SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 9, 2018

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

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KA 14-01171

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KAVIN L. ROWE, DEFENDANT-APPELLANT.

WILLIAM G. PIXLEY, PITTSFORD, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered March 31, 2014. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of robbery in the first degree (Penal Law § 160.15 [4]). As part of the plea bargain, defendant retained his right to appeal. Before he was sentenced, defendant moved to withdraw his plea on the ground that, by pleading guilty, he had ostensibly forfeited certain appellate challenges he wanted to make regarding the integrity of the underlying grand jury proceedings and the prosecutor's duty of fair dealing in connection therewith (hereafter, grand jury claims). Supreme Court told defendant that his grand jury claims were "subject to appeal." Defendant, reiterating that he had not waived his right to appeal, then abandoned his motion to withdraw the plea and proceeded to sentencing.

Defendant now contends that the court erred by incorrectly advising him that his grand jury claims were not forfeited by his guilty plea, and that this purportedly incorrect advice prompted him to abandon his motion to withdraw his plea. As a remedy, defendant seeks the vacatur of his plea. We reject defendant's contention and decline to vacate his plea, for the following three reasons.

First, contrary to defendant's contention, the court never advised him that his grand jury claims were not forfeited. Rather, the court merely stated that such claims were "subject to appeal." When considered in context of the whole exchange between the court and defendant, that statement meant only that defendant had not waived his

right to present his grand jury claims to the appellate courts. The court was not guaranteeing defendant that his grand jury claims would be reviewable on the merits. Inasmuch as defendant did not waive his right to appeal, it was not inaccurate for the court to state that his grand jury claims were "subject to appeal."

Second, even assuming, arguendo, that the court had assured defendant that his grand jury claims were not forfeited by his guilty plea, we note that such a statement would not have been legally incorrect. Although certain grand jury-related contentions are forfeited by a guilty plea, such as the sufficiency of the evidence underlying an indictment, the particular contentions that defendant mentioned in connection with his motion to withdraw his plea implicated the integrity of the grand jury proceedings and the People's duty of fair dealing in the course thereof, and it is well established that those types of grand jury-related claims are not forfeited by a guilty plea (*see People v Wilkins*, 68 NY2d 269, 277 n 7 [1986]; *People v Pelchat*, 62 NY2d 97, 104-105 [1984]; *People v Washington*, 82 AD3d 1675, 1676 [4th Dept 2011]; *People v Gilmore*, 12 AD3d 1155, 1155-1156 [4th Dept 2004]; see generally People v Hansen, 95 NY2d 227, 230-231 [2000]). We therefore conclude that the court did not mislead defendant.

Third and finally, the court's purported misadvice occurred after defendant had already entered his plea and thus could not, by definition, have induced him to plead guilty. Nothing that defendant was told after his plea, erroneous or otherwise, could have infected or influenced his prior decision to plead guilty (*see People v Moissett*, 76 NY2d 909, 912 [1990]; *People v McKeon*, 78 AD3d 1617, 1617 [4th Dept 2010], *lv denied* 16 NY3d 799 [2011]). Therefore, even assuming, arguendo, that the court misled defendant by stating that his grand jury claims were "subject to appeal," he would not be entitled to the remedy that he now seeks, namely, the vacatur of his guilty plea. "Significantly, defendant does not contend that the plea itself was not voluntary, knowing and intelligent" (*Moissett*, 76 NY2d at 910; *cf. People v Colon*, 151 AD3d 1915, 1918-1919 [4th Dept 2017]).

In light of the foregoing, we affirm the judgment.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 12-01637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS T. WILCHER, DEFENDANT-APPELLANT.

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

MARQUIS T. WILCHER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered March 12, 2012. The judgment convicted defendant, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a nonjury verdict, of criminal sale of a controlled substance in the first degree (Penal Law § 220.43 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1], [12]). Defendant failed to preserve for our review the contention in his main brief that the evidence is legally insufficient to support the conviction because the testimony of the confidential informant was incredible as a matter of law (*see People v Gaston*, 100 AD3d 1463, 1464 [4th Dept 2012]; *see also People v Gray*, 86 NY2d 10, 19 [1995]) and, in any event, that contention lacks merit. The confidential informant's testimony "was not incredible as a matter of law inasmuch as it was not impossible of belief, i.e., it was not manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v Harris*, 56 AD3d 1267, 1268 [4th Dept 2008], *lv denied* 11 NY3d 925 [2009]). The confidential informant's extensive criminal history and receipt of favorable treatment in exchange for his testimony do not render his testimony incredible as a matter of law (*see People v Hodge*, 147 AD3d 1502, 1503 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *People v Carr*, 99 AD3d 1173, 1174 [4th Dept 2012], *lv denied* 20 NY3d 1010 [2013]). Those facts were placed before the court, and we see no basis to disturb its credibility determination (*see Carr*, 99 AD3d at 1174). Furthermore,

viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to support the conviction with respect to each count (*see People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Bausano*, 122 AD3d 1341, 1342 [4th Dept 2014], *lv denied* 25 NY3d 1069 [2015]; *People v Nicholson*, 238 AD2d 924, 924 [4th Dept 1997], *lv denied* 90 NY2d 908 [1997]). Additionally, viewing the evidence in light of the elements of the crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contention in his main brief that the verdict is against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

We reject defendant's further contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel. We conclude that defendant has not sustained his burden of establishing "that his attorney 'failed to provide meaningful representation' that compromised 'his right to a fair trial' " (*People v Pavone*, 26 NY3d 629, 647 [2015]). Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]), we conclude that defendant received meaningful representation (*see generally People v Wragg*, 26 NY3d 403, 409 [2015]). To the extent that defendant raises in his main and pro se supplemental briefs contentions regarding alleged instances of ineffective assistance of counsel that are based upon matters outside the record on appeal, those contentions must be raised by way of a motion pursuant to CPL 440.10 (*see People v Streeter*, 118 AD3d 1287, 1289 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014]).

Contrary to defendant's further contention, the sentence is not unduly harsh or severe. Finally, we have considered the remaining contentions raised by defendant in his pro se supplemental brief and conclude that none warrants modification or reversal of the judgment.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-00571

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

COURTNEY WELLINGTON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Thomas E. Moran, J.), rendered December 15, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree and assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) arising from an incident in which he brutally attacked the mother of his child with a hammer in the City of Rochester. Defendant was sentenced, in accordance with the plea bargain, to an aggregate determinate term of 18 years of imprisonment and 5 years of postrelease supervision. Preliminarily, we agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of his bargained-for sentence (*see People v Gruzca*, 145 AD3d 1505, 1506 [4th Dept 2016]; *see generally People v Maracle*, 19 NY3d 925, 927-928 [2012]). We see no reason, however, to reduce defendant's sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]). As defendant admitted during the plea colloquy, he struck the mother of his child in the head multiple times with a hammer, intending to kill her. The mitigating factors that defendant proffers in his brief are unexceptional, and they are more than fully accounted for by the agreed-upon, midrange sentence imposed by Supreme Court.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 16-00621

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

VENUS DENNIS AND LACINAN KONATE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

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

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

Appeal from an order of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated October 30, 2015. The order, insofar as appealed from, granted those parts of defendants' omnibus motions to dismiss counts one, two, and four of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, those parts of the omnibus motions seeking to dismiss counts one, two, and four of the indictment are denied, those counts are reinstated, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings on the indictment.

Memorandum: The People appeal from an order that dismissed the first, second, and fourth counts of a seven-count indictment. The case arose from an incident in which defendants struggled with four campus security officers employed by Onondaga Community College while the officers were arresting them for disorderly conduct. During his testimony before the grand jury, one of the officers was asked whether he was designated as a peace officer, and he responded in the affirmative. The same officer also testified that he sustained injuries in the struggle. The first count of the indictment charged defendant Venus Dennis with assault in the second degree (Penal Law § 120.05 [3]). The second and fourth counts of the indictment charged each defendant with one count of resisting arrest (§ 205.30). Supreme Court granted those parts of defendants' omnibus motions seeking to dismiss those counts of the indictment on the ground that there was insufficient evidence before the grand jury that any of the officers was a peace officer. That was error.

In reviewing the sufficiency of evidence before a grand jury, a

court must view all of the competent evidence in the light most favorable to the People (*see People v Bello*, 92 NY2d 523, 525 [1998]), and ask whether, "if accepted as true, [it] would establish every element of [the] offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent" (CPL 70.10 [1]; *see People v Vieira-Suarez*, 147 AD3d 1405, 1406 [4th Dept 2017], *lv denied* 29 NY3d 1088 [2017]). Thus, a court must determine "whether the evidence adduced before the grand jury, if unexplained and uncontradicted, would warrant conviction by a petit jury" (*Vieira-Suarez*, 147 AD3d at 1406).

To establish the crime of assault in the second degree, the People were required to prove, inter alia, that Dennis acted with the "intent to prevent a peace officer . . . from performing a lawful duty . . . [and] cause[d] physical injury to such peace officer" (Penal Law § 120.05 [3]). Likewise, to establish the crime of resisting arrest, the People were required to prove that defendants "intentionally prevent[ed] or attempt[ed] to prevent a . . . peace officer from effecting an authorized arrest" (§ 205.30). A peace officer is defined in relevant part as a "security officer employed by a community college who is specifically designated as a peace officer by the board of trustees of a community college pursuant to [Education Law § 6306 (5-a)]" (CPL 2.10 [78]). We agree with the People that the grand jury testimony of the injured officer, who testified that he was an Onondaga Community College campus security officer designated as a peace officer, is legally sufficient to establish that he was a peace officer (*see People v German*, 145 AD3d 1550, 1550 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 17-01489

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V ORDER

VENUS DENNIS AND LACINAN KONATE,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

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

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

Appeal from a supplemental decision of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), dated November 6, 2015. The supplemental decision, among other things, adjudged that the People failed to produce sufficient evidence to the grand jury that a witness was a peace officer.

It is hereby ORDERED that said appeal is unanimously dismissed (*see Kuhn v Kuhn*, 129 AD2d 967, 967 [4th Dept 1987]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-00919

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HOWARD DRAPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 4, 2015. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of endangering the welfare of a child (Penal Law § 260.10 [1]). Defendant was also charged in the two-count indictment with sexual abuse in the first degree (§ 130.65 [3]) but was acquitted of that charge. Initially, we note that defendant's contention that the verdict is against the weight of the evidence because the proof at trial was at variance with the indictment is actually a challenge to the legal sufficiency of the evidence, and defendant failed to preserve that contention for our review (*see generally People v Gray*, 86 NY2d 10, 19 [1995]; *People v Davis*, 15 AD3d 920, 921 [4th Dept 2005], *lv denied* 4 NY3d 885 [2005], *reconsideration denied* 5 NY3d 787 [2005]). In any event, defendant's contention lacks merit. There " 'is a valid line of reasoning and permissible inferences from which' " the jury could have rationally concluded that the offense occurred during the indictment's time period, and thus the conviction is supported by legally sufficient evidence (*People v Danielson*, 9 NY3d 342, 349 [2007]). Furthermore, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we conclude that the verdict, which was based primarily on the testimony of the victim, is not against the weight of the evidence (*see People v Smith*, 73 AD3d 1469, 1470 [4th Dept 2010], *lv denied* 15 NY3d 778 [2010]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant also contends that, inasmuch as the jury acquitted

defendant of the charge of sexual abuse, the verdict is repugnant because both charges were predicated on defendant's sexual contact with a child. We reject that contention. The charge to the jury did not limit the conduct under the endangerment count to sexual activity, and there was adequate proof of impermissible conduct separate from sexual activity to establish the endangerment count (*see People v Strickland*, 78 AD3d 1210, 1211 [3d Dept 2010]; *People v Harris*, 50 AD3d 1387, 1390 [3d Dept 2008]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 14-01699

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS HAMN, DEFENDANT-APPELLANT.

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

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Supreme Court, Monroe County (Alex R. Renzi, J.), entered June 16, 2014. The order denied the pro se motion of defendant pursuant to CPL 440.10 seeking, inter alia, to set aside his sentence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and vacating the sentence and as modified the order is affirmed, and the matter is remitted to Supreme Court, Monroe County, for resentencing in accordance with the following memorandum: Defendant appeals by permission of this Court pursuant to CPL 460.15 from an order denying his pro se motion pursuant to CPL 440.10 seeking, inter alia, to set aside his sentence on the ground that he was improperly sentenced as a second felony offender. To the extent that defendant challenged his sentence, in the interest of justice we convert that part of defendant's pro se motion to one pursuant to CPL 440.20.

As the People correctly concede, defendant's contention has merit. "It is well settled that, under New York's strict equivalency standard for convictions rendered in other jurisdictions, a federal conviction for conspiracy to commit a drug crime may not serve as a predicate felony for sentencing purposes" (*People v Hall*, 149 AD3d 1610, 1610 [4th Dept 2017] [internal quotation marks omitted]; *see People v Robinson*, 148 AD3d 1639, 1640-1641 [4th Dept 2017]; *see generally People v Jurgins*, 26 NY3d 607, 613-615 [2015]). We therefore modify the order by granting that part of defendant's motion pursuant to CPL 440.20 seeking to vacate the sentence, and we remit the matter to Supreme Court to resentence defendant as a nonpredicate felon (*see Robinson*, 148 AD3d at 1641).

We have reviewed defendant's remaining contentions and conclude that none warrants further modification or reversal of the order.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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OP 17-01673

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

IN THE MATTER OF G. STEVEN PIGEON, PETITIONER,

V MEMORANDUM AND ORDER

HON. DONALD F. CERIO, JR., ACTING JUSTICE OF THE SUPREME COURT, ERIE COUNTY, AND ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, NEW YORK STATE, RESPONDENTS.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENT ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, NEW YORK STATE.

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]) to prohibit respondent Hon. Donald F. Cerio, Jr. from considering the motion of the People for leave to reargue and/or renew a suppression order.

It is hereby ORDERED that the petition so appealed from is unanimously dismissed without costs and the stay is vacated.

Memorandum: The People commenced a criminal prosecution against petitioner, during which Hon. Donald F. Cerio, Jr. (respondent) issued an order granting petitioner's motion to suppress certain evidence. The People filed a notice of appeal regarding that order, with the requisite statement pursuant to CPL 450.50 (2). Before perfecting that appeal, however, the People moved for leave to reargue and/or renew that order, and respondent issued a scheduling order for that motion. Petitioner then commenced this CPLR article 78 original proceeding in the nature of prohibition seeking to prevent respondent from considering the People's motion during the pendency of the People's appeal. By order of this Court dated September 21, 2017, further proceedings in Supreme Court were stayed pending resolution of this petition.

"The extraordinary remedy . . . of prohibition . . . lies only where there is a clear legal right, and . . . only when a court . . . acts or threatens to act without jurisdiction in a matter . . . over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction" (*Matter of State of New York v King*, 36 NY2d 59, 62 [1975]; *see Matter*

of Dondi v Jones, 40 NY2d 8, 13 [1976], *rearg denied* 39 NY2d 1058 [1976]). Supreme Court unquestionably has jurisdiction over the subject matter of a criminal prosecution of a felony (*see* CPL 10.10 [2] [a]; 10.20 [1] [a]), and thus the only issue before us is whether respondent exceeded his authorized powers by entertaining a motion for leave to reargue and/or renew after the People filed a CPL 450.50 (2) notice. Numerous cases from the Appellate Division have reviewed orders issued upon reargument after the People have filed a notice of appeal and a CPL 450.50 (2) statement from an original order (*see e.g. People v Wyatt*, 153 AD3d 1371, 1371 [2d Dept 2017], *lv denied* 30 NY3d 1024 [2017]; *People v Campos*, 56 AD3d 342, 342 [1st Dept 2008], *lv denied* 12 NY3d 781 [2009]), thus demonstrating that the motion court retains jurisdiction to consider motions for leave to reargue despite the filing of an appeal by the People. Indeed, in *People v Johnson* (93 AD3d 1317, 1317 [4th Dept 2012]), this Court deemed a People's appeal from an order to be an appeal from a subsequent order entered upon reargument. Consequently, we conclude that petitioner failed to establish that respondent is acting in excess of his authorized powers, and thus the petition is without merit.

Furthermore, the Court of Appeals has noted that, "even if there has been an excess of jurisdiction or power, the extraordinary remedy will not lie if there is available an adequate remedy at law, of which appeal is but one, which may bar the extraordinary remedy" (*King*, 36 NY2d at 62). Thus, even assuming, arguendo, that respondent exceeded his authorized powers by granting leave to reargue and/or renew, we note that it is "well settled that '[a] CPLR article 78 proceeding is not the appropriate method to seek review of issues that could be raised on direct appeal' " (*Matter of Wisniewski v Michalski*, 114 AD3d 1188, 1188 [4th Dept 2014]). Here, "there is an adequate remedy at law by way of a direct appeal" (*Matter of Alomari v Pietruszka*, 298 AD2d 949, 949-950 [4th Dept 2002], *appeal dismissed and lv denied* 99 NY2d 566 [2003]), and thus this proceeding must also be dismissed on that basis.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01372

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

CHARLIE ZANGHI AND SHANNON ZANGHI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

JAMES L. DOERFLER AND TOWN OF AMHERST,
DEFENDANTS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (MICHAEL J. CHMIEL OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

STAMM LAW FIRM, WILLIAMSVILLE (MELISSA A. STADLER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered June 16, 2017. The order denied the motion of defendants for summary judgment dismissing the complaint and granted the cross motion of plaintiffs 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 commenced this action seeking damages for injuries they sustained when a dump truck owned by defendant Town of Amherst (Town) and operated by defendant James L. Doerfler rear-ended their vehicle while they were stopped at an intersection. Defendants moved for summary judgment dismissing the complaint on the ground that the "reckless disregard" standard of care pursuant to Vehicle and Traffic Law § 1103 (b) applies, and they contended that they established as a matter of law that Doerfler's conduct was not reckless. Plaintiffs cross-moved for partial summary judgment on negligence, contending that the reckless disregard standard of care in Vehicle and Traffic Law § 1103 (b) is not applicable to this case, and that the rear-end collision established defendants' negligence as a matter of law. Supreme Court denied defendants' motion and granted plaintiffs' cross motion. We affirm.

We reject defendants' contention that Doerfler was "actually engaged in work on a highway" at the time of the collision (*id.*). Instead, Doerfler was traveling between work sites and the dump truck was empty. He was not plowing, salting, sanding or hauling snow. Thus, "the so-called 'rules of the road' exemption contained in Vehicle and Traffic Law § 1103 (b)" is inapplicable to Doerfler's

operation of the dump truck at the time of the rear-end collision, and the proper standard of care is negligence (*Davis v Incorporated Vil. of Babylon, N.Y.*, 13 AD3d 331, 332 [2d Dept 2004]; *see Hofmann v Town of Ashford*, 60 AD3d 1498, 1499 [4th Dept 2009]).

We reject defendants' further contention that the court erred in granting plaintiffs' cross motion. It is well settled that "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Pitchure v Kandefer Plumbing & Heating*, 273 AD2d 790, 790 [4th Dept 2000]; *see Leal v Wolff*, 224 AD2d 392, 393 [2d Dept 1996]). "In order to rebut the presumption [of negligence], the driver of the rear vehicle must submit a non[]negligent explanation for the collision" (*Pitchure*, 273 AD2d at 790; *see Herdendorf v Polino*, 43 AD3d 1429, 1429 [4th Dept 2007]), and we conclude that defendants failed to submit such an explanation.

Defendants' emergency doctrine contention, raised for the first time on appeal, is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 15-02098

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

ALOKE CHAUDHURI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARGARET KILMER, AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL A. JONES, JR., DECEASED, DEFENDANT-RESPONDENT.
(APPEAL NO. 1.)

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFF-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered September 29, 2015. The order denied plaintiff's motion for partial summary judgment on liability and granted defendant's cross motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this legal malpractice action against his former attorney (decedent), who died during the pendency of this appeal, for alleged damages arising from his representation of plaintiff in a Family Court custody/child support matter. In appeal No. 1, plaintiff appeals from an order that denied his motion for partial summary judgment on liability and granted defendant's cross motion for summary judgment dismissing the complaint. In appeal No. 2, plaintiff appeals from an order denying his motion to settle the record insofar as he sought to include in the record for appeal No. 1 a "Response Affidavit to Memorandum of Law." Addressing first the order in appeal No. 2, we conclude that, contrary to plaintiff's contention, that affidavit was properly excluded inasmuch as " 'the record on appeal is . . . limited to those papers that were before the court in deciding the motion[]' and cross motion[]" (*Kai Lin v Strong Health* [appeal No. 1], 82 AD3d 1585, 1586 [4th Dept 2011], *lv dismissed in part and denied in part* 17 NY3d 899 [2011], *rearg denied* 18 NY3d 878 [2012]).

We likewise affirm the order in appeal No. 1. In order to recover damages in a legal malpractice action, a plaintiff must establish that the attorney "failed to exercise the ordinary

reasonable skill and knowledge commonly possessed by a member of the legal profession, that this failure was the proximate cause of actual damages to plaintiff, and that the plaintiff would have succeeded on the merits of the underlying action but for the attorney's negligence" (*Hufstader v Friedman & Molinsek, P.C.*, 150 AD3d 1489, 1489 [3d Dept 2017] [internal quotation marks omitted]). In moving for summary judgment dismissing the complaint in such an action, a defendant must "present evidence in admissible form establishing that plaintiff is unable to prove at least one of [those] elements" (*id.* at 1490 [internal quotation marks omitted]; *see New Kayak Pool Corp. v Kavinoky Cook LLP*, 125 AD3d 1346, 1348 [4th Dept 2015]). Here, defendant met her initial burden on the motion by establishing that plaintiff is unable to prove proximate cause and damages, and plaintiff "failed to submit nonspeculative evidence in support of" those elements in opposition to defendant's motion (*New Kayak Pool Corp.*, 125 AD3d at 1349 [internal quotation marks omitted]; *see Hufstader*, 150 AD3d at 1490-1491; *Barbieri v Fishoff*, 98 AD3d 703, 704-705 [2d Dept 2012]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 16-00716

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

ALOKE CHAUDHURI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARGARET KILMER, AS ADMINISTRATRIX OF THE ESTATE OF MICHAEL A. JONES, JR., DECEASED, DEFENDANT-RESPONDENT.
(APPEAL NO. 2.)

