10), and nothing on the face of the record calls into question the voluntariness of the plea or casts significant doubt upon defendant's guilt" (*People v Karlsen*, 147 AD3d 1466, 1468 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]).

Defendant further contends that the waiver of the right to appeal does not encompass his challenge to the severity of his sentence (*see generally People v Maracle*, 19 NY3d 925, 927-928 [2012]). Although the court, during its oral colloquy, referenced defendant's "right . . . to appeal th[e] conviction" without referencing his right to challenge the severity of the sentence, we note that defendant executed and acknowledged in open court a written waiver of the right to appeal, in which he specifically agreed to waive "any issue relating to the conviction or sentence." Thus, we reject defendant's contention (*see People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *cf. People v Cook*, 147 AD3d 1387, 1387-1388 [4th Dept 2017], *lv denied* 29 NY3d 996 [2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1390

KA 16-01414

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JONATHAN SOLIVAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Judith A. Sinclair, J.), rendered August 16. 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that Supreme Court (Piampiano, J.) erred in refusing to suppress physical evidence seized from his person and a vehicle in which he had been located. As the People correctly concede, the court erred in refusing to suppress the evidence.

With respect to the marihuana seized from defendant’s pocket, we agree with defendant that the police officer lacked any basis upon which to search defendant’s person. The police officer observed defendant sitting inside a parked vehicle lacking a valid inspection. The officer approached the vehicle and, upon seeing a kitchen knife on the floorboard of the vehicle, asked defendant to exit the vehicle. Without any further provocation from defendant, the officer conducted a search of defendant’s person, discovering a small amount of marihuana in defendant’s pocket. That search was unlawful for a variety of reasons.

First, the search cannot be justified as a frisk for officer safety inasmuch as there was no evidence that, after defendant exited

the vehicle, the officer "reasonably suspected that defendant was armed and posed a threat to [the officer's] safety" (*People v Fagan*, 98 AD3d 1270, 1271 [4th Dept 2012], *lv denied* 20 NY3d 1061 [2013], *cert denied* ___ US ___, 134 S Ct 262 [2013]; *see People v Lipscomb*, 179 AD2d 1043, 1044 [4th Dept 1992]; *cf. People v Carter*, 109 AD3d 1188, 1189 [4th Dept 2013], *lv denied* 22 NY3d 1087 [2014]). Second, even assuming, arguendo, that the officer was entitled to conduct a protective frisk, we conclude that he was not entitled to search defendant's pockets. "A protective frisk is an intrusion tailored to discover the presence of concealed weapons, usually consisting of a pat-down of a person's outer clothing . . . [It] 'should not be extended beyond its purpose of securing the safety of the officer and preventing an escape' " (*Lipscomb*, 179 AD2d at 1044, quoting *People v Marsh*, 20 NY2d 98, 101 [1967]). Where, as here, there is no evidence that the officer believed that the individual's pockets contained weapons, the search of those pockets is unlawful (*see People v Diaz*, 81 NY2d 106, 109 [1993]; *People v Williams*, 217 AD2d 1007, 1007-1008 [4th Dept 1995]; *Lipscomb*, 179 AD2d at 1044).

At the suppression hearing, the officer justified his search of defendant's person and pockets on the ground that he was going to be placing defendant in the police vehicle and he searched "everybody" and "anybody" that was going to be placed inside his vehicle. The officer's position lacks merit. "Although a police officer may reasonably pat down a person before he [or she] places [that person] in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing [the person] in the police car in the first place" (*People v Kinsella*, 139 AD2d 909, 911 [4th Dept 1988]; *see People v Richards*, 151 AD3d 1717, 1719 [4th Dept 2017]). Here, as in *Richards*, the People failed to establish the legitimacy of placing defendant in the patrol vehicle. The officer lacked any suspicion, let alone a reasonable one, "that a crime ha[d] been, [was] being, or [was] about to be committed" (*People v Martinez*, 80 NY2d 444, 447 [1992]). At most, the evidence established that the unidentified owner of the vehicle had committed a *parking violation* (Vehicle and Traffic Law § 306 [b]).

"There is no question . . . that a police officer is not authorized to conduct a search every time he [or she] stops a motorist for speeding or some other ordinary traffic infraction" (*Marsh*, 20 NY2d at 100) and, "without more[,] a mere custodial arrest for a traffic offense will not sustain a contemporaneous search of the person" (*People v Weintraub*, 35 NY2d 351, 353 [1974], citing *People v Adams*, 32 NY2d 451, 455 [1973] and *Marsh*, 20 NY2d at 101-102; *cf. People v Troiano*, 35 NY2d 476, 478 [1974]). If such conduct is not authorized for a traffic offense, then it cannot be authorized for the lesser offense of a parking violation.

We likewise agree with defendant that the court erred in refusing to suppress the physical evidence found inside the uninspected vehicle inasmuch as the People failed to establish that the purported inventory search was valid (*see People v Johnson*, 1 NY3d 252, 255-257 [2003]). Even if we were to conclude that the uninspected vehicle

could be impounded and subjected to an inventory search, a questionable proposition at best, the People failed to establish the existence of any departmental policy concerning inventory searches or that the officer properly conducted the search in compliance with established and standardized procedures (*see id.* at 256; *see also People v Gomez*, 13 NY3d 6, 10-11 [2009]).

In light of our conclusion that the court should have granted those parts of defendant's omnibus motion seeking to suppress the physical evidence obtained as a result of the illegal search of defendant's person and the uninspected vehicle, defendant's guilty plea must be vacated (*see People v Stock*, 57 AD3d 1424, 1425 [4th Dept 2008]). Further, because our conclusion results in the suppression of all evidence in support of the crimes and violation charged, the indictment must be dismissed (*see id.*).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1392

CAF 15-01879

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

IN THE MATTER OF DAMONE H., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ORDER

DAMONE H., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 8, 2015 in a proceeding pursuant to Family Court Act article 10. The order determined that respondent had neglected the subject child.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Lisa E.* [appeal No. 1], 207 AD2d 983, 983 [4th Dept 1994]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1393

CAF 15-01880

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

IN THE MATTER OF DAMONE H., JR.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DAMONE H., SR., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

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

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 24, 2015 in a proceeding pursuant to Family Court Act article 10. The order provided for 12 months' supervision of respondent by petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father contends that petitioner failed to establish by a preponderance of the evidence that he neglected the subject child. We agree with the father, and we therefore reverse the order and dismiss the petition.

Petitioner alleged that the father inflicted excessive corporal punishment on the child. In particular, petitioner alleged that, on January 18, 2014, the child had two small bruises on his left temple, allegedly inflicted by the father. Additionally, petitioner alleged that, on March 19, 2014, the child sustained several scratches on his face, a bruise on his cheek, and several minor bruises and abrasions, also allegedly inflicted by the father. At the hearing on the petition, petitioner's caseworker testified that the child initially stated that he sustained a bruise in January 2014 while roughhousing with his siblings and, although he later gave inconsistent accounts of the incident, the child maintained that his father had not caused the injury. The caseworker further testified that in March 2014 he observed that the child had three scarlet marks on the right side of his face, a reddish mark on the left side of his face, and a small,

reddish mark on his abdomen. When asked about those marks, the child stated that he had been in trouble at school, so the father struck him. According to the testimony of the father, he was called into the school by the child's teachers in March 2014 because the child was misbehaving. When the father stated that he was taking the child home, the child began running around the classroom. The father chased the child around the classroom and, in attempting to grab him, accidentally caught him in the face with his hand, causing the marks. The father further testified, consistent with the child's statement to the caseworker, that the child sustained a bruise in January 2014 while roughhousing with his siblings.

"[A] finding of neglect requires proof that the child's 'physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired' as a result of the parent's failure 'to exercise a minimum degree of care' " (*Matter of Peter G.*, 6 AD3d 201, 203 [1st Dept 2004], *appeal dismissed* 3 NY3d 655 [2004], quoting Family Ct Act § 1012 [f] [i]; *see Matter of Lacey-Sophia T.-R. [Ariela (T.)W.]*, 125 AD3d 1442, 1444 [4th Dept 2015]). Although the use of excessive corporal punishment constitutes neglect (*see* § 1012 [f] [i] [B]), a parent has the right to use reasonable physical force to instill discipline and promote the child's welfare (*see Matter of Jaivon J. [Patricia D.]*, 148 AD3d 890, 891 [2d Dept 2017]). Here, we conclude that petitioner failed to establish that the father intentionally harmed the child or that his conduct was part of a pattern of excessive corporal punishment (*see Matter of Nicholas W. [Raymond W.]*, 90 AD3d 1614, 1615 [4th Dept 2011]), and petitioner thus failed to meet its burden of establishing by a preponderance of the evidence that the child was in imminent danger (*see Lacey-Sophia T.-R.*, 125 AD3d at 1445; *see generally Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1397

CA 17-01033

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

BARBARA ANN PETERSON AND CHARLES E. PETERSON,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ASHLEY R. WARD, DEFENDANT-RESPONDENT.

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

TREVETT CRISTO, P.C., ROCHESTER (ALAN J. DEPETERS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered February 27, 2017. The order denied the motion of plaintiffs for partial summary judgment on the issues of negligence and serious injury.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of plaintiffs' motion on the issue of negligence and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action to recover damages for an injury allegedly sustained by Barbara Ann Peterson (plaintiff) in a motor vehicle accident while riding as a back seat passenger in defendant's vehicle. Plaintiffs moved for partial summary judgment on the issues of negligence and serious injury. We conclude that Supreme Court erred in denying that part of plaintiffs' motion with respect to the issue of negligence, and we therefore modify the order accordingly. Plaintiffs met their initial burden by establishing that defendant was negligent in violating Vehicle and Traffic Law § 1142 (a) by turning left at an intersection directly into the path of an oncoming vehicle and that defendant's violation of the statute was unexcused (*see Redd v Juarbe*, 124 AD3d 1274, 1275 [4th Dept 2015]). Additionally, inasmuch as defendant admitted in his deposition testimony that he never saw the oncoming vehicle prior to the collision, we conclude that defendant was negligent as a matter of law in failing to see what was there to be seen and in crossing in front of an oncoming vehicle when it was hazardous to do so (*see Guadagno v Norward*, 43 AD3d 1432, 1433 [4th Dept 2007]). Although we agree with defendant that there are conflicting accounts concerning whether he stopped at the posted stop sign prior to the accident, we conclude that this minor discrepancy does not raise an issue of fact precluding

an award of summary judgment in plaintiffs' favor on the issue of defendant's negligence because in either scenario defendant was negligent as a matter of law (*see* Vehicle and Traffic Law § 1142 [a]; *Singh v Shafi*, 252 AD2d 494, 494-495 [2d Dept 1998]; *cf. Oluwatayo v Dulinayan*, 142 AD3d 113, 117-121 [1st Dept 2016]).

We conclude, however, that there are material issues of fact whether plaintiff's alleged injury, i.e., a fractured femur, was caused by the motor vehicle accident and thus that the court properly denied that part of plaintiffs' motion on the issue of serious injury (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]). Specifically, there is an issue of fact, among others, concerning whether plaintiff would be able to ambulate freely without assistance for a day and a half following the accident if she had sustained a fracture to her femur as a result of the collision. Thus, we conclude that plaintiffs failed to meet their burden on the motion with respect to the issue of the causation of plaintiff's injury, and we need not consider the sufficiency of defendant's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1404

CA 17-01220

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

MARCELLA JAMES, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

DARNELL A. THOMAS, RANDOLPH THOMAS AND MARILYN G. THOMAS, DEFENDANTS-APPELLANTS-RESPONDENTS.

BARTH SULLIVAN BEHR, BUFFALO (BRENDAN S. BYRNE OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered March 6, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment on the issue of negligence.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when the vehicle she was driving was struck from behind by a vehicle driven by defendant Darnell A. Thomas. Defendants moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury in the accident within the meaning of the three categories of serious injury alleged by her (*see* Insurance Law § 5102 [d]), and plaintiff cross-moved for partial summary judgment on the issue of negligence. Supreme Court denied defendants' motion and plaintiff's cross motion. Defendants appeal and plaintiff cross-appeals, and we affirm.

We agree with plaintiff on defendants' appeal that the court properly denied defendants' motion because they failed to meet their initial burden of establishing that plaintiff's injuries were not caused by the accident. Defendants contended with respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury alleged by plaintiff that such injuries were preexisting, having resulted from a previous motor vehicle accident. Although defendants' expert ultimately opined in his report that plaintiff's injuries were not causally related to the accident, that report relies on plaintiff's medical records, which

conclude that plaintiff sustained injuries that were causally related to the collision. The report also noted the quantitative assessments of plaintiff's physicians with respect to her limited range of motion in her cervical and lumbar spine after the accident. Thus, defendants failed to eliminate all issues of fact with respect to whether plaintiff sustained serious injuries that were causally related to the accident under those two categories (*see Croisdale v Weed*, 139 AD3d 1363, 1364 [4th Dept 2016]; *Nyhlen v Giles*, 138 AD3d 1428, 1429 [4th Dept 2016]; *Houston v Geerlings*, 83 AD3d 1448, 1450 [4th Dept 2011]).

