SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

SEPTEMBER 27, 2019

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

182

CA 18-01155

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

MARY ELLEN HANDS, JOHANNAH HANDS, JENNIFER LYNN BOWIE, DIANA BROHMAN AND CHANTAL QUESNEL, PLAINTIFFS-RESPONDENTS,

V ORDER

RENE J. BISSON, ET AL., DEFENDANTS, STEPHANIE HUME, AS EXECUTRIX OF THE ESTATE OF TIMOTHY J. HUME, DECEASED, AND MATRIX EXPEDITED SERVICE, LLC, DEFENDANTS-APPELLANTS.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FEROLETO LAW, BUFFALO (JOHN P. FEROLETO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Samuel D. Hester, J.), entered December 28, 2017. The order granted plaintiffs' motion to set aside the liability verdict of the jury as against the weight of the evidence.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on March 7, 2019, and filed in the Oneida County Clerk's Office on March 14, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

488

CA 18-01748

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

LATISHA D. HAMILTON, PLAINTIFF-RESPONDENT,

V ORDER

GERALD JONES AND USBK EXPRESS, LLC,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 1.)

LAW OFFICES OF JENNIFER S. LAWRENCE, YONKERS (JOAN REYES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE DIETRICH LAW FIRM, P.C., WILLIAMSVILLE (NICHOLAS J. SHEMIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered March 22, 2018. The order denied the motion of defendants to dismiss the complaint.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 14, 2019, and filed in the Niagara County Clerk’s Office on February 6, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

489

CA 18-01749

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

LATISHA D. HAMILTON, PLAINTIFF-RESPONDENT,

V ORDER

GERALD JONES AND USBK EXPRESS, LLC,
DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

LAW OFFICES OF JENNIFER S. LAWRENCE, YONKERS (JOAN REYES OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE DIETRICH LAW FIRM, P.C., WILLIAMSVILLE (NICHOLAS J. SHEMIK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered August 16, 2018. The order granted the motion of defendants for leave to renew a prior motion to dismiss the complaint, and upon renewal, denied that motion.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 14, 2019, and filed in the Niagara County Clerk’s Office on February 6, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

769

KA 18-00364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS T. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered August 1, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted burglary in the third degree (Penal Law §§ 110.00, 140.20). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hicks*, 89 AD3d 1480, 1480 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012] [internal quotation marks omitted]), and 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" (*Lopez*, 6 NY3d at 256). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see id.* at 255-256).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

770

KA 19-00431

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RADU TURNER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered July 14, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). We reject defendant's contention that County Court erred in refusing to suppress weapons that were found in his shed. The People established at the suppression hearing that the search of the shed was lawful pursuant to the emergency doctrine exception to the warrant requirement (*see People v Samuel*, 152 AD3d 1202, 1203 [4th Dept 2017], *lv denied* 30 NY3d 983 [2017]). The emergency doctrine exception "is comprised of three elements: (1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property and this belief must be grounded in empirical facts; (2) the search must not be primarily motivated by an intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched" (*People v Doll*, 21 NY3d 665, 670-671 [2013], *rearg denied* 22 NY3d 1053 [2014], *cert denied* 572 US 1022 [2014]). A police sergeant testified that he responded to a shots fired call in or around a neighborhood park and spoke with three witnesses at three different locations around the park, who confirmed that they heard gunshots. He approached defendant's residence, whose backyard bordered the park, based on his

knowledge that defendant was a known gang member. The sergeant observed a shed in the backyard that had been broken into and was open, and he entered the shed to ensure that no one was hiding inside with a gun. We conclude that the People established through that testimony that all three prongs of the standard were met (*see People v Junious*, 145 AD3d 1606, 1608-1609 [4th Dept 2016], *lv denied* 29 NY3d 1033 [2017], *reconsideration denied* 29 NY3d 1129 [2017]).

Defendant contends that his guilty plea was not knowingly, intelligently, and voluntarily entered because he did not give a factual allocution to the crimes and gave only "yes" and "no" answers to the court's questions. That contention is actually a challenge to the factual sufficiency of the plea allocution, which defendant failed to preserve for our review inasmuch as he did not move to withdraw his guilty plea or vacate the judgment of conviction (*see People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]). This case does not fall within the narrow exception to the preservation rule set forth in *People v Lopez* (71 NY2d 662, 666-667 [1988]) because "nothing in the plea colloquy negates an essential element of [the crimes], raises a potential defense to th[ose] charge[s], or otherwise casts doubt on defendant's guilt" (*Pryce*, 148 AD3d at 1626).

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

771

KA 15-02022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MORGAN TETRO, ALSO KNOWN AS MORGAN BURNELL,
DEFENDANT-APPELLANT.

JARROD W. SMITH, ESQ., P.L.L.C., JORDAN (JARROD W. SMITH OF COUNSEL), FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (LISA E. FLEISCHMANN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Oswego County Court (Walter W. Hafner, Jr., J.), rendered November 16, 2015. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree, welfare fraud in the fourth degree, grand larceny in the third degree, offering a false instrument for filing in the first degree (two counts) and criminal tax fraud in the fourth degree (two counts).

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

Memorandum: In this prosecution arising from allegations that defendant and her codefendant took advantage of an elderly woman—whom they had befriended and provided with care—by liquidating her assets and appropriating her funds for their own use, defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, grand larceny in the second degree (Penal Law § 155.40 [1]). We affirm.

Defendant contends that the grand jury proceeding was defective pursuant to CPL 210.35 (5) and that County Court therefore erred in refusing to dismiss the indictment (*see generally* CPL 210.20 [1] [c]). We conclude upon our review of the grand jury minutes that defendant's contention lacks merit (*see People v Gonzales*, 145 AD3d 1432, 1432 [4th Dept 2016], *lv denied* 29 NY3d 1079 [2017]; *see generally People v Huston*, 88 NY2d 400, 409 [1996]).

Contrary to defendant's further contention, although the court erred in arraigning her and initially setting bail in the absence of counsel, we conclude that reversal is not required inasmuch as the record establishes that defendant's nonrepresentation at that critical stage of the prosecution had no impact on the ultimate adjudication (*see People v Kaetzel*, 117 AD3d 1187, 1188-1189 [3d Dept 2014], *lv*

denied 24 NY3d 962 [2014]; *People v Young*, 35 AD3d 958, 960 [3d Dept 2006], *lv denied* 8 NY3d 929 [2007]; *see also People v Green*, 48 AD3d 1056, 1057 [4th Dept 2008], *lv denied* 10 NY3d 934 [2008]; *see generally Hurrell-Harring v State of New York*, 15 NY3d 8, 21 [2010]). To the extent that defendant, after initially being assigned counsel following arraignment, was thereafter unrepresented for a period pending a further determination of her eligibility for assigned counsel, we likewise conclude that reversal is not required on that ground. Even assuming, arguendo, that such period constituted a critical stage of the prosecution, the lack of representation had no impact on the case as a whole, and defendant's unsupported and speculative assertion to the contrary is insufficient to warrant reversal (*see Kaetzel*, 117 AD3d at 1188-1189; *Young*, 35 AD3d at 960). Defendant also contends that, in light of the fact that several of the People's witnesses were local attorneys, the court should have assigned her counsel from outside the county. Defendant failed to preserve that contention for our review (*see People v Alexander*, 132 AD3d 1412, 1413 [4th Dept 2015], *lv denied* 27 NY3d 1148 [2016]; *see generally* CPL 470.05 [2]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). To the extent that defendant contends that defense counsel was ineffective based on conflicts of interest, that contention concerns matters outside the record and must be raised by way of a motion pursuant to CPL article 440 (*see People v Maltese*, 148 AD3d 1780, 1783 [4th Dept 2017], *lv denied* 29 NY3d 1093 [2017]).

We reject defendant's contention that she was denied meaningful representation. Contrary to defendant's assertion, the record establishes that defense counsel, among other things, made appropriate pretrial motions, effectively cross-examined the People's witnesses in conjunction with the codefendant's attorney, lodged appropriate objections, introduced evidence in favor of defendant, and made compelling opening and closing statements, thereby mounting a cogent, albeit unsuccessful, defense premised largely upon the argument that the victim had knowingly approved of the financial dealings as acts of generosity toward defendant and the codefendant based on the victim's close relationship with them (*see People v Crumpler*, 163 AD3d 1457, 1459 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018], *reconsideration denied* 32 NY3d 1125 [2018]; *see generally People v Baldi*, 54 NY2d 137, 147 [1981]). Defendant also contends that she was denied meaningful representation by defense counsel's decision not to seek severance of her trial from that of the codefendant. That contention lacks merit inasmuch as such a motion would have had little or no chance of success and, moreover, defendant has not shown the absence of strategic or other legitimate explanations for the absence of a severance motion (*see People v McGee*, 20 NY3d 513, 520 [2013]; *People v Evans*, 142 AD3d 1291, 1292 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]). To the extent that defendant's contention that she was denied meaningful representation is based upon defense counsel's alleged failure to consult experts in preparation of the defense, it involves matters outside the record on appeal and must therefore be raised by way of a motion pursuant to CPL article 440 (*see People v Washington*, 122 AD3d 1406, 1406 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]). To the extent that defendant's contention is based on

defense counsel's failure to produce expert witnesses at trial to rebut the evidence introduced by the People, we conclude that defendant "has not established that such expert testimony was available, that it would have assisted the jury in its determination or that [she] was prejudiced by its absence" (*People v Woolson*, 122 AD3d 1353, 1354 [4th Dept 2014], *lv denied* 25 NY3d 1078 [2015] [internal quotation marks omitted]).

Defendant further contends that the court erred in admitting the testimony of an expert witness for the People because the court did not qualify the witness as an expert. That contention lacks merit inasmuch as the court overruled the objection by defense counsel made on that ground, thereby "implicitly indicat[ing] the court's discretionary acceptance of [the witness's] opinion as 'expert testimony' in [her] applicable field" (*People v Gordon*, 202 AD2d 166, 167 [1st Dept 1994], *lv denied* 83 NY2d 911 [1994]; *see People v Benjamin R.*, 103 AD2d 663, 669 [4th Dept 1984]). Furthermore, the court "was not required to declare or certify on the record that the witness was an expert before permitting [her] to testify" (*People v Valentine*, 48 AD3d 1268, 1269 [4th Dept 2008], *lv denied* 10 NY3d 871 [2008]).

Defendant also contends that the court committed reversible error by depriving her of the constitutional right to counsel when it initially prohibited her from communicating with anyone about her testimony during a weekend recess while she was in the midst of testifying in her defense. Defendant failed to preserve that contention for our review inasmuch as defense counsel was " 'present and available to register a protest' to [the] restriction on communication that would [have] provide[d] the court with an opportunity to rectify its error," but failed to do so (*People v Umali*, 10 NY3d 417, 423 [2008], *rearg denied* 11 NY3d 744 [2008], *cert denied* 556 US 1110 [2009]; *see People v Narayan*, 54 NY2d 106, 112 [1981]; *People v Brown*, 169 AD3d 1258, 1260 [3d Dept 2019], *lv denied* 33 NY3d 1029 [2019]). In any event, although the court erred in initially issuing a restriction on communication that prohibited defendant from discussing her testimony with defense counsel during the weekend recess (*see People v Joseph*, 84 NY2d 995, 996 [1994]), reversal is not required under the circumstances of this case. The record establishes that the court rescinded the restriction later the same day upon realizing that it was improper; that defendant and defense counsel thereafter were able to consult, albeit not in person, over the weekend; that the court provided defendant and defense counsel as much time as they deemed necessary to further consult before the trial resumed after the weekend; and that they did so (*see Umali*, 10 NY3d at 423-424). In view of the foregoing, we conclude that defense counsel's failure to object to the initial restriction was not so "egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Stewart*, 68 AD3d 1438, 1440 [3d Dept 2009], *lv denied* 14 NY3d 773 [2010]).

We reject defendant's contention that reversal is required based on the alleged loss of certain trial exhibits. Even assuming,

arguendo, that the exhibits have " 'substantial importance' to the issues in the case," we conclude that meaningful appellate review is not precluded inasmuch as "the information in the missing exhibit[s] can be gleaned from the record and there is no dispute as to [the] accuracy" of that information (*People v Yavru-Sakuk*, 98 NY2d 56, 60 [2002]; *see People v Jackson*, 11 AD3d 928, 930 [4th Dept 2004], *lv denied* 3 NY3d 757 [2004]).

Contrary to defendant's additional contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to credit the testimony of the People's witnesses, including that of the victim, over the testimony of defendant's witnesses, including that of defendant herself, and we perceive no reason to disturb those credibility determinations (*see People v Christopher*, 64 AD3d 1006, 1006-1007 [3d Dept 2009], *lv denied* 13 NY3d 795 [2009]; *People v Massaro*, 32 AD3d 1223, 1223 [4th Dept 2006]; *People v Gustke*, 201 AD2d 923, 923-924 [4th Dept 1994], *lv denied* 83 NY2d 911 [1994]).

Finally, defendant's sentence, as reduced by operation of law to an aggregate indeterminate term of 7⅓ to 20 years of imprisonment (*see* Penal Law § 70.30 [1] [e] [i]), is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

772

KA 17-00892

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM REDDICK, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD 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 (Robert L. Bauer, A.J.), rendered March 24, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (four counts).

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 four counts of burglary in the third degree (Penal Law § 140.20), defendant contends that the waiver of the right to appeal is not valid; that his plea was not knowingly, voluntarily or intelligently entered; and that the sentence is unduly harsh and severe. Even assuming, arguendo, that the waiver of the right to appeal is not valid (*see generally People v Lopez*, 6 NY3d 248, 256-257 [2006]), we nevertheless conclude that the judgment should be affirmed.

With respect to his plea, defendant contends that his plea was not knowingly, voluntarily or intelligently entered because County Court did not ensure that defendant, who suffers from mental illness, was competent to enter the plea. In addition, defendant contends that the plea colloquy was insufficient because the court did not ask him to recite the details of the crimes. Neither of those challenges is preserved for our review inasmuch as defendant did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]; *see also People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [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]).

Finally, contrary to defendant's contention, we conclude that the bargained-for sentence is not unduly harsh or severe.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

774

KA 18-00365

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS T. SMITH, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered August 1, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [8]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Supreme Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hicks*, 89 AD3d 1480, 1480 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012] [internal quotation marks omitted]), and 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" (*Lopez*, 6 NY3d at 256). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of his sentence (*see id.* at 255-256).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

775

KA 18-00695

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LABADEE, DEFENDANT-APPELLANT.

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

TODD J. CASELLA, DISTRICT ATTORNEY, PENN YAN (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered December 19, 2017. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). We reject defendant's contention that he did not knowingly, voluntarily, and intelligently waive his right to appeal (*see People v Garrett*, 167 AD3d 1586, 1586 [4th Dept 2018]; *see generally People v Lopez*, 6 NY3d 248, 256-257 [2006]). Contrary to defendant's contentions, the record establishes that County Court " 'did not improperly conflate the waiver of the right to appeal with those rights automatically forfeited by a guilty plea' " (*People v Bray*, 170 AD3d 1538, 1538 [4th Dept 2019], *lv denied* 33 NY3d 1066 [2019]; *see People v Alfano*, 172 AD3d 1920, 1921 [4th Dept 2019], *lv denied* 33 NY3d 1101 [2019]), and "the court 'was not required to specify during the colloquy which specific claims survive the waiver of the right to appeal' " (*People v Livermore*, 161 AD3d 1569, 1569 [4th Dept 2018], *lv denied* 32 NY3d 939 [2018]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v McArthur*, 149 AD3d 1568, 1568-1569 [4th Dept 2017]; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Defendant contends that his plea was not knowing, intelligent, and voluntary because he simply responded "yes" and "no" to many of the court's questions. That contention is actually a challenge to the factual sufficiency of the plea allocution, which is encompassed by

the valid waiver of the right to appeal (*see People v Pryce*, 148 AD3d 1625, 1625-1626 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]; *People v Simcoe*, 74 AD3d 1858, 1859 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]). In any event, defendant did not preserve that contention for our review because he did not move to withdraw the plea or to vacate the judgment of conviction (*see Livermore*, 161 AD3d at 1570), and this case does not fall within the narrow exception to the preservation rule (*see People v Lopez*, 71 NY2d 662, 666 [1988]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

776

CAF 18-01199

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

IN THE MATTER OF THE ADOPTION OF BRIANNA B.

SWAZETTE S., PETITIONER-RESPONDENT,

MEMORANDUM AND ORDER

V

STACEY B., RESPONDENT,
AND SHACOYA L., RESPONDENT-APPELLANT.

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

ROSSI & ROSSI, NEW YORK MILLS (VINCENT J. ROSSI, JR., OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered May 18, 2018. The order adjudged that the pending petition for adoption of the subject child may proceed without the consent of respondent Shacoya L.