GERARD A. STRAUSS, NORTH COLLINS, FOR PLAINTIFF-APPELLANT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered April 21, 2016. The order denied plaintiff's motion to settle the record insofar as he sought to include in the record on appeal a "Response Affidavit to Memorandum of Law."

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

Same memorandum as in *Chaudhuri v Kilmer* ([appeal No. 1] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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TP 17-00390

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

IN THE MATTER OF ANTHONY MEDINA, PETITIONER,

V MEMORANDUM AND ORDER

A. RODRIGUEZ, ACTING DIRECTOR, SPECIAL HOUSING/INMATE DISCIPLINARY PROGRAM OF NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENT.

ANTHONY MEDINA, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JOSEPH M. SPADOLA OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered February 17, 2017) to annul a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this proceeding seeking to annul the determination, following a tier III hearing, that he violated various inmate rules. At the outset, we note that, " '[b]ecause the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court' " (*Matter of Wearen v Deputy Supt. Bish*, 2 AD3d 1361, 1362 [4th Dept 2003]). Nevertheless, we address petitioner's contentions in the interest of judicial economy (*see id.*).

We reject petitioner's contention that he was improperly denied his right to call witnesses inasmuch as the requested witnesses would have provided testimony that was either irrelevant or redundant (*see Matter of Cruz v Annucci*, 152 AD3d 1100, 1102 [3d Dept 2017]; *see also* 7 NYCRR 253.5 [a]).

We also reject petitioner's contention that he was denied effective employee assistance. "Insofar as the assistant failed to provide petitioner with certain documents, the Hearing Officer cured this deficiency by producing them at the hearing" (*Matter of McNeil v Fischer*, 95 AD3d 1520, 1521-1522 [3d Dept 2012]; *see Matter of Lashway*

v Fischer, 117 AD3d 1141, 1142 [3d Dept 2014]).

Petitioner further contends that he was effectively denied access to documents because he was unable to read them and he was not provided with reasonable accommodations for his visual impairment. We reject that contention. The record establishes that petitioner was provided with a functioning CCTV device that assisted him in reading documents, and the record further establishes that the accommodations provided to petitioner enabled him to understand the charges against him and vigorously participate in the proceedings (*see Matter of McFadden v Prack*, 120 AD3d 853, 854-855 [3d Dept 2014], *lv dismissed* 24 NY3d 930 [2014], *lv denied* 24 NY3d 908 [2014]).

We have reviewed petitioner's remaining contentions, and we conclude that they are without merit.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

51

KA 16-01770

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL E. FREEMAN, DEFENDANT-APPELLANT.

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 Niagara County Court (Matthew J. Murphy, III, J.), rendered September 7, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]). Contrary to his contention, the record demonstrates that defendant validly waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]). Defendant's valid waiver of his right to appeal forecloses his challenge to the severity of his sentence (*see id.* at 256).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

57

KA 17-01314

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

DEYONTAY BARNETT, DEFENDANT-RESPONDENT.

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

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

Appeal from an order of the Erie County Court (James A.W. McLeod, A.J.), dated April 12, 2017. The order granted defendant's motion to dismiss the superceding indictment.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, the superseding indictment is reinstated and the matter is remitted to Erie County Court for further proceedings on the superseding indictment.

Memorandum: The People appeal from an order granting defendant's motion to dismiss the superseding indictment on statutory speedy trial grounds. This case arises from the discovery of a .45 caliber pistol in defendant's apartment by parole officers while they were conducting a home visit and curfew check at defendant's residence. Defendant was originally indicted for criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Following an examination of the grand jury minutes, County Court (DiTullio, J.) determined that the proceedings were defective and granted that part of defendant's omnibus motion seeking to dismiss the indictment. By superseding indictment filed the same day as the dismissal of the original indictment, defendant was charged with criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant thereafter moved to dismiss the superseding indictment on statutory speedy trial grounds. We agree with the People that County Court (McLeod, A.J.) erred in granting that motion inasmuch as the statutory speedy trial period had not expired.

Where, as here, the defendant is charged with a felony, the People must announce readiness for trial within six months of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cooper*, 90 NY2d 292, 294 [1997]). The statutory period is calculated by "computing the time elapsed between the filing of the first accusatory

instrument and the People's declaration of readiness, subtracting any periods of delay that are excludable under the terms of the statute and then adding to the result any postreadiness periods of delay that are actually attributable to the People and are ineligible for exclusion" (*People v Cortes*, 80 NY2d 201, 208 [1992]).

Here, there is no dispute that the statutory speedy trial period was 183 days, and that the 164-day period before the People announced their readiness for trial at defendant's arraignment on May 26, 2016 was prereadiness delay that is chargeable to the People. Thus, at the time of defendant's arraignment, 19 days remained on the speedy trial clock. The period from May 26 to January 11, 2017 is excluded from the speedy trial calculation as delay attributable to the filing of motions by defendant and suppression hearings (*see* CPL 30.30 [4] [a]). Defendant's speedy trial motion was based on the People's inability to proceed on January 11, 2017, the third day of defendant's scheduled suppression hearings, because of the temporary unavailability of their witness. The People advised the court and defendant that the witness's father was undergoing surgery that day, and that the witness would be available to testify the next day, January 12, 2017. Despite the People's request for a one-day continuance of the hearings, the court urged the parties to "work out a middle ground" and directed them to return to court with an update on February 2, 2017. On February 2, 2017, defendant rejected the plea offer, and the court rescheduled the continuation of the hearings.

In granting defendant's motion to dismiss the superseding indictment, the court charged to the People the entire 22-day period from January 11, 2017 to February 2, 2017. That was error. We agree with the People that a witness's one-day unavailability while her father is undergoing heart surgery is an excludable delay that was "occasioned by exceptional circumstances" (CPL 30.30 [4] [g]; *see e.g. People v Harden*, 6 AD3d 181, 182 [1st Dept 2004], *lv denied* 3 NY3d 641 [2004]; *People v Lopez*, 2 AD3d 234, 234 [1st Dept 2003], *lv denied* 2 NY3d 742 [2004]; *People v Rodriguez*, 212 AD2d 368, 369 [1st Dept 1995], *lv denied* 85 NY2d 913 [1995]). Moreover, the ensuing 21-day adjournment until February 2, 2017 was attributable to the court and not chargeable to the People (*see People v Goss*, 87 NY2d 792, 798 [1996]), inasmuch as the People had requested a one-day adjournment and "any period of an adjournment in excess of that actually requested by the People is excluded" (*People v Hernandez*, 92 AD3d 802, 803 [2d Dept 2012], *lv denied* 19 NY3d 961 [2012]). We reject defendant's contention that the period of adjournment resulted from nonfeasance or lack of due diligence by the People.

We further agree with the People that the court erred in charging to them the three-day period beginning February 21, 2017 through February 23, 2017, and we reject defendant's contention that the court erred in not charging to the People the entire period from February 15, 2017 to February 23, 2017. Those days were not postreadiness delay inasmuch as the People were ready for trial on January 12, 2017, and the original indictment was not dismissed until February 23, 2017.

The record, however, establishes that the court erroneously

excluded from the time chargeable to the People an eight-day period between the dismissal of the original indictment on February 23, 2017 and the People's declaration of readiness to proceed on the superseding indictment on March 3, 2017. Although the court determined that the People announced their readiness to proceed upon the filing of the superseding indictment on February 23, 2017, based on the record before us, we conclude that those eight days must be charged to the People. Thus, at the time of defendant's motion, there were 11 days remaining in the statutory speedy trial period.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00805

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

TAMAICA TAYLOR, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARCIA BIRDSONG, DEFENDANT,
AND DAVID L. VANGALIO, DEFENDANTS-RESPONDENTS.

FRANK S. FALZONE, BUFFALO, FOR PLAINTIFF-APPELLANT.

BARTH SULLIVAN BEHR, BUFFALO (DANIEL CARTWRIGHT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered June 8, 2016. The order, inter alia, denied the motion of plaintiff pursuant to CPLR 4404 (a) to set aside a jury verdict and grant her a new trial on the issue whether she sustained a serious injury.

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

Memorandum: Plaintiff appeals from an order that denied her motion pursuant to CPLR 4404 (a) to set aside a jury verdict and grant her a new trial on the issue whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d), and that granted defendant David L. Vangalio's motion for a directed verdict on the issue of Vangalio's negligence. We conclude that the appeal must be dismissed. Although the order on appeal was entered after entry of the final judgment, that order is subsumed in the judgment and there is no right to appeal directly therefrom (*see Thoreson v Penthouse Intl.*, 179 AD2d 29, 36 [1st Dept 1992], *affd* 80 NY2d 490 [1992], *rearg denied* 81 NY2d 835 [1993]; *Paul Revere Life Ins. Co. v Campagna*, 233 AD2d 954, 955 [4th Dept 1996]). We note that, even if we did not dismiss the appeal on that ground, we would be unable to address the merits of plaintiff's contentions on appeal inasmuch as the record does not include a full trial transcript (*see Bouchey v Claxton-Hepburn Med. Ctr.*, 117 AD3d 1216, 1216-1217 [3d Dept 2014]; *Kruseck v Ross*, 82 AD3d 939, 940 [2d Dept 2011]; *Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

75

CAF 16-01134

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

IN THE MATTER OF FAITH B. AND HOPE B.

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

MEMORANDUM AND ORDER

ROCHELLE C., RESPONDENT-APPELLANT.

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

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

ARLENE BRADSHAW, ATTORNEY FOR THE CHILDREN, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 21, 2016 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, granted petitioner's request for the temporary removal of the subject children from the custody of respondent.

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

Memorandum: Respondent mother appeals from an order entered in a proceeding pursuant to Family Court Act article 10, which granted petitioner's request for the temporary removal of the subject children from the custody of the mother. We dismiss the appeal because a final order of disposition was entered during the pendency of the appeal, finding that the children were neglected but releasing the children to the mother's custody. This appeal has thus been rendered moot (*see Matter of Gaige F. [Carolyn F.]*, 144 AD3d 1575, 1576 [4th Dept 2016]; *Matter of Bruce P.*, 138 AD3d 864, 865 [2d Dept 2016]; *Matter of John S.*, 26 AD3d 870, 870 [4th Dept 2006]; *cf. Matter of C. Children*, 249 AD2d 540, 540 [2d Dept 1998]; *see generally Matter of Javier R. [Robert R.]*, 43 AD3d 1, 3-5 [1st Dept 2007]). "Inasmuch as a temporary order is not a finding of wrongdoing, the exception to the mootness doctrine does not apply" (*Matter of Cali L.*, 61 AD3d 1131, 1133 [3d Dept 2009]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

79

CAF 16-01282

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

IN THE MATTER OF JAYVEON S.

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

MEMORANDUM AND ORDER

ALEXANDRA C., RESPONDENT,
AND TIMOTHY S., RESPONDENT-APPELLANT.

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

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

PETER J. DIGIORGIO, JR., ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered July 12, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to the subject child.

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

Memorandum: Respondent father appeals from an order that, inter alia, terminated his parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect. We reject the father's contention that Family Court improperly admitted hearsay evidence at the fact-finding hearing when it received a written psychological report recommending that mental health treatment be part of the father's service plan. The report was not offered for the truth of the matters asserted therein (*see generally Matter of Christopher II.*, 222 AD2d 900, 902 [3d Dept 1995], *lv denied* 87 NY2d 812 [1996]). Rather, it was offered, and was properly admitted, for the limited purpose of establishing the good-faith basis for petitioner's service plan for the father (*see Matter of Michael JJ. [Gerald JJ.]*, 101 AD3d 1288, 1291 [3d Dept 2012], *lv denied* 20 NY3d 860 [2013]).

Contrary to the father's further contention, we conclude that petitioner met its burden of establishing "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the [father] and [the child] by providing 'services and other assistance aimed at ameliorating or resolving the

problems preventing [the child's] return to [the father's] care' . . . , and that the [father] failed substantially and continuously to plan for the future of the child although physically and financially able to do so . . . Although the [father] participated in the services offered by petitioner, [he] did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see* Social Services Law § 384-b [7] [a]). We reject the father's contention that the court erred in denying his request for a suspended judgment (*see Matter of Makayla S. [David S.—Alecia P.]*, 118 AD3d 1312, 1312 [4th Dept 2014], *lv denied* 24 NY3d 904 [2014]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

81

CA 17-00598

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

CAROL BLENDOWSKI, PLAINTIFF-RESPONDENT,

V ORDER

MICHAEL B. WIESE, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ORTHOPEDICS EAST, P.C., ORTHOPEDICS EAST, P.C., BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, MARC O'DONNELL, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF CROUSE HOSPITAL, AND CROUSE HOSPITAL, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (MARK DUNN OF COUNSEL), FOR DEFENDANTS-APPELLANTS MICHAEL B. WIESE, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ORTHOPEDICS EAST, P.C., AND ORTHOPEDICS EAST, P.C., BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS MARC O'DONNELL, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF CROUSE HOSPITAL, AND CROUSE HOSPITAL, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES.

BOTTAR LEONE, PLLC, SYRACUSE (SAMANTHA RIGGI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered March 3, 2017. The order denied the motions of defendants for summary judgment dismissing the complaint against them.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-00599

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

CAROL BLENDOWSKI, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL B. WIESE, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ORTHOPEDICS EAST, P.C., ORTHOPEDICS EAST, P.C., BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, MARC O'DONNELL, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF CROUSE HOSPITAL, AND CROUSE HOSPITAL, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (MARK DUNN OF COUNSEL), FOR DEFENDANTS-APPELLANTS MICHAEL B. WIESE, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF ORTHOPEDICS EAST, P.C., AND ORTHOPEDICS EAST, P.C., BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES.

GALE GALE & HUNT, LLC, SYRACUSE (ANDREW R. BORELLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS MARC O'DONNELL, M.D., INDIVIDUALLY, AND AS AN OFFICER, AGENT AND/OR EMPLOYEE OF CROUSE HOSPITAL, AND CROUSE HOSPITAL, BY AND THROUGH ITS OFFICERS, AGENTS AND/OR EMPLOYEES.

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

Appeals from an amended order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered March 6, 2017. The amended order denied that part of the motions of defendants for summary judgment dismissing the first cause of action, for medical malpractice against them.

It is hereby ORDERED that the amended order so appealed from is unanimously modified on the law by granting the motion of defendants Marc O'Donnell, M.D. and Crouse Hospital in its entirety and dismissing the complaint against them and as modified the amended order is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries that she sustained after undergoing a knee-replacement surgery at defendant Crouse Hospital. The surgery was performed by defendant Michael B. Wiese, M.D., who was sued

individually and as an officer, agent and/or employee of defendant Orthopedics East, P.C. (Orthopedics East), and by defendant Marc O'Donnell, M.D., a third-year orthopedic resident who was sued individually and as an officer, agent and/or employee of Crouse Hospital. It is undisputed that, during the surgery, O'Donnell severed plaintiff's peroneal and tibial nerves while drilling into the intramedullary canal of her left femur, which resulted in permanent nerve damage in her leg. We conclude that Supreme Court properly denied that part of the motion of Wiese and Orthopedics East for summary judgment dismissing the first cause of action, for medical malpractice, against them but erred in denying that part of the motion of O'Donnell and Crouse Hospital for summary judgment dismissing that cause of action against them. We therefore modify the amended order accordingly.

We conclude that O'Donnell and Crouse Hospital met their burden on their motion with respect to the medical malpractice cause of action by establishing that O'Donnell did not exercise independent medical judgment during the procedure. It is well settled that a "resident who assists a doctor during a medical procedure, and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene" (*Wulbrecht v Jehle*, 92 AD3d 1213, 1214 [4th Dept 2012] [internal quotation marks omitted]; *see Reading v Fabiano*, 137 AD3d 1686, 1687 [4th Dept 2016]). Even where a resident "play[s] an active role in [plaintiff's] procedure," the resident cannot commit malpractice unless he or she was shown to have exercised some " 'independent medical judgment' " (*Green v Hall*, 119 AD3d 1366, 1367 [4th Dept 2014]). Here, it is undisputed that plaintiff was Wiese's patient, and Wiese determined the type of surgery to be performed on plaintiff. The deposition testimony of O'Donnell and Wiese establishes that O'Donnell was acting as a resident under Wiese's direction and supervision during the procedure. Indeed, Wiese testified at his deposition and averred in his affidavit that he supervised O'Donnell's selection of the location and angle of the drill, and that he made the decision to stop drilling. We therefore conclude that O'Donnell and Crouse Hospital met their burden on the motion by establishing that O'Donnell did not exercise independent medical judgment with respect to his operation of the drill, and plaintiff failed to raise an issue of fact (*see Nasima v Dolen*, 149 AD3d 759, 760 [2d Dept 2017]; *Muniz v Katlowitz*, 49 AD3d 511, 513-514 [2d Dept 2008]).

We further conclude that Wiese and Orthopedics East met their initial burden on their motion with respect to the medical malpractice cause of action by submitting the affidavit and deposition testimony of Wiese establishing " 'that there was no deviation or departure from the applicable standard of care' " (*Occhino v Fan*, 151 AD3d 1870, 1871 [4th Dept 2017]). Wiese's deposition testimony and affidavit described his treatment of plaintiff, and he stated that the procedures he used were in keeping with the accepted standards of practice. We conclude, however, that plaintiff raised a triable issue of fact through the submission of her expert's affirmation.

Plaintiff's expert stated that Wiese deviated from the standard of care because he did not properly select the angle and trajectory for the drill bit and he did not continually check the angle and trajectory as the drilling progressed. This squarely opposes Wiese's affidavit and deposition testimony, presenting a classic "battle of the experts" that is properly left to a jury for resolution (*Williamson v Hodson*, 147 AD3d 1488, 1489 [4th Dept 2017], *lv denied* 29 NY3d 913 [2017] [internal quotation marks omitted]; *see Wilk v James*, 107 AD3d 1480, 1484 [4th Dept 2013]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01300

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

NICHOLAS DEMARTINO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

RICHARD M. KRONHAUS, M.D., ET AL., DEFENDANTS,
AND CROUSE HOSPITAL, DEFENDANT-APPELLANT.

GALE GALE & HUNT, LLC, SYRACUSE (MATTHEW J. VANBEVEREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KUEHNER LAW FIRM, PLLC, SYRACUSE (KEVIN P. KUEHNER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered February 1, 2017. The order, insofar as appealed from, denied the motion of defendant Crouse Hospital for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion of defendant Crouse Hospital is granted and the complaint against it is dismissed.

Memorandum: In this medical malpractice action, defendant Crouse Hospital (hospital) appeals from an order that, inter alia, denied its motion for summary judgment dismissing the complaint against it. We agree with the hospital that Supreme Court should have granted the motion.

It is well settled that " '[a] plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability for negligence for the first time in opposition to the motion' " (*Marchetti v East Rochester Cent. Sch. Dist.*, 26 AD3d 881, 881 [4th Dept 2006]; *see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 1770 [4th Dept 2010], *affd* 16 NY3d 729 [2011]). Here, the complaint alleged, inter alia, negligence on the part of the hospital's "employees, agents, apparent agents, independent contractors and/or staff members," none of whom was sued by plaintiff. The complaint also alleged a theory of vicarious liability against the hospital.

In its demand for a bill of particulars, the hospital asked plaintiff to identify the employee or employees whose actions allegedly gave rise to the hospital's vicarious liability. Plaintiff's bill of particulars identified one of the other defendants, a physician in private practice who merely had privileges

at the hospital (physician defendant), as the person whose actions gave rise to the hospital's vicarious liability. The bill of particulars did not allege that the hospital was vicariously liable for anyone else's actions, nor did it specifically allege that any of the hospital's nurses were negligent.

Following discovery, the hospital moved for summary judgment dismissing the complaint against it, contending that the physician defendant was not its employee and that the hospital therefore could not be held vicariously liable for his alleged negligence. In opposing the motion, plaintiff did not address the hospital's contention with respect to the physician defendant's employment status and instead argued for the first time that two of the hospital's nurses were negligent and that the hospital was vicariously liable for their actions. In our view, that is a new theory of recovery and thus could not be used by plaintiff to defeat the hospital's motion (*see Darrisaw,* 74 AD3d at 1770). We note that plaintiff did not move to amend the bill of particulars to allege that the hospital was vicariously liable for the nurses' negligence. Inasmuch as plaintiff did not dispute that the hospital was not vicariously liable for the alleged negligence of the physician defendant, there was no basis to deny the motion, which we now grant.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

87

CA 17-01454

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

VICTOR G., JR., AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN, MARISSA F. AND MARISSA F., INDIVIDUALLY, PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

NORTH SYRACUSE CENTRAL SCHOOL DISTRICT, DEFENDANT-RESPONDENT.

A.A. CASTRO C.L.A.N. PLLC, NEW YORK CITY (ANGEL ANTONIO CASTRO, III, OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (KATE REID OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered April 10, 2017. The order granted the motion of defendant for summary judgment dismissing the complaint, and denied the cross motion of plaintiffs for partial summary judgment on the breach of contract cause of action.

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

Memorandum: Plaintiff Marissa F. (plaintiff mother) is the mother of the infant plaintiff (hereafter, plaintiff), a student residing in defendant, North Syracuse Central School District (District). In 2008, plaintiff was identified by the District's Committee on Special Education (CSE) as a student with a disability and was classified autistic. Since that time, the District's CSE, which includes, among others, plaintiff's parents, has developed individual education plans (IEPs) for each school year. After various disputes arose between the parties, the parties entered into a resolution agreement (hereafter, Agreement) in November 2015. As relevant to this appeal, the Agreement provided that, for the 2015-2016 school year and the following two school years, the District would "bear the cost of up to $36,562.50 towards either: (1) the Student's tuition at the Vincent Smith School in Long Island, New York; or (2) the Student's tuition at another private school in New York State of the Parent's choosing . . . , upon receipt of satisfactory proof of the Student's enrollment." At the conclusion of the 2015-2016 school year, the Dean of Students at the Vincent Smith School informed plaintiff mother that the private school was not an appropriate place for plaintiff because he needed a "therapeutic environment."