We further conclude that defendants failed to establish their entitlement to judgment as a matter of law on the third category of serious injury alleged by plaintiff, i.e., the 90/180-day category, inasmuch as "[t]he examination[] by defendants' physician[] took place well after the relevant 180-day period, [he] did not opine about plaintiff's condition during that period, and defendants submitted no other evidence refuting plaintiff's claim that, as a result of her injuries, she . . . was unable" to perform household chores, cook, or shovel light snow following the accident (*Steele v Santana*, 125 AD3d 523, 524 [1st Dept 2015]; *see Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]). In any event, plaintiff's deposition testimony, which was submitted by defendants in support of their motion, establishes that there is an issue of fact whether plaintiff could perform substantially all of her activities of daily living for not less than 90 days during the 180 days immediately following the occurrence of her injuries (*see Durante v Hogan*, 137 AD3d 1677, 1678 [4th Dept 2016]). In light of defendants' failure to meet their initial burden on the motion, there is no need to consider the sufficiency of plaintiff's opposition thereto (*see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]).

The court also properly denied plaintiff's cross motion. It is well settled that a rear-end collision establishes a prima facie case of negligence on the part of the driver of the rear vehicle and, in order to rebut the presumption of negligence, the driver of the rear vehicle must submit a nonnegligent explanation for the collision (*see Shulga v Ashcroft*, 11 AD3d 893, 894 [4th Dept 2004]). Here, there is evidence in the record that plaintiff stopped her vehicle suddenly, which is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*see Zbock v Gietz*, 145 AD3d 1521, 1522 [4th Dept 2016]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1405

TP 17-01011

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

IN THE MATTER OF PAUL PORTER, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD A. ZUCKER, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, RESPONDENT.

DISABILITY RIGHTS NEW YORK, ROCHESTER (RYAN J. MCDONALD OF COUNSEL), FOR PETITIONER.

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, Erie County [James H. Dillon, J.], entered April 11, 2017) to review a determination of respondent. The determination denied petitioner's request for preapproval to purchase an ultra lightweight, manual wheelchair as a backup while his primary, power wheelchair is unavailable for use.

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 challenge a determination, made after a fair hearing, that denied his request for preapproval to purchase an ultra lightweight, manual wheelchair as a backup while his primary, power wheelchair is unavailable for use. Contrary to petitioner's contention, respondent's determination that the requested wheelchair is not medically necessary within the meaning of Social Services Law § 365-a is supported by substantial evidence (*see Matter of Storch v Grinker*, 150 AD2d 585, 585-586 [2d Dept 1989]). At the fair hearing challenging the denial of his request, petitioner offered the affidavit of his occupational therapist, who stated that petitioner has the strength to use an ultra lightweight wheelchair to self-propel short distances in his own home, but cannot self-propel using a heavier wheelchair. Petitioner acknowledged that he has personal care aides 70 hours per week and that his parents would be willing to assist in pushing the wheelchair, but he stated that he wished to perform mobility-related activities for daily living independently. In opposition, respondent's occupational therapist testified that ultra lightweight wheelchairs are designed for long-distance self-propulsion, and that there was no evidence that petitioner has the

strength to self-propel long distances using such a wheelchair. Moreover, respondent's occupational therapist further testified that the ultra lightweight wheelchair lacks "tilt-in-space" capability, placing petitioner at risk for pressure ulcers.

Contrary to petitioner's further contention, the determination was not inconsistent with respondent's prior precedent and thus was not arbitrary and capricious on that ground (*see Matter of Buffalo Teachers Fedn., Inc. v New York State Pub. Empl. Relations Bd.*, 153 AD3d 1643, 1645 [4th Dept 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1406

KA 15-00476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN A. DUKES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 13, 2015. The appeal was held by this Court by order entered February 10, 2017, decision was reserved and the matter was remitted to Supreme Court, Monroe County, for further proceedings (147 AD3d 1534). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to Supreme Court based on the court's failure "to make a reasoned determination whether [defendant] should be afforded youthful offender status" (*People v Dukes*, 147 AD3d 1534, 1535 [4th Dept 2017]). We directed the court on remittal to "state for the record its reasons for determining that neither of the CPL 720.10 (3) factors is present," as required by *People v Middlebrooks* (25 NY3d 516, 527-528 [2015]) (*Dukes*, 147 AD3d at 1535).

Upon remittal, the court declined to adjudicate defendant a youthful offender, and we now affirm. Inasmuch as defendant was convicted of robbery in the first degree (Penal Law § 160.15 [4]), an armed felony offense (*see* CPL 1.20 [41] [b]), he is ineligible for a youthful offender adjudication unless the court determined that there were "mitigating circumstances that bear directly upon the manner in which the crime was committed" (CPL 720.10 [3] [i]) or where the defendant was not the sole participant in the crime and his "participation was relatively minor although not so minor as to constitute a defense to the prosecution" (CPL 720.10 [3] [ii]). The court properly concluded that there were no such mitigating circumstances in this case and that, although defendant was not the sole participant in the crime, his participation was not relatively

minor. The court therefore did not abuse its discretion in refusing to afford defendant youthful offender status (*see People v Stewart*, 140 AD3d 1654, 1654-1655 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *People v Agee*, 140 AD3d 1704, 1704 [4th Dept 2016], *lv denied* 28 NY3d 925 [2016]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1407

KA 16-00637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTOINE SANDERS, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered April 28, 2015. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (five counts) and criminal possession of a weapon in the second degree.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1408

KA 16-00727

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASON E. TUTTY, 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 an order of the Monroe County Court (John L. DeMarco, J.), entered August 19, 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 reversed on the law without costs and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order determining him to be a level two risk based upon his conviction in federal court of knowingly receiving child pornography (18 USC § 2252 [a] [2] [A]). Contrary to defendant's contention, County Court's determination to assess points against him under risk factors 3 and 7 is supported by clear and convincing evidence.

The Court of Appeals has noted that "the children depicted in child pornography are necessarily counted as victims under [risk] factor 3, and nothing in that factor's plain terms suggests otherwise. After all, factor 3 permits the assessment of 30 points [where, as here,] '[t]here were three or more victims' involved in a defendant's current sex crime" (*People v Gillotti*, 23 NY3d 841, 855 [2014], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 10 [2006]). The Court of Appeals has also made it clear that "the plain terms of [risk] factor 7 authorize the assessment of points based on a child pornography offender's stranger relationship with the children featured in his or her child pornography files, and thus points can be properly assessed under that factor due to an offender's lack of prior acquaintance with the children depicted in the files" (*id.* at 854). Here, the People established by clear and convincing evidence that the children depicted in the images on defendant's computer were strangers to defendant. Consequently, the

court properly concluded that "defendant should be assessed 30 points under risk factor 3, 'number of victims,' based on the numerous child victims depicted in the images he possessed . . . and 20 points under risk factor 7, 'relationship with victim, stranger,' [inasmuch] as defendant did not know his child victims."

We agree with defendant, however, that the court erred in failing to consider his request for a downward departure from the presumptive level two risk yielded by his 80-point total score on the risk assessment instrument (*see People v Davis*, 145 AD3d 1625, 1626 [4th Dept 2016], *lv dismissed* 29 NY3d 976 [2017]). We therefore reverse the order and remit the matter to County Court for a determination of whether defendant met his "initial burden of '(1) 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 Guidelines; and (2) establishing the facts in support of its existence by a preponderance of the evidence' " (*People v Watson*, 95 AD3d 978, 979 [2d Dept 2012]; *see Gillotti*, 23 NY3d at 861) and, if so, for the court to exercise its discretion whether to grant defendant's request for a downward departure (*see People v Cobb*, 141 AD3d 1174, 1175 [4th Dept 2016]; *People v Lewis*, 140 AD3d 1697, 1697 [4th Dept 2016]; *see also People v Kemp*, 148 AD3d 1284, 1285 [3d Dept 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1410

KA 17-00007

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRI J. ALFIERE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 17, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [12]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.*). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see id.* at 255-256).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1411

KA 15-00847

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TOREY D. SMITH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered September 3, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1415

KA 17-00008

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRI J. ALFIERE, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered November 17, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). The record establishes that he "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.*). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of the sentence (*see id.* at 255-256).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1425

CA 16-01918

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

IN THE MATTER OF JOEL PROVIDENCE,
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 (LEAH RENE NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered August 18, 2016 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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1426

CA 17-00554

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

LISA J. RIPICH, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

GREGORY G. RIPICH, DEFENDANT-RESPONDENT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR PLAINTIFF-APPELLANT-RESPONDENT.

MACHT, BRENIZER & GINGOLD, P.C., SYRACUSE (JON W. BRENIZER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (Martha E. Mulroy, A.J.), entered June 15, 2016. The order, among other things, granted that part of defendant's motion for a downward modification of his maintenance and child support obligations and imputed certain income to defendant.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1428

TP 17-01002

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

IN THE MATTER OF TERRY PETTERSON, PETITIONER,

V MEMORANDUM AND ORDER

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

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

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered May 26, 2017) to annul a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including inmate rule 113.10 (7 NYCRR 270.2 [B] [14] [i] [possession of a weapon]). Contrary to petitioner's contention, we conclude that there is substantial evidence to support the determination that he violated that inmate rule (*see Matter of Sanchez v Goord*, 300 AD2d 956, 956 [3d Dept 2002]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1430

KA 16-01599

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BILLY JOE ARNOLD, 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 an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered June 23, 2016. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as " '[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under [that] risk factor' " (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see People v Jackson*, 134 AD3d 1580, 1580 [4th Dept 2015]). Contrary to defendant's further contention, " '[a]n offender need not be abusing alcohol or drugs at the time of the instant offense to receive points' for that risk factor" (*Kunz*, 150 AD3d at 1697).

In addition, we conclude that the court providently exercised its discretion in denying defendant's request for a downward departure from his presumptive risk level (*see People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1431

KA 16-00556

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS LOPEZ, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered October 15, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted 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 attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id*. at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1433

KA 15-01688

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAION M. JORDAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered April 22, 2015. 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 he was deprived of a fair suppression hearing by prosecutorial misconduct. Defendant failed to preserve that contention for our review (*see People v Chinn*, 104 AD3d 1167, 1168-1169 [4th Dept 2013], *lv denied* 21 NY3d 1014 [2013]). We nonetheless note that, contrary to the People's contention, the prosecutor engaged in misconduct during the suppression hearing by repeatedly " 'forcing defendant on cross-examination to characterize [the] prosecution witnesses as liars' " (*People v McClary*, 85 AD3d 1622, 1624 [4th Dept 2011]), which is a tactic that we have condemned in numerous cases (*see e.g. People v Shinebarger*, 110 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 24 NY3d 1088 [2014]; *People v Washington*, 89 AD3d 1516, 1516-1517 [4th Dept 2011], *lv denied* 18 NY3d 963 [2012]; *People v Paul*, 212 AD2d 1020, 1021 [4th Dept 1995], *lv denied* 85 NY2d 912 [1995]; *People v Edwards*, 167 AD2d 864, 864 [4th Dept 1990], *lv denied* 77 NY2d 877 [1991]). In any event, we conclude that the improper questioning would not require reversal here inasmuch as the record establishes that "the prosecutor's misconduct did not substantially prejudice defendant" (*Shinebarger*, 110 AD3d at 1480; *see Edwards*, 167 AD2d at 864).

We reject defendant's further contention that County Court erred in refusing to suppress a handgun seized by the police from

defendant's person and defendant's statements to the police. "The suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record" and, here, we perceive no basis to disturb the court's determination to credit the testimony of the police officers and to discredit most of the conflicting testimony of defendant (*People v Hale*, 130 AD3d 1540, 1541 [4th Dept 2015], *lv denied* 26 NY3d 1088 [2015], *reconsideration denied* 27 NY3d 998 [2016] [internal quotation marks omitted]; *see People v Barfield*, 21 AD3d 1396, 1396-1397 [4th Dept 2005], *lv denied* 5 NY3d 881 [2005]).

Contrary to defendant's contention, the police conduct "was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998], citing *People v De Bour*, 40 NY2d 210, 222-223 [1976]). The evidence at the suppression hearing established that, while two police officers were on patrol in a high-crime area associated with gang activity, their attention was drawn to defendant, who was walking down the street, because he looked like a suspect contained in a set of mug shots carried by the officers. The officers immediately noticed that hanging out of defendant's right jacket pocket was a sock containing a hard, "L shaped" object, which appeared to be the outline of a gun. Based upon their training and experience, including a similar incident in which a suspect was found in the same area with a gun secreted in a sock and briefings indicating that gang members were carrying weapons in that manner, both officers suspected that defendant possessed a gun. At a minimum, such circumstances provided the officers with the requisite objective, credible reason for subsequently approaching defendant in their patrol vehicle and asking him for identification (*see People v Hollman*, 79 NY2d 181, 190-191 [1992]; *De Bour*, 40 NY2d at 220). Defendant then reached into his sweatpants for his identification and, exhibiting nervous behavior, he "turned around blading himself" away from the officers and essentially spun around before he began walking toward the patrol vehicle. In considering the totality of the circumstances, we conclude that the officers had at least a "founded suspicion that criminal activity [was] afoot" when they exited the patrol vehicle and engaged in a common-law inquiry regarding what defendant had in his pocket (*De Bour*, 40 NY2d at 223; *see People v Simmons*, 133 AD3d 1275, 1276 [4th Dept 2015], *lv denied* 27 NY3d 1006 [2016]; *People v Johnson*, 129 AD3d 1516, 1517 [4th Dept 2015], *lv denied* 26 NY3d 1009 [2015]; *People v Niles*, 237 AD2d 537, 537-538 [2d Dept 1997], *lv denied* 90 NY2d 861 [1997]). When defendant responded that he had a handgun, the officers were entitled to seize it and to arrest defendant (*see Johnson*, 129 AD3d at 1517).