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

Memorandum: Respondent Shacoya L., the biological mother of the subject child, appeals from an order determining, following an evidentiary hearing, that she abandoned the child and that her consent to the adoption of the child by petitioner, who has had custody of the child since birth, is not required pursuant to Domestic Relations Law § 111. The biological mother contends, in effect, that Family Court erred in denying her motion to dismiss the petition for adoption as facially insufficient. We reject that contention. Upon giving the petition a liberal construction, accepting the facts alleged therein as true, and according petitioner the benefit of every favorable inference (*see Matter of Machado v Tanoury*, 142 AD3d 1322, 1323 [4th Dept 2016]; *see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we conclude that petitioner adequately alleged that the biological mother's consent to adoption was not required due to her abandonment of the child (*see* Domestic Relations Law § 111 [2] [a]; [6] [a], [b]). To the extent that the mother's contention may be construed as a jurisdictional challenge, we conclude that her contention lacks merit (*see* Family Ct Act § 641; *Matter of El-Sheemy v El-Sheemy*, 35 AD3d 738, 739 [2d Dept 2006]).

We reject the biological mother's further contention that the court erred in dispensing with her consent to the adoption of the

child on the ground of abandonment. A mother's consent to adoption is required unless she "evinces an intent to forego . . . her parental or custodial rights and obligations as manifested by . . . her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so" (Domestic Relations Law § 111 [2] [a]; *see* § 111 [1] [b], [c]). "Where the person having custody of the child thwarts or interferes with the noncustodial parent's efforts to visit or communicate with the child, a finding of abandonment is inappropriate" (*Matter of Lydia A.C. v Gregory E.S.*, 155 AD3d 1680, 1681 [4th Dept 2017]). "The party seeking a finding of abandonment has the burden of establishing abandonment by clear and convincing evidence" (*id.*).

Here, contrary to the biological mother's initial contention, the court did not err in considering her contact with the child and communication with petitioner during the six-month period immediately preceding the filing of the petition (*see* Domestic Relations Law § 111 [2] [a]; *Matter of Adreona C. [Andrew C.—Andrew R.]*, 79 AD3d 1768, 1769 [4th Dept 2010]; *Matter of Patrick D.*, 52 AD3d 1280, 1280 [4th Dept 2008], *lv denied* 11 NY3d 711 [2008]). Furthermore, although the court was presented with the conflicting testimony of petitioner and the biological mother regarding the substance and frequency of such contact and communication during the six-month period, the court resolved that credibility issue in favor of petitioner. It is well established that "the court's credibility determinations are . . . entitled to great deference" (*Matter of Angelina K. [Eliza W.—Michael K.]*, 105 AD3d 1310, 1312 [4th Dept 2013], *lv denied* 21 NY3d 860 [2013] [internal quotation marks omitted]), and we see no basis to disturb the court's determination here. The testimony credited by the court established that, during the six-month period, the biological mother did not call petitioner, nor did she visit, write to, or provide any gifts for the child, and the biological mother's only contact with the child was a brief interaction initiated by petitioner at another individual's home during which the biological mother did not want to hold the child. "Such insubstantial and infrequent contact is insufficient to preclude a finding of abandonment" (*Matter of Amanda*, 197 AD2d 923, 924 [4th Dept 1993], *lv denied* 82 NY2d 662 [1993]; *see* Domestic Relations Law § 111 [6] [b]; *Patrick D.*, 52 AD3d at 1281). Finally, "[t]he court was entitled to discredit the testimony of the [biological] mother that petitioner[] thwarted her efforts to contact the child" (*Patrick D.*, 52 AD3d at 1281), and we conclude that the record does not support the biological mother's contention that petitioner interfered with any such efforts (*see Matter of Brittany S.*, 24 AD3d 1298, 1299 [4th Dept 2005], *lv denied* 6 NY3d 708 [2006]; *Amanda*, 197 AD2d at 924).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

777

CAF 18-00298

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

IN THE MATTER OF STEPHANIE LIN ROSENDAHL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

RICHARD ALLEN WINN, III, RESPONDENT-RESPONDENT.

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

ANTHONY J. DIMARTINO, JR., OSWEGO, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered November 14, 2017 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition seeking modification of a prior custody order.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order that denied her petition to the extent that it sought modification of a prior custody order, thereby continuing in effect the terms of the prior order that awarded her and respondent father joint physical and legal custody of the subject children and directed that the father have parenting time for four days a week and that his residence be deemed the children's residence for school enrollment purposes. Contrary to the mother's contention, there is a sound and substantial basis in the record for Supreme Court's determination that the mother failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the changes to the custody arrangement that she requested are in the best interests of the children (*see Matter of Peay v Peay*, 156 AD3d 1358, 1360 [4th Dept 2017]; *Gizzi v Gizzi*, 136 AD3d 1405, 1406 [4th Dept 2016]). In any event, the record also establishes that continuation of the relevant terms of the prior order are in the children's best interests (*see Gizzi*, 136 AD3d at 1406).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

778

CAF 18-01132

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

IN THE MATTER OF ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

RUSSELL R., RESPONDENT-APPELLANT.

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

PETER M. RAYHILL, COUNTY ATTORNEY, UTICA (DENISE J. MORGAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 6, 2018 in a proceeding pursuant to Family Court Act article 5. The order denied the application of respondent seeking to vacate an order of filiation dated June 7, 1999.

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

Memorandum: Respondent father appeals from an order that denied his application seeking to vacate an order of filiation entered upon his default. We affirm.

The determination whether to vacate an order entered upon a default is left to the sound discretion of the court (*see Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965 [4th Dept 2007]), and we conclude that Family Court did not abuse its discretion here. " 'Pursuant to CPLR 5015 (a) (1), a court may vacate a judgment or order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense' " (*Matter of Shehatou v Louka*, 145 AD3d 1533, 1534 [4th Dept 2016]). "Although default orders are disfavored in cases involving the custody or support of children, and thus the rules with respect to vacating default judgments are not to be applied as rigorously in those cases . . . , that policy does not relieve the defaulting party of the burden of establishing a reasonable excuse for the default or a meritorious defense" (*id.* [internal quotation marks omitted]).

With respect to whether there was a reasonable excuse for the default, the father's assertions that he was never served with the underlying summons and petition for paternity and that he was unaware that he needed to appear at the hearing on the petition are belied by the record. The process server's affidavit of personal service

establishes that she personally served the father at an address in Florida, which he later acknowledged in a letter to the court was his correct home address. Thus, the father's "conclusory and unsubstantiated denial of service of the underlying [summons and] petition lacked the factual specificity necessary to rebut the prima facie proof of proper service established by the process server's affidavit of service" (*Matter of Orange County Dept. of Social Servs. v Germel Y.*, 101 AD3d 1019, 1020 [2d Dept 2012], *lv dismissed* 20 NY3d 1086 [2013]). Furthermore, the summons expressly stated that his failure to appear at the hearing would result in the default entry of an order of filiation. The father was thus on notice of his need to attend the hearing, and his conclusory statements that he did not understand the laws and rules of New York are not credible (*see Matter of A.C.S. Child Support Litig. Unit v David S.*, 32 AD3d 724, 724 [1st Dept 2006]). To the extent the father contends that his incarceration in Florida limited his ability to contact the court prior to the hearing, we note that the paternity proceeding was commenced approximately one year before he was incarcerated.

Moreover, in order to support his claim of a meritorious defense, the father was "required to set forth sufficient facts [or legal arguments] to demonstrate, on a prima facie basis, that a defense existed" (*Matter of Strumpf v Avery*, 134 AD3d 1465, 1466 [4th Dept 2015] [internal quotation marks omitted]), but he failed to do so. His speculative assertion that he may not be the child's father because the mother worked in a strip club around the time of conception is insufficient (*see id.*; *see also A.C.S. Child Support Litig. Unit*, 32 AD3d at 725).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

780

CA 19-00503

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

JESICA LEONARD, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MOTOR VEHICLE ACCIDENT INDEMNIFICATION CORPORATION, RESPONDENT-APPELLANT.

KORNFELD, REW, NEWMAN & SIMEONE, SUFFERN (WILLIAM S. BADURA OF COUNSEL), FOR RESPONDENT-APPELLANT.

FITZSIMMONS, NUNN & PLUKAS, LLP, ROCHESTER (JASON E. ABBOTT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered September 14, 2018. The order granted petitioner's application for leave to file a late notice of claim against respondent.

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

Memorandum: Respondent appeals from an order granting petitioner's application for leave to file a late notice of claim against it. We affirm. On December 21, 2017, petitioner, a hospital employee, was injured while assisting a patient into a vehicle at the hospital entrance. While standing next to the vehicle, she was struck by a passing vehicle that stopped momentarily, but then drove off. The police investigated the accident and issued a report. On July 16, 2018, petitioner filed an application for leave to file a late notice of claim against respondent pursuant to Insurance Law § 5208 (b) (2).

Where, as here, a petitioner has a cause of action for damages for bodily injury arising out of the accident, but the cause of action is against a person whose identity is unascertainable, he or she may seek the protection provided by respondent by filing an affidavit with respondent within 90 days of the accrual of the cause of action (*see* Insurance Law § 5208 [a] [2] [A] [i-iii]). In addition, where, as here, a petitioner fails to file such an affidavit prior to the expiration of that period, a court may grant leave to file an affidavit within a reasonable time thereafter, but no later than one year after the cause of action accrued (*see* § 5208 [b] [2]; [c]). A petitioner must submit "facts which caused the delay and that it was not reasonably possible to file the affidavit within the specified period and that the affidavit was filed as soon as was reasonably

possible" (§ 5208 [b] [1]; *see* § 5208 [b] [2]). The court shall consider "whether [respondent] acquired actual knowledge of the essential facts constituting the claim within [180 days of the accrual of the cause of action] or a reasonable time thereafter" (§ 5208 [b] [2]; *see* § 5208 [a] [1]). The court shall also consider "all other relevant facts and circumstances, including whether . . . [t]he delay in filing substantially prejudiced [respondent] in maintaining a defense on the merits" (§ 5208 [b] [2] [C]). We note that the relevant statutory language is in many respects identical to that used in General Municipal Law § 50-e (5) regarding late notices of claim in tort actions against municipalities, and thus reliance on case law applying section 50-e (5) is appropriate.

We conclude that Supreme Court did not abuse its discretion in granting the application (*see Matter of Craver v Motor Veh. Acc. Indem. Corp.*, 238 AD2d 956, 956 [4th Dept 1997]; *see also Matter of Diegelman v City of Buffalo*, 148 AD3d 1692, 1693 [4th Dept 2017]). Petitioner averred that her delay in filing stemmed from the fact that she did not own, possess, or insure any motor vehicle, and she did not know of respondent or its purpose until she sought legal advice in early July 2018. The court found that the lack of understanding that coverage may exist for a hit-and-run accident was "a common and excusable misunderstanding." The affidavit was thus filed "as soon as was reasonably possible" (Insurance Law § 5208 [b] [1]; *see* § 5208 [b] [2]). In addition, respondent acquired actual knowledge of the essential facts constituting the claim when petitioner filed her application. Although not within the 180 days prescribed by the statute, it was within "a reasonable time thereafter" (§ 5208 [b] [2]; *see* § 5208 [a] [1]; *Nationwide Ins. Co. v Village of Alexandria Bay*, 299 AD2d 855, 856 [4th Dept 2002]).

Finally, petitioner averred that respondent would not be prejudiced by the delay because the police department investigated the accident, and the hospital documented her injuries. Respondent failed to rebut that showing "with particularized evidence" (*Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 467 [2016], *rearg denied* 29 NY3d 963 [2017]). In fact, respondent did not even allege that it would suffer any prejudice from the late filing. Respondent's contention that it was prejudiced because it lost the opportunity to examine and preserve the hospital video footage is improperly raised for the first time on appeal (*see Matter of Tejada v City of New York*, 161 AD3d 876, 878 [2d Dept 2018]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

783

CA 18-00037

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF JOSEPH S., CONSECUTIVE NO. 546400, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

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

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR
PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF
COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered December 4, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, continued petitioner’s commitment to a secure treatment facility.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

785

CA 18-01778

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

CONSTELLATION ENERGY GROUP, PLAINTIFF-RESPONDENT,

V ORDER

RODNEY J. WRAY, DEFENDANT-APPELLANT.

HOUSH LAW OFFICES, PLLC, BUFFALO (FRANK HOUSH OF COUNSEL), FOR DEFENDANT-APPELLANT.

RELIN, GOLDSTEIN & CRANE, LLP, ROCHESTER, D.J. & J.A. CIRANDO, PLLC, SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Renee Forgensi Minarik, A.J.), entered February 22, 2018. The judgment awarded plaintiff money damages upon a nonjury verdict.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

790

KA 18-01539

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO M. ANDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered May 1, 2018. 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: Defendant appeals, in appeal No. 1, 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]). In appeal No. 2, he appeals from a judgment convicting him, also upon his guilty plea, of criminal sale of a controlled substance in the fifth degree (§ 220.31). Contrary to defendant's contention in both appeals, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and those valid waivers foreclose his challenge to the severity of the sentences (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

791

KA 14-01227

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FRANK J. JUDGE, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (John B. Gallagher, Jr., A.J.), rendered May 9, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt 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 contempt in the second degree (Penal Law § 215.50 [3]). Contrary to defendant's contention, his waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant discussed his right to appeal with his attorney before waiving that right and was advised that his "right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*id.*; *see generally People v Truitt*, 170 AD3d 1591, 1591 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]). Further, "[t]he plea allocution establishes that the waiver of the right to appeal was voluntarily, knowingly, and intelligently entered . . . , even though some of defendant's responses to [Supreme Court's] inquiries were monosyllabic" (*People v Frazier*, 63 AD3d 1633, 1633 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009] [internal quotation marks omitted]). Because defendant, under the circumstances here, does not raise a jurisdictional challenge, defendant's valid waiver of the right to appeal encompasses his contention that the court erred in denying that part of his second omnibus motion seeking to dismiss certain criminal complaints against him (*cf. People v Oliveri*, 49 AD3d 1208, 1209 [4th Dept 2008]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

792

KA 19-00517

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GEOFFREY MARTIN, DEFENDANT-APPELLANT.

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

MICHAEL D. CALARCO, DISTRICT ATTORNEY, LYONS (R. MICHAEL TANTILLO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Daniel G. Barrett, J.), rendered September 6, 2018. The judgment convicted defendant, after a nonjury trial, of forcible touching (two counts), sexual abuse in the third degree (two counts), and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, following a bench trial, of two counts each of forcible touching (Penal Law § 130.52 [1]), sexual abuse in the third degree (§ 130.55), and endangering the welfare of a child (§ 260.10 [1]). "Viewing the evidence in light of the elements of the crimes in this nonjury trial" (*People v Hutchings*, 142 AD3d 1292, 1293 [4th Dept 2016], *lv denied* 28 NY3d 1124 [2016]; *see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). County Court "reasonably found defendant's exculpatory testimony incredible and rejected it . . . and, notwithstanding minor inconsistencies in the [victim's] testimony . . . , 'there is no basis for disturbing the [court's] determinations concerning credibility' " (*People v Sommerville*, 159 AD3d 1515, 1516 [4th Dept 2018], *lv denied* 31 NY3d 1121 [2018]).

Defendant's contention that the trial testimony rendered the indictment duplicitous is unpreserved for appellate review (*see People v Allen*, 24 NY3d 441, 449-450 [2014]), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see e.g. People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). Contrary to defendant's contention, defense counsel was not ineffective in failing to seek the

dismissal of the endangering the welfare of a child counts on statute of limitations grounds (*see People v Ambers*, 26 NY3d 313, 318-320 [2015]; *People v Evans*, 16 NY3d 571, 575-576 [2011], *cert denied* 565 US 912 [2011]; *People v St. Pierre*, 141 AD3d 958, 961-962 [3d Dept 2016], *lv denied* 28 NY3d 1031 [2016]). Even if, as defendant asserts, the court's admission of testimony about a missing photograph violated the best evidence rule, any such error is harmless (*see People v Haggerty*, 23 NY3d 871, 876 [2014]; *Hutchings*, 142 AD3d at 1294).