Plaintiffs commenced this action alleging causes of action for, inter alia, breach of contract. Specifically, plaintiffs alleged that plaintiff mother contacted a therapeutic residential school for plaintiff but was told that the District needed to provide a referral before she could begin the application process. According to plaintiff mother, the District failed to provide a referral, in breach of the Agreement. The District moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for partial summary judgment on the breach of contract cause of action. Supreme Court granted the District's motion and denied plaintiffs' cross motion. We affirm.

Plaintiffs contend that the District breached an implied covenant of good faith and fair dealing under the Agreement by failing to provide plaintiff mother with a referral so that she could meet the condition precedent of enrolling plaintiff in the therapeutic residential school. Every contract contains an implied covenant of good faith and fair dealing (*see Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 68 [1978]), and "[t]his covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Aventine Inv. Mgt. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). Here, the Agreement contains no provision requiring the District to provide a referral for plaintiff to enroll in a "residential therapeutic school" and we will not, by implication, impose one. Indeed, it is not the province of a court to remake the parties' contract under the guise of an implied covenant (*see Rowe*, 46 NY2d at 69).

Mark W. Bennett

Entered: February 9, 2018

Clerk of the Court

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

91

KA 15-01260

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELIGIO ADAMES, DEFENDANT-APPELLANT.

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARGARET A. CIEPRISZ OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 16, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance 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 controlled substance in the second degree (Penal Law § 220.18 [1]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's valid waiver of the right to appeal forecloses his challenge to the severity of his sentence (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

92

KA 16-01506

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMEL B. MCINTOSH, DEFENDANT-APPELLANT.

ADAM H. VAN BUSKIRK, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (AMANDA L. CASSELMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered May 8, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of robbery in the second degree (Penal Law § 160.10 [1], [2] [a]). The case arose from an incident wherein defendant, accompanied by another person, forcibly stole a glass pipe from the victim in the parking lot of a supermarket. The entire event was recorded on video by the supermarket's security cameras, and footage from the cameras was admitted in evidence at trial.

Contrary to defendant's contention, the evidence that he was aided by another is legally sufficient. The video evidence established that defendant "committed the robbery in the full view of his companion, who acted as a lookout and was in a position to render immediate assistance to defendant" (*People v Wilkerson*, 189 AD2d 592, 592 [1st Dept 1993], *lv denied* 81 NY2d 849 [1993]; *see People v Hamilton*, 114 AD3d 590, 590 [1st Dept 2014], *lv denied* 23 NY3d 963 [2014]).

Contrary to defendant's further contention, the evidence that the victim sustained physical injury is also legally sufficient. Although the victim was not competent to testify that he sustained a fracture or underwent reconstructive surgery (*see generally People v Brandon*, 102 AD2d 832, 833 [2d Dept 1984]), he was "competent to testify to 'readily apparent external physical injuries of which he obviously [had] personal knowledge' " (*People v Blauvelt*, 156 AD3d 1333, 1334 [4th Dept 2017]). Here, the victim competently testified that he

suffered a black eye, making it difficult to see, and suffered an injury to his finger requiring medical attention and surgery. The victim also competently testified that, at the time of trial, he still had limited mobility in the injured finger. That evidence is legally sufficient to establish that the victim sustained a physical injury (*see People v Blocker*, 23 AD3d 575, 575 [2d Dept 2005], *lv denied* 6 NY3d 809 [2006]; *cf. People v Williams*, 146 AD3d 906, 909 [2d Dept 2017], *lv denied* 29 NY3d 1002 [2017]). In addition, although we agree with defendant that County Court erred in allowing the victim to offer testimony that he was not competent to provide (*see generally Brandon*, 102 AD2d at 833), we conclude that the error is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his remaining challenges to the legal sufficiency of the evidence because his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged errors (*People v Gray*, 86 NY2d 10, 19 [1995]). In any event, defendant's contentions lack merit. Furthermore, viewing the evidence in light of the elements of the two counts of robbery 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]).

Defendant contends that the court erred in denying that part of his omnibus motion seeking a *Wade* hearing with respect to the identifications by four police officers. The court's rationale was that a *Wade* hearing was not necessary inasmuch as the identifications were confirmatory. Preliminarily, we note that defendant failed to preserve his contention for our review with respect to three of those police officers because his omnibus motion sought a hearing on the identification by only one of the police officers (*see People v Zhang Wan*, 203 AD2d 499, 499-500 [2d Dept 1994], *lv denied* 83 NY2d 973 [1994]), and we decline to exercise our power to review that part of his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). With respect to the fourth officer, defendant more particularly contends that the court "should have granted [his] request for a hearing, at least to explore [that officer's] alleged prior familiarity with him" (*People v Rodriguez*, 79 NY2d 445, 451 [1992]). Although we agree with defendant that the court erred in summarily determining that the identification by that officer was confirmatory (*see id.* at 448-452; *People v Casanova*, 119 AD3d 976, 979-980 [3d Dept 2014]), we conclude that the error is harmless (*see generally Crimmins*, 36 NY2d at 237).

We reject defendant's challenges to the admissibility of an audio recording of a telephone call that he made from county jail to his accomplice. Contrary to his contention, he was not entitled to a *Huntley* hearing with respect to the statements he made during the call inasmuch as "the information was not sought by the prosecutor but, rather, was passively received by the prosecutor" (*People v Davis*, 38 AD3d 1170, 1171 [4th Dept 2007], *lv denied* 9 NY3d 842 [2007], *cert denied* 552 US 1065 [2007]). Contrary to his further contention, the portion of the recording that was played at trial is not " 'so

inaudible and indistinct that the jury would have to speculate concerning its contents' " (*People v Lopez*, 119 AD3d 1426, 1428 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]). Contrary to his next contention, we conclude that the recording was admissible because defendant's statements were relevant to his consciousness of guilt, and the probative value of the statements outweighed any potential for undue prejudice (*see People v Jefferson*, 125 AD3d 1463, 1463 [4th Dept 2015], *lv denied* 25 NY3d 990 [2015]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

94

KA 16-00012

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER HOLDBY, DEFENDANT-APPELLANT.

LUCILLE M. RIGNANESE, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered June 5, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, County Court properly refused to suppress the guns recovered from an apartment and his statements to the police. The evidence at the suppression hearing established that the police were notified by the apartment manager that maintenance workers found a bag containing two handguns in an apartment that was supposed to be vacant. When the police arrived, defendant was inside the apartment and told the officers that he resided there. Defendant also told the officers that he was on federal probation. The officers contacted defendant's probation officer, who determined that the residence should be searched because defendant was in violation of his probation by using the apartment as a residence without informing the probation officer. During the search conducted by probation officers, the guns were located. We conclude that the search of the residence by the probation officers was lawful (*see People v Adams*, 126 AD3d 1405, 1405 [4th Dept 2015], *lv denied* 25 NY3d 1158 [2015]; *People v Davis*, 101 AD3d 1778, 1779 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]). Contrary to defendant's contention, exigent circumstances were not required for the search. We reject defendant's further contention that his statements should have been suppressed. The questions asked by one of the police officers upon arriving at the apartment were investigatory in nature and did not constitute interrogation (*see People v Spirles*, 136 AD3d 1315, 1316 [4th Dept 2016], *lv denied* 27

NY3d 1007 [2016], *cert denied* — US —, 137 S Ct 298 [2016]; *People v Shelton*, 111 AD3d 1334, 1336-1337 [4th Dept 2013], *lv denied* 23 NY3d 1025 [2014]).

Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, contrary to defendant's contention, the evidence is legally sufficient to establish that he exercised dominion and control over the area where the firearms were found (*see Davis*, 101 AD3d at 1779-1780; *People v Mattison*, 41 AD3d 1224, 1225 [4th Dept 2007], *lv denied* 9 NY3d 924 [2007]; *see generally People v Manini*, 79 NY2d 561, 573-574 [1992]). Contrary to defendant's further contention, the home exception of Penal Law § 265.03 (3) is inapplicable inasmuch as defendant committed the crime of criminal possession of a weapon in the fourth degree and stipulated that he had previously been convicted of a crime (*see* §§ 265.01 [1]; 265.02 [1]; *People v Jones*, 22 NY3d 53, 57 [2013]; *People v Barber*, 117 AD3d 1430, 1431 [4th Dept 2014], *lv denied* 24 NY3d 1081 [2014]). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

The court did not abuse its discretion in denying defendant's CPL 330.30 (1) motion to set aside the verdict on the ground of ineffective assistance of counsel without conducting a hearing (*see People v Morgan*, 77 AD3d 1419, 1420 [4th Dept 2010], *lv denied* 15 NY3d 922 [2010]). In support of the motion, defendant submitted a report jointly prepared after trial by his three experts, who analyzed the fingerprint report of the People's expert. Defense counsel asserted in an affirmation in support of defendant's motion that she should have sought an adjournment of the trial to give the defense experts sufficient time to review the People's report. Defense counsel acknowledged, however, that one defense expert had reviewed the People's report prior to trial. In fact, the record establishes that defense counsel raised the same issues during her cross-examination of the People's expert that the defense experts subsequently raised in their posttrial report, thus demonstrating that defense counsel had not needed to seek an adjournment. We therefore conclude that defendant failed to demonstrate the absence of strategic or other legitimate explanations for defense counsel's alleged shortcomings (*see People v Nickel*, 14 AD3d 869, 872 [3d Dept 2005], *lv denied* 4 NY3d 834 [2005]; *see generally People v Benevento*, 91 NY2d 708, 712 [1998]), and thus no hearing was necessary on the motion.

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

96

KA 14-01771

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SARAH A. MURPHY SEARS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered April 29, 2014. The judgment convicted defendant, upon her plea of guilty, of attempted assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]). Contrary to her contention, the record demonstrates that defendant validly waived her right to appeal (*see generally People v Lopez*, 6 NY3d 248, 255-256 [2006]). Defendant's valid waiver of her right to appeal forecloses her challenge to the severity of her sentence (*see id.* at 256). Although defendant's challenges to her *Alford* plea are not foreclosed by her waiver of the right to appeal, she failed to preserve those challenges for our review (*see People v Elliott*, 107 AD3d 1466, 1466 [4th Dept 2013], *lv denied* 22 NY3d 996 [2013]). We decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

107

CA 17-01256

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

IN THE MATTER OF LINDA SANTANAM, JOHN KURYLA, IN HIS CAPACITY AS PRESIDENT OF NORTH SYRACUSE EDUCATION ASSOCIATION AND NORTH SYRACUSE EDUCATION ASSOCIATION, PETITIONERS-RESPONDENTS,

V ORDER

BOARD OF EDUCATION OF NORTH SYRACUSE CENTRAL SCHOOL DISTRICT, ANNETTE SPEACH, IN HER CAPACITY AS SUPERINTENDENT OF NORTH SYRACUSE CENTRAL SCHOOL DISTRICT, NORTH SYRACUSE CENTRAL SCHOOL DISTRICT AND ALFRED RICCIO, IN HIS CAPACITY AS HEARING OFFICER, RESPONDENTS-APPELLANTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (DOUGLAS M. MCRAE OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

ROBERT T. REILLY, LATHAM (MATTHEW E. BERGERON OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered September 29, 2016 pursuant to CPLR article 78. The judgment granted the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs as moot (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

115

KA 15-01657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CRISTY L. STUTZMAN, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (EMILY A. WOODARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (John T. Ward, J.), rendered July 6, 2015. The judgment convicted defendant, upon her plea of guilty, of unlawful manufacture of methamphetamine in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [2]). As the People correctly concede, defendant's waiver of the right to appeal is invalid (*see People v Bouton*, 107 AD3d 1035, 1036 [3d Dept 2013], *lv denied* 21 NY3d 1072 [2013]).

Defendant's contention that her plea was not knowingly, voluntarily and intelligently entered is preserved for our review only with respect to the contentions that she raised in her motion to withdraw the plea (*see id.* at 1037), i.e., that the plea was coerced and that she was innocent because she had a defense to one of the charges that was satisfied by her plea. Thus, defendant failed to preserve for our review her remaining contentions, including that her colloquy was insufficient because she gave only one-word answers to County Court's questions regarding her rights and that she made statements at sentencing that cast doubt on the voluntariness of the plea. In any event, we reject all of defendant's contentions.

With respect to defendant's unpreserved contentions, the Court of Appeals has "said repeatedly that there is no requirement for a uniform mandatory catechism of pleading defendants" (*People v Seeber*, 4 NY3d 780, 781 [2005] [internal quotation marks omitted]). Thus, contrary to defendant's contention, her " 'yes' and 'no' answers

during the plea colloqu[y] do not invalidate [her] guilty plea[]" (*People v Russell*, 133 AD3d 1199, 1199 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]; *see People v Barrett*, 153 AD3d 1600, 1600 [4th Dept 2017], *lv denied* — NY3d — [Dec. 28, 2017]). Defendant's comments at sentencing do not "cast doubt upon [her] guilt and the voluntariness of [her] plea" such that further inquiry from the court at sentencing was required (*People v Gresham*, 151 AD3d 1175, 1177 [3d Dept 2017]; *see People v Jackson*, 273 AD2d 937, 937 [4th Dept 2000], *lv denied* 95 NY2d 906 [2000]; *see generally People v Vogt*, 150 AD3d 1704, 1705 [4th Dept 2017]).

With respect to defendant's preserved contentions in support of her motion to withdraw her plea, i.e., that the plea was coerced and that she was innocent because she had a defense to one of the charges that was satisfied by the plea, defendant contends that the court abused its discretion in denying her motion to withdraw her plea without conducting a hearing. It is well settled that "the nature and extent of the fact-finding inquiry rest[s] largely in the discretion of the Judge to whom the motion is made and a hearing will be granted only in rare instances" (*People v Manor*, 27 NY3d 1012, 1013 [2016] [internal quotation marks omitted]). Here, the court did not abuse its discretion in denying the motion in the absence of "some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Noce*, 145 AD3d 1456, 1457 [4th Dept 2016] [internal quotation marks omitted]). Indeed, most of defendant's contentions regarding the motion, including her protestations of innocence, were belied by the affidavits submitted in support of the motion (*see generally People v Culver*, 94 AD3d 1427, 1427-1428 [4th Dept 2012], *lv denied* 19 NY3d 1025 [2012]).

Finally, the sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

124

KA 15-01058

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARY R. BAKER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 23, 2015. The judgment convicted defendant upon her plea of guilty of, inter alia, aggravated driving while intoxicated.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of, inter alia, aggravated driving while intoxicated (Vehicle and Traffic Law § 1192 [2-a] [a]). Even assuming, arguendo, that defendant's waiver of the right to appeal is invalid and thus does not preclude our review of her challenge to the severity of her sentence (*see People v Herman*, 151 AD3d 1866, 1867 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]), we conclude that the sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

126

KA 16-01944

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLLAN M. COATS, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT, FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Thomas P. Brown, J.), rendered July 21, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree, criminal possession of stolen property in the fourth degree and burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of grand larceny in the fourth degree (Penal Law § 155.30 [4]), criminal possession of stolen property in the fourth degree (§ 165.45 [2]), and burglary in the second degree (§ 140.25 [2]). We agree with defendant that his waiver of the right to appeal is not valid. "Although the drug court contract [signed by defendant] contained a written waiver of the right to appeal, County Court did not conduct any colloquy concerning that waiver at the plea proceeding . . . , and we conclude that the contract alone is insufficient to establish a valid waiver" (*People v Mason*, 144 AD3d 1589, 1589 [4th Dept 2016], *lv denied* 28 NY3d 1186 [2017]; *see People v Sampson*, 149 AD3d 1486, 1487 [4th Dept 2017]).

Nevertheless, we affirm. Defendant's contention that counts of the superior court information were improperly joined in a single accusatory instrument does not survive his plea of guilty inasmuch as "[a] guilty plea generally results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings" (*People v Fernandez*, 67 NY2d 686, 688 [1986]). Defendant's contention that his challenge with respect to improper joinder survives his plea of guilty because the superior court information was jurisdictionally defective is without merit inasmuch as each count therein charges an "offense for which the defendant was held for action of a grand jury"(CPL 195.20; *cf. People v Pierce*, 14 NY3d 564, 574 [2010]).

The sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

128

CA 17-01263

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

ASHLEY BENZ, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JEAN CALDER, ET AL., DEFENDANTS,
JOHN M. SZCZEPANSKI AND M.G. FITZPATRICK,
DEFENDANTS-APPELLANTS.

MCCABE, COLLINS, MCGEOUGH, FOWLER, LEVINE & NOGAN, LLP, HAMBURG (TAMARA M. HARBOLD OF COUNSEL), FOR DEFENDANT-APPELLANT JOHN M. SZCZEPANSKI.

BOUVIER LAW, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT M.G. FITZPATRICK.

DIXON & HAMILTON, LLP, GETZVILLE (DENNIS P. HAMILTON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Erie County (Deborah A. Chimes, J.), entered October 4, 2016. The order, inter alia, denied the motions of defendants John M. Szczepanski and M.G. Fitzpatrick for summary judgment dismissing the complaint against them.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that she allegedly sustained in a multivehicle accident. We conclude that Supreme Court properly denied the respective motions of John M. Szczepanski and M.G. Fitzpatrick (defendants) for summary judgment dismissing the complaint against them. Although defendants met their initial burdens of establishing as a matter of law that plaintiff's negligence in rear-ending Fitzpatrick's vehicle was the sole proximate cause of the accident (*see Johnson v Curry*, 155 AD3d 1601, 1601 [4th Dept 2017]), plaintiff raised an issue of fact by submitting evidence of a nonnegligent explanation for the accident, i.e., the sudden stop of the vehicles operated by defendants (*see Borowski v Ptak*, 107 AD3d 1498, 1499 [4th Dept 2013]; *Colonna v Suarez*, 278 AD2d 355, 355 [2d Dept 2000]).

Finally, Szczepanski's contention regarding the emergency doctrine is raised for the first time on appeal and is therefore not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985

[4th Dept 1994]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

140

CA 17-00604

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

MEGAN ULIN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

HOBART AND WILLIAM SMITH COLLEGES, BY AND THROUGH ITS AGENTS, OFFICERS, AND/OR EMPLOYEES, AND DANIEL THOMPSON, INDIVIDUALLY, AND AS AN AGENT, OFFICER, AND/OR EMPLOYEE OF HOBART AND WILLIAM SMITH COLLEGES, DEFENDANTS-APPELLANTS.

LAW OFFICES OF THERESA J. PULEO, ALBANY (NORAH M. MURPHY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOTTAR LEONE, PLLC, SYRACUSE (ADAM P. MASTROLEO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Spencer J. Ludington, A.J.), entered December 19, 2016. The order denied defendants' motion for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this negligence action to recover damages for injuries she sustained while she was sailing on Seneca Lake as part of a beginner sailing course offered by defendant Hobart and William Smith Colleges, by and through its agents, officers, and/or employees, and taught by defendant Daniel Thompson, individually, and as an agent, officer, and/or employee of Hobart and William Smith Colleges. While plaintiff was sailing, her boat capsized and, during her efforts to right the capsized boat, the boom struck her in the head. Defendants moved for summary judgment dismissing the complaint based upon plaintiff's assumption of the risk, and Supreme Court denied the motion. We affirm.

"The assumption of [the] risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities 'is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks' " (*Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 56 [2d Dept 2014], quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]). "However, the doctrine of primary assumption of [the] risk will not serve as a bar to liability if the risk is unassumed, concealed, or

unreasonably increased" (*id.*). Here, even assuming, arguendo, that defendants established as a matter of law that plaintiff assumed the risks inherent in sailing, we conclude that plaintiff raised triable issues of fact whether defendants unreasonably increased the risks associated with sailing by failing to provide any capsize recovery training to plaintiff and by letting plaintiff sail on the lake under the weather conditions present on the day of the accident (*see generally Brown v Roosevelt Union Free Sch. Dist.*, 130 AD3d 852, 854 [2d Dept 2015]; *Vanderbrook v Emerald Springs Ranch*, 109 AD3d 1113, 1115 [4th Dept 2013]; *Gilbert v Lyndonville Cent. Sch. Dist.*, 286 AD2d 896, 896 [4th Dept 2001]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

143

KA 17-01295

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE BOZEMAN, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered January 12, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, the record establishes that his waiver of the right to appeal was made "knowingly, intelligently and voluntarily" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Inasmuch as defendant's valid waiver encompasses both his conviction and his sentence, defendant is foreclosed from challenging the severity of his sentence on appeal (*see id.* at 255-256; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *People v Walker*, 151 AD3d 1730, 1731 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

144

KA 17-00061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE M. GOTHAM, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 10, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree, robbery in the second degree, kidnapping in the second degree, burglary in the second degree (two counts) and attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty to a superior court information (SCI) of, inter alia, robbery in the second degree (Penal Law § 160.10 [1]) and attempted burglary in the second degree (§§ 110.00, 140.25 [2]).

Defendant contends that the SCI was deficient because the factual allegations of count two do not support the crime set forth in that count, i.e., robbery in the second degree as a violation of Penal Law § 160.10 (2). Contrary to the assertion of the People, defendant's contention survives his guilty plea (*see People v Tun Aung*, 117 AD3d 1492, 1493 [4th Dept 2014]). We conclude, however, that the contention is without merit. The record establishes that the discrepancy between the factual allegations of count two and the crime charged therein is the result "solely [of] a typographical error" inasmuch as the facts alleged in count two of the SCI make it clear that the crime intended to be charged is robbery in the second degree as a violation of Penal Law § 160.10 (1), and we conclude that the typographical error does not render the SCI jurisdictionally defective (*People v Jackson*, 128 AD3d 1279, 1279-1280 [3d Dept 2015], *lv denied* 26 NY3d 930 [2015]). We note that the certificate of conviction contains the same typographical error. It incorrectly recites that defendant was convicted of robbery in the second degree under Penal Law § 160.10 (2), and it must therefore be amended to reflect that he

was convicted of that crime under Penal Law § 160.10 (1) (*see People v Saxton*, 32 AD3d 1286, 1286-1287 [4th Dept 2006]).