Finally, the sentence is not unduly harsh or severe.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1436

KA 10-01734

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD J. DELP, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered February 17, 2011. The judgment convicted defendant upon a jury verdict of, inter alia, kidnapping in the second degree as a sexually motivated felony, sexual abuse in the third degree, 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 modified on the law by vacating the sentence imposed on the conviction of kidnapping in the second degree as a sexually motivated felony, and as modified the judgment is affirmed, and the matter is remitted to Niagara County Court for resentencing on that count.

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of, inter alia, kidnapping in the second degree as a sexually motivated felony (Penal Law §§ 130.91 [2]; 135.20), sexual abuse in the first degree (§ 130.65 [2]), and endangering the welfare of a child (§ 260.10 [1]). We reject defendant's contention that he was denied effective assistance of counsel. Although defendant faults defense counsel for failing to make a number of objections at trial, we conclude that the objections had little or no chance of success (*see People v Prescott*, 125 AD3d 1332, 1332-1333 [4th Dept 2015], *lv denied* 27 NY3d 1004 [2016]). Defense counsel also was not ineffective for making "frivolous" objections at trial inasmuch as those objections in no way prejudiced defendant (*see generally People v Lott*, 55 AD3d 1274, 1275 [4th Dept 2008], *lv denied* 11 NY3d 898 [2008], *reconsideration denied* 12 NY3d 760 [2009]). Further, while defense counsel's decision to call character witnesses opened the door to cross-examination referencing unfavorable propensity evidence, "[v]iewed objectively, the transcript . . . reveal[s] the existence of a trial strategy that might well have been pursued by a reasonably competent attorney [and] . . . [i]t is not for this [C]ourt to

second-guess whether a course chosen by defendant's counsel was the best trial strategy, or even a good one, so long as defendant was afforded meaningful representation" (*People v Satterfield*, 66 NY2d 796, 799-800 [1985]). We have considered defendant's remaining contentions concerning defense counsel's alleged ineffectiveness and likewise conclude that they are without merit.

As defendant correctly concedes, he failed to preserve for our review his contention that the evidence is legally insufficient to establish that he "abduct[ed]" the victim (Penal Law § 135.20), and did so for the purpose of his "own direct sexual gratification" as required under the statute (§ 130.91 [1]), inasmuch as he failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject that contention. The term "[a]bduct" is defined in relevant part as "restrain[ing] a person with intent to prevent his [or her] liberation by . . . secreting or holding him [or her] in a place where he [or she] is not likely to be found" (§ 135.00 [2] [a]). The People established that the victim was secreted in a place in which he was unlikely to be found, both when he was riding in defendant's car (*see People v Manning*, 151 AD3d 1936, 1937 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *People v Barnette*, 150 AD3d 1134, 1135 [2d Dept 2017], *lv denied* 29 NY3d 1123 [2017]), and when he was in defendant's apartment (*see People v Denson*, 26 NY3d 179, 189 [2015]). Moreover, defendant's intent to prevent the victim's liberation may be inferred from defendant's conduct, particularly because, even when defendant was out with the victim in public, he lied about his relationship to the victim, and also instructed the victim to do so (*see People v Antonio*, 58 AD3d 515, 516 [1st Dept 2009], *lv denied* 12 NY3d 814 [2009]; *see generally Denson*, 26 NY3d at 189). Further, defendant's conduct supports the inference that defendant abducted the victim for his own sexual gratification (*see People v Owens*, 149 AD3d 1561, 1563 [4th Dept 2017], *lv denied* 30 NY3d 982 [2017]). Such an inference is "clearly appropriate" in the instant case, where defendant made sexually explicit comments to the victim and rubbed himself against the victim while allowing the victim to sit on his lap and steer the vehicle (*id.* [internal quotation marks omitted]; *see People v Judware*, 75 AD3d 841, 844-845 [3d Dept 2010], *lv denied* 15 NY3d 853 [2010]). Thus, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to establish the kidnapping conviction. 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 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The sentence is not unduly harsh or severe. We note, however, that a discrepancy between the sentencing minutes and the certificate of conviction requires vacatur of the sentence imposed on the conviction of kidnapping in the second degree as a sexually motivated felony. At the sentencing hearing, County Court originally sentenced defendant to a determinate sentence of 25 years, plus five years of postrelease supervision, on the conviction of kidnapping in the second degree as a sexually motivated felony. The court thereafter, noting

that defendant's conviction of kidnapping in the second degree was as a sexually motivated felony, instead imposed a period of 20 years of postrelease supervision. The certificate of conviction, however, recites that the sentence for the conviction of kidnapping in the second degree is 25 years of imprisonment, plus five years of postrelease supervision. Given the discrepancy between the sentencing minutes and the certificate of conviction, we modify the judgment by vacating the sentence imposed on the conviction of kidnapping in the second degree as a sexually motivated felony, and we remit the matter to County Court for resentencing on that count (*see generally People v Bradford*, 118 AD3d 1254, 1257-1258 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]; *People v Jacobson*, 60 AD3d 1326, 1329 [4th Dept 2009], *lv denied* 12 NY3d 916 [2009]).

We have reviewed defendant's remaining contentions and conclude that none requires reversal or further modification of the judgment.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1439

CA 17-00881

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

CALAMAR SENIOR HOUSING FUND, II, LLC, AND
CALAMAR CAPITAL SERVICES, LLC,
PLAINTIFFS-APPELLANTS,

V ORDER

MK CHC HOLDINGS, LLC, MOUNT KELLETT MASTER
FUND II-B, L.P., MOUNT KELLETT CAPITAL
MANAGEMENT, LP, FORTRESS INVESTMENT GROUP, LLC,
FORTRESS MK ADVISORS, LLC, AND DRAWBRIDGE SPECIAL
OPPORTUNITIES FUND, LP, DEFENDANTS-RESPONDENTS.

ANDERSON KILL P.C., NEW YORK CITY (FINLEY T. HARCKHAM OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (CRAIG A. LESLIE OF COUNSEL), AND SIDLEY AUSTIN LLP, NEW YORK CITY, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Henry J. Nowak, Jr., J.), entered April 7, 2017. The order and judgment granted the motion of defendants to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on November 10 and 13, 2017,

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1441

CA 17-00477

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

FRANCIS X. SMITH AND CHERYL SMITH,
PLAINTIFFS-RESPONDENTS,

V ORDER

VILLAGE OF ARCADE AND ARCADE FIRE
DEPARTMENT, INC., ALSO KNOWN AS VILLAGE OF
ARCADE FIRE DEPARTMENT, DEFENDANTS-RESPONDENTS,
DONALD J. SAULTER, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

KENNEY SHELTON LIPTAK NOWAK, LLP, BUFFALO (AALOK J. KARAMBELKAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRADY & SWENSON, P.C., SALAMANCA (MATTHEW R. SWENSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (ROBERT M. LIPPMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered March 3, 2016. The order, among other things, denied the motion of defendant Donald J. Saulter, Jr. for summary judgment dismissing the complaint against him.

Now, upon the stipulations of discontinuance signed by the attorneys for the parties on February 16 and June 23, 2017, and filed in the Wyoming County Clerk's Office on April 28 and July 24, 2017,

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1442

CA 17-00478

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

FRANCIS X. SMITH AND CHERYL SMITH,
PLAINTIFFS-RESPONDENTS,

V ORDER

VILLAGE OF ARCADE AND ARCADE FIRE
DEPARTMENT, INC., ALSO KNOWN AS VILLAGE OF
ARCADE FIRE DEPARTMENT, DEFENDANTS-RESPONDENTS,
DONALD J. SAULTER, JR., DEFENDANT-APPELLANT,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

KENNEY SHELTON LIPTAK NOWAK, LLP, BUFFALO (AALOK J. KARAMBELKAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRADY & SWENSON, P.C., SALAMANCA (MATTHEW R. SWENSON OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

LIPPMAN O'CONNOR, BUFFALO (ROBERT M. LIPPMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered February 2, 2017. The order, among other things, denied in part the motion of defendant Donald J. Saulter, Jr. for a determination that defendant Village of Arcade is obligated to indemnify him and pay for the costs of his defense.

Now, upon the stipulations of discontinuance signed by the attorneys for the parties on February 16 and June 23, 2017, and filed in the Wyoming County Clerk's Office on April 28 and July 24, 2017,

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1443

CA 17-00707

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

U.S. ENERGY DEVELOPMENT CORPORATION, PLAINTIFF,

V MEMORANDUM AND ORDER

SUPERIOR WELL SERVICES, INC., NOW KNOWN AS NABORS COMPLETION & PRODUCTION SERVICES, CO., AS SUCCESSOR IN INTEREST TO SUPERIOR WELL SERVICES, LTD., DEFENDANT-RESPONDENT.

SUPERIOR WELL SERVICES, INC., NOW KNOWN AS NABORS COMPLETION & PRODUCTION SERVICES, CO., AS SUCCESSOR IN INTEREST TO SUPERIOR WELL SERVICES, LTD., THIRD-PARTY PLAINTIFF-RESPONDENT,

V

KROFF CHEMICAL COMPANY, INC., THIRD-PARTY DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (ARLOW M. LINTON OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO, SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (TIMOTHY R. CAPOWSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT AND THIRD-PARTY PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered April 21, 2016. The order denied the motion of third-party defendant to dismiss the third-party complaint.

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

Memorandum: Plaintiff commenced this action to recover damages it allegedly sustained when defendant-third-party plaintiff (third-party plaintiff) improperly performed hydraulic fracturing (fracking) operations on 97 natural gas wells owned by plaintiff between 2005 and 2007, and third-party plaintiff commenced this third-party action seeking indemnification and contribution. Supreme Court properly denied third-party defendant's motion to dismiss the third-party complaint.

On a prior appeal, this Court rejected the contention of third-party plaintiff that plaintiff's negligence cause of action was barred

by the economic loss doctrine, and we determined that the "field invoices" containing various terms and conditions limiting third-party plaintiff's liability never became part of the contract between plaintiff and third-party plaintiff (*U.S. Energy Dev. Corp. v Superior Well Servs., Inc.*, ___ AD3d ___, ___ [Nov. 9, 2017] [4th Dept 2017]). We therefore reject the present contentions of third-party defendant that the economic loss doctrine bars third-party plaintiff from seeking indemnification and contribution in the third-party action, and that the forum selection clause contained in the field invoices is enforceable (*see id.*).

We reject third-party defendant's further contention that the court erred in failing to dismiss third-party plaintiff's indemnification claims for failure to state a cause of action. "[T]o establish a claim for common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of [the alleged wrong]" (*Grove v Cornell Univ.*, 151 AD3d 1813, 1816 [4th Dept 2017] [internal quotation marks omitted]; *see generally Bigelow v General Elec. Co.*, 120 AD3d 938, 939-940 [4th Dept 2014]).

Here, plaintiff alleged in the third amended complaint that third-party plaintiff jointly designed, developed, and modified the SAS systems and fracturing fluid used during the fracking operations, and that those systems were defectively designed, improperly manufactured, and improperly used. Third-party plaintiff acknowledged in the third-party complaint that the products were jointly invented and developed, but alleged that third-party defendant was responsible for their production. Third-party plaintiff alleged that it was therefore entitled to seek indemnification and/or contribution in the event that plaintiff recovers for negligent production of the products. We conclude that the third-party complaint alleges sufficient facts that, if true, may entitle third-party plaintiff to indemnification from third-party defendant based upon its alleged negligence in manufacturing the products used in the fracking operations (*see Spring Sheet Metal & Roofing Co. v Koppers Indus.*, 273 AD2d 789, 790 [4th Dept 2000]; *Syracuse Cablesystems v Niagara Mohawk Power Corp.*, 173 AD2d 138, 143 [4th Dept 1991]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1446

CA 17-01012

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

MARY LYSIAK, PLAINTIFF-APPELLANT,

V ORDER

SOUTHTOWNS FITNESS CENTER, DEFENDANT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (MICHAEL P. SULLIVAN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (JULIE P. APTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered December 13, 2016. The order granted the motion of defendant for summary judgment dismissing the complaint and denied the cross motion of plaintiff for partial summary judgment on the issue of negligence.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1447

CA 17-00716

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

IN THE MATTER OF THE ARBITRATION BETWEEN
NEW YORK CENTRAL MUTUAL FIRE INSURANCE
COMPANY, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

BRANDON J. BAKER, RESPONDENT-APPELLANT.

BRANDON J. BAKER, RESPONDENT-APPELLANT PRO SE.

SCHNITTER CICCARELLI MILLS PLLC, WILLIAMSVILLE (JOSEPH M. SCHNITTER OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered June 23, 2016. The order granted the petition for a permanent stay of arbitration.