Defendant's challenges to the conditions of his probation are unpreserved for appellate review, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see generally People v Graves*, 163 AD3d 16, 24-25 [4th Dept 2018]; *People v King*, 151 AD3d 1651, 1654 [4th Dept 2017], *lv denied* 30 NY3d 951 [2017]; *cf. generally People v Letterlough*, 86 NY2d 259, 261-269 [1995]; *People v Saraceni*, 153 AD3d 1559, 1560 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]). Finally, the incarceration component of the split sentence is not illegal (*see* Penal Law § 60.01 [2] [d]; *see generally People v Zephrin*, 14 NY3d 296, 300-301 [2010]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

793

KA 15-00238

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MCMURTY, JR., ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered May 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: 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 did not validly waive his right to appeal and that the sentence is unduly harsh and severe. The record establishes that defendant's waiver of the right to appeal was made knowingly, intelligently, and voluntarily (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]). The valid waiver of the right to appeal encompasses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

794

KA 16-00641

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT G. WILSON, DEFENDANT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, 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 5, 2016. The judgment convicted defendant, upon a jury verdict, of rape in the first degree, attempted strangulation in the second degree, and rape in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Monroe County, for further proceedings.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, rape in the first degree (Penal Law § 130.35 [1]) and rape in the third degree (§ 130.25 [3]). Although defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence, " 'we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). We nonetheless conclude that, 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]), the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention and the People's concession, rape in the third degree (Penal Law § 130.25 [3]) is not an inclusory concurrent count of rape in the first degree (*see* CPL 300.50 [6]; *see also* CPL 300.30 [4]). The cases cited by the parties are inapposite because they implicate an exception that is not present here (*see generally* CPL 300.50 [6] [i], [ii]; *People v Hackett*, 167 AD3d 1090, 1091 [3d Dept 2018]; *People v Stephanski*, 286 AD2d 859, 860 [4th Dept 2001]). Moreover, we are not bound by the People's erroneous concession (*see People v Berrios*, 28 NY2d 361, 366-367 [1971]; *People v Colsrud*, 144 AD3d 1639, 1640 [4th Dept 2016], *lv*

denied 29 NY3d 1030 [2017]).

We agree with defendant, however, that the verdict sheet, which states in relevant part "Fourth Count: Rape in the Third Degree (lack of consent/totality of circumstances)," contains an impermissible annotation. Specifically, the "totality of circumstances" language is impermissible because it is not "statutory language" (CPL 310.20 [2]; *see* Penal Law § 130.25 [3]). Rather, it is language from the pattern jury instructions (*see* CJI 2d[NY] Penal Law § 130.25 [3]). Supreme Court was therefore required to obtain defense counsel's consent prior to submitting the annotated verdict sheet to the jury (*see People v O'Kane*, 30 NY3d 669, 672 [2018]; *see also People v Johnson*, 88 AD3d 1293, 1295 [4th Dept 2011]). Although "consent to the submission of an annotated verdict sheet may be implied where defense counsel 'fail[s] to object to the verdict sheet after having an opportunity to review it' " (*People v Johnson*, 96 AD3d 1586, 1587 [4th Dept 2012], *lv denied* 19 NY3d 1027 [2012]), here, the record does not reflect whether defense counsel had that opportunity. We therefore hold the case, reserve decision and remit the matter to Supreme Court to determine, following a hearing if necessary, whether defense counsel consented to the annotated verdict sheet (*see Johnson*, 88 AD3d at 1295).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

795

KA 18-01540

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTONIO M. ANDERSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered May 1, 2018. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fifth degree.

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

Same memorandum as in *People v Anderson* ([appeal No. 1] — AD3d — [Sept. 27, 2019] [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

797

CAF 18-00741

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

IN THE MATTER OF HENRY G., JR., AMILEEANA G., AND SELENA T.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES, PETITIONER-RESPONDENT;

AMELINDA L., RESPONDENT, AND DANNY T., RESPONDENT-APPELLANT.

MEMORANDUM AND ORDER

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

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

LORENZO NAPOLITANO, ROCHESTER, ATTORNEY FOR THE CHILD.

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

Appeal from an order of the Family Court, Monroe County (Dandrea L. Ruhlmann, J.), entered April 12, 2018 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Danny T. had neglected the subject children.

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 a fact-finding and dispositional order that, inter alia, adjudged that he neglected the subject children. We affirm. Contrary to the father's contention, there is a sound and substantial basis in the record supporting Family Court's determination that petitioner met its burden of establishing his neglect of the subject children (*see Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). We have reviewed the father's remaining contention and conclude that it lacks merit.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

798

CAF 19-00158

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

IN THE MATTER OF STACY FLICK,
PETITIONER-APPELLANT,

V ORDER

GARY J. MOSIER, RESPONDENT-RESPONDENT.

HAWTHORNE & VESPER, PLLC, BUFFALO (TINA M. HAWTHORNE OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (ROBERT R. VARIO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DEBORAH J. SCINTA, ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered July 16, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition for modification of custody.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

799

CAF 18-00899

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

IN THE MATTER OF ALEXANDER WALTON-CARTER,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

REGINA BUTLER, RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered April 11, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, denied the petition for modification of custody insofar as petitioner sought primary physical custody of the subject child.

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

Memorandum: Petitioner father filed a petition seeking modification of an existing custody order and a separate petition alleging that respondent mother violated that custody order. The father appeals from an order that, among other things, denied his modification petition insofar as it sought primary physical custody of the parties' child and dismissed the violation petition. Contrary to the father's contention, the determination of Family Court that it was in the child's best interests to remain in the primary physical custody of the mother is supported by the requisite sound and substantial basis in the record (*see Matter of White v Stone*, 165 AD3d 1641, 1642 [4th Dept 2018], *lv denied* 32 NY3d 913 [2019]; *see generally Eschbach v Eschbach*, 56 NY2d 167, 171 [1982]).

We reject the father's further contention that the court erred in dismissing his violation petition and refusing to find the mother in civil contempt of court for violating the existing custody order. We conclude that the father failed to establish by clear and convincing evidence the elements necessary to support a finding of civil contempt (*see generally El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

800

CAF 18-00758

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

IN THE MATTER OF KENNETH A. SHAFFER,
PETITIONER-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

TERI M. WOODWORTH,
RESPONDENT-PETITIONER-RESPONDENT.

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

MARK & GRABER, PLLC, MEDINA (LANCE J. MARK OF COUNSEL), FOR RESPONDENT-PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Orleans County (Sanford A. Church, J.), entered March 23, 2018 in a proceeding pursuant to Family Court Act article 6. The order denied the petition seeking unsupervised visitation with the subject child and granted the cross petition seeking to reduce petitioner-respondent's supervised visitation with 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 6 of the Family Court Act, petitioner-respondent father filed a petition seeking to modify a prior consent order of custody and visitation by providing him with unsupervised visitation with the subject child. Respondent-petitioner mother filed a cross petition seeking to reduce the father's supervised visitation to one day per week. The father now appeals from an order that, in essence, denied the petition and granted the cross petition. We affirm.

Initially, we conclude that the father "waived [his] contention that the [mother] failed to establish a change of circumstances warranting an inquiry into the best interests of the child[ ] inasmuch as the [father] alleged in [his] . . . petition that there had been such a change in circumstances" (*Matter of Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018]; *see Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018], *lv denied* 33 NY3d 903 [2019]).

Contrary to the father's contention, Family Court did not abuse its discretion in discontinuing his Sunday visitation. It is well

settled that " '[t]he propriety of visitation is generally left to the sound discretion of Family Court[,] whose findings are accorded deference by this Court and will remain undisturbed unless lacking a sound basis in the record' " (*Matter of Robert AA. v Colleen BB.*, 101 AD3d 1396, 1397 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]; *see Matter of Golda v Radtke*, 112 AD3d 1378, 1378 [4th Dept 2013]). Here, we conclude that a sound and substantial basis in the record supports the court's determination to reduce the father's visitation. Specifically, the record establishes that the Sunday visits interfered with the child's other activities and that the father failed to avail himself of his Sunday visitation on numerous occasions (*see Golda*, 112 AD3d at 1378; *cf. Matter of Gorton v Inman*, 147 AD3d 1537, 1538 [4th Dept 2017]).

We also reject the father's contention that the court should have permitted him to have unsupervised visitation. "Courts have broad discretion in determining whether visits should be supervised" (*Matter of Campbell v January*, 114 AD3d 1176, 1177 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]; *see Matter of Procopio v Procopio*, 132 AD3d 1243, 1244 [4th Dept 2015], *lv denied* 26 NY3d 915 [2015]), and we conclude that there is a sound and substantial basis in the record supporting the court's determination that visitation should continue to be supervised (*see generally Campbell*, 114 AD3d at 1177; *Matter of Austin M. [Dale M.]*, 97 AD3d 1168, 1170 [4th Dept 2012]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

802

CA 18-01840

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

IN THE MATTER OF THE ESTATE OF DENNIS M. CUNNINGHAM, DECEASED.

ORDER

DEIDRE M. CUNNINGHAM, PETITIONER-APPELLANT;

BRENDAN CUNNINGHAM, RESPONDENT-RESPONDENT.

BOND SCHOENECK & KING, PLLC, BUFFALO (RIANE F. LAFFERTY OF COUNSEL), FOR PETITIONER-APPELLANT.

LAW OFFICE OF RALPH C. LORIGO, WEST SENECA (JON F. MINEAR OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Erie County (Acea M. Mosey, S.), entered August 27, 2018. The order denied the motion to enforce a settlement agreement.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

805

CA 18-02130

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

TIMOTHY GOVENETTIO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DOLGENCORP OF NEW YORK, INC., INDIVIDUALLY AND DOING BUSINESS AS DOLLAR GENERAL, DOLLAR GENERAL CORPORATION, BHATTI PROPERTYS INC., AND KIMBERLY FITZGERALD, INDIVIDUALLY AND DOING BUSINESS AS FOREVER GREEN PROPERTY MAINTENANCE, DEFENDANTS-RESPONDENTS.

SHAW & SHAW, P.C., HAMBURG (LEONARD D. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOERGEN, MANSON & MCCARTHY, BUFFALO (KEVIN LOFTUS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS DOLGENCORP OF NEW YORK, INC., INDIVIDUALLY AND DOING BUSINESS AS DOLLAR GENERAL, DOLLAR GENERAL CORPORATION, AND BHATTI PROPERTYS INC.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT KIMBERLY FITZGERALD, INDIVIDUALLY AND DOING BUSINESS AS FOREVER GREEN PROPERTY MAINTENANCE.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered October 1, 2018. The order granted defendants' motion and cross motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion and reinstating the complaint against defendants Dolgencorp of New York, Inc., individually and doing business as Dollar General, Dollar General Corporation, and Bhatti Propertys Inc., and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries that he sustained when, at between 5:00 p.m. and 6:00 p.m., he slipped and fell in the parking lot of a Dollar General store that was leased to defendant Dolgencorp of New York, Inc., individually and doing business as Dollar General, from defendant Bhatti Propertys Inc. Contrary to plaintiff's contention, Supreme Court properly granted the motion of defendant Kimberly Fitzgerald, individually and doing business as Forever Green Property Maintenance (Forever Green), for summary judgment dismissing the complaint against her. Forever Green is a snow removal company that was contractually

responsible for plowing snow from the parking lot. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Although there are three well-established exceptions to that rule (*see id.* at 140), plaintiff did not allege facts in his complaint or bill of particulars that would establish the applicability of any of those exceptions, and thus Fitzgerald was not required to affirmatively negate the possible application of any of them in order to meet her initial burden (*see Baker v Buckpitt*, 99 AD3d 1097, 1099 [3d Dept 2012]; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1320 [4th Dept 2012]). Instead, Fitzgerald had to demonstrate only that plaintiff was not a party to the snow removal contract and that she therefore owed no duty to him, which she accomplished by submitting a copy of the contract (*see Baker*, 99 AD3d at 1099). In opposition, plaintiff failed to raise an issue of fact with respect thereto (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

We agree with plaintiff, however, that the court erred in granting the cross motion of the remaining defendants (defendants) for summary judgment dismissing the complaint against them. A defendant seeking to avail itself of the storm in progress doctrine meets its prima facie burden by establishing as a matter of law that there was a storm in progress at the time of the accident (*see Alvarado v Wegmans Food Mkts., Inc.*, 134 AD3d 1440, 1440 [4th Dept 2015]; *Glover v Botsford*, 109 AD3d 1182, 1183 [4th Dept 2013]). The doctrine applies in situations where there are severe winter conditions, as well as where there is " 'less severe, yet still inclement, winter weather' " (*Glover*, 109 AD3d at 1184), but it does not apply when the accumulation of snow is "negligible" (*Patricola v General Motors Corp.*, 170 AD3d 1506, 1507 [4th Dept 2019]). Here, defendants submitted the affidavit of a meteorologist, who opined that one-tenth of an inch of snow fell after 3:30 p.m. on the day in question, and who relied in part on winter weather advisories that predicted, among other things, snow and freezing rain between 3:00 p.m. and 11:00 p.m. in several counties, including the one where the store is located. In addition, defendants submitted the deposition testimony of plaintiff, who testified that snow and rain had been predicted that day, but during the time leading up to his fall it was merely overcast. Thus, defendants' own submissions raise an issue of fact whether there was a storm in progress at the time of the fall (*see Patricola*, 170 AD3d at 1507; *cf. Witherspoon v Tops Mkts., LLC*, 128 AD3d 1541, 1541 [4th Dept 2015]). Furthermore, defendants submitted the deposition testimony of an assistant store manager, who testified that there were "a few" "different" "slippery spots" in the parking lot when she arrived for her shift at 2:00 p.m. on the day of plaintiff's fall, thus raising issues of fact whether the slippery condition preexisted the alleged storm (*see generally Wrobel v Tops Mkts., LLC*, 155 AD3d 1591, 1592 [4th Dept 2017]; *Alvarado*, 134 AD3d at 1440), and whether defendants had actual or constructive notice of the slippery condition (*see Patricola*, 170 AD3d at 1507). We therefore modify the order by denying defendants' cross motion and reinstating the complaint against them (*see generally Brinson v Geneva Hous. Auth.*, 45 AD3d 1397, 1398

[4th Dept 2007]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

809

CA 18-01632

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

RETA WALKER, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF TRENT WALKER, DECEASED, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH A. CARUANA, M.D., ET AL., DEFENDANTS, AND CATHOLIC HEALTH SYSTEM, DOING BUSINESS AS SISTERS HOSPITAL OF BUFFALO, DEFENDANT-RESPONDENT.

PAUL WILLIAM BELTZ, P.C., BUFFALO (ANNE B. RIMMLER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARGNESI BRITT PLLC, BUFFALO (JASON T. BRITT OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered December 7, 2017. The order, insofar as appealed from, granted the motion of defendant Catholic Health System, doing business as Sisters Hospital of Buffalo, for summary judgment and dismissed the second amended complaint against it.

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

Memorandum: In this medical malpractice action, plaintiff appeals from an order that, inter alia, granted the motion of defendant Catholic Health System, doing business as Sisters Hospital of Buffalo (Sisters), for summary judgment dismissing the second amended complaint against it. We affirm.

Contrary to plaintiff's contention, Sisters met its initial burden on the motion by submitting the affirmation of its expert physician, who addressed each of the specific factual allegations of negligence raised in the second amended complaint and bill of particulars (*see Isensee v Upstate Orthopedics, LLP*, 174 AD3d 1520, 1521 [4th Dept 2019]). Plaintiff's challenge to the qualifications of Sisters' expert is unpreserved inasmuch as she failed to object to the alleged deficiency before Supreme Court, and she may not raise that issue for the first time on appeal (*see generally White v Bajwa*, 161 AD3d 1513, 1516 [4th Dept 2018]; *Matter of McKeown [Image Collision, Ltd.]*, 94 AD3d 1445, 1447 [4th Dept 2012]; *Kibler v Gillard Constr., Inc.*, 53 AD3d 1040, 1042 [4th Dept 2008]). Inasmuch as Sisters met its initial burden, the burden shifted to plaintiff to raise a triable

issue of fact in opposition (*see Groff v Kaleida Health*, 161 AD3d 1518, 1520 [4th Dept 2018]; *Chillis v Brundin*, 150 AD3d 1649, 1650 [4th Dept 2017]).

We conclude that plaintiff's expert failed to refute the conclusions of Sisters' expert with respect to plaintiff's claims. Rather, plaintiff's opposition contained new theories of liability that were not included in the second amended complaint or bill of particulars and thus could not be used to defeat Sisters' motion (*see DeMartino v Kronhaus*, 158 AD3d 1286, 1287 [4th Dept 2018]; *see also Iodice v Giordano*, 170 AD3d 971, 972 [2d Dept 2019]; *Stewart v Dunkleman*, 128 AD3d 1338, 1341 [4th Dept 2015], *lv denied* 26 NY3d 902 [2015]). Therefore, plaintiff failed to raise a triable issue of fact, and the court properly granted Sisters' motion (*see Chillis*, 150 AD3d at 1651).

In light of our determination, plaintiff's remaining contentions are academic.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

810

CA 19-00103

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

JEANNETTE C. GIAMBRONE, NINO E. GIAMBRONE, PLAINTIFFS-RESPONDENTS-APPELLANTS, AND NATIONWIDE MUTUAL INSURANCE COMPANY, AS SUBROGEE OF JEANNETTE C. GIAMBRONE AND NINO E. GIAMBRONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, AND PETER T. SMITH, DEFENDANTS-APPELLANTS-RESPONDENTS. (APPEAL NO. 1.)