Defendant further contends that count six fails to set forth his conduct that constituted the crime of attempted burglary in the second degree in violation of Penal Law §§ 110.00 and 140.25 (2). That contention, however, "is related to the sufficiency of the factual allegations, as opposed to a failure to allege the material elements of the crime," and thus it does not survive defendant's guilty plea (*People v Price*, 234 AD2d 978, 978-979 [4th Dept 1996], *lv denied* 90 NY2d 862 [1997]).

We conclude that County Court did not abuse its discretion in denying defendant's request for youthful offender status (*see People v Johnson*, 109 AD3d 1191, 1191-1192 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*see generally People v Mills*, 151 AD3d 1744, 1745 [4th Dept 2017], *lv denied* 29 NY3d 1131 [2017]). Finally, the sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

147

KA 15-00252

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERRY CROSBY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (JOHN J. GILSENAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (VICTORIA M. WHITE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered November 14, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), robbery in the first degree, burglary in the first degree and criminal possession of stolen property in the fifth degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of murder in the second degree (Penal Law § 125.25 [3]), robbery in the first degree (§ 160.15 [1]), burglary in the first degree (§ 140.30 [2]), and criminal possession of stolen property in the fifth degree (§ 165.40). Contrary to defendant's contention, County Court did not err in refusing to suppress his statements to the police. The evidence at the suppression hearing established that, when a police detective was administering the *Miranda* warnings, defendant said that his lawyer, mother, brother, and sister were on their way to the police station. The detective finished administering the warnings and, without hesitation, defendant said that he understood the warnings and agreed to waive his rights and to speak with the police. We agree with the court that defendant's statement was not an unequivocal request for the assistance of counsel and thus, contrary to defendant's contention, the right to counsel did not attach (*see generally People v Grice*, 100 NY2d 318, 320-321 [2003]). A request for the assistance of counsel must be unequivocal (*see People v Mitchell*, 2 NY3d 272, 276 [2004]). " 'Whether a particular request [for counsel] is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor [and] manner of expression[,] and the particular words found to have been used by the defendant' "

(*People v Barber*, 124 AD3d 1312, 1313 [4th Dept 2015], *lv dismissed* 26 NY3d 965 [2015], quoting *People v Glover*, 87 NY2d 838, 839 [1995]). Here, defendant did not "adequately apprise[] the police that he had retained an attorney with respect to the matter under investigation and that he wished his attorney to be present during questioning" (*People v Ellis*, 58 NY2d 748, 750 [1982]; *see Mitchell*, 2 NY3d at 276; *People v Henry*, 111 AD3d 1321, 1322 [4th Dept 2013], *lv denied* 23 NY3d 1021 [2014]).

Defendant contends that the evidence is not legally sufficient to establish that he is guilty of the crimes charged. We reject that contention, and we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction. The People presented evidence that intruders forcibly entered the victim's residence and stole a television and coin sets, that the items were forcibly taken from the victim, and that the victim was killed during the robbery and burglary (*see* Penal Law §§ 125.25 [3]; 140.30 [2]; 160.15 [1]). The People also presented evidence that defendant took part in the crimes. Three fresh droplets of blood that matched defendant were recovered from the victim's residence, including in the area where the television had been removed, and defendant's blood was also found on one of the coin sets that was later recovered from a pawn broker, who testified that defendant had sold him the coin sets a few days after the homicide. A pawn broker receipt and a coin box matching the coin sets were also recovered from defendant's residences.

Contrary to defendant's further contention, viewing the evidence in light of the elements of murder, robbery, and burglary 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]). It is well settled that issues of credibility and the weight to be accorded to the evidence are primarily for the jury's determination (*see People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]), and we perceive no reason to disturb the jury's determination of those issues in this case.

Defendant's contention that the court violated the best evidence rule by allowing a police detective to testify with respect to what defendant said during a videotaped interrogation rather than playing the contents of the videotape for the jury is not preserved for our review (*see People v Steinhilber*, 133 AD3d 798, 799 [2d Dept 2015], *lv denied* 27 NY3d 1155 [2016]). In any event, even assuming, arguendo, that the court erred, we conclude that any error was harmless (*see People v Haggerty*, 23 NY3d 871, 876 [2014]). Defendant's remaining contention that he was denied a fair trial based on prosecutorial misconduct on summation is not preserved for our review (*see People v Lewis*, 154 AD3d 1329, 1330 [4th Dept 2017]), and we decline to

exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

155

CAF 16-01431

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

IN THE MATTER OF LUCILLE A. SOLDATO, COMMISSIONER, ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES, ASSIGNEE, ON BEHALF OF ANITA PIEBER, PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOHN W. FEKETA, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered July 25, 2016 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed the Support Magistrate's determination that respondent had willfully violated a prior child support order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Oneida County, for further proceedings in accordance with the following memorandum: Respondent father appeals from an order confirming the determination of the Support Magistrate that he willfully violated a prior child support order. The order also directed that the father be incarcerated for a period of six months. At the confirmation hearing, the mother testified that she was agreeable to a resolution whereby the father, who owed approximately $26,000 in arrears, would make a $3,000 child support payment to the mother that morning; he would make the required future monthly child support payments from the construction job he had recently acquired; and he would receive a suspended sentence of incarceration. Counsel for the father asked Family Court to approve that settlement agreement, which the father, the mother, and petitioner had agreed to that morning. We agree with the father that the court erred in refusing to allow the parties to enter into the settlement agreement (*see Keegan v Keegan*, 147 AD3d 1417, 1417-1418 [4th Dept 2017]). "Stipulations of settlement are favored by the courts and not lightly cast aside" (*Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *see Matter of Lomanto v Schneider*, 78 AD3d 1536, 1538 [4th Dept 2010]). "As a general matter, open court stipulations are especially favored by the courts inasmuch as they promote efficient dispute resolution, timely management of court calendars, and the 'integrity of the litigation process' " (*Keegan*, 147 AD3d at 1418). Under the circumstances of this case, we conclude that the court erred in refusing to allow the parties to settle the matter, and

we therefore reverse the order and remit the matter to Family Court for further proceedings. If the parties no longer wish to settle, we direct the court to hold a new confirmation hearing.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

156

CAF 16-01101

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

IN THE MATTER OF JERRY W. GWOREK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY M. GWOREK, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

CATHERINE E. MARRA, ATTORNEY FOR THE CHILD, BUFFALO.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered April 6, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking to modify the parties' existing order of custody and visitation.

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

Memorandum: In appeal No. 1, petitioner father appeals from an order that dismissed, without a hearing, his petition seeking to modify the parties' existing order of custody and visitation (existing order). In appeal No. 2, the father appeals from the same order as in appeal No. 1, and we therefore dismiss the appeal from the order in appeal No. 2 as duplicative of the appeal from the order in appeal No. 1 (*see generally Burnett v City of New York*, 104 AD3d 437, 438 [1st Dept 2013]). In appeal No. 3, the father appeals from an order that dismissed, without a hearing, a subsequent, similar petition for modification.

Contrary to the father's contentions in appeal Nos. 1 and 3, we conclude that Family Court did not abuse its discretion in sua sponte dismissing the respective petitions without conducting a hearing. "A hearing is not automatically required whenever a parent seeks modification of a custody [or visitation] order . . . and, here, the [father] failed to make a sufficient evidentiary showing of a change in circumstances to require a hearing" with respect to either petition (*Matter of Consilio v Terrigino*, 114 AD3d 1248, 1248 [4th Dept 2014] [internal quotation marks omitted]; *see Matter of Sierak v Staring*,

124 AD3d 1397, 1398 [4th Dept 2015]).

We reject the father's further contention in appeal No. 3 that the court erred in modifying the existing order as a matter of law, without a hearing on the second petition, to eliminate a provision that improperly delegated decision-making authority with respect to visitation to one of the children's counselors (*see generally Matter of Henrietta D. v Jack K.*, 272 AD2d 995, 995 [4th Dept 2000]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

157

CAF 16-01103

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

IN THE MATTER OF JERRY W. GWOREK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY M. GWOREK, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

CATHERINE E. MARRA, ATTORNEY FOR THE CHILD, BUFFALO.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered April 6, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking to modify the parties' existing order of custody and visitation.

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

Same memorandum as in *Matter of Gworek v Gworek* ([appeal No. 1] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

158

CAF 17-00051

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

IN THE MATTER OF JERRY W. GWOREK,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MARY M. GWOREK, RESPONDENT-RESPONDENT.
(APPEAL NO. 3.)

DEBORAH J. SCINTA, ORCHARD PARK, FOR PETITIONER-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-RESPONDENT.

CATHERINE E. MARRA, ATTORNEY FOR THE CHILD, BUFFALO.

MINDY L. MARRANCA, ATTORNEY FOR THE CHILDREN, BUFFALO.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered November 15, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking to modify the parties' existing order of custody and visitation.

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

Same memorandum as in *Matter of Gworek v Gworek* ([appeal No. 1] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

159

CAF 16-01436

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

IN THE MATTER OF SORAYA S.

CHAUTAUQUA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T., RESPONDENT-APPELLANT,
AND TIMOTHY S., RESPONDENT.

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY SPEEDY HAJDU, ATTORNEY FOR THE CHILD, LAKEWOOD.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered June 15, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, determined that respondent Kathryne T. permanently neglected the subject child.

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

Memorandum: Respondent mother appeals from an order that, 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. Contrary to the mother's contention, petitioner established by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child (*see* Social Services Law § 384-b [7] [a]). The evidence adduced at the fact-finding hearing established that petitioner, inter alia, provided mental health care referrals, parenting classes, and transportation or bus tickets and/or mileage reimbursement to counseling and the child's medical appointments, and scheduled and coordinated visitation (*see Matter of Joshua T.N. [Tommie M.]*, 140 AD3d 1763, 1763 [4th Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Matter of Jerikkoh W. [Rebecca W.]*, 134 AD3d 1550, 1550-1551 [4th Dept 2015], *lv denied* 27 NY3d 903 [2016]).

In addition, we conclude that, despite those diligent efforts, the mother failed to plan for the future of the child (*see Matter of Burke H. [Richard H.]*, 134 AD3d 1499, 1500-1501 [4th Dept 2015]). "It is well settled that, to plan substantially for a child's future, 'the parent must take meaningful steps to correct the conditions that led

to the child's removal' " (*Jerikkoh W.*, 134 AD3d at 1551). Here, Family Court required the mother to complete various programs and to attend regularly appointments for mental health treatment, but she failed to do either. She voluntarily ceased attending her court-ordered attachment-based therapy and was not engaged or cooperative when she did attend. The mother also missed more than two-thirds of the child's medical appointments and failed to take advantage of numerous visitation opportunities. To the extent that the mother participated in any of the recommended or ordered programs or services, she "did not successfully address or gain insight into the problems that led to the removal of the child and continued to prevent the child's safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see Matter of Rachael N. [Christine N.]*, 70 AD3d 1374, 1374 [4th Dept 2010], *lv denied* 15 NY3d 708 [2010]), asserting that she did not "need to be taught how to be a parent."

Finally, the record supports the court's decision to terminate the mother's parental rights rather than to grant a suspended judgment (*see Matter of Cyle F. [Alexander F.]*, 155 AD3d 1626, 1627-1628 [4th Dept 2017]; *Matter of Kendalle K. [Corin K.]*, 144 AD3d 1670, 1672 [4th Dept 2016]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

163

CA 17-01520

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

KOTECKI'S GRANDVIEW GROVE CORP.,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ACADIA INSURANCE COMPANY, DEFENDANT-APPELLANT,
AND FIRST NIAGARA RISK MANAGEMENT, INC.,
DEFENDANT.

GOLDBERG SEGALLA LLP, BUFFALO (BRIAN R. BIGGIE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered February 27, 2017. The order denied the motion of defendant Acadia Insurance Company for summary judgment dismissing the amended complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint against defendant Acadia Insurance Company is dismissed.

Memorandum: Plaintiff commenced this action to recover under an insurance policy issued by defendant Acadia Insurance Company (Acadia) for loss that it allegedly sustained in a "rain and/or windstorm." Plaintiff reported the loss to its insurance broker, defendant First Niagara Risk Management, Inc. (First Niagara). First Niagara prepared a property loss notice listing the date of loss as June 10, 2013. Acadia investigated the claim, partially denied it in October 2013, and reaffirmed that denial in February 2014. All of Acadia's correspondence listed the date of loss as June 10, 2013. The correspondence also advised plaintiff pursuant to New York insurance regulations that, in the event it wished to contest the denial, plaintiff was required by the policy to commence such an action within two years of the reported date of loss. On June 3, 2015, plaintiff commenced this action. During discovery, it was learned that the actual date of loss was May 28, 2013. In response to Acadia's notice to admit, plaintiff admitted that it noticed the damage to its property on May 28, 2013, that it contacted a roofing company on that date to repair the damage, and that it also contacted First Niagara on that date. Acadia then moved for summary judgment dismissing the

amended complaint against it as time-barred.

Supreme Court erred in denying the motion. Acadia met its initial burden of establishing that plaintiff's action was not commenced within two years of the date of loss as required by the policy (*see Compis Servs. v Hartford Steam Boiler Inspection & Ins. Co.*, 272 AD2d 886, 887 [4th Dept 2000]; *see generally Nowacki v Becker*, 71 AD3d 1496, 1497 [4th Dept 2010]), and plaintiff failed to raise an issue of fact to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Contrary to plaintiff's contention, it did not raise a triable issue of fact whether Acadia should be equitably estopped from relying on the limitations period provided in the policy. "Under the doctrine of equitable estoppel, a defendant is estopped from pleading a statute of limitations defense if the plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Richey v Hamm*, 78 AD3d 1600, 1601-1602 [4th Dept 2010] [internal quotation marks omitted]; *see Simcuski v Saeli*, 44 NY2d 442, 449 [1978]). "A plaintiff seeking to apply the doctrine of equitable estoppel must 'establish that subsequent and specific actions by defendant[] somehow kept [him or her] from timely bringing suit' " (*Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552 [2006]). Here, Acadia did nothing to keep plaintiff from commencing the suit in a timely manner. Although Acadia listed the date of loss incorrectly in its correspondence disclaiming coverage, that was the result of incorrect information provided by First Niagara, plaintiff's agent. In any event, plaintiff was always aware of the actual date of loss and that an action had to be commenced within two years of that date. Thus, plaintiff was not induced by Acadia's conduct to refrain from filing this suit in a timely manner.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

171

KA 17-00213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH C. HOBBS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered August 5, 2016. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree, criminal mischief in the third degree and criminal mischief in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for further proceedings in accordance with the following memorandum: On appeal from two judgments convicting him upon his pleas of guilty of various offenses including burglary in the third degree (Penal Law § 140.20) and two counts of attempted burglary in the second degree (§§ 110.00, 140.25 [2]), defendant contends in both appeal Nos. 1 and 2 that County Court failed to make an express determination whether he should be adjudicated a youthful offender, and that the court misapprehended its authority to grant him youthful offender status without the prosecution's consent. Although we reject defendant's first contention (*cf. People v Henderson*, 145 AD3d 1554, 1555 [4th Dept 2016]; *People v Munoz*, 117 AD3d 1585, 1585 [4th Dept 2014]), we agree with the second contention.

There is no dispute that defendant was eligible in both appeal No. 1 and appeal No. 2 for youthful offender treatment (*see* CPL 720.10). Nevertheless, based on comments that the court made in denying defendant's request for youthful offender treatment, it appears that the court believed that it was constrained to deny defendant's request simply because it was not contemplated by the People's plea offer. Stated otherwise, the record does not establish that the court denied defendant's request "on any basis other than that it was not part of the agreed-upon sentence" (*People v Saunders*,

146 AD3d 447, 448 [1st Dept 2017]). At no time did the court indicate that, in its view, defendant should not be adjudicated a youthful offender.

"Compliance with CPL 720.20 (1) requires the sentencing court to actually consider and make *an independent determination* of whether an eligible youth is entitled to youthful offender treatment" (*People v Stevens*, 127 AD3d 791, 791-792 [2d Dept 2015] [emphasis added]). Inasmuch as the Court of Appeals has held that CPL 720.20 (1) mandates "that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant . . . agrees to forgo it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501 [2013]), a new sentencing proceeding is required in both appeal Nos. 1 and 2. We therefore modify the judgments in both appeal Nos. 1 and 2 by vacating the sentence, and we remit each matter to County Court to make an independent determination whether defendant is a youthful offender before imposing a sentence.

Based on our determination, we do not address defendant's contention that the sentence imposed is unduly harsh and severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

172

KA 17-00214

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH C. HOBBS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (MELANIE J. BAILEY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered August 5, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree (two counts), petit larceny and criminal mischief in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Ontario County Court for further proceedings in accordance with the same memorandum as in *People v Hobbs* ([appeal No. 1] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

173

KA 16-00798

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONDELL JEMISON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered April 11, 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 Supreme Court erred in refusing to suppress a handgun seized by police officers after a search of the vehicle in which he was a passenger and his subsequent statements to the police. Specifically, defendant contends that the court erred in determining that the officers had probable cause to search the vehicle inasmuch as the officers' testimony at the suppression hearing was incredible. We reject defendant's contention.

At the suppression hearing, two officers testified that they were riding together in a patrol car when they observed a parked vehicle that was blocking a portion of a driveway, which constitutes a parking violation. The vehicle was running and had partially opened windows. When the officers approached, they smelled the odor of freshly burnt marihuana emanating from the vehicle. As defendant correctly concedes, the " 'odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants' " (*People v Hogan*, 136 AD3d 1399, 1399 [4th Dept 2016], *lv denied* 27 NY3d 1070 [2016]). One of the officers asked whether anyone had been smoking marihuana, and defendant answered that he had been doing so, and that the marihuana was located in the center console of the vehicle. The officers testified that, upon searching

the vehicle they found a loaded semi-automatic handgun in a gym bag located in the vehicle's trunk. Upon realizing that the gun had been recovered by the police, defendant spontaneously admitted that the gun belonged to him.

It is well settled that, when reviewing a ruling after a suppression hearing, "[t]he court's credibility determination is entitled to great deference" (*People v Coleman*, 57 AD3d 1519, 1520 [4th Dept 2008], *lv denied* 12 NY3d 782 [2009]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). Here, we conclude that "[t]he police officer[s'] testimony at the suppression hearing does not have all appearances of having been patently tailored to nullify constitutional objections . . . , and was not so inherently incredible or improbable as to warrant disturbing the . . . court's determination of credibility" (*People v Walters*, 52 AD3d 1273, 1274 [4th Dept 2008], *lv denied* 11 NY3d 795 [2008] [internal quotation marks omitted]). We therefore find no basis in the record for disturbing the court's determination that the officers had probable cause to search the vehicle (*see People v Ricks*, 145 AD3d 1610, 1611 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

174

KA 16-00086

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SELES VARIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (James J. Piampiano, J.), entered December 17, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*). Defendant contends that the People failed to notify defendant 10 days prior to the SORA hearing that they intended to seek a determination different from that recommended by the Board of Examiners of Sex Offenders (Board), as required by Correction Law § 168-n (3). We reject that contention inasmuch as the record establishes that the People did not seek a determination different from that recommended by the Board. Rather, the People sought a determination that defendant is a level two risk, as recommended by the Board. Moreover, even if County Court erred in assessing points under risk factors 3 and 7 and defendant was therefore a presumptive level one risk, the court determined, in the alternative, that an upward departure from a presumptive level one classification was warranted. We conclude that the determination to grant an upward departure was "based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument" (*People v Sherard*, 73 AD3d 537, 537 [1st Dept 2010], *lv denied* 15 NY3d 707 [2010]), including, inter alia, "the quantity and nature of the child pornography used by defendant, the lengthy period of time over which he collected and viewed it, and the extremely young children depicted therein" (*People v McCabe*, 142 AD3d 1379, 1380-1381 [4th Dept 2016]).

We reject defendant's alternative contention that the court erred in denying his request for a downward departure to level one. Defendant failed to prove, by a preponderance of the evidence, a "mitigating factor of a kind, or to a degree, that is otherwise not adequately taken into account by the guidelines" (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006]; *see generally People v Wooten*, 136 AD3d 1305, 1306 [4th Dept 2016]; *People v Smith*, 122 AD3d 1325, 1325-1326 [4th Dept 2014]). Contrary to defendant's contention, his acceptance of responsibility, engagement in sex offender treatment and lack of a prior criminal history were adequately taken into account in the risk assessment instrument (*see People v Scone*, 145 AD3d 1327, 1329 [3d Dept 2016]; *People v DeDona*, 102 AD3d 58, 71 [2d Dept 2012]; *see also People v Jewell*, 119 AD3d 1446, 1448-1449 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

178

KA 15-01859

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER L. MOORE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 September 10, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his guilty plea of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Tantao*, 41 AD3d 1274, 1274 [4th Dept 2007], *lv denied* 9 NY3d 882 [2007]). County Court "was 'not required to engage in any particular litany' in order to obtain a valid waiver of the right to appeal" (*Tantao*, 41 AD3d at 1274-1275, quoting *People v Moissett*, 76 NY2d 909, 910 [1990]). The valid waiver of the right to appeal encompasses defendant's challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Garner*, 52 AD3d 1265, 1266 [4th Dept 2008], *lv denied* 11 NY3d 736 [2008]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

192

CA 17-01412

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

VILLAGE OF EAST AURORA,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

EAST AURORA UNION FREE SCHOOL DISTRICT, BOARD OF EDUCATION OF EAST AURORA UNION FREE SCHOOL DISTRICT, NEW YORK STATE EDUCATION DEPARTMENT AND MARY ELLEN ELIA, COMMISSIONER, NEW YORK STATE EDUCATION DEPARTMENT,
RESPONDENTS-DEFENDANTS-RESPONDENTS.

BARTLO, HETTLER, WEISS & TRIPI, KENMORE (PAUL D. WEISS OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (RICHARD T. SULLIVAN OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS EAST AURORA UNION FREE SCHOOL DISTRICT AND BOARD OF EDUCATION OF EAST AURORA UNION FREE SCHOOL DISTRICT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (LAURA ETLINGER OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS NEW YORK STATE EDUCATION DEPARTMENT AND MARY ELLEN ELIA, COMMISSIONER, NEW YORK STATE EDUCATION DEPARTMENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered February 24, 2017 in a CPLR article 78 proceeding and a declaratory judgment action. The judgment, among other things, granted the motions of respondents-defendants to dismiss the amended petition-complaint.