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

Memorandum: Respondent was injured in a motor vehicle accident while riding as a passenger in a vehicle driven by Joseph M. Merkley, Jr. The Merkley vehicle was rear-ended by a motor vehicle driven by Kristi L. Bailey and was propelled into oncoming traffic, where it was struck by a vehicle driven by Anna F. Swartsfelder. Respondent, Merkley and Swartsfelder all pursued personal injury claims against Bailey and the owner of the Bailey vehicle. The Bailey vehicle was insured by nonparty carriers with a policy limit of $100,000 per accident, and those carriers offered respondent, Merkley and Swartsfelder the policy limit, to be divided in equal amounts so that each received $33,333.33. When respondent thereafter sought supplemental uninsured motorist (SUM) benefits from petitioner, New York Central Mutual Fire Insurance Company (NYCM), the insurer of the Merkley vehicle, disputed the claim. According to NYCM, it was entitled to aggregate the amounts received by Merkley and respondent from the Bailey vehicle carriers in calculating the offset for the SUM endorsement under its policy, and the amount received from the Bailey vehicle carriers was greater than that SUM limit ($50,000 per accident). Respondent thereafter filed a demand for SUM arbitration under the Merkley policy. We conclude that Supreme Court properly granted NYCM’s petition pursuant to CPLR article 75 seeking a permanent stay of arbitration based upon the offset permitting SUM limits to be reduced by the motor vehicle liability payments made on behalf of the tortfeasor. Once the Bailey vehicle carriers tendered

the policy limit, the exclusion in the SUM endorsement that limited SUM payments to the difference between the limits of SUM coverage and the insurance payments received by Merkley and respondent from any person legally liable for bodily injuries applied. Inasmuch as NYCM properly offset the $66,666 received by respondent and Merkley from the Bailey vehicle carriers' policies against the SUM limits under the exclusion, respondent was precluded from any recovery under the SUM endorsement (*see* 11 NYCRR 60-2.1 [c]). We therefore conclude that the court properly granted the petition for a permanent stay of arbitration (*see Matter of Government Empls. Ins. Co. v Terrelonge*, 126 AD3d 792, 793-794 [2d Dept 2015]; *Matter of Graphic Arts Mut. Ins. Co. [Dunham]*, 303 AD2d 1038, 1038-1039 [4th Dept 2003], *amended on rearg* 306 AD2d 953 [2003]).

We have considered respondent's remaining arguments and conclude that they are without merit.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1449

TP 17-01063

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

IN THE MATTER OF BENJAMIN GARROW, PETITIONER,

V ORDER

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

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

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, Wyoming County [Michael M. Mohun, A.J.], entered June 5, 2017) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1450

KA 16-00772

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER J. LOGUE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered April 22, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1451

KA 16-00533

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MAHALIA GUEST, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered March 10, 2016. The judgment convicted defendant, upon her plea of guilty, of manslaughter in the first 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 manslaughter in the first degree (Penal Law § 125.20 [1]). Contrary to defendant's contention, we conclude that she "knowingly, intelligently and voluntarily" waived her right to appeal (*People v Lopez*, 6 NY3d 248, 256 [2006]), and that she "ha[d] 'a full appreciation of the consequences' of such waiver" (*People v Bradshaw*, 18 NY3d 257, 264 [2011]). We further conclude, "[b]ased on the combination of a lengthy oral colloquy, a written waiver wherein defendant 'expressly waived [her] right to appeal without limitation,' and an acknowledgment of that written waiver during the oral colloquy . . . , that the valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence" (*People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]). We have reviewed defendant's remaining contentions regarding the waiver of the right to appeal and conclude that they are without merit.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1453

KA 10-00859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD ADGER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Stephen R. Sirkin, A.J.), rendered July 27, 2005. The judgment convicted defendant, after a nonjury trial, of, inter alia, rape 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, following a bench trial, of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). Defendant contends that his waiver of the right to a jury trial was invalid inasmuch as Supreme Court failed to conduct an adequate allocution to determine whether the waiver was voluntary, knowing, and intelligent. Because defendant did not challenge the adequacy of the court's allocution, that contention is not preserved for our review (*see* CPL 470.05 [2]; *People v Hailey*, 128 AD3d 1415, 1415-1416 [4th Dept 2015], *lv denied* 26 NY3d 929 [2015]; *see also People v Magnano*, 158 AD2d 979, 979 [4th Dept 1990], *affd* 77 NY2d 941 [1991], *cert denied* 502 US 864 [1991]). In any event, the record does not support defendant's contention that he did not understand the consequences of his waiver (*see Hailey*, 128 AD3d at 1416).

Defendant further contends that the court erred in allowing him to override defense counsel's advice with respect to the decision whether to waive his right to a jury trial, thereby depriving defendant of his right to counsel. That contention is without merit. The record establishes that defendant made an unequivocal and timely request to waive his right to a jury trial. He signed the written waiver in open court after consulting with defense counsel and his mother. Although defense counsel did not agree with that decision, such disagreement does not equate to defendant being deprived of his

fundamental right to counsel. It is well established that a defendant, " 'having accepted the assistance of counsel, retains authority . . . 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 [1997] [emphasis added]; *see People v McKenzie*, 142 AD3d 1279, 1280 [4th Dept 2016]). In cases where defendant has the ultimate decision whether to exercise or waive a particular right, the court must permit the right to be waived, even if it believes the waiver to be improvident or against the advice of defense counsel (*see generally People v Davis*, 49 NY2d 114, 119-120 [1979]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1454

KA 17-00311

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LESTER LANAUX, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (CRAIG P. SCHLANGER OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 7, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]). Contrary to defendant's contention, Supreme Court properly refused to suppress physical evidence seized during the execution of a search warrant for his residence. The court properly determined that the People established the confidential informant's reliability and the basis of the informant's knowledge to satisfy the *Aguilar-Spinelli* test (*see People v Baptista*, 130 AD3d 1541, 1541-1542 [4th Dept 2015], *lv denied* 27 NY3d 991 [2016]; *People v Henry*, 74 AD3d 1860, 1861-1862 [4th Dept 2010], *lv denied* 15 NY3d 852 [2010]; *see generally People v Bigelow*, 66 NY2d 417, 423 [1985]). Defendant further contends that the court erred in determining that there was no search of the home before the warrant was signed. We reject that contention. The court credited testimony from police officers that they opened closet doors only to secure the premises and did not search the residence before obtaining the warrant, and it discredited the testimony of defendant's wife that she heard drawers being opened. "It is well settled that great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous" (*People v Layou*, 134 AD3d 1510, 1511 [4th Dept 2015], *lv denied* 27 NY3d 1070

[2016], *reconsideration denied* 28 NY3d 932 [2016]). We see no reason to disturb the court's determination.

Defendant's remaining contentions concerning the validity of the search warrant and the search are not preserved for our review inasmuch as he failed to raise them in his motion papers or at the suppression hearing (*see People v Watkins*, 151 AD3d 1913, 1913 [4th Dept 2017], *lv denied* 30 NY3d 984 [2017]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1455

KA 17-00997

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN ZEMAN, DEFENDANT-APPELLANT.

TULLY RINCKEY, PLLC, ROCHESTER (PETER J. PULLANO OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (NICOLE K. INTSCHERT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered June 1, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree and assault 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 a jury verdict of, inter alia, assault in the second degree (Penal Law § 120.05 [2]), defendant contends that the verdict is against the weight of the evidence with respect to that crime. We reject that contention. Viewing the evidence in light of the elements of the crime as charged to the jury, we conclude that "the People proved beyond a reasonable doubt all elements of the crime[] charged" (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In particular, the credible evidence established that defendant caused physical injury to the victim by striking her multiple times with a broom, which constituted a dangerous instrument inasmuch as the circumstances of its use made it readily capable of causing serious physical injury (*see* § 10.00 [9], [13]; *People v Becker*, 298 AD2d 986, 986 [4th Dept 2002], *lv denied* 99 NY2d 555 [2002]; *People v Flowers*, 178 AD2d 682, 682 [3d Dept 1991], *lv denied* 79 NY2d 947 [1992]).

Defendant failed to preserve for our review his contentions that he was denied a fair trial based upon prosecutorial misconduct (*see People v Smith*, 129 AD3d 1549, 1549-1550 [4th Dept 2015], *lv denied* 26 NY3d 971 [2015]), that the victim's testimony at trial rendered the indictment duplicitous (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv*

denied 29 NY3d 1031 [2017]), and that he was deprived of a fair trial by improper jury instructions (*see People v Green*, 35 AD3d 1211, 1212 [4th Dept 2006], *lv denied* 8 NY3d 985 [2007]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Finally, we reject defendant's contention that he was denied effective assistance of counsel inasmuch as he failed to " 'demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). In particular, defendant was not denied effective assistance of counsel by defense counsel's failure to make certain motions or arguments that had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1458

KA 15-00063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAWN M. NGUYEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered May 19, 2014. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of falsifying business records in the first degree (Penal Law § 175.10). We reject defendant's contention that Supreme Court erred in failing to give the jury a missing witness charge with respect to defendant's ex-boyfriend (*see generally People v Kitching*, 78 NY2d 532, 536-537 [1991]). Defendant's request for the charge "was untimely because it was not made until both parties had rested, rather than at the close of the People's proof, when defendant became 'aware that the witness would not testify' " (*People v Williams*, 94 AD3d 1555, 1556 [4th Dept 2012], quoting *People v Hayes*, 261 AD2d 872, 873 [4th Dept 1999], *lv denied* 93 NY2d 1019 [1999]). In any event, we conclude that defendant failed to demonstrate that the witness was expected to give noncumulative testimony (*see DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013]).

We reject defendant's further contention that she was denied a fair trial on the ground that the court failed to issue a blanket ruling prohibiting trial spectators from wearing firefighter uniforms and other firefighter attire. The court's ruling permitted no more than 10 spectators in uniform in the courtroom and no more than three such spectators seated together. We conclude that the court's ruling constituted a fair resolution of a decorum issue, did not deny defendant her right to a fair trial, and was not an abuse of discretion (*see People v Nelson*, 27 NY3d 361, 370 [2016]).

Finally, we reject defendant's contention that the court abused its discretion in admitting certain text message conversations between defendant and three other people. It is well settled that a trial court has wide latitude to admit or preclude evidence after weighing its probative value against any danger of confusing the main issues, unfairly prejudicing the other side, or being cumulative (*see People v Halter*, 19 NY3d 1046, 1051 [2012]; *People v Petty*, 7 NY3d 277, 286 [2006]). We perceive no reason to disturb the court's determination that the probative value of the text messages outweighed any such danger.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1459

CA 17-01105

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

KAYLA WASHINGTON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, DEFENDANT-APPELLANT,
ET AL., DEFENDANTS.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (SPENCER L. ASH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LIPSITZ & PONTERIO LLC, BUFFALO (ZACHARY JAMES WOODS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (John J. Ark, J.), entered August 15, 2016. The order, inter alia, denied the motion of defendant City of Rochester for summary judgment dismissing the amended complaint against it.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries she allegedly sustained as a result of exposure to lead paint while residing at a residence that she alleged was owned by defendants City of Rochester (City) and Davis Passmore during the relevant time frame, i.e., June 1994 through March 1995. Supreme Court properly denied the City's motion for summary judgment dismissing the amended complaint against it. Contrary to the City's contention, it failed to establish as a matter of law that it is shielded from liability on the ground of governmental immunity.

"When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose . . . A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises" (*Turturro v City of New York*, 28 NY3d 469, 477 [2016] [internal quotation marks omitted]; *see Gilberti v Town of Spafford*, 117 AD3d 1547, 1548-1549 [4th Dept 2014]). Where a municipality acts in a proprietary capacity, it "is subject to suit under the ordinary rules of negligence applicable to nongovernmental parties" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]).