BARCLAY DAMON LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF CHARLES F. HARMS, JR., GARDEN CITY (ANGELO CAPALBO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal and cross appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 1, 2018. The order denied defendants' motion for summary judgment and denied the cross motion of plaintiffs Jeannette C. Giambrone and Nino E. Giambrone 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: Plaintiffs Jeannette C. Giambrone and Nino E. Giambrone (Giambrones) commenced an action to recover damages for injuries sustained by Jeannette Giambrone (plaintiff) as the result of a motor vehicle accident that occurred when the vehicle operated by plaintiff collided with a utility truck owned by defendant Niagara Mohawk Power Corporation, doing business as National Grid (National Grid), and operated by National Grid employee, defendant Peter T. Smith. Thereafter, the Giambrones' insurance carrier, plaintiff Nationwide Mutual Insurance Company, as subrogee of the Giambrones, commenced a subrogation action against defendants.

After the two actions were consolidated, defendants moved for summary judgment dismissing the complaints, and the Giambrones cross-

moved for partial summary judgment on the issue of negligence. In appeal No. 1, defendants appeal and the Giambrones cross-appeal from the order denying the motion and cross motion. In appeal No. 2, defendants appeal from an order denying their motion to, inter alia, strike plaintiffs' complaints pursuant to CPLR 3126 as a sanction for disposing of the electronic data recorder (EDR) from plaintiff's vehicle prior to the commencement of litigation.

Defendants contend in appeal No. 1 that Supreme Court erred in denying their summary judgment motion because they established as a matter of law that plaintiff's actions were the sole proximate cause of the accident. We reject that contention (*see Chilinski v Maloney*, 158 AD3d 1174, 1175 [4th Dept 2018]; *see also Pagels v Mullen*, 167 AD3d 185, 188-189 [4th Dept 2018]). The record is replete with issues of fact that render such a determination inappropriate, including with respect to the location of the accident, i.e., the distance that it occurred from the subject intersection, and the speed of the utility truck operated by Smith—or whether the truck was moving at all—at the time of the accident. Those same issues of fact require denial of the Giambrones' cross motion because they failed to establish as a matter of law that Smith was negligent in the operation of the utility truck (*see Carnevale v Bommer*, — AD3d —, — , 2019 NY Slip Op 06244, *1 [4th Dept 2019]).

With respect to appeal No. 2, we conclude that the court properly denied defendants' motion to strike plaintiffs' complaints. "A court may, as one of the possible sanctions for spoliation of evidence, enter 'an order striking out pleadings or parts thereof' " (*Mahiques v County of Niagara*, 137 AD3d 1649, 1651 [4th Dept 2016], quoting CPLR 3126 [3]). Generally, "striking a pleading is reserved for instances of willful or contumacious conduct" (*id.* [internal quotation marks omitted]), and defendants failed to establish that plaintiffs acted with the requisite state of mind. Assuming, arguendo, that plaintiffs were negligent in disposing of the EDR, we conclude that defendants, to be entitled to dismissal, were "required to demonstrate that [plaintiffs] . . . negligently[] dispose[d] of crucial items of evidence . . . before [defendants] ha[d] an opportunity to inspect them . . . , thus depriving [defendants] of the means of proving [their] . . . defense" (*Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [4th Dept 2008] [internal quotation marks omitted]; *see Mahiques*, 137 AD3d at 1651). "The gravamen of this burden is a showing of prejudice" (*Mahiques*, 137 AD3d at 1651 [internal quotation marks omitted]). Because defendants failed to make such a showing, the striking of plaintiffs' complaints was not an appropriate sanction (*see Burke v Queen of Heaven R.C. Elementary Sch.*, 151 AD3d 1608, 1609-1610 [4th Dept 2017]; *Sarach v M&T Bank Corp.*, 140 AD3d 1721, 1722 [4th Dept 2016]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

811

CA 19-00104

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

JEANNETTE C. GIAMBRONE, NINO E. GIAMBRONE, PLAINTIFFS-RESPONDENTS, AND NATIONWIDE MUTUAL INSURANCE COMPANY, AS SUBROGEE OF JEANNETTE C. GIAMBRONE AND NINO E. GIAMBRONE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

NIAGARA MOHAWK POWER CORPORATION, DOING BUSINESS AS NATIONAL GRID, AND PETER T. SMITH, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

BARCLAY DAMON LLP, BUFFALO (DENNIS R. MCCOY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

LAW OFFICE OF CHARLES F. HARMS, JR., GARDEN CITY (ANGELO CAPALBO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered October 1, 2018. The order denied defendants' motion for sanctions against plaintiffs pursuant to CPLR 3126.

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

Same memorandum as in *Giambrone v Niagara Mohawk Power Corp.* ([appeal No. 1] — AD3d — [Sept. 27, 2019] [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

812

KA 17-00502

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JESSICA R. SOBLE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered January 11, 2017. 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: On appeal from a judgment convicting her upon her plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that the sentence is unduly harsh and severe. The record, however, establishes that defendant validly waived her right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]), and that valid waiver of the right to appeal forecloses her challenge to the severity of the sentence (*see id.* at 255).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

814

KA 18-00107

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID ORTEGA, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 21, 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.

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]). As an initial matter, defendant correctly contends and the People correctly concede that defendant's waiver of his right to appeal is invalid (*see People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v McCoy*, 107 AD3d 1454, 1454 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013]). Nevertheless, although defendant further contends that County Court erred in refusing to suppress physical evidence, "defendant forfeited the right to raise that suppression issue on appeal inasmuch as he pleaded guilty before the court issued a ruling thereon" (*People v Dix*, 170 AD3d 1575, 1576 [4th Dept 2019], *lv denied* 33 NY3d 1030 [2019]; *see People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Rodgers*, 162 AD3d 1500, 1501 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018]).

Defendant failed to preserve his contention that his plea was not knowingly, intelligently, and voluntarily entered because he failed to move to withdraw the plea or vacate the judgment of conviction (*see People v Peter*, 141 AD3d 1115, 1116 [4th Dept 2016]; *see generally People v Williams*, 27 NY3d 212, 219 [2016]). We reject defendant's contention that this case falls within the narrow exception to the preservation doctrine (*see People v Lopez*, 71 NY2d 662, 666 [1988]; *People v Carlisle*, 120 AD3d 1607, 1607-1608 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]), and we decline to exercise our power to review

defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Contrary to defendant's further contention, the sentence is not unduly harsh or severe.

We agree with defendant and the People correctly concede, however, that the sentence and commitment form should be amended because it incorrectly reflects that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

820

KA 17-01780

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

INALIA ROLLDAN, ALSO KNOWN AS SKY,
DEFENDANT-APPELLANT.

LINDSEY M. PIEPER, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered December 21, 2016. The judgment convicted defendant, upon a jury verdict, of kidnapping in the second degree (two counts), criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree and dismissing counts 28, 30, and 32 of the indictment against her and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of two counts of kidnapping in the second degree (Penal Law § 135.20), and one count each of criminal use of a firearm in the first degree (§ 265.09 [1] [a]), criminal possession of a weapon in the third degree (§ 265.02 [3]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). Defendant's contention that Supreme Court should have severed her trial from that of her codefendants is not preserved for our review because her pretrial motion for severance was based on different grounds than the grounds she now raises on appeal (*see People v Howie*, 149 AD3d 1497, 1499 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]; *People v Wooden*, 296 AD2d 865, 866 [4th Dept 2002], *lv denied* 99 NY2d 541 [2002]). We decline to exercise our power to review her contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the evidence is legally sufficient to support her conviction of kidnapping in the second degree. Viewing the evidence in the light most favorable to

the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the conclusion that defendant had "a shared intent, or 'community of purpose' with the principal[s]" (*People v Carpenter*, 138 AD3d 1130, 1131 [2d Dept 2016], *lv denied* 28 NY3d 928 [2016], quoting *People v Cabey*, 85 NY2d 417, 421 [1995]). Defendant was present in a house when the police raided it and rescued two victims who were being held captive there, and the identification of one of the victims was found in a backpack that defendant was wearing when the police entered the house. It could be readily inferred from the evidence that defendant was aware that the victims were being held there and that she intentionally aided the principals by providing them and the victims with food (*see generally* Penal Law § 20.00). In addition, viewing the evidence in light of the elements of kidnapping in the second 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 generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that the evidence is legally insufficient to support her conviction of the counts of criminal use of a firearm in the first degree, criminal possession of a weapon in the third degree, and criminal possession of a weapon in the fourth degree, and we therefore modify the judgment accordingly. Those counts were based on her possession of a rifle that was found in the house after the police entered. To establish constructive possession of the weapon, the People had to establish that defendant "exercised dominion or control over [the weapon] by a sufficient level of control over the area in which [it was] found" (*People v Everson*, 169 AD3d 1441, 1442 [4th Dept 2019], *lv denied* 33 NY3d 1068 [2019] [internal quotation marks omitted]; *see People v Manini*, 79 NY2d 561, 573 [1992]; *People v Jones*, 149 AD3d 1580, 1580 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]). Here, the evidence established that, prior to the arrival of the police, defendant was sitting in the living room of the house, the rifle was on a table in the living room, and one of the other perpetrators in the kidnapping put on a mask, grabbed the rifle, went to the room where the victims were being held, then came back to the living room and put the rifle back on the table. Contrary to the People's contention, that evidence is insufficient to establish that defendant had constructive possession of the weapon. A defendant's mere presence in the house where the weapon is found is insufficient to establish constructive possession (*see Everson*, 169 AD3d at 1442-1443), and there was no evidence establishing that defendant exercised dominion or control over the weapon (*see People v Carmichael*, 68 AD3d 1704, 1704-1705 [4th Dept 2009], *lv denied* 14 NY3d 798 [2010]; *cf. Everson*, 169 AD3d at 1442-1443; *Jones*, 149 AD3d at 1580-1581).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

821

KA 16-02170

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COREY ROHADFOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 13, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree and resisting arrest.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, criminal possession of a controlled substance in the fifth degree (Penal Law § 220.06 [5]). Contrary to defendant's contention, the fact that he was proceeding pro se when he pleaded guilty and waived his right to appeal does not render the waiver invalid. "A waiver of the right to appeal may be elicited as a condition of a plea bargain . . . , but it must be knowingly, voluntarily and intelligently entered into by the accused" (*People v Johnson*, 14 NY3d 483, 486 [2010]). In determining the validity of a waiver of the right to appeal, a court must consider "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" (*People v Seaberg*, 74 NY2d 1, 11 [1989]; *see People v Sanders*, 25 NY3d 337, 340 [2015]; *see generally People v Smith*, 164 AD3d 1621, 1621-1622 [4th Dept 2018], *lv denied* 32 NY3d 1177 [2019]). Here, we conclude that Supreme Court engaged defendant "in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017] [internal quotation marks omitted]; *see People v Brown*, 166 AD3d 1579, 1579 [4th Dept 2018], *lv denied* 32 NY3d 1169 [2019]). The record establishes that defendant had " 'a full appreciation of the consequences' " of the waiver (*People v Bradshaw*, 18 NY3d 257, 264 [2011]), particularly considering the thorough discussion between

defendant and the court regarding the nature and terms of the agreement, including the waiver and the negotiated sentence, as well as defendant's age, his level of education, and his background, which included experience in the criminal justice system representing himself (*see Sanders*, 25 NY3d at 342). Contrary to defendant's further contentions, the record establishes that, before defendant pleaded guilty, the court mentioned that the waiver would be a condition of the plea bargain (*cf. People v Willis*, 161 AD3d 1584, 1584 [4th Dept 2018]; *People v Blackwell*, 129 AD3d 1690, 1690 [4th Dept 2015], *lv denied* 26 NY3d 926 [2015]), and "[t]he fact that the appeal waiver was not reduced to writing is of no moment where, as here, the oral waiver was adequate" (*Smith*, 164 AD3d at 1621).

We conclude that the valid waiver of the right to appeal forecloses our review of defendant's challenge to the court's adverse suppression ruling (*see Sanders*, 25 NY3d at 342; *People v Kemp*, 94 NY2d 831, 833 [1999]).

Defendant contends that, while he was represented by defense counsel and before he was permitted to proceed pro se, the court erred in failing to make appropriate inquires into his requests for substitution of counsel and for an opportunity to retain counsel of his own choosing. Defendant also contends that the court erred in permitting him to proceed pro se. Defendant does not, however, assert that those alleged errors affected the voluntariness of the plea, which he sought mid-trial after hearing the evidence against him and which he entered following thorough discussions with the court (*see People v Richardson*, 173 AD3d 1859, 1860 [4th Dept 2019]). Moreover, any such assertion is not supported by the record (*see People v Doyle*, 82 AD3d 564, 564 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]). Thus, our review of defendant's contentions is precluded by the valid waiver of the right to appeal (*see Richardson*, 173 AD3d at 1860; *People v Gordon*, 89 AD3d 1466, 1466 [4th Dept 2011], *lv denied* 18 NY3d 957 [2012]; *Doyle*, 82 AD3d at 564).

Defendant did not preserve for our review his additional contention that before sentencing the People failed to file a CPL 400.21 statement indicating that he had a predicate felony offense (*see People v Judd*, 111 AD3d 1421, 1423 [4th Dept 2013], *lv denied* 23 NY3d 1039 [2014]; *see generally People v Pellegrino*, 60 NY2d 636, 637 [1983]). In any event, we conclude that the record establishes that any error is harmless, and remitting the matter for the filing of a predicate felony statement "would be futile and pointless" (*People v Bouyea*, 64 NY2d 1140, 1142 [1985]; *see People v Fuentes*, 140 AD3d 1656, 1657 [4th Dept 2016], *lv denied* 28 NY3d 1072 [2016]; *Judd*, 111 AD3d at 1423).

Finally, contrary to defendant's contention, we conclude under the circumstances of this case that "any violation of defendant's right to counsel at sentencing had no adverse impact, and he is not entitled to the remedy of a remand for resentencing . . . , which 'would serve no useful purpose' " (*People v Coppin*, 55 AD3d 374, 375 [1st Dept 2008], *lv denied* 11 NY3d 896 [2008]; *see People v Adams*, 52

AD3d 243, 243-244 [1st Dept 2008], *lv denied* 11 NY3d 829 [2008]; *cf. People v Allen*, 99 AD3d 1252, 1253 [4th Dept 2012]; *see generally People v Johnson*, 20 NY3d 990, 991 [2013]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

822

CA 19-00019

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

ANTHONY P. LOZZI, PLAINTIFF,

V MEMORANDUM AND ORDER

FULLER ROAD MANAGEMENT CORPORATION,
M+W U.S., INC., DEFENDANTS-APPELLANTS,
AND ARROW SHEET METAL WORKS, INC.,
DEFENDANT-RESPONDENT.

BARCLAY DAMON LLP, ROCHESTER (ROBERT M. SHADDOCK OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (DAVID M. GOODMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J., for Tracey A. Bannister, J.), entered July 26, 2018. The order, insofar as appealed from, denied the cross motion of defendants Fuller Road Management Corporation and M+W U.S., Inc., for summary judgment on their cross claim for indemnification against defendant Arrow Sheet Metal Works, Inc.

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

Memorandum: Defendants Fuller Road Management Corporation (Fuller) and M+W U.S., Inc. (MWI) appeal from an order that, inter alia, denied the cross motion of Fuller and MWI seeking summary judgment on their cross claim for indemnification against defendant Arrow Sheet Metal Works, Inc. We affirm.

Supreme Court properly denied the cross motion of Fuller and MWI inasmuch as it was untimely. In a scheduling order, the court ordered that motions for summary judgment must be filed and served within 60 days of the filing of the trial note of issue. Plaintiff subsequently filed the note of issue on November 20, 2017. The joint cross motion for summary judgment filed by Fuller and MWI on March 19, 2018 was therefore untimely, and Fuller and MWI were thus required to establish good cause for the delay (*see Mitchell v City of Geneva*, 158 AD3d 1169, 1169 [4th Dept 2018]; *Finger v Saal*, 56 AD3d 606, 606-607 [2d Dept 2008]; *see generally Brill v City of New York*, 2 NY3d 648, 651 [2004]). Fuller and MWI first addressed the issue of "good cause" in their reply papers, however, and "[i]t is well settled that it is improper for a court to consider the 'good cause' proffered by a

movant if it is presented for the first time in reply papers" (*Mitchell*, 158 AD3d at 1169; *see Bissell v New York State Dept. of Transp.*, 122 AD3d 1434, 1434-1435 [4th Dept 2014]).

Contrary to the contention of Fuller and MWI, their untimely cross motion was not "made on nearly identical grounds" as plaintiff's timely motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) claim, and thus their cross motion was not properly before the court on that basis (*Cracchiola v Sausner*, 133 AD3d 1355, 1356 [4th Dept 2015] [internal quotation marks omitted]; *see Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]).

In light of our determination, we do not address the remaining contentions of Fuller and MWI.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

823

CA 18-01281

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

IN THE MATTER OF BRIAN BROWDER,
PETITIONER-APPELLANT,

V ORDER

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

BRIAN BROWDER, PETITIONER-APPELLANT PRO SE.

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

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 12, 2018 in a CPLR article 78 proceeding. The judgment, inter alia, dismissed the petition.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

824

CA 19-00502

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

THOMAS CZECHOWSKI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BUFFALO NIAGARA MEDICAL CAMPUS, INC., ET AL.,
DEFENDANTS.