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

Memorandum: We affirm for reasons stated in the decision at Supreme Court. We write only to note that the accrual date for purposes of the four-month statute of limitations is November 6, 2014 (*see* CPLR 217 [1]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

193.1

CA 15-00543

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

JANE F. DEPERNO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL W. DEPERNO, DEFENDANT-APPELLANT.

DANIEL W. DEPERNO, DEFENDANT-APPELLANT PRO SE.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN E. MCCAMPBELL OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered February 18, 2015. The order denied defendant's motion to vacate the parties' amended default judgment of divorce.

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

Memorandum: Defendant appeals from an order that denied his motion to vacate the parties' amended default judgment of divorce. We affirm. In his motion, defendant contended only that vacatur was warranted on the ground of excusable default, which requires a showing of both a reasonable excuse for the default and a meritorious defense (*see* CPLR 5015 [a] [1]; *see e.g. Marshall v Marshall*, 124 AD3d 1314, 1317 [4th Dept 2015]; *Cavallaro v Cavallaro* [appeal No. 2], 278 AD2d 812, 813 [4th Dept 2000], *lv dismissed* 96 NY2d 792 [2001]). Despite the well-established " 'liberal policy with respect to vacating default judgments in matrimonial actions' " (*Telly v Telly*, 242 AD2d 928, 928 [4th Dept 1997]), "it is well settled that '[t]he determination of whether . . . to vacate a default . . . is generally left to the sound discretion of the court' " (*Mills v Mills*, 111 AD3d 1306, 1307 [4th Dept 2013], *lv dismissed* 22 NY3d 1167 [2014]). Under the circumstances of this case, we conclude that Supreme Court did not abuse its discretion in determining that defendant did not establish a reasonable excuse for the default or a meritorious defense.

We have reviewed defendant's remaining contentions and conclude that they lack merit.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

196

KA 15-00657

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILBERT QUINONES, ALSO KNOWN AS WILBERT QUINONES MEDINA, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Thomas E. Moran, J.), rendered October 20, 2014. The judgment convicted defendant, upon his plea of guilty, of manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). Defendant contends that his oral and written waivers of the right to appeal do not bar his challenge to the severity of his sentence. We conclude that the record establishes that defendant knowingly, voluntarily and intelligently waived the right to appeal (*see People v Ramos*, 7 NY3d 737, 738 [2006]; *People v Morales*, 148 AD3d 1638, 1639 [4th Dept 2017], *lv denied* 29 NY3d 1083 [2017]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver encompasses his challenge to the severity of the sentence (*see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

198

KA 16-01807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JEREMIE S. BRASS, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered July 27, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree.

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

200

KA 15-00424

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE L. JOUBERT, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered December 9, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, the waiver of the right to appeal was knowingly, intelligently, and voluntarily entered (*see People v Goodwin*, 147 AD3d 1352, 1352 [4th Dept 2017], *lv denied* 29 NY3d 1032 [2017]; *see generally People v Sanders*, 25 NY3d 337, 340-341 [2015]). County Court ensured that defendant understood that "the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]; *see People v Brand*, 112 AD3d 1320, 1321 [4th Dept 2013], *lv denied* 23 NY3d 961 [2014]). Contrary to defendant's contention, the court was not required to advise defendant that the waiver of the right to appeal encompassed the court's suppression ruling (*see Brand*, 112 AD3d at 1321; *see generally People v Kemp*, 94 NY2d 831, 833 [1999]), and his challenge to the adverse suppression ruling is foreclosed by the valid waiver of the right to appeal (*see Kemp*, 94 NY2d at 833; *People v Carter*, 147 AD3d 1540, 1540 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]). We agree with defendant, however, that the waiver of the right to appeal does not encompass his challenge to the severity of the sentence. Although "it is evident that defendant waived [his] right to appeal [his] *conviction*, there is no indication in the record that defendant waived the right to appeal the harshness of [his] *sentence*" (*People v Maracle*, 19 NY3d 925, 928 [2012]; *see People v Gang*, 145 AD3d 1566,

1566-1567 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]). Nevertheless, we reject defendant's contention that his sentence is unduly harsh and severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

205

KA 16-00717

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW SAPETKO, DEFENDANT-APPELLANT.

CATHERINE H. JOSH, ROCHESTER, 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 September 22, 2015. The judgment convicted defendant, upon his plea of guilty, of 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 burglary in the third degree (Penal Law § 140.20). Defendant's contention that the amount of the restitution ordered by County Court is not supported by the record " 'is not properly before this Court for review because [he] did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order[] during the sentencing proceeding' " (*People v Peck*, 31 AD3d 1216, 1217 [4th Dept 2006], *lv denied* 9 NY3d 992 [2007], quoting *People v Horne*, 97 NY2d 404, 414 n 3 [2002]). Defendant further contends that his guilty plea was not knowing, intelligent and voluntary because, prior to entering his plea, he was not advised that he could challenge the constitutionality of his predicate felony conviction in a hearing before being sentenced as a second felony offender. That contention is not preserved for our review inasmuch as defendant did not move to withdraw his guilty plea or to vacate the judgment of conviction (*see People v Stokely*, 49 AD3d 966, 967 [3d Dept 2008]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1095

CA 17-00527

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

IN THE MATTER OF VIOLET REALTY, INC., DOING BUSINESS AS MAIN PLACE LIBERTY GROUP, PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE, MARK C. POLONCARZ, JOHN LOFFREDO, RESPONDENTS-DEFENDANTS-RESPONDENTS, ET AL., RESPONDENTS-DEFENDANTS.

THE KNOER GROUP, PLLC, BUFFALO (ROBERT E. KNOER OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JENNIFER C. PERSICO OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (denominated order) of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered December 20, 2016 in a CPLR article 78 proceeding and declaratory judgment action. The order and judgment, inter alia, granted the pre-answer motion of respondents-defendants-respondents to dismiss the petition-complaint.

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

Memorandum: This litigation arises from an urban renewal project that began in 1965 in respondent-defendant City of Buffalo (City). At that time, the City, Erie County Savings Bank (Bank), and the Central Buffalo Project Corporation (Developer) entered into an agreement to redevelop a portion of downtown Buffalo. The project included the construction of several buildings, a parking garage, and, as relevant to this appeal, a tunnel that would extend from a street, continue under one of the other buildings that was to be constructed, and connect to the garage, using an easement created as part of the project. The parties agree that, pursuant to the documents that govern the project, the City owns the fee title to the parking garage and possesses the current right to operate the parking garage. In 1999, petitioner-plaintiff (plaintiff) duly exercised an option to acquire fee title to the parking garage, and the parties do not dispute that such title will vest in plaintiff in 2019. In 2016, officials of respondent-defendant County of Erie (County), apparently based on security concerns, blocked all public access to the tunnel.

Plaintiff, contending that it obtained an interest in the easement by a series of agreements and conveyances made in 1965, 1969, 1985 and 1995, commenced this litigation seeking, inter alia, relief pursuant to CPLR article 78 and a declaration of its rights in the easement, along with various forms of relief arising from those purported easement rights. Plaintiff appeals from an order and judgment that granted the pre-answer motion of the County and respondents-defendants Mark C. Poloncarz and John Loffredo (defendants) to dismiss the petition-complaint on the ground that plaintiff lacked standing, and dismissed the petition-complaint against all respondents-defendants. We affirm.

Where, as here, a defendant makes a pre-answer motion to dismiss based on lack of standing, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing, rather than on the plaintiff to affirmatively establish its standing in order for the motion to be denied" (*Deutsche Bank Trust Co. Ams. v Vitellas*, 131 AD3d 52, 59-60 [2d Dept 2015]; *see e.g. Brown v State of New York*, 144 AD3d 88, 92-93 [4th Dept 2016]; *Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016]). In order "[t]o defeat a defendant's motion, the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff's submissions raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Ams.*, 131 AD3d at 60; *see Aurora Loan Servs., LLC v Komarovsky*, 151 AD3d 924, 927 [2d Dept 2017]; *see e.g. First Franklin Fin. Corp. v Norton*, 132 AD3d 1423, 1424 [4th Dept 2015]).

The warranty deed dated April 4, 1968 from the Bank to the County expressly reserved to the Bank the easement at issue. In the 1968 deed reserving the easement, the Bank conveyed to the County "Lots Number 78 and 79" in the City, but excepted out therefrom a portion of Lot 78 and reserved the subject easement over a different portion of Lot 79, the fee title of which was conveyed to the County by that same instrument. Based upon the limited record submitted by the parties, this conveyance establishes that the parcel conveyed to the County became the servient estate burdened by the easement. Although the Bank and its successor, Empire of America Federal Savings Bank, were parties to various agreements and/or conveyances after 1968, the record does not reflect that the Bank made any subsequent conveyance of the easement at issue to any party to this litigation. Contrary to plaintiff's contention, the 1995 warranty deed from the Developer to plaintiff, under which plaintiff asserts an interest in the subject easement, does not convey the easement.

We conclude that *this record* does not contain any instrument of conveyance after 1968 in which the Bank transferred the easement. The parties failed to submit an abstract of title for the Bank's chain of title after 1968, and we are limited to the record prepared by the parties and presently before us.

Plaintiff contends in the alternative that its exercise of the option to acquire the parking garage from the City in 2019 confers standing. We reject that contention. The record submitted by the

parties does not establish that the real property upon which the parking garage is situated is the dominant estate benefitted by the easement. Even assuming, arguendo, that an exercise of an option to acquire a parcel of real property in the future conferred standing to enforce an easement benefitting a parcel to be acquired, we conclude that on *this record* the present or future acquisition of the parking garage would not vest in plaintiff any interest in the subject easement.

We therefore conclude *on this record* that defendants met their burden on the motion by establishing that plaintiff has no interest in the easement and thus has no standing (*see generally Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). Inasmuch as "plaintiff's submissions [fail to] raise a question of fact as to its standing" (*Deutsche Bank Trust Co. Ams.*, 131 AD3d at 60), Supreme Court properly granted the motion to dismiss.

We have considered plaintiff's remaining contentions and conclude that they provide no basis for reversal.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1283

CA 17-00646

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

NORMAN ROBINSON, JR.,
PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

SPRAGUES WASHINGTON SQUARE, LLC, BILL GUGINO BUILDERS, INC., DEFENDANTS-RESPONDENTS-APPELLANTS, AND TIMOTHY GAREY, AN INDIVIDUAL ON BEHALF OF AN ENTITY TO BE FORMED, DEFENDANT-RESPONDENT.

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

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT SPRAGUES WASHINGTON SQUARE, LLC AND DEFENDANT-RESPONDENT.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH MATTELIANO OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT BILL GUGINO BUILDERS, INC.

Appeal and cross appeals from an order of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered July 7, 2016. The order, among other things, denied that part of plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1) and granted those parts of the motion of defendant Sprague Washington Square, LLC and the cross motion of defendant Bill Gugino Builders, Inc. for summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.

It is hereby ORDERED that the order so appealed from is modified on the law by denying those parts of the motion of defendant Sprague Washington Square, LLC and the cross motion of defendant Bill Gugino Builders, Inc. seeking dismissal of the Labor Law § 241 (6) cause of action against them insofar as it is based upon the alleged violation of 12 NYCRR 23-1.8 (c) (1) and reinstating that cause of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he sustained while working on a commercial redevelopment project. The project entailed the conversion of property formerly used for manufacturing into a multifaceted retail space. Plaintiff was injured when he was attempting to install a door frame in an exterior doorway. The frame became stuck, and when plaintiff tried to free it, a steel lintel fell on his head. The lintel was four and a

half feet long and weighed 50 pounds.

The complaint sets forth causes of action alleging violations of Labor Law §§ 200, 240 (1) and 241 (6), and common-law negligence against, inter alia, defendant Spragues Washington Square, LLC (SWS), the owner of the building, and defendant Bill Gugino Builders, Inc. (BGB), which was allegedly the general contractor or the agent of SWS on the project.

Plaintiff appeals and SWS and BGB cross-appeal from an order that, inter alia, denied that part of plaintiff's motion for partial summary judgment on the issue of liability under Labor Law § 240 (1), granted those parts of the motion of SWS and the cross motion of BGB seeking summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action, and otherwise denied the motion of SWS and the cross motion of BGB seeking summary judgment dismissing the complaint and cross claims against them.

Addressing first BGB's cross appeal, BGB contends, inter alia, that it was entitled to summary judgment dismissing the Labor Law causes of action and related cross claims against it on the ground that, contrary to plaintiff's allegations, it is not subject to liability under the Labor Law as a general contractor or an agent of SWS. We reject that contention. "An entity is a contractor within the meaning of Labor Law § 240 (1) and § 241 (6) if it had the power to enforce safety standards and choose responsible subcontractors . . . , and an entity is a general contractor if, in addition thereto, it was responsible for coordinating and supervising the . . . project" (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428 [4th Dept 2007] [internal quotation marks omitted]). In addition, an entity that serves as "a construction manager 'may be vicariously liable as an agent of the property owner . . . where the manager had the ability to control the activity which brought about the injury' " (*Bausenwein v Allison*, 126 AD3d 1466, 1468 [4th Dept 2015]). Here, BGB's own submissions raise triable issues of fact whether BGB had the authority to supervise or control the injury-producing work, and thus whether it may be held liable as a general contractor or an agent of the owner (*see Predmore v EJ Constr. Group, Inc.*, 51 AD3d 1405, 1406 [4th Dept 2008], *lv dismissed* 10 NY3d 952 [2008]). Contrary to plaintiff's contention on his appeal, however, he failed to establish as a matter of law that BGB was the general contractor or the agent of SWS, and he is therefore not entitled to partial summary judgment on that issue.

With regard to plaintiff's Labor Law § 200 and common-law negligence causes of action against BGB, we conclude that, contrary to BGB's contention on its cross appeal, it failed to eliminate triable issues of fact whether it had " 'control over the work site and actual or constructive notice of the dangerous condition' " that allegedly caused plaintiff's injuries (*Ozimek v Holiday Val., Inc.*, 83 AD3d 1414, 1416 [4th Dept 2011]).

Contrary to the contentions of SWS and BGB on their cross appeals, Supreme Court properly denied their respective motion and

cross motion insofar as they sought summary judgment dismissing the Labor Law § 240 (1) cause of action and, contrary to the contention of plaintiff on his appeal, the court properly denied that part of plaintiff's motion seeking partial summary judgment on liability under section 240 (1). The evidence submitted by the parties fails to answer conclusively "the single decisive question" with respect to that cause of action, i.e., "whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). Contrary to our dissenting colleagues, we conclude that whether the lintel was installed by plaintiff or by employees of another subcontractor has no bearing on whether SWS and BGB discharged their nondelegable duty under the statute (*see generally Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500 [1993]). Moreover, we cannot agree with the dissent that plaintiff's deposition testimony eliminated triable issues of fact whether the lintel required securing for the purpose of his undertaking. Rather, we conclude that the evidence fails to establish whether the lintel was permanently secured to the building with mortar or temporarily installed on top of the doorframe, and thus triable issues of fact remain "whether a statutorily enumerated protective device would have been 'necessary or even expected' to shield plaintiff" from the falling lintel (*Bush v Gregory/Madison Ave.*, 308 AD2d 360, 361 [1st Dept 2003]). We also reject the contentions of SWS and BGB that plaintiff's conduct was the sole proximate cause of his injuries based upon his decision to dislodge the door frame by hand rather than by using a sledgehammer that was available at the job site. Triable issues of fact remain whether the lintel was adequately secured before plaintiff attempted to dislodge the door frame (*see Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 759 [2008]).

We reject the contention of SWS that the court erred in denying its motion seeking summary judgment dismissing the complaint and cross claims against it in their entirety on the ground that plaintiff was a special employee of SWS and thus is barred by the exclusive remedy provisions of the Workers' Compensation Law from maintaining this action against SWS (*see* Workers' Compensation Law §§ 11, 29 [6]; *Cleary v Walden Galleria, LLC*, 145 AD3d 1524, 1525 [4th Dept 2016]). The court properly concluded that triable issues of fact remain whether plaintiff was a special employee of SWS on the project (*see generally Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]).

We agree with plaintiff on his appeal, however, that the court erred in granting those parts of the motion of SWS and the cross motion of BGB dismissing the Labor Law § 241 (6) cause of action insofar as it is predicated on a violation of 12 NYCRR 23-1.8 (c) (1). SWS and BGB failed to establish as a matter of law that plaintiff was not working in an "area where there [was] a danger of being struck by falling objects or materials or where the hazard of head bumping exist[ed]" (12 NYCRR 23-1.8 [c] [1]; *see Cantineri v Carrere*, 60 AD3d 1331, 1333 [4th Dept 2009]). We therefore modify the order accordingly. Contrary to plaintiff's contention, BGB and SWS

established their entitlement to judgment dismissing the section 241 (6) cause of action insofar as it is predicated on a violation of 12 NYCRR 23-1.7 (a), and plaintiff failed to raise a triable issue of fact (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 826 [2d Dept 2009]).

All concur except NEMOYER and CURRAN, JJ., who dissent in part and vote to modify in accordance with the following memorandum: We respectfully dissent in part. We depart from our colleagues in the majority solely on the ground that we conclude that Supreme Court erred in denying those parts of the motion of defendant Spragues Washington Square, LLC (SWS) and the cross motion of defendant Bill Gugino Builders, Inc. (BGB) seeking summary judgment dismissing the Labor Law § 240 (1) cause of action inasmuch as SWS and BGB established as a matter of law that the lintel did not fall on plaintiff as a consequence of the absence or inadequacy of an enumerated safety device. We would therefore further modify the order accordingly.

It is well settled that "not every object that falls on a worker[] gives rise to the extraordinary protection of Labor Law § 240 (1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]). Here, the evidence submitted by SWS and BGB in support of their motion and cross motion established as a matter of law that the lintel did not "require[] securing for the purposes of the undertaking" (*Outar v City of New York*, 5 NY3d 731, 732 [2005]), and did not fall because of the absence or inadequacy of a safety device (*see Narducci*, 96 NY2d at 268-269). Rather, the evidence established that the lintel had previously been installed by another subcontractor, and plaintiff was not in any way involved in that installation. Moreover, SWS and BGB submitted plaintiff's deposition, in which he testified that the type of lintel at issue was the kind that was permanently installed before he performed the framing work. Thus, the lintel had become part of the building's permanent structure upon installation, did not require securing for the purposes of plaintiff's undertaking, and did not fall because of a lack of a safety device.

The majority's determination that a question of fact exists whether the lintel was temporarily, as opposed to permanently, installed is based on speculation. The majority's reliance on *Bush v Gregory/Madison Ave.* (308 AD2d 360, 361 [1st Dept 2003]) is misplaced inasmuch as that case is distinguishable. In *Bush*, unlike here, safety devices were required because the workers were in the process of securing the lintel in question when it fell and injured the plaintiff ironworker.

Finally, in our view, extending the protections of Labor Law § 240 (1) to this case "extends the reach of section 240 (1) beyond its intended purpose to any component that may lend support to a structure" (*Fabrizi v 1095 Ave. of the Ams., L.L.C.*, 22 NY3d 658, 663

[2014]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1288

CA 17-00721

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

SADASHIV S. SHENOY, M.D., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, ET AL., DEFENDANTS,
AND RALPH BENEDICT, M.D., DEFENDANT-APPELLANT.

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

GARVEY & GARVEY, BUFFALO (MATTHEW J. GARVEY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Joseph R. Glownia, J.), entered November 2, 2016. The order denied the motion of defendant Ralph Benedict, M.D. for summary judgment dismissing the complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the complaint against defendant Ralph Benedict, M.D. is dismissed.

Memorandum: Plaintiff, a doctor employed by defendant Kaleida Health (Kaleida), performed a surgery in which the patient died. As a result of this incident, and pursuant to Kaleida policy, plaintiff underwent a neuropsychological competence assessment by Ralph Benedict, M.D. (defendant). Defendant thereafter submitted a written report detailing his findings and opinions to both Kaleida's internal review body and plaintiff's personal physician. Plaintiff then commenced the instant action and asserted, inter alia, causes of action for defamation and, in effect, tortious interference with economic relations against defendant based on allegations that defendant's written report and associated oral comments damaged plaintiff's reputation and professional and business relationship with Kaleida. Supreme Court denied defendant's motion for summary judgment dismissing the complaint against him. Defendant appeals, and we now reverse.

We agree with defendant that the court erred in denying that part of his motion with respect to the causes of action for defamation against him. "It is well settled that summary judgment is properly granted [dismissing a defamation cause of action] where a qualified privilege obtains and the plaintiff[] offer[s] an insufficient showing of actual malice" (*Trails W. v Wolff*, 32 NY2d 207, 221 [1973]). Here,

defendant established as a matter of law that his written report and associated oral commentary were protected both by the " 'common interest' " qualified privilege (*Liberman v Gelstein*, 80 NY2d 429, 437 [1992]; *see Shapiro v Health Ins. Plan of Greater N.Y.*, 7 NY2d 56, 60-61 [1959]), and by the statutory qualified privilege of Education Law § 6527 (5) (*see Colantonio v Mercy Med. Ctr.*, 135 AD3d 686, 691 [2d Dept 2016], *lv denied* 28 NY3d 903 [2016]; *Cooper v Hodge*, 28 AD3d 1149, 1150 [4th Dept 2006]). In opposition, plaintiff failed to raise a triable issue of fact on the issue of actual malice (*see Farooq v Coffey*, 206 AD2d 879, 880 [4th Dept 1994]).

We further agree with defendant that the court erred in denying that part of his motion with respect to the defamation causes of action on the alternative ground that the allegedly defamatory statements are expressions of pure opinion (*see Balderman v American Broadcasting Cos.*, 292 AD2d 67, 72-73 [4th Dept 2002], *lv denied* 98 NY2d 613 [2002]; *Roth v Tuckman*, 162 AD2d 941, 942 [3rd Dept 1990], *lv denied* 76 NY2d 712 [1990]). "Expressions of opinion . . . are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]).