Here, the City failed to meet its initial burden of establishing as a matter of law "that its allegedly negligent acts were undertaken in a governmental rather than a proprietary capacity" (*Klepanchuk v County of Monroe*, 129 AD3d 1609, 1611 [4th Dept 2015], *lv denied* 26 NY3d 915 [2015]). "Ownership and care relating to buildings with tenants has traditionally been carried on through private enterprises, specifically by landlords[,] and thus constitutes a proprietary function when performed by the [municipality]" (*Miller v State of New York*, 62 NY2d 506, 513 [1984]; *see Doe v City of New York*, 67 AD3d 854, 856 [2d Dept 2009]). The City submitted evidence that the property was transferred to Passmore by revocable deed on September 12, 1994, which was after plaintiff began residing at the property. Although the City argued that Passmore took control of the property prior to that through a purchase agreement with the City, the City could not produce that agreement, show the date on which it was executed, or provide evidence concerning the terms of that agreement.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1461

TP 17-01039

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

IN THE MATTER OF MELISSA M. HUTTENLOCKER,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES
APPEALS BOARD AND THOMAS B. LENNON, AS DEPUTY
COMMISSIONER OF NEW YORK STATE DEPARTMENT OF
MOTOR VEHICLES, RESPONDENTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (DANIEL J. CHIACCHIA OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (WILLIAM E. STORRS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by an order of the Supreme Court, Erie County [Donna M. Siwek, J.], entered June 1, 2017) to annul a determination of respondent. The determination revoked petitioner's license.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 seeking to annul the determination revoking her driver's license based on her refusal to submit to a chemical test following her arrest for driving while intoxicated (DWI). We confirm the determination. Contrary to the contention of petitioner, "having been lawfully arrested for DWI, [she] was not entitled to condition [her] consent to submit to a chemical test on first consulting with [her] attorney" (*Matter of Clark v New York State Dept. of Motor Vehs.*, 55 AD3d 1284, 1284 [4th Dept 2008]). Contrary to the further contention of petitioner, the determination is supported by substantial evidence. The arresting officer's testimony at the hearing, along with his refusal report, which was entered in evidence, established that petitioner refused to submit to the chemical test after being warned twice of the consequences of such refusal (*see Matter of Linton v State of N.Y. Dept. of Motor Vehs. Appeals Bd.*, 92 AD3d 1205, 1206 [4th Dept 2012]). " '[T]he Administrative Law Judge . . . was entitled to discredit petitioner's testimony to the contrary' " (*id.*). Petitioner's related contention that she was not adequately warned by the officer that "continuing to ask to speak to

her attorney would be considered a refusal" has been raised for the first time on appeal and, therefore, she has failed to exhaust her administrative remedies with respect to that contention (*see Matter of Mastrodonato v New York State Dept. of Motor Vehs.*, 27 AD3d 1121, 1122 [4th Dept 2006]; *Matter of Nawaz v State Univ. of N.Y. Univ. at Buffalo Sch. of Dental Medicine*, 295 AD2d 944, 944 [4th Dept 2002]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1464

CA 17-00512

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, COUNTY OF MONROE, EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.
(APPEAL NO. 1.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY AND COUNTY OF MONROE.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANT-RESPONDENT EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 3, 2016. The order and judgment, inter alia, granted the motion of defendants County of Monroe Industrial Development Agency and County of Monroe for summary judgment dismissing the amended complaint against them and for partial summary judgment with respect to the first and second counterclaims.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1465

CA 17-00513

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, ET AL., DEFENDANTS, TOWN OF IRONDEQUOIT AND EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT, DEFENDANTS-RESPONDENTS. (APPEAL NO. 2.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER, SECREST & EMERY LLP, ROCHESTER (EDWARD F. PREMO, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT TOWN OF IRONDEQUOIT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANT-RESPONDENT EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 2, 2016. The order and judgment, inter alia, granted the motion of defendant Town of Irondequoit for summary judgment dismissing the amended complaint against it and for partial summary judgment with respect to the second through fourth counterclaims.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1466

CA 17-00514

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY,
ET AL., DEFENDANTS,
AND EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 14, 2016. The order and judgment, inter alia, granted the motion of defendant East Irondequoit Central School District for summary judgment dismissing the amended complaint against it and for partial summary judgment with respect to the second and third counterclaims.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1467

CA 17-00515

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY,
DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 4.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 30, 2016. The judgment directed plaintiff to pay certain monies to defendant County of Monroe Industrial Development Agency.

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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1468

CA 17-00516

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY,
ET AL., DEFENDANTS,
AND COUNTY OF MONROE, DEFENDANT-RESPONDENT.
(APPEAL NO. 5.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (PHILIP G. SPELLANE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 30, 2016. The judgment directed defendants to pay certain monies to defendant County of Monroe.

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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1469

CA 17-00517

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY, ET AL., DEFENDANTS, AND TOWN OF IRONDEQUOIT, DEFENDANT-RESPONDENT. (APPEAL NO. 6.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (EDWARD F. PREMO, II, OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 22, 2016. The judgment directed plaintiff to pay certain monies to defendant Town of Irondequoit.

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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1470

CA 17-00518

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

BERSIN PROPERTIES, LLC, PLAINTIFF-APPELLANT,

V ORDER

COUNTY OF MONROE INDUSTRIAL DEVELOPMENT AGENCY,
ET AL., DEFENDANTS,
AND EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,
DEFENDANT-RESPONDENT.
(APPEAL NO. 7.)

QUINN EMANUEL URQUHART & SULLIVAN, LLP, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FERRARA FIORENZA PC, EAST SYRACUSE (CHARLES E. SYMONS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered June 21, 2016. The judgment directed plaintiff to pay certain monies to defendant East Irondequoit Central School District.

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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1474

CA 17-00705

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

PAUL KRAEGER AND EILEEN KRAEGER,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

FEDERAL EXPRESS CORP., AMBER STEVENS,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

CHERUNDOLO LAW FIRM, PLLC, SYRACUSE (JOHN C. CHERUNDOLO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN WARD WILLIAMS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered December 5, 2016. The order granted the motion of defendants Federal Express Corp. and Amber Stevens for summary judgment dismissing the amended complaint against them.

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

Memorandum: Paul Kraeger (plaintiff) was injured when the bicycle he was riding struck the rear of a delivery truck owned by defendant Federal Express Corp. and operated by defendant Amber Stevens (collectively, FedEx defendants). Stevens had parked the truck on the shoulder of a roadway, completely to the right of the fog line, in order to deliver a package. Plaintiff collided with the rear of the truck and sustained serious neck injuries that rendered him a paraplegic. Plaintiffs thereafter commenced this action asserting causes of action for, inter alia, negligence and the violation of the Vehicle and Traffic Law. The FedEx defendants moved for summary judgment dismissing the amended complaint against them, and Supreme Court granted the motion. We affirm.

Plaintiffs contend that the court erred in granting the motion inasmuch as there are triable issues of fact with respect to the negligence of Stevens. We reject that contention. Plaintiff, as a bicyclist, was "subject to all of the duties applicable to the driver of a vehicle" (Vehicle and Traffic Law § 1231). It is well settled that a "rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Stalikas v United Materials*, 306 AD2d 810, 810 [4th Dept

2003], *affd* 100 NY2d 626 [2003]), "thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Gee v Malik*, 116 AD3d 918, 919 [2d Dept 2014]).

Here, the evidence submitted by the FedEx defendants in support of their motion established that the truck was stopped when plaintiff drove his bicycle into the rear of the truck. The evidence further established that Stevens, who was traveling at a speed of approximately 45 miles per hour, passed plaintiff approximately a quarter of a mile before she parked on the shoulder of the roadway. As she pulled over the truck, Stevens activated her right blinker and checked her mirrors. After she parked the truck, she activated her four-way flashers, set the emergency brake, turned off the truck, unlatched her seatbelt, and entered the truck's "dock bin" to retrieve a package. At that point, she heard the collision. Statements from two eyewitnesses in their affidavits established that plaintiff was traveling at a high rate of speed on his bicycle with his head down as he approached and struck the truck from the rear. Plaintiff testified at his deposition that he did not remember the accident, including the moments leading up to it.

We conclude that the submissions of the FedEx defendants in support of their motion established as a matter of law their "freedom from negligence and a prima facie case of negligence against the injured plaintiff" (*Gee*, 116 AD3d at 919). In opposition, plaintiffs failed to provide a nonnegligent explanation for the rear-end collision (*see id.*; *see generally Stalikas*, 306 AD2d at 810-811), or otherwise raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1475

KAH 17-00488

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
TREVOR FREDERICK, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY,
RESPONDENT-RESPONDENT.

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

TREVOR FREDERICK, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered October 13, 2016 in a habeas corpus proceeding. The judgment denied the petition and dismissed the proceeding.

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

Memorandum: Supreme Court properly denied the petition seeking a writ of habeas corpus and dismissed the proceeding. Habeas corpus relief is not an appropriate remedy where, as here, the claim raised by petitioner was or could have been raised on direct appeal or in a proceeding pursuant to CPL article 440 (*see People ex rel. Haddock v Dolce*, 149 AD3d 1593, 1593 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]). In addition, inasmuch as petitioner would not be entitled to immediate release even if his present contentions in his main and pro se supplemental briefs had merit, habeas corpus relief was properly denied on that ground as well (*see People ex rel. Bagley v Albaugh*, 278 AD2d 891, 891-892 [4th Dept 2000], *lv denied* 96 NY2d 709 [2001]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1478

KA 15-02154

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS COLON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (JULIE BENDER FISKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered September 30, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and attempted 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 criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and attempted assault in the first degree (§§ 110.00, 120.10 [1]). County Court "expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see People v Toney*, 153 AD3d 1583, 1583 [4th Dept 2017]). The court also specifically explained that the waiver included defendant's right to appeal his "conviction and sentence," thereby foreclosing defendant's challenge to the severity of his sentence (*see Toney*, 153 AD3d at 1583; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1479

KA 16-00446

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH FLETCHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 28, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that the sentence is unduly harsh and severe. We reject that contention. Defendant received the benefit of an advantageous plea agreement in which he pleaded guilty to one count in satisfaction of several pending cases and, despite being rearrested prior to sentencing in violation of County Court's warning, he nonetheless received a lesser sentence than the four-year term of incarceration in the original plea agreement.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1483

KA 16-00732

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AL A. GIVANS, DEFENDANT-APPELLANT.

COUTU LANE, PLLC, BUFFALO (KEVIN A. LANE OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (GEORGE R. SHAFFER, III, OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (James P. McClusky, J.), rendered March 31, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminally using drug paraphernalia in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Jefferson County Court for further proceedings in accordance with the following memorandum: On appeal 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]) and criminally using drug paraphernalia in the second degree (§ 220.50 [3]), defendant contends that County Court erred in denying his request for a *Darden* hearing (*see generally People v Darden*, 34 NY2d 177, 181 [1974], *rearg denied* 34 NY2d 995 [1974]). We agree. Where, as here, there is insufficient evidence to establish probable cause supporting a search warrant without the statements of a confidential informant, the People must make the informant available for questioning in camera (*see People v Allen*, 298 AD2d 856, 856 [4th Dept 2002], *lv denied* 99 NY2d 579 [2003]; *see generally People v Crooks*, 27 NY3d 609, 612-613 [2016]). If, however, the informant cannot be produced despite the diligent efforts of the People, "the People may instead 'establish the existence of [the] confidential informant[] through extrinsic evidence' after demonstrating that 'the informant is legitimately unavailable' " (*People v Edwards*, 95 NY2d 486, 493 [2000]). Here, the court summarily denied defendant's request upon the People's bare assertion that the informant was in California and thus unavailable. Although the People subsequently produced an unsworn letter, purportedly from the informant's drug treatment facility in California, stating that the informant required uninterrupted care, that letter, without more, is insufficient to demonstrate that the informant was legitimately unavailable. We

conclude that the People failed to establish that an exception to the *Darden* rule is applicable, and thus the court erred in denying defendant's request for a *Darden* hearing (*see People v Carpenito*, 171 AD2d 45, 53-54 [2d Dept 1991], *affd* 80 NY2d 65 [1992]). We therefore hold the case, reserve decision, and remit the matter to County Court to conduct an appropriate hearing, at which the People will not be precluded from offering evidence that the informant is currently unavailable.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1486

CA 17-00899

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

ENCORE PROPERTIES OF ROCHESTER, LLC,
PLAINTIFF-APPELLANT,

V ORDER

WELLS FARGO BANK, N.A., AS TRUSTEE FOR REGISTERED HOLDERS OF CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORP., COMMERCIAL MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-C5, DEFENDANT-RESPONDENT, ET AL., DEFENDANT.

JOSEPH A. TADDEO, JR, ROCHESTER, FOR PLAINTIFF-APPELLANT.

WOODS OVIATT GILMAN LLP, ROCHESTER (JOHN C. NUTTER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 15, 2016. The order, inter alia, granted the motion of defendant-respondent to dismiss 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: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1488

CA 16-02319

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ESTATE OF PATRICIA S. HAINES, DECEASED.

PETER L. HAINES AND MINNIE H. BRENNAN, AS COEXECUTORS OF THE ESTATE OF PATRICIA S. HAINES, DECEASED, PETITIONERS-RESPONDENTS;

HOLLY WEST, RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

CARMEL, MILAZZO & DICHIARA LLP, NEW YORK CITY (CHRISTOPHER P. MILAZZO OF COUNSEL), FOR RESPONDENT-APPELLANT.

BURNS & SCHULTZ LLP, PITTSFORD (ANDREW M. BURNS OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a decree of the Surrogate's Court, Steuben County (Marianne Furfure, S.), entered September 15, 2016. The decree, among other things, awarded petitioners the sum of $868,892.96 against respondent Holly West.

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

Memorandum: Petitioners, the coexecutors of decedent's estate, commenced this proceeding seeking, inter alia, an order directing respondent to return funds to the estate. Respondent asserted a counterclaim seeking an order directing petitioners to return to her shares in certain corporations that were allegedly the subject of an inter vivos gift from decedent to respondent. We reject respondent's contention that Surrogate's Court erred in determining, following a trial, that she failed to meet her burden of establishing a valid inter vivos gift. Although there is no dispute that decedent endorsed in blank three stock certificates in the presence of the parties, respondent presented no evidence that there was actual or constructive delivery of those certificates to her (*see generally Gruen v Gruen*, 68 NY2d 48, 56-57 [1986]; *Bader v Digney* [appeal No. 2], 55 AD3d 1290, 1291 [4th Dept 2008]). Respondent's remaining contentions are not preserved for our review inasmuch as she failed to present to the Surrogate the specific arguments that she now raises on appeal (*see generally Nary v Jonientz* [appeal No. 2], 110 AD3d 1448, 1448 [4th Dept 2013]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1492

CA 17-01106

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

NANCY LEWIS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF ROCHESTER, ROCHESTER POLICE DEPARTMENT AND DONALD T. MANFREDI, DEFENDANTS-APPELLANTS.