BUFFALO NIAGARA MEDICAL CAMPUS, INC., ET AL.,
THIRD-PARTY PLAINTIFFS,

V

ARIA CONTRACTING CORP., THIRD-PARTY
DEFENDANT-RESPONDENT.

DOLCE PANEPINTO, P.C., BUFFALO (ANNE M. WHEELER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (DAVID R. ADAMS OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered September 11, 2018. The order, inter alia, granted plaintiff's motion to compel a prospective witness to appear for a deposition, but limited the scope of questioning during that deposition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating that part of the order that limited the scope of questioning during the deposition of a prospective witness and as modified the order is affirmed without costs.

Memorandum: In this personal injury action, plaintiff appeals from an order that, inter alia, granted his motion to compel a former employee of third-party defendant Aria Contracting Corp. (Aria) to appear for a deposition but limited the scope of plaintiff's questioning of that prospective witness, and denied plaintiff's separate motion to compel two other representatives of Aria to appear for second depositions and answer questions that counsel for Aria directed them not to answer during their first depositions. We modify the order by vacating that part of the order that limited the scope of questioning during the deposition of the prospective witness.

Preliminarily, Supreme Court's ruling limiting the scope of a pretrial examination, although reduced to an order, is not appealable as of right (*see Roggow v Walker*, 303 AD2d 1003, 1003-1004 [4th Dept 2003]; *Matter of Beeman*, 108 AD2d 1010, 1011 [3d Dept 1985]; *see generally* CPLR 5701 [a]). In the exercise of our discretion, however, we "treat the notice of appeal as an application for permission to appeal and grant such permission" (*Roggow*, 303 AD2d at 1004; *see* CPLR 5701 [c]).

We agree with plaintiff that the court erred in limiting in advance the scope of plaintiff's questioning during a deposition of the prospective witness. The court's limitation on the future deposition testimony of that witness, Aria's former office manager, could result in the preclusion of testimony that would be relevant at trial or in preparation for trial (*see generally Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Certain areas of inquiry that would be precluded under the court's limitation, such as questions concerning a witness's credibility, bias, or motive, are indisputably relevant to the prosecution or defense of an action (*see Dominicci v Ford*, 119 AD3d 1360, 1361 [4th Dept 2014]; *Roggow*, 303 AD2d at 1003), and thus the anticipatory ruling by the court would preclude inquiry into legitimate areas of pretrial discovery (*see Tardibuono v County of Nassau*, 181 AD2d 879, 881 [2d Dept 1992]).

Contrary to plaintiff's further contention, the court did not err in denying his motion to compel two other representatives of Aria to appear for second depositions. Here, the questions that plaintiff intended to ask those witnesses during the second depositions either called for privileged information, or were not material or relevant to plaintiff's personal injury action, or were asked and answered during those witnesses' first depositions (*see generally* CPLR 3101; *Brown v Home Depot, U.S.A.*, 304 AD2d 699, 699-700 [2d Dept 2003]; *MS Partnership v Wal-Mart Stores*, 273 AD2d 858, 858 [4th Dept 2000]; *Shapiro v Levine*, 104 AD2d 800, 800-801 [2d Dept 1984]). "Absent an abuse of discretion, we will not disturb the court's control of the discovery process" (*MS Partnership*, 273 AD2d at 858; *see generally Kern v City of Rochester* [appeal No. 1], 267 AD2d 1026, 1026 [4th Dept 1999]), and we perceive no abuse of discretion here.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

826

CA 18-01253

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

PAULA L. GIBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

PAULA L. GIBBS, PLAINTIFF-APPELLANT PRO SE.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered May 18, 2018. The order denied the motion of plaintiff for a stay of all proceedings.

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

Memorandum: In this action seeking damages for breach of a homeowner's insurance policy, plaintiff appeals in appeal Nos. 1 and 2 from orders that denied her respective motions for a stay of further proceedings, including the scheduled retrial on damages. In appeal No. 3, plaintiff appeals from an order denying her motion to vacate an order that dismissed the action upon her default for failure to appear at the retrial. Contrary to plaintiff's contention in appeal Nos. 1 and 2, we conclude that Supreme Court did not abuse its discretion in denying her motions for a stay (*see* CPLR 2201). Contrary to plaintiff's contention in appeal No. 3, we conclude that the court did not err in denying her motion to vacate the default order (*see* CPLR 5015 [a]). We have considered plaintiff's remaining contention and conclude that it does not provide a basis to reverse or modify the orders in appeal Nos. 1-3 in this action.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

827

CA 18-02159

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

PAULA L. GIBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

PAULA L. GIBBS, PLAINTIFF-APPELLANT PRO SE.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered June 21, 2018. The order denied the motion of plaintiff for a stay of all proceedings.

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

Same memorandum as in *Gibbs v State Farm Fire and Cas. Co.* ([appeal No. 1] — AD3d — [Sept. 27, 2019] [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

828

CA 18-02160

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

PAULA L. GIBBS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STATE FARM FIRE AND CASUALTY COMPANY,
DEFENDANT-RESPONDENT.
(APPEAL NO. 3.)

PAULA L. GIBBS, PLAINTIFF-APPELLANT PRO SE.

MURA & STORM, PLLC, BUFFALO (ROY A. MURA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), dated October 23, 2018. The order denied the motion of plaintiff to vacate the order dismissing the action.

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

Same memorandum as in *Gibbs v State Farm Fire and Cas. Co.* ([appeal No. 1] — AD3d — [Sept. 27, 2019] [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

834

CA 18-01682

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

DONALD J. PHEARSDORF AND DANIELLE PHEARSDORF,
CLAIMANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 121775.)

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW C. LENAHAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

BRIAN CHAPIN YORK, JAMESTOWN, FOR CLAIMANTS-RESPONDENTS.

Appeal from a judgment of the Court of Claims (Renee Forgensi Minarik, J.), dated March 30, 2018. The interlocutory judgment determined that defendant is liable for the injuries sustained by claimant Donald J. Phearsdorf.

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

Memorandum: Defendant appeals from an interlocutory judgment, entered following a nonjury trial, in favor of claimants on the issue of liability under Labor Law § 240 (1). Viewing the evidence in the light most favorable to sustain the judgment and giving due deference to the determinations of the Court of Claims regarding witness credibility (*see generally Matter of City of Syracuse Indus. Dev. Agency [Alterm, Inc.]*, 20 AD3d 168, 170 [4th Dept 2005]), we conclude that, contrary to defendant's contention, there is a fair interpretation of the evidence supporting the court's determination that claimant Donald J. Phearsdorf was not furnished with the requisite safety devices and that the absence of adequate safety devices was a proximate cause of his injuries (*see generally Floyd v New York State Thruway Auth.*, 125 AD3d 1456, 1458 [4th Dept 2015]). We have reviewed defendant's remaining contentions and conclude that none warrants reversal or modification of the judgment.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

835

CA 18-01474

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

MICHAEL FINK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AL-SAR REALTY CORP. AND 2870 ERIE BOULEVARD NOVELTIES & GIFTS, INC., DEFENDANTS-APPELLANTS.

ROBIN J. GRAY, WYOMISSING, PENNSYLVANIA, FOR DEFENDANTS-APPELLANTS.

STANLEY LAW OFFICES, SYRACUSE (ANNA ROBBINS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered July 27, 2018. The order, insofar as appealed from, granted the motion of plaintiff for partial summary judgment pursuant to Labor Law § 240 (1) and denied in part the cross motion of defendants for summary judgment.

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

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking to recover damages for injuries that he sustained when he fell from a ladder while attempting to access an HVAC unit on the roof of a building allegedly owned by defendants. Supreme Court granted plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240 (1), denied those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims, and granted those parts of defendants' cross motion seeking summary judgment dismissing the Labor Law § 200 claim and the common-law negligence causes of action. Defendants appeal.

"It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court" (*Singh v Getty Petroleum Corp.*, 275 AD2d 740, 740 [2d Dept 2000]; *see* CPLR 5526; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). Here, defendants' appeal must be dismissed based on defendants' failure to provide an adequate record, including the failure to include the operative complaint, i.e., the amended complaint filed on July 3, 2017, which defendants seek to

dismiss in their cross motion (*see generally Mergl*, 19 AD3d at 1147).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

836

CA 19-00077

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

IN THE MATTER OF SIMARIS DIAZ,
CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

ROCHESTER-GENESEE REGIONAL TRANSPORTATION AUTHORITY (RGRTA), REGIONAL TRANSIT SERVICE, INC., AND LIFT LINE, INC.,
RESPONDENTS-RESPONDENTS.

CELLINO & BARNES, P.C., ROCHESTER (RICHARD P. AMICO OF COUNSEL), FOR CLAIMANT-APPELLANT.

BARCLAY DAMON LLP, ROCHESTER (STACY A. MARRIS OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered July 11, 2018. The order denied 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: Claimant appeals from an order that denied her application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Claimant was operating a garbage truck on August 2, 2017, when the truck was involved in a collision with a bus allegedly owned and operated by respondents. Shortly thereafter, an employee of respondent Regional Transit Service, Inc. went to the scene of the collision and spoke to claimant as part of an investigation. Claimant stated that she was unhurt. On October 24, 2017, claimant retained the services of a law firm, which prepared a notice of claim, but the notice of claim was not timely served. An application for leave to serve a late notice of claim was served on respondents on January 29, 2018. Supreme Court denied the application, and we affirm.

A party asserting a tort claim against a public corporation must serve a notice of claim within 90 days of the accrual of the claim (*see* General Municipal Law § 50-e [1] [a]). A court may, however, extend the time in which to serve a notice of claim upon consideration of several factors, including whether the claimant has “shown a reasonable excuse for the delay, whether [the] respondents had actual knowledge of the facts surrounding the claim within 90 days of its

accrual 'or within a reasonable time thereafter,' and whether the delay would cause substantial prejudice to the [respondents]" (*Matter of Diegelman v City of Buffalo*, 148 AD3d 1692, 1693 [4th Dept 2017], quoting § 50-e [5]). Although no factor is determinative, " 'one factor that should be accorded great weight is whether the [respondents] received actual knowledge of the facts constituting the claim in a timely manner' " (*Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]; *see Matter of Darrin v County of Cattaraugus*, 151 AD3d 1930, 1931 [4th Dept 2017]). "It is well established that '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim' " (*Turlington*, 143 AD3d at 1248; *see Darrin*, 151 AD3d at 1931). " 'Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed' " (*Matter of Szymkowiak v New York Power Auth.*, 162 AD3d 1652, 1653-1654 [4th Dept 2018]).

Here, it is undisputed that respondents lacked actual knowledge of claimant's alleged injuries within the 90-day statutory period. Moreover, the record establishes that claimant's attorneys did not promptly notify respondents of the essential facts of the claim upon discovering their failure to serve a notice of claim in a timely manner. Instead, for reasons that are not explained in the record, claimant's attorneys waited until 180 days had passed since the accident to serve the application. Although we agree with claimant that respondents failed to establish substantial prejudice resulting from the delay (*see generally Matter of Newcomb v Middle Country Cent. Sch. Dist.*, 28 NY3d 455, 466 [2016], *rearg denied* 29 NY3d 963 [2017]), claimant failed to provide a reasonable excuse. Therefore, we cannot conclude that the court clearly abused its broad discretion in denying claimant's application (*see generally Powell v Central N.Y. Regional Transp. Auth.*, 169 AD3d 1412, 1413-1414 [4th Dept 2019]; *Turlington*, 143 AD3d at 1249).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

838

KA 16-00850

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ABDIEL VAZQUEZ, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRIDGET L. FIELD OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 13, 2016. The judgment convicted defendant, upon his plea of guilty, of 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 robbery in the second degree (Penal Law § 160.10 [1]). Defendant contends on appeal that Supreme Court erred in determining following a pretrial hearing that the victim had an independent basis for his in-court identification of defendant. We reject that contention. The victim testified that he had an unobstructed view of defendant's face for over five minutes in well-lit areas inside and outside his residence during the commission of the offense (*see People v Young*, 20 AD3d 893, 894 [4th Dept 2005], *affd* 7 NY3d 40 [2006]; *People v Lopez*, 85 AD3d 1641, 1642 [4th Dept 2011], *lv denied* 17 NY3d 860 [2011]). The court properly concluded that the People established by clear and convincing evidence that the victim's observations of defendant during the commission of the crime provided an independent basis for an in-court identification (*see generally People v Marshall*, 26 NY3d 495, 504 [2015]). Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

842

KA 16-00190

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMAR A. GRAHAM, 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 Monroe County Court (Victoria M. Argento, J.), rendered July 30, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree and attempted kidnapping in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]) and attempted kidnapping in the second degree (§§ 110.00, 135.20). Contrary to defendant's contention, the oral and written waivers of the right to appeal establish that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Moore*, 158 AD3d 1312, 1312 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Cochran*, 156 AD3d 1474, 1474 [4th Dept 2017], *lv denied* 30 NY3d 1114 [2018]). While we agree with defendant that the written waiver includes improperly overbroad language, it is well established that "[a]ny nonwaivable issues purportedly encompassed by the waiver are excluded from the scope of the waiver [and] the remainder of the waiver is valid and enforceable" (*People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017] [internal quotation marks omitted]). Defendant's valid waiver of the right to appeal forecloses his contentions that County Court erred in compelling him to submit to a buccal swab for DNA analysis and in failing to adjourn the trial (*see People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]; *see generally People v Watt*, 82 AD3d 912, 912 [2d Dept 2011], *lv denied* 16 NY3d 900 [2011]). Furthermore, those contentions are also forfeited by his plea of guilty (*see People v King*, 155 AD3d 1574, 1574 [4th Dept 2017], *lv denied* 30 NY3d 1106 [2018]; *Smith*, 138 AD3d at 1416; *People v Simcox*, 219 AD2d 869, 869 [4th Dept 1995]).

Although a valid waiver of the right to appeal does not preclude defendant's challenge to the voluntariness of his plea, defendant failed to preserve that challenge for our review inasmuch as he did not move to withdraw the plea or to vacate the judgment of conviction (*see People v Mobayed*, 158 AD3d 1221, 1222 [4th Dept 2018], *lv denied* 31 NY3d 1015 [2018]; *People v Cruz*, 81 AD3d 1300, 1301 [4th Dept 2011], *lv denied* 17 NY3d 793 [2011]), and the "narrow, 'rare case' exception to the preservation doctrine" does not apply here (*People v Toxey*, 86 NY2d 725, 726 [1995], *rearg denied* 86 NY2d 839 [1995]; *see generally People v Hansen*, 95 NY2d 227, 230-232 [2000]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

843

KA 17-01753

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY R. MAGEE, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered July 10, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [1]), defendant contends that he did not validly waive his right to appeal and that the sentence is unduly harsh and severe. The record establishes, however, that defendant's waiver of the right to appeal, as a condition of the bargained-for plea agreement, was knowing, intelligent, and voluntary (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Colon*, 122 AD3d 1309, 1309 [4th Dept 2014], *lv denied* 25 NY3d 1200 [2015]). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

844

KA 17-01862

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANNIE J. SIMS, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered August 8, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [4]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses his challenge to the severity of his sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

845

KA 17-01539

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT SUDA, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered August 3, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). We reject defendant's sole contention on appeal that the waiver of indictment is jurisdictionally defective. Contrary to defendant's contention, the waiver accurately states the statutory provisions of "each offense to be charged in the superior court information" (CPL 195.20); thus this is not a case where the "waiver of indictment does not contain any data whatsoever" regarding the name of the offense to be charged (*People v Colon-Colon*, 169 AD3d 187, 192 [4th Dept 2019], *lv denied* 33 NY3d 975 [2019]). Further, the statutory provisions are not erroneously or misleadingly formatted, but instead accurately reflect the offense charged in the superior court information (*see* CPL 195.20).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

846

KA 18-01873

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HANDSOME RICE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 9, 2017. 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 modified on the law by vacating the surcharge and crime victim assistance fee and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him as a juvenile offender upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that County Court failed to satisfy its obligation to determine whether he was eligible for youthful offender treatment (*see generally People v Middlebrooks*, 25 NY3d 516, 525-527 [2015]; *People v Rudolph*, 21 NY3d 497, 499-501 [2013]). We reject defendant's contention. Where a court imposes sentence on a person who may be an eligible youth and who stands convicted of an armed felony, the court may, as it did here, "satisfy its obligation under *Middlebrooks* by declining to adjudicate the defendant a youthful offender after consideration on the record of factors pertinent to a determination whether an eligible youth should be adjudicated a youthful offender" (*People v Stitt*, 140 AD3d 1783, 1784 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]; *see People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]). Contrary to defendant's further contention, even assuming, arguendo, that he was eligible to be adjudicated a youthful offender, we conclude that the court did not abuse its discretion in declining to grant defendant that status (*see People v Lewis*, 128 AD3d 1400, 1400 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]), and we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see id.* at 1400-1401; *cf. People v Amir W.*, 107 AD3d 1639, 1640-1641 [4th Dept 2013]).