Contrary to plaintiff's contention, that part of the motion seeking summary judgment dismissing the defamation causes of action is not premature merely because defendant has not been deposed (*see Colantonio*, 135 AD3d at 693). " 'A mere chance that somehow, somewhere, on cross examination or otherwise plaintiff[] will uncover something which might add to [his] case but obviously of which now [he has] no knowledge, is mere speculation and conjecture and is not sufficient' " to establish that a summary judgment motion is premature (*Trails W.*, 32 NY2d at 221).

Finally, we agree with defendant that his motion also should have been granted with respect to the causes of action for, in effect, tortious interference with economic relations because defendant established as a matter of law that his conduct was "insufficiently 'culpable' to create liability for [tortious] interference with . . . economic relations" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1289

CA 17-00868

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

PAMELA M. KRACKER AND STEVEN M. KRACKER,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LIAM P. O'CONNOR, DEFENDANT-APPELLANT.

HAGELIN SPENCER LLC, BUFFALO (MATTHEW D. PFALZER OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (KENNETH A. SZYSZKOWSKI OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered February 21, 2017. The order denied the motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use and 90/180-day categories of serious injury within the meaning of Insurance Law § 5102 (d), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries that Pamela M. Kracker (plaintiff) allegedly sustained as a result of a motor vehicle accident wherein plaintiff's vehicle was stopped at an intersection and was struck from behind by a vehicle owned and operated by defendant. Defendant appeals from an order denying his motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the three categories alleged by plaintiffs, i.e., the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories (*see* Insurance Law § 5102 [d]).

We conclude that defendant met his initial burden on the motion by submitting evidence establishing as a matter of law that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and 90/180-day categories (*see Hoffman v Stechenfinger*, 4 AD3d 778, 779 [4th Dept 2004]; *Cook v Franz*, 309 AD2d 1234, 1234-1235 [4th Dept 2003]; *Winslow v Callaghan*, 306 AD2d 853, 854 [4th Dept 2003]). Defendant submitted the affidavit of a physician who, after examining plaintiff and reviewing plaintiff's

imaging studies, medical records and medical history, opined that plaintiff sustained a "sprain and strain" and "soft tissue injuries," which are "not serious and permanent injuries." Plaintiff testified at her deposition that she missed no work as a result of the accident, and her medical records establish that she was medically cleared to work "without restrictions" less than two weeks after the accident. In opposition, plaintiffs failed to raise an issue of fact with respect to the permanent consequential limitation of use and 90/180-day categories (*see Griffo v Colby*, 118 AD3d 1421, 1422 [4th Dept 2014]; *Yoonessi v Givens*, 39 AD3d 1164, 1166 [4th Dept 2007]), and we therefore modify the order accordingly.

We conclude, however, that, although defendant also met his initial burden on the motion with respect to the significant limitation of use category of Insurance Law § 5102 (d), plaintiffs raised an issue of fact by submitting the affirmation of their medical expert (*see LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391 [4th Dept 2011]). Specifically, after reviewing plaintiff's medical records and imaging studies, plaintiffs' expert opined that plaintiff sustained a superior labral anterior and posterior tear to her right shoulder that required surgery and was causally related to the accident.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1307

CA 17-00821

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

CAROL L. JONES, AS EXECUTOR OF THE ESTATE OF DONALD J. JONES, CAROL L. JONES, JONES-CARROLL, INC., AND SEALAND WASTE LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TOWN OF CARROLL AND TOWN BOARD OF TOWN OF CARROLL, DEFENDANTS-APPELLANTS.

ERICKSON WEBB SCOLTON & HAJDU, LAKEWOOD (PAUL V. WEBB, JR., OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (ALAN J. KNAUF OF COUNSEL), FOR PLAINTIFF-RESPONDENT SEALAND WASTE LLC.

Appeal from an order of the Supreme Court, Chautauqua County (Frank A. Sedita, III, J.), entered January 9, 2017. The order, among other things, granted the motion of plaintiff Sealand Waste LLC, to intervene as a plaintiff.

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

Memorandum: The facts of this case are fully set forth in our decisions on the prior appeals (*Jones v Town of Carroll*, 32 AD3d 1216 [4th Dept 2006], *lv dismissed* 12 NY3d 880 [2009]; *Jones v Town of Carroll* [appeal No. 1], 57 AD3d 1376 [4th Dept 2008], *revd* 15 NY3d 139 [2010], *rearg denied* 15 NY3d 820 [2010]; *Jones v Town of Carroll* [appeal No. 2], 57 AD3d 1379 [4th Dept 2008]; *Jones v Town of Carroll*, 122 AD3d 1234 [4th Dept 2014], *lv denied* 25 NY3d 910 [2015] [*Jones III*]). As relevant to the present appeal, plaintiff Carol L. Jones and her husband, Donald J. Jones (decedent), owned property on a portion of which plaintiff Jones-Carroll, Inc. operated a construction and demolition landfill under permits obtained from the New York State Department of Environmental Conservation (DEC) (*see Jones III*, 122 AD3d at 1235). Plaintiff Sealand Waste LLC (Sealand) is a potential buyer of the property that had previously entered into an agreement with Jones, decedent, and Jones-Carroll, Inc. providing, among other things, that Sealand would test the suitability of the property for expansion of the landfill on the entire parcel and then enter into contract negotiations to purchase the property. Sealand thereafter applied for, and is still actively pursuing, a DEC permit for the proposed expansion. Sealand was denied a requested federal permit as

a result of Local Law No. 1 of 2007 (2007 Law), which had been enacted by defendants and banned the operation of any solid waste management facility in defendant Town of Carroll (Town), but exempted, inter alia, such a facility then in operation pursuant to a permit issued by the DEC under the current terms and conditions of the existing operating permit (*see Jones III*, 122 AD3d at 1235-1236). Jones, decedent, and Jones-Carroll, Inc. commenced this action challenging the validity of the 2007 Law. Sealand moved to intervene as a plaintiff and submitted a proposed complaint containing the same claims as the first, third, and fifth causes of action in the amended complaint. Defendants appeal from an order that, among other things, granted Sealand's motion. We affirm.

Upon a timely motion, a nonparty is permitted to intervene as of right in an action involving property where the nonparty "may be affected adversely by the judgment" (CPLR 1012 [a] [3]; *see Cavages, Inc. v Ketter*, 56 AD2d 730, 731 [4th Dept 1977]). Additionally, after considering "whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party," a court may, in its discretion, permit a nonparty to intervene when, inter alia, the nonparty's "claim or defense and the main action have a common question of law or fact" (CPLR 1013). "Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677 [2d Dept 2010]; *see Matter of Norstar Apts. v Town of Clay*, 112 AD2d 750, 750-751 [4th Dept 1985]).

Defendants do not contend in their brief that Sealand lacks a real and substantial interest in the outcome of the proceeding or that Sealand's claims lack common questions of law or fact with the main action, and defendants are therefore deemed to have abandoned any such contentions (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]).

Defendants nonetheless challenge the timeliness of the motion. Defendants initially contend that Sealand was too late in seeking leave to intervene because our determination in *Jones III*, coupled with the parties' subsequent stipulation of discontinuance of the second and fourth causes of action, "effectively dismissed" the action before Sealand sought intervention (*see generally Carnrike v Youngs*, 70 AD3d 1146, 1147 [3d Dept 2010]). We reject that contention. In *Jones III*, among other things, we modified the judgment by denying the motion of Jones, individually and as executor for decedent's estate, and Jones-Carroll, Inc. (plaintiffs) for summary judgment with respect to the first, third, and fifth causes of action in the amended complaint and by vacating Supreme Court's declaration that the 2007 Law was null and void and of no force and effect with respect to plaintiffs' use of the property, and we affirmed that part of the judgment denying defendants' cross motion for a determination that the 2007 Law was a proper exercise of the Town's police power that did not

violate plaintiffs' rights and required their compliance (122 AD3d at 1236-1237, 1239). "The denial of a motion for summary judgment establishes nothing except that summary judgment is not warranted at [that] time" (Siegel, NY Prac § 287 at 487 [5th ed 2011]), and does not constitute an adjudication on the merits (*see Metropolitan Steel Indus., Inc. v Perini Corp.*, 36 AD3d 568, 570 [1st Dept 2007]). Thus, the action has not been finally determined and, contrary to defendants' related contention, the Court of Appeals' denial of leave to appeal in *Jones III* "has no precedential value" (*Matter of Calandra v Rothwax*, 65 NY2d 897, 897 [1985]; *see Matter of Marchant v Mead-Morrison Mfg. Co.*, 252 NY 284, 297-298 [1929], *rearg denied* 253 NY 534 [1930], *appeal dismissed* 282 US 808 [1930]). In any event, even if a motion to intervene is made after judgment, a court is not precluded from granting such relief in appropriate circumstances (*see e.g. Auerbach v Bennett*, 64 AD2d 98, 105 [2d Dept 1978], *mod on other grounds* 47 NY2d 619 [1979]; *112-40 F.L.B. Corp. v Tycoon Collections, Inc.*, 73 AD3d 719, 721 [2d Dept 2010]; *cf. Breslin Realty Dev. Corp. v Shaw*, 91 AD3d 804, 804-805 [2d Dept 2012]).

Contrary to defendants' further contention, the motion was not otherwise untimely. "In examining the timeliness of [a] motion [to intervene], courts do not engage in mere mechanical measurements of time, but consider whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party" (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]; *see Norstar Apts.*, 112 AD2d at 751). Here, although Sealand did not seek to intervene until several years after it knew its interests in the property may be implicated in the dispute, we conclude that the court did not abuse its discretion in granting the motion inasmuch as Sealand's intervention will not delay resolution of the action and defendants will not suffer prejudice (*see Poblocki v Todoro*, 55 AD3d 1346, 1347 [4th Dept 2008]; *Norstar Apts.*, 112 AD2d at 751). Sealand does not seek to assert any new claims or to conduct extensive additional discovery but rather, in essence, seeks only to continue the challenge to the 2007 Law on causes of action that remain unresolved despite lengthy litigation (*see Poblocki*, 55 AD3d at 1347). Where, as here, there is no "showing of prejudice resulting from delay in seeking intervention, the motion should not be denied as untimely" (*Norstar Apts.*, 112 AD2d at 751).

Finally, defendants' contention that Sealand's motion should be denied on res judicata and collateral estoppel grounds is improperly raised for the first time on appeal (*see Matter of Hall*, 275 AD2d 979, 979 [4th Dept 2000]) and, in any event, is without merit inasmuch as there has been no final determination on the merits with respect to the first, third, and fifth causes of action in the amended complaint (*see generally Yanguas v Wai Wai Pun*, 147 AD2d 635, 635 [2d Dept 1989]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1329

CA 16-01844

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

PRIMAX PROPERTIES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MONUMENT AGENCY, INC., MARLENE KERNAN, WATERBURY SQUARE, INC., FORMERLY KNOWN AS 107 RIVER STREET, INC., DEFENDANTS-APPELLANTS, AND PETER C. EARLE, DEFENDANT-RESPONDENT.

KERNAN PROFESSIONAL GROUP, LLP, ORISKANY (JAMES M. KERNAN OF COUNSEL), AND KERNAN AND KERNAN, P.C., UTICA, FOR DEFENDANTS-APPELLANTS.

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C., ALBANY (SCOTT C. PATON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

WOODRUFF LEE CARROLL, SYRACUSE, FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), dated August 3, 2016. The order and judgment, among other things, granted plaintiff's motion for partial summary judgment on its third and sixth causes of action.

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

Memorandum: In 2014, plaintiff, a commercial real estate developer, entered into two separate real estate contracts with the intention of building a Dollar General store in the Village of Oriskany, New York. In the first contract, defendant Peter C. Earle agreed to sell plaintiff his entire parcel of land (hereafter, Earle parcel) in exchange for $190,000. In the second contract, defendant Monument Agency, Inc. (Monument), through its agent defendant Marlene Kernan, agreed to sell plaintiff a portion of a parcel neighboring the Earle parcel (hereafter, Monument parcel) for $10,000. As of March 20, 2015, plaintiff had fulfilled all of its obligations under the contract with Monument and sent Monument a letter indicating that it was ready to close. Plaintiff did not receive any response to that letter nor to any of its repeated phone calls requesting that Monument close on the contract. In April 2015, plaintiff sent two letters to Monument indicating that it remained ready, willing, and able to close, and demanding specific performance of the contract. After receiving no response from Monument, plaintiff filed the instant action against Monument, seeking, inter alia, specific performance of the contract. In its answer, Monument asserted as an affirmative

defense that it was unable to close on the contract because the description of the property to be conveyed was incorrect.

Thereafter, plaintiff was forestalled from closing on the Earle parcel because of a claim made by another entity, defendant Waterbury Square, Inc., formerly known as 107 River Street, Inc. (Waterbury), that the Earle parcel was incorrectly described in the contract between plaintiff and Earle. Specifically, Waterbury stated that it had purchased land at a tax sale in 2014 (hereafter, Waterbury parcel), and that purchase included a portion of the land that Earle was attempting to sell to plaintiff. As a result, plaintiff amended its complaint to include Waterbury and Earle as defendants. Plaintiff then moved for partial summary judgment on its third cause of action, for specific performance of the contract with Monument, and on its sixth cause of action, seeking a declaration as to the location of the boundary line between the Waterbury parcel and the Earle parcel. Supreme Court, inter alia, granted plaintiff's motion, ordered that Monument fulfill its obligations under the contract and issued a declaration that the boundary line between the Earle parcel and the Waterbury parcel is the same boundary line as is set forth in the survey of plaintiff's expert surveyor. Waterbury, Kernan and Monument (hereafter, defendants) appeal.

Contrary to defendants' contention, the court properly awarded plaintiff specific performance of the contract with Monument. "To obtain summary judgment for specific performance of a real estate contract, [the] plaintiff must 'demonstrate that [it] substantially performed [its] contractual obligations and [was] ready, willing and able to fulfill [its] remaining obligations, [and] that [the] defendant was able but unwilling to convey the property' " (*Fallati v Mackey*, 31 AD3d 879, 880 [3d Dept 2006], *lv denied* 7 NY3d 711 [2006]; *see Pasquarella v 1525 William St., LLC*, 120 AD3d 982, 983 [4th Dept 2014]). Here, plaintiff presented evidence establishing that it sent Monument three letters stating that it was ready, willing, and able to close, and that Monument failed to respond to those letters or to close on the transaction. Plaintiff further submitted the affidavit of an expert surveyor, who opined that the boundary line between the Earle parcel and the Monument parcel was the same as described in the contract with Monument. Moreover, plaintiff submitted the affidavit of a title researcher, who reviewed the parcels' deeds, title commitment paperwork, and tax maps, and agreed with the expert surveyor's opinion. Therefore, we conclude that plaintiff met its burden of establishing its entitlement to specific performance of the contract with Monument, and that the burden then shifted to defendants "to produce evidentiary proof in admissible form sufficient to raise a material issue of fact to avoid summary judgment" (*Fallati*, 31 AD3d at 880; *see Bergstrom v McChesney*, 92 AD3d 1125, 1126 [3d Dept 2012]; *see also Piekunka v Straubing*, 149 AD3d 1483, 1483-1484 [4th Dept 2017]).

In response, defendants submitted the affidavit of a title researcher who did not survey the relevant parcels, but who opined that plaintiff's expert surveyor had incorrectly relied on the tax maps of the parcels when conducting his survey. Defendants also submitted the affidavit of their expert surveyor, who did not survey

the parcels and offered no criticisms of the work of plaintiff's surveyor. We conclude that, without a competing survey accompanied by an affidavit of a surveyor, defendants failed to raise a triable question of fact (*see Piekunka*, 149 AD3d at 1484; *see also City of Binghamton v T & K Communications Sys.*, 290 AD2d 797, 799 [3d Dept 2002], *lv dismissed* 98 NY2d 685 [2002], *rearg denied* 98 NY2d 728 [2002]; *see generally Bergstrom*, 92 AD3d at 1126-1127), and the court therefore properly granted that part of plaintiff's motion seeking specific performance of the Monument contract.

We reject defendants' further contention that the court erred granting that part of plaintiff's motion seeking a declaration with respect to the boundary line between the Waterbury parcel and the Earle parcel. It is well settled that, "[t]o prevail in a proceeding pursuant to RPAPL article 15, a party must demonstrate good title in itself; it may not rely on the weakness of its adversary's title" (*LaSala v Terstiege*, 276 AD2d 529, 530 [2d Dept 2000]; *see State of New York v Moore*, 298 AD2d 814, 815 [3d Dept 2002]; *see generally Mazzoni v Village of Seneca Falls*, 68 AD3d 1805, 1806 [4th Dept 2009]). Here, plaintiff established through expert affidavits that Earle had good title to the Earle parcel, as that parcel is described in the Earle contract, and defendants failed to raise a triable issue of fact (*see Bergstrom*, 92 AD3d at 1126-1127; *T & K Communications Sys.*, 290 AD2d at 799).

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1345

CA 16-02320

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

DELPHI HEALTHCARE PLLC, DELPHI HOSPITALIST SERVICES LLC, WORKFIT MEDICAL, LLC, WORKFIT STAFFING LLC, AND HEALTHCARE SUPPORT SERVICES, LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PETRELLA PHILLIPS LLP AND THOMAS A. PETRELLA, DEFENDANTS-APPELLANTS.

LANDMAN CORSI BALLAINE & FORD P.C., NEW YORK CITY (WILLIAM G. BALLAINE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (D. CHARLES ROBERTS, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 22, 2016. The order granted that part of defendants' motion to dismiss with respect to the cause of action for indemnification and contribution.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion with respect to the second and fourth causes of action and with respect to the remaining causes of action to the extent that they seek damages for attorneys' fees associated with the underlying class action lawsuit and dismissing the complaint to that extent and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action for, inter alia, accounting malpractice and breach of contract, alleging that they had hired defendants as their accountants, in part to ensure that plaintiffs were in compliance with the overtime compensation and wage notice requirements set forth in the Federal Fair Labor Standards Act (FLSA) and New York Labor Law. Plaintiffs allege that defendants failed to provide the aforementioned services, which resulted in a class action lawsuit being commenced against plaintiffs in federal court on behalf of plaintiffs' current and former employees. In the instant action, plaintiffs seek to recover damages for attorneys' fees incurred in the defense and settlement of the underlying class action, as well as damages for loss of business, business reputation, and contract payments. Defendants moved to dismiss the complaint pursuant to CPLR 3211, and defendants now appeal from an order that granted their motion only in part, dismissing the cause of action for

indemnification and contribution.

Defendants contend that Supreme Court should have granted their motion in its entirety because the remaining causes of action and classes of damages constitute requests for indemnification, which are barred by the FLSA. It is well established that "there is no right of contribution or indemnity for employers found liable under the FLSA" (*Herman v RSR Sec. Servs. Ltd.*, 172 F3d 132, 144 [2d Cir 1999]), and the FLSA preempts any conflicting provisions of state labor laws, including those of New York (*see id.*; *see generally Matter of Carver v State of New York*, 26 NY3d 272, 284 [2015]). A party may not avoid this bar on indemnity by seeking indemnification damages through other legal theories (*see Lyle v Food Lion, Inc.*, 954 F2d 984, 987 [4th Cir 1992]; *Flores v Mamma Lombardis of Holbrook, Inc.*, 942 F Supp 2d 274, 278 [ED NY 2013]; *Gustafson v Bell Atl. Corp.*, 171 F Supp 2d 311, 328 [SD NY 2001]). In view of the foregoing, we agree with defendants that seeking attorneys' fees associated with that underlying class action is a request for indemnity (*see generally Central Trust Co., Rochester v Goldman*, 70 AD2d 767, 767-768 [4th Dept 1979], *appeal dismissed* 47 NY2d 1008 [1979]). We therefore modify the order by granting those parts of the motion seeking dismissal of the complaint to the extent that it seeks damages for attorneys' fees associated with the underlying class action. Contrary to defendants' contention, that determination does not require dismissal of the complaint in its entirety inasmuch as the remaining classes of damages sought by plaintiffs are not barred by the FLSA. Damages for loss of business, business reputation, and contract payments arise directly from the business relationship between plaintiffs and defendants, and awarding such damages does not indemnify plaintiffs for their liability under the FLSA in the underlying class action.

Defendants contend, in the alternative, that the second through fourth causes of action, for negligence, breach of contract and breach of fiduciary duty, should be dismissed as duplicative of the first cause of action, for accounting malpractice. We agree with defendants with respect to the negligence and breach of fiduciary duty causes of action, and we therefore further modify the order accordingly.

Causes of action for negligence, breach of contract and breach of fiduciary duty are duplicative of professional malpractice causes of action where they are based on the same factual allegations and seek similar damages (*see Board of Trustees of IBEW Local 43 Elec. Contrs. Health & Welfare, Annuity & Pension Funds v D'Arcangelo & Co., LLP*, 124 AD3d 1358, 1360 [4th Dept 2015]; *Dischiavi v Calli* [appeal No. 2], 68 AD3d 1691, 1693 [4th Dept 2009]; *TVGA Eng'g, Surveying, P.C. v Gallick* [appeal No. 2], 45 AD3d 1252, 1256 [4th Dept 2007]). Here, the negligence and breach of fiduciary duty causes of action are duplicative of the accounting malpractice cause of action inasmuch as they share the same set of underlying facts and seek the same damages as that cause of action. Moreover, the allegation in the breach of fiduciary duty cause of action that defendants concealed their errors and omissions from plaintiffs does not differentiate that cause of action from the accounting malpractice cause of action inasmuch as "there is no independent cause of action for 'concealing' malpractice"

(*Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept 1992]).

Upon construing the complaint liberally, and affording plaintiffs the benefit of every possible favorable inference (*see generally Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we reject defendants' contention that the breach of contract cause of action is duplicative of the accounting malpractice cause of action. The breach of contract cause of action is based on allegations that defendants breached their agreements with plaintiffs by failing to perform certain services, and that plaintiffs are entitled to recover all compensation paid to defendants for those unperformed services. That is separate and distinct from the allegations in the accounting malpractice cause of action, which seeks damages based on allegations that defendants did perform services pursuant to the contract but failed to comply with the accepted standards of care.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1349

CA 17-00804

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

GEORGE STUCK AND KAREN STUCK,
PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

TRACY K. HICKMOTT, RESPONDENT-APPELLANT.