BRIAN F. CURRAN, CORPORATION COUNSEL, ROCHESTER (SPENCER L. ASH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), dated August 30, 2016. The order denied the purported "motion to renew" of defendants.

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

Memorandum: Contrary to defendants' contention, Supreme Court properly determined that their purported "motion to renew" is a motion for leave to reargue (*see DiCienzo v Niagara Falls Urban Renewal Agency*, 63 AD3d 1663, 1664 [4th Dept 2009]; *see generally* CPLR 2221 [d], [e]). In support of their motion, defendants failed to offer new facts that were unavailable when the court initially denied their motion for summary judgment dismissing the complaint (*see Matter of Hamilton v Alley*, 143 AD3d 1235, 1236 [4th Dept 2016]; *Hill v Milan*, 89 AD3d 1458, 1458 [4th Dept 2011]). Thus, the motion was in effect a motion for leave to reargue, the denial of which is not appealable (*see MidFirst Bank v Storto*, 121 AD3d 1575, 1575 [4th Dept 2014]; *Britt v Buffalo Mun. Hous. Auth.*, 115 AD3d 1252, 1252 [4th Dept 2014]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1493

CA 16-02018

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

DAVID F. TUSZYNSKI, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

THE STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 125827.)

DAVID F. TUSZYNSKI, CLAIMANT-APPELLANT PRO SE.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered June 15, 2016. The order granted defendant's motion to dismiss the claim.

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

Memorandum: Claimant, a pro se inmate, appeals from an order granting defendant's motion to dismiss the claim. We affirm. Inasmuch as claimant served the claim by regular mail, the Court of Claims was deprived of subject matter jurisdiction and thus properly dismissed the claim (*see Zoeckler v State of New York*, 109 AD3d 1133, 1133 [4th Dept 2013]; *see generally* Court of Claims Act § 11 [a]). Contrary to claimant's contention, there is no evidence in the record of " 'misfeasance or malfeasance on the part of facility officials' that would warrant an estoppel" (*Butler v State of New York*, 126 AD3d 1247, 1247 [3d Dept 2015]; *cf. Wattley v State of New York*, 146 Misc 2d 968, 969-970 [Ct Cl 1990]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1495

KA 16-00191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW C. LAURY, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), 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 (Thomas G. Leone, J.), rendered October 29, 2015. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of rape in the third degree (Penal Law § 130.25 [2]). Defendant, who was on parole at the time of the disposition of this case, contends that the plea was not entered knowingly, intelligently, and voluntarily because County Court failed to advise him that it would result in a parole violation. Defendant failed to preserve that contention for our review inasmuch as his motion to withdraw the plea did not include that ground (*see People v Gibson*, 140 AD3d 1786, 1787 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]). In any event, we conclude that defendant's contention is without merit. "[A] trial court must advise a defendant of the direct consequences of [a] plea, but [it] has no obligation to explain to defendants who plead guilty the possibility that collateral consequences may attach to their criminal convictions" (*People v Monk*, 21 NY3d 27, 32 [2013] [internal quotation marks omitted]). Where, as here, a defendant is sentenced pursuant to Penal Law § 70.80 (5), the sentence must run consecutively to a previously imposed undischarged sentence (*see* § 70.25 [2-a]). That is a collateral consequence of the conviction, and the court's failure "to address the impact of Penal Law § 70.25 (2-a) during the plea colloquy does not require vacatur of the plea" (*People v Belliard*, 20 NY3d 381, 389 [2013]).

Defendant was sentenced to the minimum sentence permissible under the law, and we therefore reject his contention that the sentence is

unduly harsh and severe (*see People v Barlow*, 8 AD3d 1027, 1028 [4th Dept 2004], *lv denied* 3 NY3d 657 [2004]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1496

KA 14-01033

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRANDON L. COCHRAN, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 (Victoria M. Argento, J.), rendered January 19, 2012. The judgment convicted defendant, upon his plea of guilty, of murder in the second degree (two 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 two counts of murder in the second degree (Penal Law § 125.25 [1], [3]), defendant contends that he did not validly waive his right to appeal the severity of his sentence. We reject that contention. The oral and written waiver of the right to appeal obtained during the plea proceeding establishes that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Butler*, 151 AD3d 1959, 1959-1960 [4th Dept 2017], *lv denied* 30 NY3d 948 [2017]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal, which included a waiver of the right to challenge both the conviction and the sentence, encompasses his contention that the sentence imposed is unduly harsh and severe (*see People v Walker*, 151 AD3d 1730, 1731 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017], *reconsideration denied* 30 NY3d 984 [2017]; *People v Eaton*, 151 AD3d 1950, 1951 [4th Dept 2017]; *Butler*, 151 AD3d at 1959-1960; *see generally Lopez*, 6 NY3d at 255-256).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1497

KA 17-00017

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTHONY C. MYLES, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara Sheldon, J.), rendered November 16, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal sexual act 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 attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [3]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Lopez*, 6 NY3d 248, 256 [2006]), and we conclude that the valid waiver encompasses his challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1500

KA 06-00538

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RANDY HALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered August 17, 2005. The judgment convicted defendant upon a jury verdict of, inter alia, attempted murder in the second degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and a new trial is granted on counts 1, 2, and 7 through 11 of the indictment.

Memorandum: On a prior appeal, we affirmed the judgment convicting defendant upon a jury verdict of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the second degree (§ 120.05 [2]) (*People v Hall*, 48 AD3d 1032 [4th Dept 2008], *lv denied* 11 NY3d 789 [2008]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise issues that may have merit, i.e., whether County Court had placed on the record a reasonable basis for restraining defendant before the jury and whether the court had complied with CPL 310.30 with regard to court exhibit No. 11, a note from the jury during its deliberations (*People v Hall*, 142 AD3d 1401 [4th Dept 2016]), and we vacated our prior order. We now consider the appeal de novo.

As we concluded in codefendant's appeal, we agree with defendant "that the court erred in failing to make any findings on the record establishing that defendant needed to wear a stun belt during the trial . . . Contrary to the People's contention, harmless error analysis is not applicable" (*People v Gomez*, 138 AD3d 1486, 1487 [4th Dept 2016]; *see People v Buchanan*, 13 NY3d 1, 4 [2009]; *People v Schrock*, 99 AD3d 1196, 1197 [4th Dept 2012]). We therefore reverse the judgment and grant a new trial on counts 1, 2, and 7 through 11 of the indictment, the counts of which he was convicted.

We reject the People's further contention that defendant's conviction became final before the Court of Appeals's decision in *Buchanan* and that the decision should not be applied retroactively to allow a collateral attack on the judgment. In granting defendant's motion for a writ of error coram nobis, we vacated our prior order and are considering the appeal de novo (*see People v Brink*, 134 AD3d 1390, 1391 [4th Dept 2015]). This appeal is therefore not a collateral attack on the judgment. In addition, we are not persuaded by the People's position that *Buchanan* should be applied prospectively only. *Buchanan* did not announce " 'new' rules of law that represent sharp departures from precedent or raise concerns about the orderly administration of justice" (*People v Vasquez*, 88 NY2d 561, 573-574 [1996]; *see generally People v Pepper*, 53 NY2d 213, 220 [1981], *cert denied* 454 US 967 [1981]). Instead, we apply the "traditional common-law" rule of deciding this appeal in accordance with the law as it now exists (*Vasquez*, 88 NY2d at 573; *see People v Schrock*, 108 AD3d 1221, 1225 [4th Dept 2013], *lv denied* 22 NY3d 998 [2013], *reconsideration denied* 23 NY3d 1025 [2015]).

We reject defendant's contention that reversal is required based on alleged mode of proceedings errors during jury deliberation. With respect to court exhibit No. 11, we note that the exhibit has been located since codefendant's appeal and that it is simply a ministerial request from the jury for a lunch and smoking break. We therefore conclude that there was no *O'Rama* error requiring this Court to reverse the judgment on that ground (*see People v Fedrick*, 150 AD3d 1656, 1657 [4th Dept 2017], *lv denied* 29 NY3d 1126 [2017]). We reject defendant's further contention that reversal is required on the ground that the record fails to demonstrate that he was present when the court gave nonministerial instructions to the jury in response to jury notes. A defendant alleging that he was denied his right to be present at a material stage of trial has the "burden of coming forward with substantial evidence establishing his absence" (*People v Foster*, 1 NY3d 44, 48 [2003]). "Without more, [a court reporter's] failure to record a defendant's presence is insufficient to meet the defendant's burden of rebutting the presumption of regularity" (*id.*; *see People v Martin*, 26 AD3d 847, 848-849 [4th Dept 2006], *affd* 8 NY3d 129 [2007]).

In light of our determination to grant a new trial, we do not consider defendant's remaining contentions with respect to the sentence.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1502

CAF 16-01340

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

IN THE MATTER OF JAYDALEE P. AND QUENTIN P.

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

CODILEE R., RESPONDENT-APPELLANT.

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

JACQUELYN M. ASNOE, HERKIMER, FOR PETITIONER-RESPONDENT.

EDWARD G. KAMINSKI, ATTORNEY FOR THE CHILDREN, UTICA.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), dated July 8, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject children.

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

Memorandum: On appeal from an order adjudging her two children to be neglected, respondent mother contends that Family Court should have granted an adjournment or permitted the mother to participate by telephone when she was unable to appear for the trial. One month before the trial on the petition, the mother was personally served with a notice informing her of the trial date and warning her that, if she failed to appear for the trial, the court would proceed in her absence "on an inquest basis." At some point thereafter, the mother relocated to Michigan. On the eve of the trial, the court received a letter from the mother in which she stated that she did not have the money to travel to New York and back to Michigan. The mother stated that she went to Michigan because she was "not working and . . . not eligible for social services" in New York. The mother asked if she "could get a phone interview."

On the day of the trial, the court informed the mother's attorney that it was denying the mother's request to appear by telephone for the trial. The attorney neither objected to the court's statement nor requested an adjournment. We thus conclude that the mother failed to preserve for our review her present contention, raised for the first time on appeal, that the court erred in refusing to adjourn the trial and proceeding in her absence (*see Matter of Nicholas Francis K.*, 20 AD3d 478, 478-479 [2d Dept 2005]; *see also Matter of Keara MM. [Naomi*

MM.], 84 AD3d 1442, 1444 [3d Dept 2011]).

In contrast, the mother's contention that the court erred in refusing to allow her to participate in the trial by telephone is preserved for our review because "the issue was contested" and decided against her (*Matter of Thomas B. [Calla B.]*, 139 AD3d 1402, 1404 [4th Dept 2016]). We nevertheless conclude that reversal is not warranted. Domestic Relations Law § 75-j (2), which applies to all child custody proceedings, including neglect proceedings (*see* § 75-a [4]), states that a court "*may* permit an individual residing in another state . . . to testify by telephone" or other electronic means (emphasis added). It is a permissive statute and thus "does not require courts to allow testimony by telephone or electronic means in all cases" (*Thomas B.*, 139 AD3d at 1404; *see Matter of Barnes v McKown*, 74 AD3d 1914, 1914 [4th Dept 2010], *lv denied* 15 NY3d 708 [2010], *cert denied* 562 US 1234 [2011]). Inasmuch as the mother relocated to Michigan less than one month before the trial date without notifying petitioner (*cf. Thomas B.*, 139 AD3d at 1404), we conclude that the court did not abuse its discretion in denying her request to appear by telephone.

The mother further contends that the court erred in admitting in evidence the entire case file concerning her from another county's Department of Social Services because that file contained unredacted, inadmissible hearsay (*see generally Matter of Leon RR*, 48 NY2d 117, 122 [1979]). We agree with petitioner and the Attorney for the Child that, even though the case file contained some inadmissible hearsay, any error in its admission is harmless because " 'the result reached herein would have been the same even had such record[s], or portions thereof, been excluded' " (*Matter of Alyshia M.R.*, 53 AD3d 1060, 1061 [4th Dept 2008], *lv denied* 11 NY3d 707 [2008]; *cf. Leon RR*, 48 NY2d at 122-124). Moreover, "[t]here is no indication that the court considered, credited, or relied upon inadmissible hearsay in reaching its determination" (*Matter of Merle C.C.*, 222 AD2d 1061, 1062 [4th Dept 1995], *lv denied* 88 NY2d 802 [1996]; *see Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386 [4th Dept 2015], *lv denied* 25 NY3d 910 [2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1503

CAF 16-02054

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

IN THE MATTER OF CLIFFORD E. DRAKE, JR.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

BELLE R. RILEY, RESPONDENT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR RESPONDENT-APPELLANT.

COLE & VALKENBURGH, P.C., BATH (ASHILEE K. DICKINSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

SARA E. ROOK, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an amended order of the Family Court, Steuben County (Gerard Alonzo, J.H.O.), entered September 14, 2016 in a proceeding pursuant to, inter alia, Family Court Act article 6. The amended order, among other things, awarded petitioner sole custody of the subject children.