The sentence is not unduly harsh or severe. As the People correctly concede, however, the surcharge and crime victim assistance fee must be vacated because defendant is a juvenile offender (*see* Penal Law §§ 60.00 [2]; 60.10; *People v Antonio J.*, 173 AD3d 1743, 1744 [4th Dept 2019]; *People v Stump*, 100 AD3d 1457, 1458 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]). We therefore modify the judgment accordingly.

We have considered defendant's remaining contention and conclude that it does not require reversal or further modification of the judgment.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

847

KA 19-00389

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

KENNETH PASTORE, DEFENDANT-RESPONDENT.

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

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

Appeal from an amended order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated December 4, 2018. The amended order granted that part of defendant's omnibus motion seeking to suppress physical evidence seized from his vehicle and a statement defendant made to law enforcement after the seizure.

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

Memorandum: The People appeal from an amended order granting that part of defendant's omnibus motion seeking to suppress physical evidence seized following a limited search of his vehicle and defendant's statement made after the seizure. The evidence at the suppression hearing established that officers responded to the complainant's home after receiving a call that he had been threatened by defendant. The complainant told an officer that defendant threatened to shoot him and that he believed the threat was serious because defendant had been in possession of a black handgun prior to the instant incident. Defendant, who was seated in his truck, which was parked in front of the complainant's home, acknowledged that he had previously said he would shoot the complainant if the complainant entered defendant's property. Based on that information and defendant's admissions that he owned a rifle, which was at his home, and that he had a Virginia pistol permit but no New York pistol permit, the officers searched defendant's person but recovered no weapons. The officers then searched the area near the driver's seat of defendant's truck, from which they recovered a loaded handgun.

We conclude that, contrary to the People's contention, Supreme Court properly suppressed the handgun recovered from defendant's vehicle. The automobile exception to the warrant requirement permits a police officer to " 'search a vehicle without a warrant when [the

officer has] probable cause to believe that evidence or contraband will be found there' " (*People v Johnson*, 159 AD3d 1382, 1383 [4th Dept 2018], *lv denied* 31 NY3d 1083 [2018], quoting *People v Galak*, 81 NY2d 463, 467 [1993]). "Probable cause does not require proof beyond a reasonable doubt, but merely requires a reasonable ground for belief" (*People v Ray*, 159 AD3d 1429, 1430 [4th Dept 2018], *lv denied* 31 NY3d 1086 [2018] [internal quotation marks omitted]). "[A]bsent probable cause, it is unlawful for a police officer to invade the interior of a stopped vehicle once the suspects have been removed and patted down without incident, as any immediate threat to the officers' safety has consequently been eliminated" (*People v Mundo*, 99 NY2d 55, 58 [2002]; *see People v Torres*, 74 NY2d 224, 226 [1989]). Here, the police did not have probable cause to search defendant's vehicle after they searched him and determined that there was no immediate threat to their safety (*see Torres*, 74 NY2d at 227), inasmuch as defendant was not alleged to have brandished a gun at the scene, there was inconclusive evidence that he actually threatened the complainant at the scene, defendant did not engage in any suspicious or furtive movements, and the officers did not observe any weapons or related contraband in the vehicle or on defendant's person (*cf. Johnson*, 159 AD3d at 1383; *People v Page*, 137 AD3d 817, 817 [2d Dept 2016], *lv denied* 27 NY3d 1137 [2016]).

Contrary to the People's further contention, the officers' search of defendant's vehicle was not justifiable as a limited safety search. Probable cause is not required for a limited search of a vehicle " 'where, following a lawful stop, facts revealed during a proper inquiry or other information gathered during the course of the encounter lead to the conclusion that a weapon located within the vehicle presents an actual and specific danger to the officers' safety sufficient to justify a further intrusion' " (*People v Jones*, 39 AD3d 1169, 1171 [4th Dept 2007], quoting *Torres*, 74 NY2d at 231 n 4). However, the Court of Appeals has "emphasized . . . that a reasonable suspicion alone will not suffice" and that "the likelihood of a weapon in the [vehicle] must be substantial and the danger to the officer's safety actual and specific" (*People v Carvey*, 89 NY2d 707, 711 [1997] [internal quotation marks omitted]). Here, the People failed to tender any evidence demonstrating a substantial likelihood that a weapon was in the vehicle or that the presence of two passengers in the vehicle presented a specific danger to the officers (*cf. People v Grullon*, 44 AD3d 516, 517 [1st Dept 2007], *lv denied* 10 NY3d 765 [2008]; *People v Alston*, 195 AD2d 396, 397-398 [1st Dept 1993]; *People v Ponce*, 182 AD2d 1103, 1103 [4th Dept 1992], *lv denied* 80 NY2d 836 [1992]).

In light of the foregoing, defendant's post-seizure statement to a law enforcement agent was properly suppressed as fruit of the poisonous tree (*see generally People v James*, 27 AD3d 1089, 1091 [4th Dept 2006], *lv denied* 6 NY3d 895 [2006]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

849

CAF 18-00898

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

IN THE MATTER OF JOVAN F., JR.

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

ORDER

TIFFANY R.W., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered March 30, 2018 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: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

850

CAF 18-01487

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

IN THE MATTER OF JOVAN F., JR.

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

ORDER

TIFFANY R.W., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (PHILIP ROTHSCHILD OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

ANDREW S. GREENBERG, SYRACUSE, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Julie A. Cecile, J.), entered July 20, 2018 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondent neglected the subject child, placed the child with relatives, and placed respondent under the supervision of petitioner.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

851

CAF 18-00760

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

IN THE MATTER OF SUSAN T.,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CRYSTAL T., RESPONDENT-RESPONDENT,
AND DARIUS S., SR., RESPONDENT-APPELLANT.

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

JOHN G. KOSLOSKY, UTICA, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Herkimer County (John J. Brennan, J.), entered January 18, 2018 in a proceeding pursuant to Family Court Act article 6. The order granted petitioner custody of the subject children.

It is hereby ORDERED that said appeal insofar as it concerns respondents' oldest child is unanimously dismissed and the case is held, the decision is reserved and the matter is remitted to Family Court, Herkimer County, for further proceedings in accordance with the following memorandum: Respondent father appeals from an order that granted, without a hearing, petitioner grandmother's petition for custody of respondents' three children. Initially, we dismiss as moot the appeal from the order insofar as it concerns the oldest child because she has attained the age of majority (*see Matter of Delia S. [Desiree S.]*, 122 AD3d 1449, 1449 [4th Dept 2014]). With respect to Family Court's award of custody of the other two children to the grandmother, we conclude that the court failed to set forth " 'those facts upon which the rights and liabilities of the parties depend' " (*Matter of Russell v Banfield*, 12 AD3d 1081, 1081 [4th Dept 2004]; *see Matter of Valentin v Mendez*, 165 AD3d 1643, 1643-1644 [4th Dept 2018]).

"[E]ffective appellate review . . . requires that appropriate factual findings be made by the trial court" (*Matter of Rocco v Rocco*, 78 AD3d 1670, 1671 [4th Dept 2010]). Here, it appears from the record on appeal—which contains, among other things, references to the grandmother's ongoing status as a foster parent for the subject children since 2015—that this custody order was intended to resolve a pending child protective proceeding against one or both respondents. Nonetheless, the court failed to reference in its bench decision or its order either Family Court Act §§ 1055-b or 1089-a, the statutes that provide the requisite procedure for terminating an article 10

proceeding by granting custody to "a relative or relatives or other suitable person or persons pursuant to article six of this act" (§ 1055-b [a]; *see* § 1089-a [a]). Further, if this custody petition, in support of which nonparty Herkimer County Department of Social Services appeared but the grandmother did not, was intended to resolve a pending child protective proceeding, then the court erred in failing both to hold a joint hearing upon the father's objection to the proposed custody arrangement and to make the statutorily required findings supporting its award of custody to the grandmother (*see* §§ 1055-b [a] [iv] [A]; 1089-a [a] [iii] [A]).

Even assuming, arguendo, that the custody petition was not intended to resolve a pending child protective proceeding pursuant to Family Court Act §§ 1055-b or 1089-a, we conclude that the court nonetheless erred in failing to make any express finding that the grandmother met her burden of establishing that extraordinary circumstances existed such that she had standing to seek custody (*see generally Matter of Suarez v Williams*, 26 NY3d 440, 446 [2015]), nor did it provide an "analysis of those factors that traditionally affect the best interests of a child" (*Valentin*, 165 AD3d at 1644 [internal quotation marks omitted]). Finally, the order erroneously indicates that it was entered on the consent of both respondents, despite the court's express recognition in its bench decision of the father's objection to the proposed custody arrangement (*see Matter of Esposito v Magill*, 140 AD3d 1772, 1773 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]). We therefore hold the case, reserve decision, and remit the matter to Family Court to set forth its factual findings with respect to respondents' younger two children and, if applicable, to hold the statutorily required joint hearing (*see* §§ 1055-b [a] [iv] [A]; 1089-a [a] [iii] [A]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

857

CA 18-01732

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

JOSEPH HARTNETT AND MARIKA HARTNETT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL ZUCHOWSKI, ET AL., DEFENDANTS,
HUNT REAL ESTATE CORPORATION AND BEATRICE
DUNWOODIE, IN HER CAPACITY AS A REAL ESTATE
AGENT FOR HUNT REAL ESTATE CORPORATION,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LAW OFFICES OF STEWART H. FRIEDMAN, NEW YORK CITY (ROBERT F. HORVAT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered October 20, 2017. The order granted the motion of defendants Hunt Real Estate Corporation and Beatrice Dunwoodie for summary judgment dismissing plaintiffs' complaint and any and all cross claims against them.

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

Memorandum: After Joseph Hartnett (plaintiff) tripped and fell while descending a set of stairs in front of a house owned by defendant Michael Zuchowski, plaintiffs commenced this personal injury action against, among others, Hunt Real Estate Corporation and Beatrice Dunwoodie, in her capacity as a real estate agent for Hunt Real Estate Corporation (collectively, Hunt defendants), as well as Zuchowski. Plaintiffs appeal, in appeal No. 1, from an order granting the Hunt defendants' motion for summary judgment dismissing the complaint and all cross claims against them. In appeal No. 2, plaintiffs appeal from a further order that, inter alia, denied their cross motion for partial summary judgment against Zuchowski on the issue of liability. We affirm in both appeals.

Contrary to plaintiffs' contention in appeal No. 1, the Hunt defendants, as real estate brokers "whose only connection to the property was listing it for sale and showing it to prospective buyers, met their initial burden on their motion by establishing that they did

not occupy, own, or control the . . . home and did not employ it for a special use, and thus did not owe plaintiff a duty of care" (*Knight v Realty USA.COM, Inc.*, 96 AD3d 1444, 1444 [4th Dept 2012]; *see Pirie v Krasinski*, 18 AD3d 848, 850 [2d Dept 2005]). Plaintiffs failed to raise a triable issue of fact in opposition (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Contrary to plaintiffs' contention in appeal No. 2, Supreme Court properly denied their cross motion for partial summary judgment against Zuchowski on the issue of liability. In support of their cross motion, plaintiffs relied on, inter alia, an expert affidavit in which an architect opined that the staircase on which plaintiff fell violated several sections of the New York State Uniform Fire Prevention and Building Code (Building Code). Inasmuch as the evidence of Building Code violations "constituted only some evidence of negligence" rather than negligence per se (*Elliott v City of New York*, 95 NY2d 730, 735 [2001]; *see Morreale v Froelich*, 125 AD3d 1280, 1281 [4th Dept 2015]; *cf. generally Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 489-490 [2012]), it was insufficient to meet plaintiffs' initial burden on the cross motion (*see generally Alvarez*, 68 NY2d at 324), which the court thus properly denied (*see Hansford v Wellsby*, 149 AD3d 1603, 1603-1604 [4th Dept 2017]).

Even assuming, arguendo, that plaintiffs met their initial burden on the cross motion, we note that the evidence Zuchowski submitted in opposition to the cross motion included the affidavit of an expert indicating that the stairs were not in violation of the Building Code and that the version of that code on which plaintiffs' expert relied did not apply. Thus it will be "for a jury to decide whether [Zuchowski] violated the Building Code and, if so, whether that violation proximately caused plaintiff's accident" (*Romanowski v Yahr*, 5 AD3d 985, 986 [4th Dept 2004]; *see Morreale*, 125 AD3d at 1281-1282). In addition, Zuchowski submitted evidence raising a triable issue of fact whether the defect is trivial (*see generally Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 80-82 [2015]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

858

CA 18-01733

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

JOSEPH HARTNETT AND MARIKA HARTNETT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MICHAEL ZUCHOWSKI, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

JOSEPH G. MAKOWSKI, LLC, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

OSBORN, REED & BURKE, LLP, ROCHESTER (JEFFREY P. DIPALMA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered December 4, 2017. The order, insofar as appealed from, denied plaintiffs' cross motion for partial summary judgment against defendant Michael Zuchowski on the issue of liability.

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

Same memorandum as in *Hartnett v Zuchowski* ([appeal No. 1] — AD3d — [Sept. 27, 2019] [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

865

KA 17-00560

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GREGORY C. DINANT, JR., DEFENDANT-APPELLANT.

THEODORE W. STENUF, MINOA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (Donald E. Todd, J.), rendered April 13, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree, assault in the third degree, criminal mischief in the third degree, criminal possession of a weapon in the fourth degree, reckless endangerment (five counts), reckless driving and leaving the scene of an incident without reporting.

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, assault in the second degree (Penal Law § 120.05 [4]), assault in the third degree (§ 120.00 [2]), criminal mischief in the third degree (§ 145.05 [2]), and criminal possession of a weapon in the fourth degree (§ 265.01 [2]) stemming from a “road rage” incident in which defendant, while driving a truck, chased a car and then struck the bumper of that car, sending it careening into a light pole and causing injuries to two passengers of the car. Defendant contends that County Court erred in granting the People’s request to submit reckless assault in the second degree (§ 120.05 [4]) and reckless assault in the third degree (§ 120.00 [2]) to the jury as lesser included offenses of intentional assault in the first degree (§ 120.10 [1]) and intentional assault in the second degree (§ 120.05 [2]) related to the two injured passengers of the car. As a preliminary matter, we note that defendant’s challenge to the submission of the charge of assault in the third degree is not preserved for our review inasmuch as defendant did not object to the submission of that lesser included offense (*see People v Clark*, 161 AD2d 1181, 1181 [4th Dept 1990], *lv denied* 76 NY2d 786 [1990]; *People v Dunbar*, 145 AD2d 501, 502 [2d Dept 1988]; *cf. People v Ford*, 62 NY2d 275, 282-283 [1984]). In any event, defendant’s contention lacks merit. The charges submitted by the court qualify as lesser included

offenses of the respective charges in the indictment (*see People v Leonardo*, 89 AD2d 214, 217 [4th Dept 1982], *affd* 60 NY2d 683 [1983]; *People v Williams*, 212 AD2d 1065, 1065 [4th Dept 1995], *lv denied* 85 NY2d 916 [1995]), and there is a reasonable view of the evidence that would support a finding that defendant did not intentionally cause the injuries but, rather, recklessly caused the injuries (*see* Penal Law §§ 120.00 [2]; 120.05 [4]; *see generally* CPL 1.20 [37]; 300.50 [1]; *People v Glover*, 57 NY2d 61, 63 [1982]). Contrary to defendant's contention, the submission to the jury of those lesser included offenses did not improperly change the theory of the case (*see People v Silar*, 135 AD3d 453, 454 [1st Dept 2016], *lv denied* 27 NY3d 1006 [2016]; *cf. People v Russell*, 147 AD2d 280, 281-282 [1st Dept 1989]).

Defendant's further contention that the court erred in purportedly submitting criminal mischief in the third degree (Penal Law § 145.05 [2]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]) as lesser included offenses of criminal mischief in the second degree (§ 145.10) and criminal possession of a weapon in the third degree (§ 265.02 [1]) is unpreserved (*see generally People v Green*, 35 AD3d 1211, 1212 [4th Dept 2006], *lv denied* 8 NY3d 985 [2007]) and, in any event, lacks merit. Before trial, the court reduced the greater counts of criminal mischief and criminal possession of a weapon to the lesser offenses due to certain insufficiencies in the grand jury proof, and the jury was instructed on only those reduced offenses.

Although defendant raises challenges to the prosecutor's summation and contends that the verdict was inconsistent, those contentions are not preserved for our review (*see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016]; *People v Edwards*, 129 AD3d 1499, 1500 [4th Dept 2015], *lv denied* 27 NY3d 964 [2016]), 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]).