MICHAEL STEINBERG, ROCHESTER, FOR RESPONDENT-APPELLANT.

Appeal from a judgment (denominated amended order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 18, 2016. The judgment, inter alia, granted petitioners a license to enter onto respondent's property for the limited purpose of painting their fence on a biennial basis.

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

Memorandum: After purchasing residential real property abutting respondent's property, petitioners discovered that a narrow portion of respondent's driveway encroached upon their property. Respondent refused petitioners' request to remove the subject portion of the driveway, and petitioners subsequently constructed a six-foot tall wooden stockade fence on their property along the side of the driveway. Respondent thereafter commenced an action for, among other things, a right of adverse possession or, in the alternative, a prescriptive easement, and petitioners counterclaimed seeking judgment directing that respondent remove the encroaching portion of the driveway. In relevant part, Supreme Court granted petitioners' motion for summary judgment dismissing respondent's complaint, and also ordered that respondent be allowed a right of continued use of the driveway as situated and that neither party impair the quiet enjoyment nor obstruct the use of the driveway and fence.

Although counsel for the parties subsequently negotiated an arrangement whereby petitioners would be permitted to enter respondent's property to paint the fence, a confrontation between the parties on the arranged date resulted in petitioners abandoning their attempt at completing that work. Respondent objected to any future access by petitioners to her property. Petitioners moved by order to show cause for, among other things, an order holding respondent in contempt for denying petitioners' use of the fence and providing petitioners with a right of limited entry onto respondent's property to paint the fence, and the court implicitly converted the motion into

a special proceeding under RPAPL 881 (*see* CPLR 103 [c]; *Mindel v Phoenix Owners Corp.*, 210 AD2d 167, 167-168 [1st Dept 1994], *lv denied* 85 NY2d 811 [1995]). Respondent appeals from a judgment granting petitioners a license to enter onto her property "for the limited purpose of painting the entire length of their existing wooden fence, once per year in any even numbered year," subject to conditions, including that petitioners had to choose one of two predesignated dates for painting, provide two-weeks prior written notice to respondent, and perform the work between 9:00 a.m. and 12:00 p.m. We affirm.

RPAPL 881 provides the means by which an owner seeking "to make improvements or repairs to real property" may seek to obtain a license to enter an adjoining owner's property when those "improvements or repairs cannot be made" without such entry and "permission so to enter has been refused" (*see Matter of Lincoln Spencer Apts., Inc. v Zeckendorf-68th St. Assoc.*, 88 AD3d 606, 606 [1st Dept 2011]). The statute requires that "[t]he petition and affidavits, if any, shall state the facts making such entry necessary and the date or dates on which entry is sought" (RPAPL 881). A license to enter the adjoining property "shall be granted by the court in an appropriate case upon such terms as justice requires" (*id.*) and, "[i]n determining whether or not to grant a license pursuant to [the statute], courts generally apply a standard of reasonableness" (*Matter of Board of Mgrs. of Artisan Lofts Condominium v Moskowitz*, 114 AD3d 491, 492 [1st Dept 2014]; *see Mindel*, 210 AD2d at 167). "Courts are required to balance the interests of the parties and should issue a license 'when necessary, under reasonable conditions, and where the inconvenience to the adjacent property owner is relatively slight compared to the hardship of his [or her] neighbor if the license is refused' " (*Board of Mgrs. of Artisan Lofts Condominium*, 114 AD3d at 492).

Respondent contends that the work for which the license was sought is beyond the scope of RPAPL 881 because painting a wooden fence does not constitute an improvement or a repair to real property within the meaning of the statute. We reject that contention. While the statute must be construed narrowly inasmuch as it stands in derogation of common-law property rights (*see MK Realty Holding, LLC v Scneider*, 39 Misc 3d 1209[A], 2013 NY Slip Op 50551[U], *2 [Sup Ct, Queens County 2013]; *see generally Matter of Bayswater Health Related Facility v Karagheuzoff*, 37 NY2d 408, 414 [1975]; *Hay v Cohoes Co.*, 2 NY 159, 161-163 [1849]), we conclude that, in the absence of a statutory definition, the usual and commonly understood meaning of the words "improvement" and/or "repair" encompasses the painting of the wooden fence in this case (*see* Black's Law Dictionary 875-876, 1490 [10th ed 2014]; *Sunrise Jewish Ctr. of Val. Stream v Lipko*, 61 Misc 2d 673, 675 [Sup Ct, Nassau County 1969]; *cf. Chase Manhattan Bank [Natl. Assn.] v Broadway, Whitney Co.*, 59 Misc 2d 1085, 1086-1087 [Sup Ct, Queens County 1969]; *see generally Yaniveth R. v LTD Realty Co.*, 27 NY3d 186, 192 [2016]). That interpretation is supported by the legislative history, which establishes that the legislature—in recognition that the nature of abutting properties often requires property owners to access the neighboring property in order to make

improvements or repairs to their own—intended to encourage such improvements or repairs by removing unreasonable obstacles to efforts to prevent blight and deterioration (Introducer's Mem in Support, Bill Jacket, L 1968, ch 220; *see Sunrise Jewish Ctr. of Val. Stream*, 61 Misc 2d at 675).

Contrary to respondent's contention, inasmuch as the statute contemplates that property owners may build on their own property such that improvements or repairs cannot be made without entering an adjoining property, the fact that petitioners ostensibly created the problem by constructing their fence too close to the boundary line does not preclude the court from granting a license (*see Sunrise Jewish Ctr. of Val. Stream*, 61 Misc 2d at 675).

Contrary to respondent's further contention, the averments in petitioners' affidavit, together with the photographs attached thereto depicting the nature and positioning of the fence, adequately set forth the facts making entry onto respondent's property necessary to effectuate the requested biennial painting of the wooden fence (*see Mindel*, 210 AD2d at 167; *cf. Lincoln Spencer Apts., Inc.*, 88 AD3d at 606). Given that the inconvenience to respondent of such infrequent and brief entries to facilitate an unexceptional task is relatively slight compared to petitioners' hardship if the license is refused, i.e., an ill-maintained fence subject to deterioration, we conclude that the court properly balanced the interests of the parties by granting petitioners a limited license to enter respondent's property under reasonable conditions, the propriety of which respondent does not otherwise challenge (*see Mindel*, 210 AD2d at 167; *see generally Board of Mgrs. of Artisan Lofts Condominium*, 114 AD3d at 492).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1350

CA 16-01924

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

JOSHUA A. JIMERSON, AS ADMINISTRATOR OF THE ESTATE OF PATRICIA A. JOHN, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 121778.)

KENNETH VAN AERNAM, CLAIMANT-APPELLANT,

V

STATE OF NEW YORK, DEFENDANT-RESPONDENT. (CLAIM NO. 121782.)

LAW OFFICE OF JOEL L. DANIELS, BUFFALO (JOEL L. DANIELS OF COUNSEL), AND MEYERS BUTH LAW GROUP PLLC, ORCHARD PARK, FOR CLAIMANTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR DEFENDANT-RESPONDENT.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (CAROL E. HECKMAN OF COUNSEL), FOR SENECA NATION OF INDIANS AND SAINT REGIS MOHAWK TRIBE, AMICI CURIAE.

Appeal from an order of the Court of Claims (Michael E. Hudson, J.), entered June 2, 2016. The order, insofar as appealed from, denied that part of the motion of claimants for partial summary judgment on the issue of defendant's duty under Highway Law § 53.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, and that part of the motion seeking partial summary judgment on the issue of defendant's duty under Highway Law § 53 is granted.

Memorandum: Claimants commenced their respective actions seeking to recover damages for the wrongful death of Patricia A. John and the injuries sustained by claimant Kenneth Van Aernam when they fell through a hole on the Red House Bridge (RHB). The RHB is a four-span Warren truss bridge, which was built by defendant State of New York (State) in 1930 as part of the former State Highway 1854. There is no dispute that the RHB is located within the sovereign nation of the Seneca Nation of Indians (Seneca Nation), but confusion over who is

responsible for the maintenance of the RHB dates back to as early as 1966.

On July 25, 1976, a Memorandum of Understanding (MOU) was signed by the New York State Department of Transportation (DOT) and the Seneca Nation. Therein, the DOT agreed to "maintain roads located within the boundaries of the Nation's reservations, and for which the [DOT] and the State . . . are obligated to provide maintenance." In July 1980, the DOT issued Official Order No. 1261, which provides in pertinent part that "[t]he State shall discontinue maintenance and jurisdiction over[, inter alia, State Highway 1854], or sections thereof, including any and all bridges and culverts located thereon as have been maintained by the State as part of the State highway system and effective April 1, 1980, these highways shall be maintained as Reservation roads pursuant to Section 53 of the Highway Law." On December 14, 2007, the DOT and the Seneca Nation signed a Project Specific Agreement (PSA) regarding the RHB. The PSA provides that the DOT, "pursuant to the [MOU], is willing to undertake a contract to remove, realign, and replace such Bridge and rehabilitate such roadway at no expense to the Nation." As authority for the DOT's commitment to replace the RHB, the PSA cites Highway Law § 53. The PSA also provides that, "[d]ue to the advanced structural deterioration of the [RHB], it is anticipated that the existing [RHB] will be considered unsafe for usage by vehicular traffic, and possibly may also be considered unsafe for usage by pedestrian traffic, and may accordingly be closed and barricaded." The parties anticipated that the project would be completed in "approximately 34.5 months." Although the PSA was signed in December 2007, the project had been significantly delayed and was not completed when Van Aernam and John fell through a hole on the RHB in 2012.

After commencing these actions, claimants jointly moved for partial summary judgment pursuant to CPLR 3212 on the issue of liability. The Court of Claims denied the motion, and explained, inter alia, that it "cannot find as a matter of law that the State possessed a duty to maintain the [RHB]."

We agree with claimants that the court erred in denying that part of their motion seeking a determination that the State had a statutory duty to maintain the RHB. Highway Law § 53 obligates the State to maintain highways and bridges that it constructed on Indian reservation land, inasmuch as the statute expressly provides that "[t]he [DOT] shall have supervision and control, in the construction, maintenance and improvement of all highways and bridges constructed or to be constructed by the [S]tate on any Indian reservations." Thus, we conclude that Highway Law § 53 creates an unambiguous duty, with no temporal limitation, for the State to maintain the RHB. We note that the State's prior conduct, including signing the MOU in 1976, issuing the DOT Official Order No. 1261 in 1980, and signing the PSA in 2007, is consistent with our determination that Highway Law § 53 requires that the State maintain the RHB.

Although claimants raised additional issues in their appellate brief, their counsel withdrew those challenges at oral argument of

this appeal, and thus we limit our review to the contention discussed above. We therefore reverse the order insofar as appealed from and grant that part of the motion seeking partial summary judgment on the issue of the State's duty under Highway Law § 53.

Mark W. Bennett

Entered: February 9, 2018

Clerk of the Court

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

1351

CA 17-00309

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

TERRI A. MCDONALD, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

WHITNEY HIGHLAND HOMEOWNERS' ASSOCIATION, INC.,
AND CROFTON ASSOCIATES, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 22, 2016. The order, insofar as appealed from, granted the motion of defendants for summary judgment with respect to the second cause of action.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied with respect to the second cause of action, and that cause of action is reinstated.

Memorandum: Defendant Whitney Highland Homeowners' Association, Inc. (Association) owns and maintains the common areas in a townhouse complex in the Town of Perinton, Monroe County. Plaintiff owns a unit in the complex, and is thereby a member of the Association. The Association's governing document, the Declaration of Covenants, Conditions and Restrictions, provides that the Association has the duty to maintain any pipes that "servic[e] more than one Unit," and that the owner of an individual unit has the duty to maintain any other pipes.

Plaintiff commenced this action after her unit was flooded during a severe rainstorm. In plaintiff's second cause of action, for negligent maintenance, she seeks damages based on allegations that the flooding and associated property damage were caused by defendants' failure to provide adequate maintenance for the drainage pipes underneath her unit. Defendants moved for summary judgment dismissing the complaint, contending, inter alia, that the second cause of action should be dismissed inasmuch as they had no maintenance obligations with respect to the subject pipes because those pipes did not service

more than one unit. As limited by her brief, plaintiff contends that Supreme Court erred in granting defendants' motion with respect to the second cause of action. We agree.

"[T]he designation of common areas in a [condominium, cooperative, or homeowners' association] must be tailored to conform to the physical layout of the premises" (*Rego Park Gardens Owners v Rego Park Gardens Assoc.*, 191 AD2d 623, 625 [2d Dept 1993] [internal quotation marks omitted]). Although relevant, the fact that a particular fixture, item, or space is physically connected to, accessible from, or associated with a single unit is not necessarily dispositive of the common element inquiry (*see generally Board of Mgrs. of Bond Parc Condominium v Broxmeyer*, 62 AD3d 925, 927 [2d Dept 2009]). Rather, where the particular fixture, item, or space provides a common benefit to more than one unit, it may be deemed to service more than its physically appurtenant unit and thus may properly be classified as a common element for which the governing board or association is responsible (*see generally Royal York Owners Corp. v Royal York Assoc., L.P.*, 43 AD3d 357, 358-359 [1st Dept 2007], *lv dismissed* 10 NY3d 791 [2008]).

Here, defendants met their initial burden on their motion by establishing that the subject pipes do not service more than one unit and thus are not a common element for which the Association is responsible. It is undisputed that the subject pipes are wholly within the physical footprint of plaintiff's unit, and the plumber who repaired the pipes following the flooding testified at his deposition that they provide drainage for plaintiff's unit alone, i.e., that they do not provide any common benefit to other units in the complex.

Plaintiff, however, raised a triable issue of fact in opposition to the motion by submitting the affidavit of a professional engineer who opined that the pipes do provide a common benefit to the other units in the complex. Specifically, the engineer opined that the pipes serve, in effect, as a communal surface water drainage mechanism for the block of four townhouses to which plaintiff's unit is attached. Contrary to defendants' contention, the engineer's affidavit is not conclusory, speculative, or without foundation. The engineer explained the basis for his opinion, i.e., the slope of the block, the lack of similar piping in certain other units, and the lack of any other communal drainage system, and he described the investigative steps he took to reach that opinion, i.e., multiple site visits and a review of, inter alia, the plumber's deposition testimony. Thus, "plaintiff should be afforded the opportunity to demonstrate [at trial] that, in view of the physical layout of the property, the [subject pipes] were . . . common areas" to be maintained by the Association (*Rego Park Gardens Owners*, 191 AD2d at 625).

Finally, we conclude that the court's consideration of an alternative ground for granting summary judgment to defendants, i.e., that there was no breach of a duty to maintain the pipes, was improper because defendants did not move on that ground (*see Gilberti v Town of*

Spafford, 117 AD3d 1547, 1550 [4th Dept 2014]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1352

CA 17-00310

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

TERRI A. MCDONALD, PLAINTIFF-APPELLANT,

V ORDER

WHITNEY HIGHLAND HOMEOWNERS' ASSOCIATION, INC.,
AND CROFTON ASSOCIATES, INC.,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

LAW OFFICE OF FRANK G. MONTEMALO, PLLC, ROCHESTER (FRANK G. MONTEMALO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

OSBORN, REED & BURKE, LLP, ROCHESTER (AIMEE LAFEVER KOCH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered September 22, 2016. The order, inter alia, granted the motion of defendants to the extent it sought dismissal of the complaint.

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1357

CAF 17-00163

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

IN THE MATTER OF ELLIE JO L.H.

MELISSA L. KOFFS, ESQ., ATTORNEY FOR THE CHILD, PETITIONER-RESPONDENT;

DEBRA A.M., RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

MEMORANDUM AND ORDER

KATHY L. QUENCER, WATERTOWN, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELISSA L. KOFFS, ATTORNEY FOR THE CHILD, CHAUMONT, PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered January 13, 2017 in a proceeding pursuant to Family Court Act article 10. The order, among other things, temporarily removed the subject child from respondent's care.

It is hereby ORDERED that said order is unanimously vacated on the law without costs.

Same memorandum as in *Matter of Ellie Jo L.H.* ([appeal No. 3] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1358

CAF 17-00164

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

IN THE MATTER OF ELLIE JO L.H.

MELISSA L. KOFFS, ESQ., ATTORNEY FOR THE CHILD, PETITIONER-RESPONDENT;

DEBRA A.M., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

MEMORANDUM AND ORDER

KATHY L. QUENCER, WATERTOWN, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELISSA L. KOFFS, ATTORNEY FOR THE CHILD, CHAUMONT, PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), dated January 13, 2017 in a proceeding pursuant to Family Court Act article 10. The order directed respondent to stay away from the subject child except for supervised visitation.

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

Same memorandum as in *Matter of Ellie Jo L.H.* ([appeal No. 3] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1359

CAF 16-02244

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

IN THE MATTER OF ELLIE JO L.H.

MELISSA L. KOFFS, ESQ., ATTORNEY FOR THE CHILD, PETITIONER-RESPONDENT;

DEBRA A.M., RESPONDENT-APPELLANT.
(APPEAL NO. 3.)

MEMORANDUM AND ORDER

KATHY L. QUENCER, WATERTOWN, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (ELIZABETH deV. MOELLER OF COUNSEL), FOR RESPONDENT-APPELLANT.

MELISSA L. KOFFS, ATTORNEY FOR THE CHILD, CHAUMONT, PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered November 29, 2016 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent had neglected the subject child.

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

Memorandum: Petitioner, the Attorney for the Child (AFC), commenced this proceeding pursuant to Family Court Act article 10 alleging that the subject child had been neglected by respondent mother. In appeal No. 1, the mother appeals from an order that, inter alia, temporarily removed the subject child from the mother's care and, in appeal No. 2, she appeals from a temporary order of protection. In appeal No. 3, the mother appeals from an order determining, following a fact-finding hearing, that she neglected the child. At the outset, we note that the temporary order of protection in appeal No. 2 expired by its own terms on July 12, 2017, and the appeal from that order must therefore be dismissed as moot (*see Matter of Rottenberg v Clark*, 144 AD3d 1627, 1628 [4th Dept 2016]).

Contrary to the mother's contention in appeal No. 3, the AFC had the statutory authority to file a neglect petition on behalf of the child at the direction of Family Court (*see* Family Ct Act § 1032 [b]; *Matter of Amber A. [Thomas E.]*, 108 AD3d 664, 665 [2d Dept 2013]). The mother further contends that the court erred in permitting the AFC to substitute her judgment for that of the child. Even assuming, arguendo, that the mother preserved that contention for our review, we conclude that the AFC's position that the child lacked the capacity

for "knowing, voluntary, and considered judgment" is supported by the record (22 NYCRR 7.2 [d] [3]; *see Matter of Mason v Mason*, 103 AD3d 1207, 1208 [4th Dept 2013]).

In appeal No. 3, we agree with the mother that the court erred in determining that she neglected the child inasmuch as the AFC failed to meet her burden of establishing by a preponderance of the evidence that the "child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired" as a consequence of the mother's failure to exercise a minimum degree of care (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). It is well established that "any impairment to the child[ ] 'must be clearly attributable to the unwillingness or inability of the mother to exercise a minimum degree of care toward' [the child] . . . , rather than what may be deemed 'undesirable parental behavior' " (*Matter of Hannah U. [Dennis U.]*, 97 AD3d 908, 909 [3d Dept 2012]). "Indeed, the statutory test is *minimum* degree of care – not maximum, not best, not ideal" (*id.* [internal quotation marks omitted]; *see* Family Ct Act § 1012 [h]; *Nicholson*, 3 NY3d at 370). Here, the court concluded that, "on one hand, [the mother] may simply be a mother determined to protect her child. On the other hand, she may be a woman determined to cause emotional harm to the father of their child. In either case, the consequence of this course of action *may be* emotional harm to [the child]" (emphasis added). While the record establishes that the mother's conduct has been troubling at times, "there is no indication in the record that the child was . . . impaired or in imminent danger of impairment of her physical, mental, or emotional condition as a result of any acts committed by [the mother]" (*Matter of Cheyenne F.*, 238 AD2d 905, 905-906 [4th Dept 1997]). We therefore reverse the order in appeal No. 3 and dismiss the petition.

As a consequence of the dismissal of the petition, we vacate the temporary order in appeal No. 1.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1367

KA 14-01136

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROSE M. CHASE, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (GARY MULDOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 15, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, tampering with physical evidence, and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is modified on the law by reversing that part convicting defendant of endangering the welfare of a child and dismissing count three of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), tampering with physical evidence (§ 215.40 [2]), and endangering the welfare of a child (§ 260.10 [1]). Although we agree with defendant that the People improperly delayed turning over certain *Rosario* material, we conclude that she failed to demonstrate substantial prejudice as a result thereof, and she is therefore not entitled to a new hearing or reversal of the judgment of conviction (*see People v Boykins*, 134 AD3d 1542, 1543 [4th Dept 2015], *lv denied* 27 NY3d 1066 [2016]; *People v Carota*, 93 AD3d 1072, 1077 [3d Dept 2012]; *People v Lluveres*, 15 AD3d 848, 849 [4th Dept 2005], *lv denied* 5 NY3d 807 [2005]; *People v Collins*, 283 AD2d 437, 438 [2d Dept 2001], *lv dismissed* 96 NY2d 934 [2001], *lv denied* 97 NY2d 703 [2002]).

We reject defendant's contention that County Court erred in limiting the cross-examination of a police officer. The court ruled that defense counsel could inquire whether the officer was in communication with the District Attorney during his interview of defendant but that he could not question the officer regarding the specific contents of the communication. " 'The trial court is granted broad discretion in making evidentiary rulings in connection with the preclusion or admission of testimony[,] and such rulings should not be

disturbed absent an abuse of discretion' " (*People v Acevedo*, 136 AD3d 1386, 1387 [4th Dept 2016], *lv denied* 27 NY3d 1127 [2016]). Here, the court's ruling did not constitute an abuse of discretion.