It is hereby ORDERED that the amended order so appealed from is unanimously reversed on the law without costs, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to, inter alia, Family Court Act article 6, respondent mother appeals from an amended order that, among other things, awarded petitioner father sole custody of the parties' two children. Family Court entered the amended order after holding a joint trial on the mother's Family Court Act article 6 petition for modification of custody and visitation and the father's amended article 8 petition alleging family offenses against the mother. Before the trial commenced, the mother's attorney made a motion for an adjournment based on the mother's absence, and the court denied the motion. On the mother's prior appeal from the order of protection entered on the father's amended article 8 petition, we concluded that the court abused its discretion in denying the mother's motion for an adjournment inasmuch as she had shown good cause for her absence (*Matter of Drake v Riley*, 149 AD3d 1468, 1469 [4th Dept 2017]; *see* § 836 [a]). Inasmuch as the instant appeal arises out of the same joint trial and motion for an adjournment, we reverse the amended order on appeal for reasons stated in our prior decision (*see Drake*, 149 AD3d at 1469).

In light of our determination, we do not reach the mother's

remaining contentions.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1504

CAF 16-01181

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

IN THE MATTER OF DAH'MARII G.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CASSANDRA G., RESPONDENT-APPELLANT.

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

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

NANCY J. BIZUB, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Eric R. Adams, A.J.), entered June 27, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order that revoked a suspended judgment entered upon her admission of permanent neglect and terminated her parental rights with respect to the subject child. We affirm. Preliminarily, we note that the prior order of Family Court finding permanent neglect and suspending judgment was entered on the consent of the parties, and thus it is beyond appellate review (*see Matter of Martha S. [Linda M.S.]*, 126 AD3d 1496, 1497 [4th Dept 2015], *lv dismissed in part and denied in part* 26 NY3d 941 [2015]; *Matter of Xavier O.V. [Sabino V.]*, 117 AD3d 1567, 1567 [4th Dept 2014], *lv denied* 24 NY3d 903 [2014]). Here, the mother never moved to vacate the finding of neglect or to withdraw her consent to the order, and thus her contention that her consent was not knowing, intelligent, and voluntary is not properly before us (*see Martha S.*, 126 AD3d at 1497; *Xavier O.V.*, 117 AD3d at 1567). In any event, that contention lacks merit.

Contrary to the mother's further contention, the court properly suspended judgment and terminated her parental rights. It is well established that, "if Family Court determines by a preponderance of the evidence that there has been noncompliance with any of the terms of [a] suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ireisha P. [Shonita M.]*, 154 AD3d 1340, 1340 [4th Dept 2017] [internal quotation marks omitted];

see Matter of Ramel H. [Tenese T.], 134 AD3d 1590, 1592 [4th Dept 2015]). Here, the testimony of the case planner assigned to the mother established that the mother was repeatedly discharged from substance abuse treatment and repeatedly failed drug tests (*see Matter of Carmen C. [Margarita N.]*, 95 AD3d 1006, 1008 [2d Dept 2012]). Thus, the court properly determined that the mother "was unable to overcome the specific problems that led to the removal of the child from her home" (*Ramel H.*, 134 AD3d at 1592 [internal quotation marks omitted]; *see Matter of Jason H. [Lisa K.]*, 118 AD3d 1066, 1068 [3d Dept 2014]), and that it is in the child's best interests to terminate the mother's parental rights (*see Ireisha P.*, 154 AD3d at 1340; *Ramel H.*, 134 AD3d at 1592).

To the extent that the mother contends that petitioner improperly sought to revoke the six-month suspended judgment after four months, we reject that contention. Where, as here, "there is proof that a parent has repeatedly violated significant terms of a suspended judgment, petitioner is not obligated to wait until the end of the period of suspended judgment to seek to revoke the suspended judgment" (*Matter of Alexandria A. [Ann B.]*, 93 AD3d 1105, 1106-1107 [3d Dept 2012], *lv denied* 19 NY3d 805 [2012]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1508

CA 16-00865

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

IN THE MATTER OF THE APPLICATION OF DEBORAH J. MCCULLOCH, EXECUTIVE DIRECTOR OF CENTRAL NEW YORK PSYCHIATRIC CENTER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MELVIN H., A PATIENT AT CENTRAL NEW YORK PSYCHIATRIC CENTER, CONSECUTIVE NO. 263968, RESPONDENT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered March 14, 2016. The order granted petitioner's application for authorization to administer medication to respondent over his objection.

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

Memorandum: Respondent appeals from an order granting petitioner's application for authorization to administer medication to respondent over his objection. The order has since expired, rendering this appeal moot (*see Matter of Bosco [Quinton F.]*, 100 AD3d 1525, 1526 [4th Dept 2012]), and this case does not fall within the exception to the mootness doctrine (*see Matter of McGrath*, 245 AD2d 1081, 1082 [4th Dept 1997]; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1509

CA 17-01145

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

IN THE MATTER OF KATHLEEN GUMKOWSKI, AS ADMINISTRATRIX OF THE ESTATE OF GREGORY GUMKOWSKI, DECEASED, AND KATHLEEN GUMKOWSKI, INDIVIDUALLY, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF TONAWANDA (INCORRECTLY NAMED AS TOWN OF TONAWANDA, TOWN OF TONAWANDA EMS AND TOWN OF TONAWANDA POLICE DEPARTMENT), RESPONDENT-APPELLANT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR RESPONDENT-APPELLANT.

DEMPSEY & DEMPSEY, BUFFALO (CATHERINE B. DEMPSEY OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered March 21, 2017. The order, inter alia, granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Respondent appeals from an order that, inter alia, granted claimant's application for leave to serve a late notice of claim (*see generally* General Municipal Law § 50-e [5]). We affirm. In determining whether to grant such an application, Supreme Court should consider "whether the claimant has shown a reasonable excuse for the delay, whether the municipality had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the municipality" (*Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1790 [4th Dept 2017] [internal quotation marks omitted]; *see Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). The presence or absence of any given factor is not determinative of the application and, moreover, the factors are "directive rather than exclusive" (*Downey v Macedon Ctr. Volunteer Fire Dept.*, 179 AD2d 999, 1000 [4th Dept 1992] [internal quotation marks omitted]). Absent a clear abuse of discretion, the court's determination should not be disturbed (*see Kennedy*, 148 AD3d at 1790; *cf. Matter of Darrin v County of Cattaraugus*, 151 AD3d 1930, 1931 [4th Dept 2017]). Contrary

to respondent's contention, claimant has shown a reasonable excuse for the delay and that the delay did not cause respondent substantial prejudice (*see Matter of Pazienza v Westchester County Health Care Corp.*, 142 AD3d 669, 670 [2d Dept 2016]; *Downey*, 179 AD2d at 1000). We therefore see no reason to disturb the court's determination.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1515

KA 15-00067

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

WAYNE BAKER, ALSO KNOWN AS WAYNE M. BAKER, JR.,
DEFENDANT-APPELLANT.

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

WAYNE M. BAKER, JR., 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 (Anthony F. Aloi, J.), rendered September 16, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1517

KA 12-02146

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY L. THACKER, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered December 8, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count three of the indictment and imposing an indeterminate sentence of imprisonment of 3½ to 7 years on that count, to run concurrently with the sentence imposed on count two, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that County Court erred in refusing to suppress the weapon he discarded while he was being pursued by the police. As we stated in his codefendant's appeal, "[a]ccording to the evidence at the [joint] suppression hearing, there was a radio dispatch concerning an anonymous tip that two individuals were carrying handguns in a certain location," and a police officer who arrived at the scene less than two minutes after the dispatch observed that defendant and another individual "matched the general description of the suspects and were within a block of the location described in the tip" (*People v Gayden*, 126 AD3d 1518, 1518 [4th Dept 2015], *affd* 28 NY3d 1035 [2016]). "The officer thus had a founded suspicion that criminal activity was afoot, justifying his initial common-law inquiry" of defendant, and defendant's flight "provided the officer with the requisite reasonable suspicion of criminal activity to warrant his pursuit" of defendant (*id*.). Thereafter, the officer observed defendant hide an object in a

pile of leaves. After hiding the object, defendant continued to flee and the officer continued to pursue him. After defendant's arrest, the officer returned to the pile of leaves and recovered a gun. In our view, "the recovery of the gun discarded during [defendant's] flight was lawful inasmuch as the officer's pursuit . . . of defendant [was] lawful" (*People v Norman*, 66 AD3d 1473, 1474 [4th Dept 2009], *lv denied* 13 NY3d 940 [2010]; *see Gayden*, 126 AD3d at 1519).

Defendant further contends that the court erred in refusing to suppress statements he made at the police station. As defendant correctly concedes, however, those statements were not used at trial, and we therefore conclude that any error in refusing to suppress the statements is harmless (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

Contrary to defendant's contention, the court properly admitted in evidence a recording of the 911 call under the present sense impression exception to the hearsay rule inasmuch as the People "adduc[ed] evidence sufficiently corroborative of the 'substance and content' of the [call]" (*People v Ruttlen*, 289 AD2d 1061, 1061 [4th Dept 2001], *lv denied* 98 NY2d 713 [2002]).

Finally, as the People correctly concede, defendant's sentence for criminal possession of a weapon in the third degree, i.e., a determinate term of imprisonment of 3½ years with a five-year period of postrelease supervision, is illegal. Defendant should have been sentenced as a second felony offender to an indeterminate sentence of imprisonment with a minimum term between 2 to 4 years and a maximum term between 3½ to 7 years, with no postrelease supervision (*see* Penal Law § 70.06 [2], [3] [d]; [4] [b]). In the interest of judicial economy, we exercise our inherent authority to correct the illegal sentence (*see People v Daniels*, 125 AD3d 1432, 1433 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015], *reconsideration denied* 26 NY3d 928 [2015]). We therefore modify the judgment by vacating the sentence imposed on count three of the indictment and imposing an indeterminate sentence of imprisonment of 3½ to 7 years with no postrelease supervision. That sentence will run concurrently with the sentence imposed on count two, a determinate term of imprisonment of seven years with a five-year period of postrelease supervision.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1518

KA 15-00570

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LATROY D. SAMPSON, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (JOSEPH R. PLUKAS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered January 30, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant's valid, general waiver of his right to appeal forecloses his challenge to County Court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]). Contrary to defendant's contention, his "waiver [of the right to appeal] is not invalid on the ground that the court did not specifically inform [him] that his general waiver of the right to appeal encompassed the court's suppression ruling[]" (*People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014] [internal quotation marks omitted]; *see People v Goodwin*, 147 AD3d 1352, 1352 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]). Contrary to defendant's further contention, his " 'monosyllabic affirmative responses to questioning by [the court] do not render his [waiver of the right to appeal] unknowing and involuntary' " (*People v Harris*, 94 AD3d 1484, 1485 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]; *see People v Hand*, 147 AD3d 1326, 1326-1327 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]). Finally, there is no authority supporting defendant's assertion that a waiver of the right to appeal tendered in connection with a plea to the top count of an indictment should be automatically subjected to "higher scrutiny" on appeal.

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1519

KA 13-01429

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE J. BAKER, DEFENDANT-APPELLANT.

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

WILLIE J. BAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered June 5, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that the evidence of serious physical injury is legally insufficient to support the conviction. We reject that contention. Serious physical injury, as defined in the Penal Law, "means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (§ 10.00 [10]). Here, the stab wound inflicted by defendant to the victim's left arm and elbow resulted in protracted impairment inasmuch as it caused the victim to be unable to extend the arm for several months after the attack, and extensive surgery was required to repair the injury (*see People v Joyce*, 150 AD3d 1632, 1633 [4th Dept 2017]; *People v Heyliger*, 126 AD3d 1117, 1119 [3d Dept 2015], *lv denied* 25 NY3d 1165 [2015]; *People v Rice*, 90 AD3d 1237, 1238 [3d Dept 2011], *lv denied* 18 NY3d 961 [2012], *reconsideration denied* 19 NY3d 966 [2012]). Moreover, the stab wound inflicted by defendant to the webbing of the victim's hand resulted in nerve damage to her thumb, causing permanent numbness (*see People v Willock*, 298 AD2d 161, 162 [1st Dept 2002], *lv denied* 99 NY2d 566 [2002]).

Defendant contends that he was denied effective assistance of counsel on the ground that, during summation, defense counsel conceded

that defendant had caused serious physical injury to the victim. We reject that contention inasmuch as defendant failed to demonstrate the " 'absence of strategic or other legitimate explanations' " for making that concession (*People v Benevento*, 91 NY2d 708, 712 [1998]). Indeed, by acknowledging that the victim suffered serious physical injury in light of compelling evidence of the same, defense counsel directed the jury's attention elsewhere, i.e., to whether the People established the element of intent.

We reject defendant's further contention in his pro se supplemental brief that Supreme Court abused its discretion in refusing to allow the testimony of a witness concerning circumstantial evidence that the victim may have sexually abused her son on prior occasions. Such testimony was irrelevant and unnecessary inasmuch as it would not have established the defense of justification, i.e., that, at the time of the stabbing, defendant reasonably believed that it was necessary to use physical force to defend the child from the use or imminent use of unlawful physical force (*see generally People v Goetz*, 68 NY2d 96, 105-106 [1986]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1526

CAF 16-00736

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

IN THE MATTER OF WILLIAM BROOKMAN,
PETITIONER-APPELLANT,

V ORDER

SHARI ROGERS, RESPONDENT-RESPONDENT.