With respect to the sentence, defendant contends that he was penalized for asserting his right to trial and that a 5% surcharge was improperly imposed. Those contentions are not preserved for our review (*see People v Huddleston*, 160 AD3d 1359, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]; *People v Kirkland*, 105 AD3d 1337, 1338 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]) and, in any event, lack merit (*see People v Garner*, 136 AD3d 1374, 1374-1375 [4th Dept 2016], *lv denied* 27 NY3d 997 [2016]; *Kirkland*, 105 AD3d at 1338). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

866

KA 18-00284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL A. LOVE, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Thomas P. Franczyk, J.), entered December 21, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that he was entitled to a downward departure from his presumptive risk level because the victim's inability to consent was due solely to the victim's age. We reject that contention inasmuch as defendant "failed to establish by a preponderance of the evidence any ground for a downward departure from his risk level" (*People v Gillotti*, 119 AD3d 1390, 1391 [4th Dept 2014]; *see People v King*, 148 AD3d 1599, 1600 [4th Dept 2017], *lv denied* 29 NY3d 914 [2017]). "A court may choose to downwardly depart from the risk assessment 'in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for sexual contact with the victim, risk factor 2] results in an over-assessment of the offender's risk to public safety' " (*People v Fryer*, 101 AD3d 835, 836 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 9 [2006]; *see People v Cathy*, 134 AD3d 1579, 1580 [4th Dept 2015]). Here, although there was no evidence of forcible compulsion, a downward departure is not warranted given the age disparity between the then-55-year-old defendant and the 13-year-old victim and the circumstances surrounding the sexual assault (*see Fryer*, 101 AD3d at 836; *People v Modica*, 80 AD3d 590, 592 [2d Dept

2011]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

867

KA 17-01320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHRISTOPHER GARIS, DEFENDANT-APPELLANT.

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

GREGORY J. MCCAFFREY, DISTRICT ATTORNEY, GENESEO (VICTOR ROWCLIFFE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered January 26, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

872

CA 19-00407

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

JOSEPH P. PANELLA, PLAINTIFF-APPELLANT,

V ORDER

STATE OF NEW YORK, OFFICE OF COURT ADMINISTRATION OF STATE OF NEW YORK, HONORABLE LAWRENCE MARKS, IN HIS PROFESSIONAL CAPACITY ONLY, AS CHIEF ADMINISTRATIVE JUDGE OF STATE OF NEW YORK, DEFENDANTS-RESPONDENTS.

ROBERT F. JULIAN, P.C., UTICA (STEPHANIE A. PALMER OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Norman W. Seiter, Jr., J.), entered September 5, 2018. The order and judgment granted the motion of defendants to dismiss the complaint.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

874

CA 19-00366

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

SOUTHWESTERN INVESTORS GROUP, LLC,
PLAINTIFF-APPELLANT,

V ORDER

JH PORTFOLIO DEBT EQUITIES, LLC,
DEFENDANT-RESPONDENT,
DARREN TURCO AND JACOB ADAMO,
DEFENDANTS.

COLLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HAGERTY & BRADY, BUFFALO (MICHAEL A. BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

PHILLIPS LYTLE LLP, BUFFALO (SEAN C. MCPHEE OF COUNSEL), FOR DEFENDANTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered July 5, 2018. The order, among other things, granted the motion of defendant JH Portfolio Debt Equities, LLC for partial summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 8, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

875

OP 19-00620

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

IN THE MATTER OF ASHLEY NEWBURY, PETITIONER,

V ORDER

HON. SANFORD A. CHURCH, IN HIS OFFICIAL CAPACITY AS PISTOL PERMIT LICENSING OFFICER FOR NIAGARA COUNTY, RESPONDENT.

SANDERS & SANDERS, CHEEKTOWAGA (HARVEY P. SANDERS OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY 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 reverse the denial of petitioner's pistol permit application.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 23 and 24, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

877

CA 19-00272

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

NATIONWIDE AFFINITY INSURANCE COMPANY OF AMERICA,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

BEACON ACUPUNCTURE, P.C., COLUMBUS IMAGING CENTER, LLC, LONGEVITY MEDICAL SUPPLY, INC.,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

HOLLANDER LEGAL GROUP, P.C., MELVILLE (ALLAN HOLLANDER OF COUNSEL), HARRIS J. ZAKARIN, P.C., FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered August 7, 2018. The order, insofar as appealed from, denied in part plaintiff's motion for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is granted in its entirety, and judgment is granted in favor of plaintiff as follows:

> It is ADJUDGED and DECLARED that plaintiff is not obligated to pay the claims of defendants-respondents submitted in connection with their provision of healthcare services or medical equipment to defendant Quentin Walker.

Memorandum: Plaintiff commenced this action seeking a declaration that it was not obligated to pay certain insurance claims related to a motor vehicle accident in which, as relevant here, defendant Quentin Walker was allegedly injured. Plaintiff moved for summary judgment on the complaint against defendants-respondents (defendants), which provided healthcare services or medical equipment to Walker, and defendant Nu Age Medical Solutions, Inc. After noting that the "issue [was] limited to the bills relating to" Walker, Supreme Court denied the motion with respect to defendants. In its order, the court determined that, although plaintiff had met its initial burden and defendants had failed to raise a triable issue of fact in opposition, the motion was premature with respect to defendants. Plaintiff now appeals from the order insofar as it denied the motion in part.

We agree with plaintiff that its motion was not premature

inasmuch as defendants failed to demonstrate that " 'discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of' " plaintiff (*Gannon v Sadeghian*, 151 AD3d 1586, 1588 [4th Dept 2017]). " 'Mere hope that somehow the [nonmovant] will uncover evidence that will [help its] case provides no basis . . . for postponing a determination of a summary judgment motion' " (*Mackey v Sangani*, 238 AD2d 919, 920 [4th Dept 1997]). Further, we agree with the court that plaintiff met its burden as movant and that defendants failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). We therefore reverse the order insofar as appealed from, grant the motion in its entirety, and grant judgment in favor of plaintiff declaring that it is not obligated to pay the claims of defendants submitted in connection with their provision of healthcare services or medical equipment to defendant Quentin Walker.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

879

CA 18-02334

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

JUDD SUNSHINE AND LAURIE SUNSHINE,
PLAINTIFFS-APPELLANTS,

V ORDER

LONDRA BELL, DOING BUSINESS AS BUFFALO
CONTRACTING, AND BUFFALO CONTRACTING, LLC,
DEFENDANTS-RESPONDENTS.

JOHN J. LAVIN, P.C., BUFFALO (JOHN J. LAVIN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

WESOLOWSKI LAW GROUP, P.C., BUFFALO (KEITH R. WESOLOWSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered October 10, 2018. The order, among other things, granted the motion of defendants to dismiss plaintiffs' first, third, fourth, sixth and seventh causes of action.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

884

KA 15-01393

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. LACROSS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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 (Thomas E. Moran, J.), rendered July 16, 2015. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]). We reject defendant's contention that the photo array from which a witness identified him was unduly suggestive, thereby tainting that witness's subsequent in-court identification of defendant. "[A]lthough [ ]defendant was the only person depicted in a red shirt in the photo array, it was 'not so distinctive as to be conspicuous' " (*People v Lundy*, 165 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019]; *see People v Mead*, 41 AD3d 1306, 1307 [4th Dept 2007], *lv denied* 9 NY3d 963 [2007]).

Defendant's challenge to the legal sufficiency of the evidence with respect to whether he used or threatened to use a dangerous instrument is also without merit. "[T]he victim's testimony that defendant removed a knife from his pocket immediately before asking for money is legally sufficient to establish that defendant possessed a dangerous instrument" (*People v Simmons*, 128 AD3d 1379, 1379 [4th Dept 2015], *lv denied* 26 NY3d 935 [2015]). Further, the jury could have reasonably concluded that, by doing so, defendant was making an implied threat to use the knife against the victim (*see id.* at 1380; *People v Espada*, 94 AD3d 451, 452 [1st Dept 2012], *lv denied* 19 NY3d 1025 [2012]; *People v Mitchell*, 59 AD3d 739, 739-740 [2d Dept 2009], *lv denied* 12 NY3d 918 [2009]). "[A]ny inconsistency between the victim's trial testimony and the victim's testimony from prior

proceedings was not so great as to render his trial testimony incredible as a matter of law" (*Simmons*, 128 AD3d at 1380). Contrary to defendant's additional contention, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Johnson*, 105 AD3d 1452, 1452-1453 [4th Dept 2013], *lv denied* 21 NY3d 1016 [2013]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Finally, the sentence is not unduly harsh or severe.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

886

KA 16-01483

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAMON SALLARD, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 20, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: 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 his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered. We reject that contention. "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 generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's contention that the court erred in denying his motion to withdraw the plea survives the valid waiver of the right to appeal (*see People v Walcott*, 164 AD3d 1593, 1593 [4th Dept 2018], *lv denied* 32 NY3d 1116 [2018]), but we conclude that it is without merit. Defendant's statements during the plea colloquy belie his later assertions of innocence (*see id.*; *see generally People v Dixon*, 29 NY2d 55, 57 [1971]).

Defendant's further contention that the court failed to make a sufficient inquiry into his request for substitution of counsel "is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied*

19 NY3d 976 [2012] [internal quotation marks omitted]). In any event, we conclude that defendant's contention is without merit (*see People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* 584 US —, 138 S Ct 1571 [2018]; *see generally People v Sides*, 75 NY2d 822, 824-825 [1990]). Finally, the valid waiver of the right to appeal encompasses defendant's challenges to the suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Sampson*, 156 AD3d 1484, 1484 [4th Dept 2017], *lv denied* 31 NY3d 1017 [2018]) and the severity of the sentence (*see People v Johnson* [appeal No. 1], 169 AD3d 1366, 1366 [4th Dept 2019], *lv denied* 33 NY3d 949 [2019]; *see generally Lopez*, 6 NY3d at 255).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

889

KA 15-01678

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. LACROSS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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 (Thomas E. Moran, J.), rendered August 10, 2015. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Defendant's sole argument on appeal is that his plea should be vacated in the event that his separate judgment of conviction for robbery in the first degree is reversed (*see generally People v Pichardo*, 1 NY3d 126, 129 [2003]). Defendant's contention is academic because that judgment of conviction has been affirmed (*see People v Lacross*, — AD3d — [Sept. 27, 2019] [4th Dept 2019] [decided herewith]) and, thus, there is no basis for reversal here (*see People v Meacham*, 151 AD3d 1666, 1667 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017]; *People v Faulkner*, 137 AD3d 419, 419 [1st Dept 2016]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

891

CAF 18-00532

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

IN THE MATTER OF KAYLA V.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CRAIG V., RESPONDENT-APPELLANT.

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

JOHN A. HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered February 14, 2018 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 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 adjudicated his child to be neglected. We affirm. A neglected child is defined as, among other things, a child less than 18 years of age "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his [or her] parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof" (Family Ct Act § 1012 [f] [i] [B]). As the Court of Appeals has explained, "[t]he statute . . . imposes two requirements for a finding of neglect, which must be established by a preponderance of the evidence . . . . First, there must be proof of actual (or imminent danger of) physical, emotional or mental impairment to the child . . . . Second, any impairment, actual or imminent, must be a consequence of the parent's failure to exercise a minimum degree of parental care . . . . This is an objective test that asks whether a reasonable and prudent parent [would] have so acted, or failed to act, under the circumstances" (*Matter of Afton C. [James C.]*, 17 NY3d 1, 9 [2011] [internal quotation marks omitted]).

Here, we conclude that there is a sound and substantial basis in the record supporting Family Court's determination that petitioner met

its burden of establishing that the child was neglected (*see generally Matter of Sean P. [Brandy P.]*, 156 AD3d 1339, 1339-1340 [4th Dept 2017], *lv denied* 31 NY3d 903 [2018]). The evidence adduced by petitioner established that the father engaged in conduct that included sleeping in the same bed as the child, lying on top of her, and moving up and down on top of her. Petitioner's witnesses also testified that the father placed his genitals against the child's buttocks. Contrary to the father's contention, in this neglect proceeding, petitioner was not required to prove that the father's actions were done for the purpose of sexual gratification (*see generally* Family Ct Act § 1012 [f] [i] [B]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The court did not credit the father's testimony that he was merely hugging the child. "We accord great weight and deference to the court's determinations, 'including its drawing of inferences and assessment of credibility,' and we will not disturb those determinations where, as here, they are supported by the record" (*Matter of Emily W. [Michael S.—Rebecca S.]*, 150 AD3d 1707, 1709 [4th Dept 2017]). Contrary to the father's further contention, petitioner established that the child was placed in actual or imminent danger of physical, emotional, or mental impairment by his conduct (*see generally Nicholson*, 3 NY3d at 369). The testimony of petitioner's witnesses showed that the child was clearly impacted by the father's conduct inasmuch as she told others that she did not like it, it made her uncomfortable, and she wanted it to stop.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

892

CAF 18-00088

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

IN THE MATTER OF BROOKE T.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

TERRI T., RESPONDENT-APPELLANT.

ROBERT GALLAMORE, OSWEGO, FOR RESPONDENT-APPELLANT.

JEFFERY G. TOMPKINS, CAMDEN, FOR PETITIONER-RESPONDENT.

WALTER J. BURKARD, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oswego County (James K. Eby, J.), entered December 13, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. We affirm.

Contrary to the mother's contention, petitioner established by clear and convincing evidence that it made the requisite diligent efforts to encourage and strengthen her relationship with the child (*see Matter of Soraya S. [Kathryne T.]*, 158 AD3d 1305, 1305-1306 [4th Dept 2018], *lv denied* 31 NY3d 908 [2018]; *Matter of Holden W. [Kelly W.]*, 81 AD3d 1390, 1390 [4th Dept 2011], *lv denied* 16 NY3d 712 [2011]). Contrary to the mother's further contention, she was not denied effective assistance of counsel (*see Matter of Deanna E.R. [Latisha M.]*, 169 AD3d 691, 692 [2d Dept 2019]; *Matter of Kelsey R.K. [John J.K.]*, 113 AD3d 1139, 1140 [4th Dept 2014], *lv denied* 22 NY3d 866 [2014]). Finally, Family Court did not err in failing, sua sponte, to appoint a guardian ad litem for the mother (*see Matter of Leala T.*, 55 AD3d 1007, 1008 [3d Dept 2008]; *cf. Matter of Jesten J.F. [Ruth P.S.]*, 167 AD3d 1527, 1527-1529 [4th Dept 2018]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

893

CAF 18-00539

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

IN THE MATTER OF EDWARD D. DILLENBECK,
PETITIONER-RESPONDENT,

V ORDER

KELLY C. TRZCINSKI, RESPONDENT-APPELLANT.

IN THE MATTER OF KELLY C. TRZCINSKI,
PETITIONER-APPELLANT,

V

EDWARD D. DILLENBECK, RESPONDENT-RESPONDENT.

PETER J. DIGIORGIO, JR., UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered March 9, 2018 in proceedings pursuant to Family Court Act article 6. The order, among other things, adjudged that Kelly C. Trzcinski had willfully violated orders of the court and awarded Edward D. Dillenbeck sole custody of the subject children.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

897

CA 19-00470

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS FOR THE YEAR 2012 (4-YEAR) OR PRIOR BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF THE REAL PROPERTY TAX LAW OF THE STATE OF NEW YORK BY THE COUNTY OF OSWEGO.

MEMORANDUM AND ORDER

KEVIN L. GARDNER, IN HIS OFFICIAL CAPACITY AS OSWEGO COUNTY TREASURER, PETITIONER-RESPONDENT;

CHARLES R. TRUST, JR., RESPONDENT-APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (AMANDA M. THOMSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

RICHARD C. MITCHELL, COUNTY ATTORNEY, OSWEGO, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered September 5, 2018. The order denied respondent's motion to vacate the default judgment of foreclosure entered April 25, 2016.

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

Memorandum: Petitioner commenced this in rem tax foreclosure proceeding pursuant to RPTL article 11 seeking to foreclose delinquent tax liens on the subject property. Petitioner subsequently sought and obtained a default judgment of foreclosure that was entered in April 2016. In July 2018, respondent moved for, inter alia, vacatur of the judgment. Supreme Court denied the motion, and we affirm. "A motion to reopen a default judgment of tax foreclosure may not be brought later than one month after entry of the judgment" (*Matter of County of Herkimer [Moore]*, 104 AD3d 1332, 1333 [4th Dept 2013] [internal quotation marks omitted]; *see* RPTL 1131). Here, the motion was time-barred inasmuch as it was brought more than one month after entry of the default judgment of foreclosure (*see Matter of County of Ontario [Duvall]*, 169 AD3d 1508, 1508 [4th Dept 2019]; *Moore*, 104 AD3d at 1333).