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

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

JESSICA REYNOLDS-AMUSO, ATTORNEY FOR THE CHILD, CLINTON.

Appeal from an order of the Supreme Court, Oneida County (Randal B. Caldwell, A.J.), entered April 5, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, suspended petitioner's visitation.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*Matter of Mary L.R. v Vernon B.*, 48 AD3d 1088, 1088 [4th Dept 2008], *lv denied* 10 NY3d 710 [2008]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1527

CAF 16-02028

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

IN THE MATTER OF TABITHA R. CHOUINARD,
PETITIONER-RESPONDENT,

V ORDER

JAMES W. MARTIN, RESPONDENT-APPELLANT.

IN THE MATTER OF JAMES W. MARTIN,
PETITIONER-APPELLANT,

V

TABITHA R. CHOUINARD, RESPONDENT-RESPONDENT.

PALOMA A. CAPANNA, WEBSTER, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered October 25, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition of respondent-petitioner seeking custody of the subject children.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1538

CA 17-00378

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

HONGXING YIN, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 119163.)

HONGXING YIN, CLAIMANT-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (J. David Sampson, J.), entered May 19, 2016. The order granted defendant's motion to dismiss the claim.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1539

KA 15-01842

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD JAMES AUGSBURY, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Vincent M. Dinolfo, J.), dated August 26, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in considering the victim's grand jury testimony, which was not disclosed to defendant until after the SORA hearing (*see generally People v Baxin*, 26 NY3d 6, 11 [2015]). That contention is not preserved for our review because defendant failed to object at the hearing to the court's consideration of the grand jury testimony, "despite [the People's] explicit reliance thereon" (*People v Jewell*, 119 AD3d 1446, 1447 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]; *see People v Wells*, 138 AD3d 947, 950-951 [2d Dept 2016], *lv denied* 28 NY3d 902 [2016]). In any event, we conclude that the court's consideration of the victim's grand jury testimony constitutes harmless error. The material facts established by the victim's testimony, i.e., that she was 10 years old or less when defendant first subjected her to sexual contact, and that she was asleep at the beginning of at least one incident of sexual contact, were independently established by reliable hearsay in the presentence report (*see Baxin*, 26 NY3d at 11-12; *Wells*, 138 AD3d at 952; *see generally People v Mingo*, 12 NY3d 563, 573 [2009]).

Defendant further contends that the court erred in failing to address his request for a downward departure to a level two risk. That omission by the court does not require remittal because the

record is sufficient for us to make our own findings of fact and conclusions of law with respect to defendant's request (*see People v McKee*, 66 AD3d 854, 854 [2d Dept 2009], *lv denied* 13 NY3d 715 [2010]; *see generally People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]). Even assuming, arguendo, that defendant preserved for our review the ground for a downward departure that he advances on appeal, i.e., that the assessment of points under risk factors 5 and 6 resulted in "an inflated . . . score" on the risk assessment instrument and thus overassessed the risk that he presents to public safety, we conclude that he failed to allege a mitigating circumstance that is not adequately taken into account by the risk assessment guidelines (*see People v King*, 148 AD3d 1599, 1600 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]; *People v Carlberg*, 145 AD3d 1646, 1646-1647 [4th Dept 2016]; *see generally People v Gillotti*, 23 NY3d 841, 861 [2014]). The assessment of points for both the age of the victim under risk factor 5 and the fact that she was asleep and therefore physically helpless under risk factor 6 " 'did not constitute impermissible double counting' " (*People v Miller*, 149 AD3d 1279, 1281 [3d Dept 2017]; *see People v Smith*, 144 AD3d 652, 653 [2d Dept 2016], *lv denied* 28 NY3d 915 [2017]; *People v Edwards*, 93 AD3d 1210, 1211 [4th Dept 2012]), and thus the application of the guidelines did not result in an overassessment of the risk that defendant presents to public safety (*see generally People v Cathy*, 134 AD3d 1579, 1580 [4th Dept 2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1540

KAH 16-01960

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
MATTHEW DYE, 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 (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (BRIAN D. GINSBERG OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered September 27, 2016 in a habeas corpus proceeding. The judgment denied the petition.

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

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1542

KA 15-02165

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RICKEY MELLERSON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (MICHAEL S. DEAL OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered December 4, 2015. The judgment convicted defendant, upon his plea of guilty, of vehicular manslaughter in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a plea of guilty of vehicular manslaughter in the first degree (Penal Law § 125.13 [1]), defendant contends that his waiver of the right to appeal is invalid. Contrary to defendant's contention, "[t]he record establishes that County Court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice . . . , and informed him that the waiver was a condition of the plea agreement" (*People v Snyder*, 151 AD3d 1939, 1939 [4th Dept 2017] [internal quotation marks omitted]; *see People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's further contention, the valid waiver of the right to appeal the "conviction and sentence," which was made after defendant was informed of the maximum potential sentence (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]), encompasses his challenge to the severity of the sentence (*cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Defendant is thus precluded from "subsequently eviscerat[ing the plea] bargain by asking an appellate court to reduce the sentence in the interest of justice" (*Lopez*, 6 NY3d at 255-256).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1543

KA 15-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEAN J. LAURENT, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (HEATHER P. HINES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 3, 2014. The judgment convicted defendant, upon a jury verdict, of falsifying business records in the first degree and petit larceny.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of falsifying business records in the first degree (Penal Law § 175.10) and petit larceny (§ 155.25). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant correctly concedes that he failed to preserve for our review his contention that he was denied a fair trial based upon misconduct by the prosecutor on summation (*see* CPL 470.05 [2]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Smith*, 129 AD3d 1549, 1549-1550 [4th Dept 2015], *lv denied* 26 NY3d 971 [2015]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1545

KA 15-01428

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARLOS K. WHITE, 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 Monroe County Court (James J. Piampiano, J.), rendered October 7, 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: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends that his plea was not knowingly, voluntarily, or intelligently entered because, inter alia, he was pressured by his family to enter the plea agreement and was taking medication to address the stress of the situation. Defendant failed to preserve his contention for our review by failing to move to withdraw the plea or to vacate the judgment of conviction (*see People v Gilbert*, 111 AD3d 1437, 1437 [4th Dept 2013], *lv denied* 22 NY3d 1138 [2014]), and the narrow exception to the preservation rule does not apply here (*see People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, defendant's contention lacks merit. Defendant's statement during the plea colloquy that it was his "and [his] family['s] decision" to enter the plea agreement did not render the plea involuntary (*see Gilbert*, 111 AD3d at 1437). In addition, although defendant stated that he was taking sleeping medication "because of the stress," he further stated that it would not affect his ability to make "a proper decision," and "there is no indication in the record that defendant's ability to understand the plea proceeding was impaired" by the medication (*People v Jackson*, 85 AD3d 1697, 1698 [4th Dept 2011], *lv denied* 17 NY3d 817 [2011]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1549

CAF 16-02016

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

IN THE MATTER OF TAMMIE MARIE SMITH,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL DAVID LOYSTER, SR., RESPONDENT-APPELLANT.

ADAM H. VANBUSKIRK, AUBURN, FOR RESPONDENT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, FOR PETITIONER-RESPONDENT.

TIMOTHY J. BRENNAN, ATTORNEY FOR THE CHILD, AUBURN.

Appeal from an order of the Family Court, Cayuga County (Thomas G. Leone, J.), entered October 12, 2016 in a proceeding pursuant to Family Court Act article 6. The order modified a prior order of custody and visitation by, inter alia, reducing respondent's visitation time with the parties' son.

It is hereby ORDERED that the order so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the fourth ordering paragraph and as modified the order is affirmed without costs in accordance with the following memorandum: Petitioner mother commenced this proceeding seeking to modify a prior order of custody and visitation pursuant to which respondent father was entitled to visitation with the parties' son for five hours every Sunday. After a hearing, Family Court modified the order by, inter alia, reducing the father's visitation time to five hours every other Saturday.

The father's contention that the court erred in considering an incident that occurred after the petition was filed is not preserved for our review because he did not object on that ground to the admission of testimony concerning the incident (*see generally Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011]; *Matter of Dustin B. [Donald M.]*, 71 AD3d 1426, 1426 [4th Dept 2010]), and we conclude that the reduction of the father's visitation time is supported by a sound and substantial basis in the record (*see Matter of Ordona v Cothern*, 126 AD3d 1544, 1545 [4th Dept 2015]). The court was entitled to credit the mother's testimony that the father was visibly intoxicated on an occasion when she came to drop the child off for visitation (*see generally Matter of Rohr v Young*, 148 AD3d 1681, 1681 [4th Dept 2017]). In view of the father's history of alcohol abuse, that testimony established both a

change of circumstances warranting review of the prior order and that modification of the father's visitation was in the best interests of the child (*see Matter of Susan B. v Charles M.*, 67 AD3d 488, 488-489 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]; *Matter of Kelley v VanDee*, 61 AD3d 1281, 1283 [3d Dept 2009]; *see also Matter of Creek v Dietz*, 132 AD3d 1283, 1284 [4th Dept 2015], *lv denied* 26 NY3d 914 [2015]).

We further conclude, however, that the court lacked the authority to condition any future application by the father to modify the custody and visitation order on proof of his "completion of a substance abuse evaluation and completion of any recommended treatment from this evaluation" (*see Ordona*, 126 AD3d at 1546; *Matter of Vieira v Huff*, 83 AD3d 1520, 1522 [4th Dept 2011]), and we therefore modify the order accordingly (*see Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

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

1551

CA 17-01144

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

JABR A. ALMUGANAHI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CANDIDO GONZALEZ, DEFENDANT-RESPONDENT.

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

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered May 30, 2017. The order granted defendant's motion to bifurcate the trial in this action.

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

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that he allegedly sustained when he was riding his bicycle and was involved in an accident with a vehicle operated by defendant. Supreme Court did not abuse its discretion in granting defendant's motion to bifurcate the trial. "As a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried separately" (*Turnmire v Concrete Applied Tech. Corp.*, 56 AD3d 1125, 1128 [4th Dept 2008] [internal quotation marks omitted]). Contrary to plaintiff's contention, he failed to establish that bifurcation would not "assist in a clarification or simplification of issues and a fair and more expeditious resolution of the action" (22 NYCRR 202.42 [a]; *see Piccione v Tri-main Dev.*, 5 AD3d 1086, 1087 [4th Dept 2004]; *cf. Mazur v Mazur*, 288 AD2d 945, 945-946 [4th Dept 2001]).

Entered: December 22, 2017

Mark W. Bennett
Clerk of the Court

MOTION NO. (599/10) KA 08-02462. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CLARENCE R. BROWN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1155/12) KA 10-00517. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V FRANK GARCIA, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND TROUTMAN, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (499/14) KA 12-01267. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ARMANDO R. TORRES, ALSO KNOWN AS "MONDO," DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, DEJOSEPH, LINDLEY, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (486/16) KA 13-00290. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HECTOR FUENTES, DEFENDANT-APPELLANT. -- Motion for reargument dismissed as untimely. PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (984.1/17) CA 17-00545. -- IN THE MATTER OF DAVID SCHNEITER AND RACHEL SCHNEITER, PETITIONERS-RESPONDENTS, V NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT, AND ERIE COUNTY DEPARTMENT OF

SOCIAL SERVICES, RESPONDENT-APPELLANT. -- Motions for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1026/17) CA 17-00114. -- HENRY J. WATERMAN, JR., PLAINTIFF-RESPONDENT, V CITY OF ROCHESTER AND DAVID J. BAGLEY, II, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1031/17) CA 17-00351. -- IN THE MATTER OF ARBITRATION BETWEEN TOWN OF GREECE, PETITIONER-APPELLANT, AND CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 828, AFSCME, AFL-CIO, RESPONDENT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1038/17) KA 14-02227. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CRAIG DAVIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1083/17) KA 15-01059. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JESSICA N. COURTEAU, DEFENDANT-APPELLANT. -- Motion for

reargument denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1122/17) KA 13-00446. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAHARI JONES, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted to the extent that, upon reargument, the memorandum and order entered November 9, 2017 (___ AD3d ___) is amended by deleting the fourth sentence of the fourth paragraph of the memorandum and substituting in place thereof "A firearms examiner testified that the weapon was test-fired with the ammunition found in it, and thus the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to the January weapon count (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987])." PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

MOTION NO. (1125/17) KA 15-00021. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DERRICK TROTMAN, DEFENDANT-APPELLANT. -- Motion for reargument and reconsideration denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

KAH 16-01631. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. WALTER GRANT, PETITIONER-APPELLANT, V PAUL M. GONYEA, SUPERINTENDENT OF MOHAWK CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT. -- Judgment unanimously

affirmed. Counsel's motion to be relieved of assignment granted (*see People v Crawford*, 71 AD2d 38 [4th Dept 1979]). (Appeal from Judgment of Supreme Court, Oneida County, Bernadette T. Clark, J. - Habeas Corpus). PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ. (Filed Dec. 22, 2017.)

TAG MECHANICAL SYSTEMS, INC., PLAINTIFF-RESPONDENT, V DWORKIN CONSTRUCTION CORP. (USA), DEFENDANT-APPELLANT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY AND NEMOYER, JJ. (Filed Dec. 22, 2017.)