Respondent contends that the court lacked jurisdiction to issue the default judgment of foreclosure because petitioner failed to comply with the notice requirements of RPTL 1125. We reject that contention (*see Duvall*, 169 AD3d at 1508-1509; *Moore*, 104 AD3d at

1333-1334). Pursuant to RPTL 1125 (1) (a) (i) and (b) (i), petitioner was required to send notice of the foreclosure proceeding by both certified mail and ordinary first class mail to the owner whose interest was a matter of public record on the date the list of delinquent taxes was filed (*see Matter of County of Seneca [Maxim Dev. Group]*, 151 AD3d 1611, 1612 [4th Dept 2017]). "[T]he failure to substantially comply with the requirement of providing the taxpayer with proper notice constitutes a jurisdictional defect which operates to invalidate the sale or prevent the passage of title" (*id.* [internal quotation marks omitted]). Here, petitioner established that he substantially complied with the notice requirements of RPTL 1125 (*see Matter of County of Herkimer [Jones]*, 34 AD3d 1327, 1328 [4th Dept 2006], *lv dismissed* 8 NY3d 955 [2007]).

Respondent's contention that the court should have vacated the default judgment of foreclosure pursuant to CPLR 5015 (a) (1) and (3) is not preserved for our review (*see PNC Bank, N.A. v Harmonson*, 154 AD3d 1347, 1348 [4th Dept 2017]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, we conclude that his contention is without merit (*see Matter of Foreclosure of Tax Liens*, 144 AD3d 1033, 1034-1035 [2d Dept 2016]). Finally, respondent contends that the default judgment of foreclosure should be vacated in the interests of substantial justice because there is no prejudice to petitioner. We conclude that such relief cannot be granted where, as here, the motion to vacate was untimely (*see Matter of County of Wayne [Schenk]*, 169 AD3d 1501, 1502-1503 [4th Dept 2019]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

902

CA 19-00432

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

CARLEY J. SMITH, PLAINTIFF-APPELLANT,

V ORDER

SAMARITAN MEDICAL CENTER, DEFENDANT,
AND ELLIOT S. COHEN, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

STANLEY LAW OFFICES, LLP, SYRACUSE (ANNA B. ROBBINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered August 27, 2018. The order, among other things, denied plaintiff's motion to amend her bill of particulars.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

903

CA 19-00434

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

CARLEY J. SMITH, PLAINTIFF-APPELLANT,

V ORDER

SAMARITAN MEDICAL CENTER, DEFENDANT,
AND ELLIOT S. COHEN, M.D., DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

STANLEY LAW OFFICES, LLP, SYRACUSE (ANNA B. ROBBINS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (CORY J. SCHOONMAKER OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered November 28, 2018. The order granted the motion of defendant Elliot S. Cohen, M.D., for summary judgment.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

906

TP 19-00341

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

IN THE MATTER OF IRRON JOHNSON, 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.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered February 19, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that said proceeding is unanimously dismissed without costs as moot (*see Matter of Free v Coombe*, 234 AD2d 996 [4th Dept 1996]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

909

KA 17-00185

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES JONES, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered November 22, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). By failing to move to withdraw the plea or to vacate the judgment, defendant failed to preserve for our review his contention that, based on his alleged mental illness and comments that he made during the plea colloquy and the sentencing—hearing, his guilty plea was not voluntarily, knowingly, and intelligently entered (*see People v Wilkes*, 160 AD3d 1491, 1491 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]; *People v Williams*, 124 AD3d 1285, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1078 [2015]). Contrary to defendant's contention, this case does not fall within the rare exception to the preservation requirement because nothing defendant said during the plea colloquy or the sentencing hearing "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[ed] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]; *see Williams*, 124 AD3d at 1285-1286).

Defendant's comment during the factual allocution about the firearm's operability was equivocal and did not cast significant doubt on whether the gun actually functioned (*see People v Goldstein*, 12 NY3d 295, 301 [2009]; *People v Ramos*, 164 AD3d 922, 923 [2d Dept 2018], *lv denied* 32 NY3d 1114 [2018]). At most, defendant's comment betrayed his lack of knowledge with respect to the firearm's

operability, but defendant's knowledge of the operability of the firearm is not an element of the offense (*see People v Brown*, 107 AD3d 1477, 1478 [4th Dept 2013], *lv denied* 21 NY3d 1040 [2013]). In addition, defendant's comment at sentencing did not cast doubt on his guilt because the challenged comment, which concerned the length of the available sentencing range, did not undermine any of the facts that supported defendant's guilt (*cf. People v Beasley*, 25 NY2d 483, 486-488 [1969]; *People v Gresham*, 151 AD3d 1175, 1177-1178 [3d Dept 2017]).

Finally, defendant's prior history of mental health problems did not cast significant doubt on the voluntariness of the plea. "A history of prior mental illness or treatment does not itself call into question [a] defendant's competence," and there is no indication in the record that defendant was unable to understand the plea proceedings or that he was mentally incompetent at the time he entered his guilty plea (*People v Robinson*, 39 AD3d 1266, 1267 [4th Dept 2007], *lv denied* 9 NY3d 869 [2007] [internal quotation marks omitted]; *see Williams*, 124 AD3d at 1286). During the plea colloquy, defendant denied suffering from any mental health problems at that time and, in general, "defendant's responses to [County C]ourt's inquiries appeared to be informed, competent and lucid" (*People v Young*, 66 AD3d 1445, 1446 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]; *see People v Shackelford*, 100 AD3d 1527, 1528 [4th Dept 2012], *lv denied* 21 NY3d 1009 [2013]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

922

CA 19-00186

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

PHILIP J. VALVO, CLAIMANT-RESPONDENT,

V ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT.
(CLAIM NO. 118356.)

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

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

Appeal from a judgment of the Court of Claims (J. David Sampson, J.), dated April 11, 2018. The judgment, among other things, adjudged that defendant violated Labor Law § 240 (1) and that the violation was the proximate cause of plaintiff's injuries.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 5, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

928

KA 19-00221

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON B. KORTS, DEFENDANT-APPELLANT.

MICHAEL P. SCIBETTA, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Livingston County Court (Dennis S. Cohen, J.), dated July 12, 2018. 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 for reasons stated in the decision at County Court.

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

933

KA 15-01965

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVONTE E. BURTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 9, 2015. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of sexual abuse in the first degree (Penal Law § 130.65 [1]), defendant contends that he was denied a fair trial by prosecutorial misconduct during jury selection and summation. Assuming, arguendo, that defendant's contention is preserved for our review (*see* CPL 470.05 [2]), we reject it. The prosecutor's questions during jury selection concerning the likelihood that a victim of child sexual abuse knows the offender were "relevant and material to the inquiry at hand" (*People v Sweney*, 55 AD3d 1350, 1351 [4th Dept 2008], *lv denied* 11 NY3d 901 [2008] [internal quotation marks omitted]; *see generally* CPL 270.15 [1] [c]). To the extent that the prosecutor mischaracterized the testimony of a witness during summation, we conclude that the prosecutor's comments were not so egregious as to deprive defendant of a fair trial (*see People v Fick*, 167 AD3d 1484, 1485-1486 [4th Dept 2018], *lv denied* 33 NY3d 948 [2019]; *People v Flowers*, 166 AD3d 1492, 1495 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]).

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

937

CA 19-00650

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

DALE NOBLE, PLAINTIFF,

V ORDER

VILLAGER CONSTRUCTION, INC., DEFENDANT.

VILLAGER CONSTRUCTION, INC., THIRD-PARTY
PLAINTIFF-APPELLANT,

V

M.J. DREHER TRUCKING, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (ELIZABETH M. BERGEN OF COUNSEL), FOR THIRD-PARTY PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, ROCHESTER (MATTHEW A. LENHARD OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an amended order and judgment (one paper) of the Supreme Court, Monroe County (William K. Taylor, J.), entered December 24, 2018. The amended order and judgment, among other things, granted the motion of third-party defendant for summary judgment and dismissed the third-party complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on May 14, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

943

CA 19-00603

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

MARY CATHERINE FITZPATRICK AND DAVID FITZPATRICK,
PLAINTIFFS-RESPONDENTS,

V ORDER

YOUNG MEN'S CHRISTIAN ASSOCIATION OF BUFFALO
NIAGARA, DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (MICHAEL E. FERDMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered February 22, 2019. The order denied defendant's motion for summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on August 20, 2019, and filed in the Erie County Clerk's Office on August 27, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

948

CA 19-00444

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

RACHEL KUECHLE, PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

EVANDER KANE, DEFENDANT-RESPONDENT-APPELLANT.

COLLINS & COLLINS, BUFFALO (SAMUEL J. CAPIZZI OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

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

Appeal and cross appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered October 25, 2018. The order granted in part and denied in part the motion of plaintiff to dismiss defendant's counterclaim.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on July 29, 2019,

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

958

CAF 18-02039

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

IN THE MATTER OF JAZ T., PETITIONER-APPELLANT,

V ORDER

KEVIN B. AND ASIA F., RESPONDENTS-RESPONDENTS.

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (CHELSEA L. PALMISANO OF COUNSEL), FOR RESPONDENT-RESPONDENT ASIA F.

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

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered September 5, 2018 in a proceeding pursuant to Family Court Act article 5. The order denied petitioner's application to vacate an order.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

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

961

CAF 18-01319

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

IN THE MATTER OF AMANDA MAY LANDENBERG,
PETITIONER-RESPONDENT,

V ORDER

EDWARD BRUCE AKENS, RESPONDENT-RESPONDENT,
AND CYNTHIA LOUISE STEVENS, RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Onondaga County (Salvatore Pavone, R.), entered June 14, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, revoked the visitation rights of respondent Cynthia Louise Stevens with respect to the subject child.

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

Entered: September 27, 2019

Mark W. Bennett
Clerk of the Court

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (484/97) KA 04-00304. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EARL STONE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CARNI, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1671/99) KA 99-00484. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOHN MOORE, ALSO KNOWN AS FRANKIE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1573/07) KA 05-00983. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JAMES F. CAHILL, III, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (221/11) KA 09-01583. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ORLANDO O. OCASIO, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NOS. (34/15 and 47/18) KA 14-00040. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ISAAC L. MCDONALD, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, CARNI, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (758/17) KA 14-01239. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SHAWN J. COFFEE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NOS. (818-819/17) KA 15-00910. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE STEWART, DEFENDANT-APPELLANT. (APPEAL NO. 1.) KA 15-00911. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V EUGENE STEWART, DEFENDANT-APPELLANT. (APPEAL NO. 2.) -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1058/17) KA 15-00214. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DANTE TAYLOR, DEFENDANT-APPELLANT. -- Motion for reargument and other relief denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1180/17) KA 13-01709. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V TANISHA M. DAVIS, DEFENDANT-APPELLANT. -- Motion for writ of

error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1275/17) KA 13-02115. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH J. SANTIAGO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1414/17) KA 14-01577. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V VANGIE M. NAVARRO, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1432/17) KA 16-01502. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V MELVIN H. MILLER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: PERADOTTO, J.P., CARNI, DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (341/18) KA 16-00771. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V NATHANIEL RAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (549/18) KA 16-00929. -- THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT, V KEVIN WILLIAMS, ALSO KNOWN AS MAURICE WILLIAMS, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (555/18) KA 15-00941. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ROBERT MCFADDEN, ALSO KNOWN AS JOHN DOE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (711/18) KA 16-02262. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LESTER SCARBROUGH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1248/18) CA 18-00897. -- NICHOLAS J. HOULE, PLAINTIFF-RESPONDENT, V SEVENTWOTEN, LLC, DOING BUSINESS AS HELL BARBELL, DEFENDANT-APPELLANT. SEVENTWOTEN, LLC, DOING BUSINESS AS HELL BARBELL, THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT, V G.S. 2 HEALTH & FITNESS MGT., INC., DOING BUSINESS AS GEORGE'S GYM EQUIPMENT, AND GEORGE'S GYM EQUIPMENT, LLC, THIRD-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CARNI, LINDLEY, DEJOSEPH, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1305/18) CA 18-01107. -- ROBERT BERNARD DICKINSON, PLAINTIFF-RESPONDENT, V BASSETT HEALTHCARE, MARSHALL E. PEDERSEN, JR., M.D., PATRICK DIETZ, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1345/18) CA 18-00647. -- IN THE MATTER OF ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY, PETITIONER-RESPONDENT, V JOHN R. STENSRUD, MARIA B. STENSRUD, RESPONDENTS-APPELLANTS, ET AL., RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, CARNI, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (1443/18) CA 18-01335. -- DEBORAH A. DINIRO (PELLIGRA), INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE AND EXECUTRIX OF THE ESTATE OF RONALD J. PELLIGRA, DECEASED, (ALSO KNOWN AS RON PELLIGRA), PLAINTIFF-RESPONDENT, V ASPEN ATHLETIC CLUB, LLC, ZEE MEDICAL, INC., EN PRO MANAGEMENT, INC., DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (129/19) OP 18-01675. -- IN THE MATTER OF UNITED REFINING COMPANY OF PENNSYLVANIA, PETITIONER, V TOWN OF AMHERST, RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (146/19) CA 18-01406. -- IN THE MATTER OF THE CAMPAIGN FOR BUFFALO HISTORY ARCHITECTURE & CULTURE, INC., DEREK BATEMAN AND LORNA C. HILL, PETITIONERS-APPELLANTS, V ZONING BOARD OF APPEALS OF CITY OF BUFFALO, PLANNING BOARD OF CITY OF BUFFALO, RACHEL HECKL, INDIVIDUALLY AND AS PRINCIPAL MEMBER OF 467 RICHMOND AVENUE, LLC, AND 467 RICHMOND AVENUE, LLC, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, DEJOSEPH, CURRAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (186/19) CA 18-00861. -- FRANK VALENTE AND DARLENE VALENTE, PLAINTIFFS-RESPONDENTS-APPELLANTS, V UTICA FIRST INSURANCE COMPANY, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CARNI, DEJOSEPH, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (263/19) CA 18-00655. -- TOWN OF BRIGHTON AND WEST BRIGHTON FIRE PROTECTION DISTRICT, PLAINTIFFS-APPELLANTS, V WEST BRIGHTON FIRE

DEPARTMENT, INC., DEFENDANT-RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: PERADOTTO, J.P., LINDLEY, DEJOSEPH, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (285/19) CA 18-00329. -- IN THE MATTER OF PAT A. INZER, BRUCE HALL, DEAN C. MARSHALL, III, KEVIN HALL, JAMES QUINN, FOR JUDICIAL DISSOLUTION OF WEST BRIGHTON FIRE DEPARTMENT, INC., PURSUANT TO NOT-FOR-PROFIT CORPORATION LAW § 1102, AND TOWN OF BRIGHTON, PETITIONERS-RESPONDENTS, V WEST BRIGHTON FIRE DEPARTMENT, INC., RESPONDENT-APPELLANT, AND ERIC T. SCHNEIDERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (312/19) KA 16-01481. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONE HERROD, ALSO KNOWN AS TONE, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (342/19) KA 03-00547. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTOINE PARRIS, ALSO KNOWN AS ANTOINE LENOIR PARRIS, DEFENDANT-APPELLANT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (398/19) TP 18-02319. -- IN THE MATTER OF RICHARD RIVERA, PETITIONER, V ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT. -- Motion for reargument denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (411/19) CA 18-02325. -- JARED N. UNDERBERG, PLAINTIFF-APPELLANT-RESPONDENT, V DRYDEN MUTUAL INSURANCE CO., DEFENDANT-RESPONDENT-APPELLANT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (463/19) CA 18-02234. -- TERESSA CHAPLIN AND GABRIELLE CHAPLIN, PLAINTIFFS-APPELLANTS, V TIM N. TOMPKINS, DEFENDANT, AND WEST MAIN STREET PARTNERS, L.P., DEFENDANT-RESPONDENT. (APPEAL NO. 1.) -- Motions for leave to appeal to the Court of Appeals denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Sept. 27, 2019.)

MOTION NO. (518/19) CA 18-02280. -- STATE FARM FIRE & CASUALTY COMPANY, AS SUBROGEE OF CHRISTINE JONES, PLAINTIFF-RESPONDENT-APPELLANT, V SCOTT PENNOCK, DOING BUSINESS AS CHIM-CHIMNEE SWEEPS, DEFENDANT-APPELLANT-RESPONDENT. -- Motion for leave to appeal to the Court

of Appeals denied. PRESENT: CARNI, J.P., DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Sept. 27, 2019.)

KA 16-00163. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V WILLIE BROWN, JR., DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Supreme Court, Monroe County, to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 27, 2019.)

KA 18-00501. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V STEVEN LISZKA, SR., DEFENDANT-APPELLANT. Motion to dismiss granted. Memorandum: The matter is remitted to Yates County Court to vacate the judgment of conviction and dismiss the indictment either sua sponte or on application of either the District Attorney or the counsel for defendant (*see People v Matteson*, 75 NY2d 745 [1989]). PRESENT: WHALEN, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ. (Filed Sept. 27, 2019.)

KAH 19-00124. -- THE PEOPLE OF THE STATE OF NEW YORK EX REL. MALIK MOSBY, PETITIONER-APPELLANT, V NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT. -- Appeal dismissed as moot. Counsel’s motion to be relieved of assignment granted. (Appeal from Judgment of Supreme Court, Wyoming

County, Michael M. Mohun, A.J. - Habeas Corpus). PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, DEJOSEPH, AND NEMOYER, JJ. (Filed Sept. 27, 2019.)