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that it is legally sufficient to establish defendant's intent to kill inasmuch as such intent " 'may be inferred from defendant's conduct as well as the circumstances surrounding the crime' " (*People v Badger*, 90 AD3d 1531, 1532 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]). In addition to certain statements of defendant from which the jury could infer that she intended to kill the victim, the People presented evidence that, on the day of the victim's death, defendant and the victim had an argument (*see People v Lucas*, 94 AD3d 1441, 1441 [4th Dept 2012], *lv denied* 19 NY3d 964 [2012]). Moreover, there is no dispute that defendant is in fact solely responsible for the victim's death, hid the body for several weeks at her home, and then transported the body to her mother's house where she cremated the body and disposed of the remains in a trash can (*see People v Geddes*, 49 AD3d 1255, 1256 [4th Dept 2008], *lv denied* 10 NY3d 863 [2008]). Viewing the evidence in light of the elements of murder in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict with respect to that charge is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that her conviction of endangering the welfare of a child is not based on legally sufficient evidence, and we therefore modify the judgment accordingly. The charge arose from defendant allegedly having her four-year-old child accompany her when she transported the victim's body to her mother's house. Viewing the evidence in support of that charge in the light most favorable to the People (*see Contes*, 60 NY2d at 621), we conclude that the People failed to establish beyond a reasonable doubt that the child's riding in the car with the victim's body was likely to result in harm to the physical, mental, or moral welfare of the child (*see* Penal Law § 260.10 [1]; *People v Hitchcock*, 98 NY2d 586, 590-591 [2002]). Specifically, the People presented no evidence that the child was aware that the victim's body was in the car or that the child was upset or bothered by any smells or sights in the car or later at his grandmother's house (*see generally People v Kanciper*, 100 AD3d 778, 779 [2d Dept 2012]).

Although the Court of Appeals has held that "[a]ctual harm to the child need not result for criminal liability" and that "it is sufficient that the defendant act in a manner which is *likely* to result in harm to the child, *knowing* of the likelihood of such harm coming to the child" (*People v Johnson*, 95 NY2d 368, 371 [2000] [internal quotation marks omitted]), "[t]he People . . . must establish that the harm was likely to occur, and not merely possible" (*Hitchcock*, 98 NY2d at 591 [2002]). Our dissenting colleagues conclude that "the jury here could have reasonably concluded that there was a likelihood that the child could be harmed by his

inevitable knowledge and understanding of the actual events in which defendant knowingly involved him." In our view, that conclusion is too tenuous, and the "common human experience and commonsense understanding of the nature of children" cannot overcome the fact that there is nothing in this record from which the jury could have concluded that defendant's four-year-old child was likely to be harmed (*People v Simmons*, 92 NY2d 829, 831 [1998]). The actions of defendant in this case are beyond repugnant, but the dissent's reliance on the child's "inevitable knowledge and understanding of the actual events" in concluding that harm is likely to occur is entirely speculative.

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

All concur except WHALEN, P.J., and WINSLOW, J., who dissent and vote to affirm in the following memorandum: We respectfully dissent inasmuch as we would affirm the judgment in its entirety. Viewing the evidence as a whole "and the inferences which may be drawn in the light most favorable to the People" (*People v Johnson*, 95 NY2d 368, 373 [2000]), we conclude that the evidence at trial is legally sufficient to support defendant's conviction of endangering the welfare of a child (Penal Law § 260.10 [1]). The jurors, "drawing upon their common human experience and commonsense understanding of the nature of children," could reasonably conclude that transporting a four-year-old child in a car with the body of the severely decomposed, dismembered corpse of the man the child knew to be his father was "likely to have caused the child harm, and that defendant knew that her [actions] were likely to cause the child to suffer harm" (*People v Simmons*, 92 NY2d 829, 831 [1998], citing *People v Kennedy*, 47 NY2d 196, 203 [1979], *rearg dismissed* 48 NY2d 635, 656 [1979]). We cannot agree with the majority that this is a case where the child was completely unaware of the circumstances. Defendant, herself, admitted in a police interview that the car "stunk" at the time, prompting her to attempt to minimize the smell by driving with the windows down and explaining to the child that "[M]ommy is trying to air out the car." Contrary to *People v Kanciper* (100 AD3d 778, 779 [2d Dept 2012]), on which the majority relies, the jury here could have reasonably concluded that there was a likelihood that the child could be harmed by his inevitable knowledge and understanding of the actual events in which defendant knowingly involved him (*see Simmons*, 92 NY2d at 831; *see generally Johnson*, 95 NY2d at 372; *People v Kalen*, 68 AD3d 1666, 1667 [4th Dept 2009], *lv denied* 14 NY3d 842 [2010]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1403

CA 17-01177

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

HYPERCEL CORPORATION, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

STAMPEDE PRESENTATION PRODUCTS, INC.,
DEFENDANT-RESPONDENT.

KAZLOW & KAZLOW, P.C., NEW YORK CITY (STUART L. SANDERS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

COLLIGAN LAW, LLP, BUFFALO (MATTHEW K. PELKEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered February 10, 2017. The order, inter alia, granted that part of the motion of defendant asking the court to "renew and reconsider" its prior motion pursuant to CPLR 3126, and precluded plaintiff from introducing or relying on any evidence concerning its former employee, including secondary and hearsay evidence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by, upon renewal, denying that part of the motion pursuant to CPLR 3126 with respect to any secondary or hearsay evidence related to plaintiff's former employee and as modified the order is affirmed without costs in accordance with the following memorandum: In this breach of contract action, plaintiff appeals from an order that, inter alia, precluded it from introducing or relying on any evidence or testimony related to plaintiff's former employee, including any secondary or hearsay evidence related to that employee. We conclude that Supreme Court abused its discretion in precluding the use of any secondary or hearsay evidence.

Plaintiff is a corporation that manufactures various consumer products, including armbands that people use to hold their cell phones while exercising. Defendant is a corporation that sells such armbands. The parties entered into a contract for defendant to purchase a certain amount of armbands from plaintiff but, upon receiving those armbands, defendant realized that they were not compatible with the recently released "iPhone 5 and other PDA's." Defendant refused to pay for the armbands and attempted to return them, but plaintiff refused to accept them and commenced this action.

During discovery, defendant sought to depose plaintiff's employee who negotiated the sale of the armbands to defendant, but that

employee was no longer employed by plaintiff. Plaintiff provided defendant with information concerning the former employee's last known address in California but, after defendant notified plaintiff of its intent to conduct an ex parte interview of the former employee, another attorney from the law firm representing plaintiff filed a notice of appearance indicating that the law firm was "appear[ing] as counsel" for the former employee, who was referred to therein as a "third party" in connection with the action. As a result of that notice of appearance, defendant was precluded from interviewing the former employee.

The parties scheduled a video deposition of the former employee, which was adjourned due to her travel schedule. Two months later, plaintiff's attorney notified defendant's attorney that the office of plaintiff's attorney had "lost contact" with the former employee and would "not be able to produce her for a deposition." Plaintiff's attorney advised defendant's attorney to "pursue other alternatives, if you still wish to depose her."

Defendant thereafter moved pursuant to CPLR 3126 to dismiss the complaint or, in the alternative, to preclude plaintiff "from utilizing any evidence or testimony relating to [the former employee], including but not limited to any secondary or hearsay evidence relating" to her. Plaintiff's attorney thereafter cross-moved for "an order relieving [her firm] as attorneys of record" for the former employee. The court denied defendant's motion without prejudice, "with the condition" that, if the former employee were not produced for a deposition, then the court would reconsider the motion. The court also denied the cross motion of plaintiff's attorney "until counsel has either produced [the former employee] for a deposition or has made sufficient efforts to secure her appearance at a deposition."

Plaintiff's attorney never produced the former employee for a deposition. Rather, plaintiff's attorney sent the former employee a letter informing her that the attorney's "motion" to be relieved as her attorney had been denied and that the court had directed plaintiff's attorney "to make additional efforts to secure [her] appearance for the deposition." The court's decision was attached to the letter. Plaintiff's attorney sent the former employee a second letter asking for her consent to allow the attorney's firm to be relieved as her attorneys. There is no indication that plaintiff's attorney ever received a response from the former employee.

The court thereafter, in relevant part, granted that part of defendant's subsequent motion asking the court "to renew and reconsider" its prior motion pursuant to CPLR 3126, and precluded plaintiff from introducing or relying on any evidence concerning the former employee, including secondary and hearsay evidence.

It is well settled that "[t]he nature and degree of the penalty to be imposed on a CPLR 3126 motion lies within the sound discretion of the trial court and will be disturbed only if there has been an abuse or improvident exercise of discretion" (*Kimmel v State of New York*, 267 AD2d 1079, 1080 [4th Dept 1999]; *see Perry v Town of Geneva*,

64 AD3d 1225, 1226 [4th Dept 2009]). A party seeking a penalty of preclusion or dismissal "is required to demonstrate that a litigant, intentionally or negligently, dispose[d] of crucial items of evidence . . . before the adversary ha[d] an opportunity to inspect them . . . , thus depriving the party seeking a sanction of the means of proving his [or her] claim or defense" (*Koehler v Midtown Athletic Club, LLP*, 55 AD3d 1444, 1445 [4th Dept 2008] [internal quotation marks omitted]; *see* CPLR 3126 [2]; *Bill's Feed Serv., LLC v Adams*, 132 AD3d 1400, 1401 [4th Dept 2015]).

Here, the court's remedy of precluding primary and secondary evidence related to the former employee effectively precludes plaintiff from asserting its claim. Such a remedy is "reserved for those instances where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious" (*D.A. Bennett LLC v Cartz*, 113 AD3d 945, 946 [3d Dept 2014] [internal quotation marks omitted]; *see Hasan v 18-24 Luquer St. Realty, LLC*, 144 AD3d 631, 632 [2d Dept 2016]; *Campbell v Obear*, 26 AD3d 877, 877 [4th Dept 2006]).

Generally, where there is no evidence that a corporation exercises control over a former employee, that corporation cannot be held responsible for the former employee's refusal to appear for a deposition (*see e.g. Cason v Smith*, 120 AD3d 1554, 1555 [4th Dept 2014], *lv dismissed* 25 NY3d 1057 [2015]; *Pezhman v Department of Educ. of the City of N.Y.*, 95 AD3d 625, 625 [1st Dept 2012]; *Ewadi v City of New York*, 66 AD3d 583, 583 [1st Dept 2009]). Here, however, the firm representing plaintiff undertook the representation of that former employee, implicitly conceding control over the former employee (*see Hann v Black*, 96 AD3d 1503, 1504 [4th Dept 2012]). When the court ordered plaintiff's attorney to make every reasonable effort to secure the former employee's appearance for a deposition, plaintiff's attorney merely sent a letter notifying the former employee that the attorney was supposed to make additional efforts to secure her presence. There is no evidence that any actual efforts to secure her appearance were made. We thus agree with the court that plaintiff should be precluded from presenting testimony from the former employee.

We conclude, however, that the court abused its discretion in precluding plaintiff from relying on any secondary or hearsay evidence related to the former employee. There was no order compelling the production of such evidence that plaintiff was alleged to have violated, and the court did not find a willful failure to disclose such evidence. We therefore modify the order accordingly.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1409

KA 16-00534

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND L. LEACH, JR., DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Genesee County Court (Michael F. Pietruszka, A.J.), entered March 29, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq.*), defendant contends that County Court erred in assessing 15 points for inflicting physical injury because there was no corroboration of the victim's "largely unsubstantiated" and "vague" complaints of pain and thus no injury rising to the Penal Law definition of physical injury. That contention is not preserved for our review inasmuch as defendant's objection to the points assessed for physical injury at the SORA hearing "was made on a different ground than the [insufficient evidence] ground he raises on appeal" (*People v Law*, 94 AD3d 1561, 1562 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]). In any event, defendant's contention lacks merit.

The SORA Risk Assessment Guidelines and Commentary (2006) (Guidelines) incorporates the Penal Law definition of physical injury in Penal Law § 10.00 (9), i.e., "impairment of physical condition or substantial pain" (*see* Guidelines at 8). "Of course 'substantial pain' cannot be defined precisely, but it can be said that it is more than slight or trivial pain. Pain need not, however, be severe or intense to be substantial" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). "Factors relevant to an assessment of substantial pain include the nature of the injury, viewed objectively, the victim's subjective description of the injury and his or her pain, whether the

victim sought medical treatment, and the motive of the offender" (*People v Haynes*, 104 AD3d 1142, 1143 [4th Dept 2013], *lv denied* 22 NY3d 1156 [2014]).

Here, the People established substantial pain by clear and convincing evidence, and it is irrelevant that the crime to which defendant entered an *Alford* plea did not contain a physical injury component because "the court was not limited to considering only such crime[]" (*People v Scott*, 71 AD3d 1417, 1418 [4th Dept 2010], *lv denied* 14 NY3d 714 [2010]; *see People v Sincerbeaux*, 121 AD3d 1577, 1578 [4th Dept 2014], *affd* 27 NY3d 683 [2016]; *see generally* Correction Law § 168-n [3]; *People v Jewell*, 119 AD3d 1446, 1447 [4th Dept 2014], *lv denied* 24 NY3d 905 [2014]).

In his statement, the victim wrote that, after defendant stabbed him in the rectum with a toothbrush, the victim was "in severe pain and in shock" and was bleeding from his rectum. The victim thereafter had to undergo a colonoscopy and was in "severe pain and discomfort." In the offer of proof at the *Alford* plea, the prosecutor stated that the victim would testify at trial that he "suffer[ed] pain" as a result of the incident and was forced to seek medical attention. That evidence is thus "deemed established for the purposes of SORA classification" (*People v Jones*, 15 AD3d 929, 930 [4th Dept 2005]), and we conclude that the People established this risk factor by clear and convincing evidence (*see* Correction Law § 168-n [3]; *People v Kruger*, 88 AD3d 1169, 1170 [3d Dept 2011], *lv denied* 18 NY3d 806 [2012]).

Defendant further contends that the court erred in assessing him 30 points for a prior conviction of endangering the welfare of a child (EWC) because that conviction was "non-sexual in nature." Inasmuch as defendant "never specifically opposed the People's request for the scoring of points" under that risk factor, we conclude that defendant's contention is not preserved for our review (*People v Gillotti*, 23 NY3d 841, 854 [2014]; *see Law*, 94 AD3d at 1562). In any event, the contention lacks merit. There is no dispute that defendant has the prior conviction and, "without regard to whether the underlying [EWC] offense involved conduct that is sexual in nature," the court is required to assess 30 points for such a prior conviction (*Sincerbeaux*, 27 NY3d at 689). Where a prior EWC conviction is nonsexual in nature, the court is not empowered to reduce the point assessment. Rather, the court is *permitted* to grant a downward departure (*see id.* at 689 n 3). Defendant failed to meet his burden of proving "the existence of the mitigating circumstances" that would justify a downward departure (*Gillotti*, 23 NY3d at 864).

We reject defendant's further contention that the court erred in assessing 10 points based on his failure to accept responsibility. Although defendant correctly contends that an *Alford* plea is insufficient, on its own, to justify an assessment of points under that category (*see People v Gonzalez*, 28 AD3d 1073, 1074 [4th Dept 2006]), the People established by clear and convincing evidence that defendant thereafter " 'denied that he performed the criminal sexual

act which formed the basis for the conviction' " (*People v Wilson*, 117 AD3d 1557, 1557 [4th Dept 2014], *lv denied* 24 NY3d 902 [2014]). Contrary to defendant's contention, we may consider his letter to the Probation Department, in which he denied all guilt and called the victim a liar, because it was attached as an enclosure to the People's January 2016 letter to the court, which is a part of the stipulated record on appeal (*cf. People v Rosa*, 217 AD2d 1013, 1013 [4th Dept 1995]). That letter, alone, justifies the assessment of points under this category. Even assuming, arguendo, that we could not consider the letter that defendant omitted from the record on appeal, we note that the prosecutor summarized the contents of that letter during the SORA hearing. We may consider the People's summary of the letter because reliable hearsay is permitted at SORA hearings (*see People v Mingo*, 12 NY3d 563, 574 [2009]).

Finally, we reject defendant's contention that the court erred in assessing 10 points for unsatisfactory conduct while confined. That assessment was based upon "a recent determination following a tier III hearing that was set forth in the case summary and that defendant [does not dispute] had been entered against him" (*People v Ealy*, 55 AD3d 1313, 1314 [4th Dept 2008], *lv denied* 11 NY3d 714 [2008]; *see People v Williams*, 100 AD3d 610, 610-611 [2d Dept 2012], *lv denied* 20 NY3d 859 [2013]; *People v Mabee*, 69 AD3d 820, 820-821 [2d Dept 2010], *lv denied* 15 NY3d 703 [2010]).

We thus conclude that "the court's determination of defendant's risk level is based on clear and convincing evidence, and we will not disturb it" (*People v Warwick*, 5 AD3d 1050, 1050 [4th Dept 2004], *lv denied* 3 NY3d 605 [2004]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1414

KA 14-01577

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VANGIE M. NAVARRO, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JAMES B. RITTS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered July 2, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts), criminal possession of a controlled substance in the seventh degree, criminal sale of marihuana in the third degree and criminal sale of marihuana in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and one count each of criminal sale of marihuana in the third degree (§ 221.45) and criminal sale of marihuana in the fourth degree (§ 221.40), defendant contends that County Court erred in refusing to hold a *Franks/Alfinito* hearing (*see Franks v Delaware*, 438 US 154 [1978]; *People v Alfinito*, 16 NY2d 181 [1965]). We reject that contention. Defendant "failed to make 'a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard of the truth, was included by the affiant in the [search] warrant affidavit, and . . . [that such] statement [was] necessary to the finding of probable cause' " (*People v Binion*, 100 AD3d 1514, 1514-1515 [4th Dept 2012], *lv denied* 21 NY3d 911 [2013], quoting *Franks*, 438 US at 155-156; *see People v Barnes*, 139 AD3d 1371, 1373-1374 [4th Dept 2016], *lv denied* 28 NY3d 926 [2016]; *see generally People v Tambe*, 71 NY2d 492, 504 [1988]).

Contrary to defendant's further contention, a hearing is not required where, as here, there is a challenge to the facial validity of the search warrant, as opposed to the validity of the information contained therein (*see People v Dunn*, 155 AD2d 75, 80 [4th Dept 1990],

affd 77 NY2d 19 [1990], *cert denied* 501 US 1219 [1991]; *People v Samuel*, 137 AD3d 1691, 1693 [4th Dept 2016]; *see generally People v Glen*, 30 NY2d 252, 262 [1972]). Here, the court properly determined that the warrant was valid because " 'it was based on firsthand information from the officer who conducted the monitored, controlled drug buy [at the residence] with a confidential informant, thereby establishing the informant's reliability' " (*People v Long*, 100 AD3d 1343, 1346 [4th Dept 2012], *lv denied* 20 NY3d 1063 [2013]; *see People v Abron*, 278 AD2d 919, 919 [4th Dept 2000], *lv denied* 96 NY2d 797 [2001]).

Defendant additionally contends that the search warrant was "overbroad" because it included weapons when the search warrant application provided no basis to believe that weapons would be found in the residence, and thus the weapons should have been suppressed. That contention is not preserved for our review " 'inasmuch as defendant failed to raise it either in his motion papers or before the suppression court' " (*Samuel*, 137 AD3d at 1693) and, in any event, it lacks merit. Even assuming, arguendo, that defendant is correct and there was no probable cause to believe that weapons would be located in the residence (*cf. People v Osorio*, 34 AD3d 1271, 1272 [4th Dept 2006], *lv denied* 8 NY3d 883 [2007]), we nevertheless conclude that the two firearms were properly seized. The officers were lawfully in a position to observe the firearms and had lawful access to them when they seized them, and "the incriminating character of the [firearms] was immediately apparent" (*People v Tangney*, 306 AD2d 360, 361 [2d Dept 2003], *lv denied* 100 NY2d 599 [2003]; *see People v Gerow*, 85 AD3d 1319, 1320 [3d Dept 2011]; *see generally People v Brown*, 96 NY2d 80, 85-88 [2001]).

Defendant failed to object to the court's ultimate *Sandoval* ruling and thus failed to preserve for our review his contention that the court's ruling constitutes an abuse of discretion (*see People v Tolliver*, 93 AD3d 1150, 1151 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]). In any event, we conclude that defendant's contention lacks merit inasmuch as "the record establishes that the court weighed appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination" (*People v Butler*, 148 AD3d 1540, 1542 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017] [internal quotation marks omitted]). Contrary to defendant's contention, the court properly allowed the prosecutor to cross-examine defendant with respect to his prior conviction of resisting arrest. Such a crime "showed the willingness of defendant to place his own interests above those of society" (*People v Salsbery*, 78 AD3d 1624, 1626 [4th Dept 2010], *lv denied* 16 NY3d 836 [2011]).

At the close of the People's case, defendant moved for a trial order of dismissal, challenging the sufficiency of the evidence related only to the weapon and marihuana counts. Thus, to the extent that defendant contends on appeal that the evidence is legally insufficient to support the conviction of criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), that contention is not preserved for our review (*see People v Gray*, 86 NY2d

10, 19 [1995]). In any event, we conclude that, for each count, there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel because defense counsel did not "adamantly request" a *Franks/Alfinito* hearing and failed to mark or introduce defendant's certificate of relief from disabilities, which defendant contends established a defense to the possession of the firearms in his home (*see* Penal Law § 265.03 [3]). We reject that contention. It is well settled that "[t]here can be no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]). Here, there was no basis for a *Franks/Alfinito* hearing (*see Binion*, 100 AD3d at 1514-1515), and defendant has failed to establish that a certificate of relief from disabilities would have raised a valid defense. The exemption found in Penal Law § 265.20 (a) (5) applies only to those who have been issued a certificate of good conduct pursuant to Correction Law § 703-b, not to those who have been issued a certificate of relief from disabilities under Correction Law §§ 701, 702 or 703. Here, there is no evidence that defendant was ever issued a certificate of good conduct (*see People v Kemp*, 273 AD2d 806, 806 [4th Dept 2000], *cert denied* 532 US 977 [2001]). Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1438

CA 17-00501

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

DANIEL WILLIAMS AND EDWARD WILLIAMS,
PLAINTIFFS-RESPONDENTS,

V OPINION AND ORDER

BEEMILLER, INC., DOING BUSINESS AS HI-POINT,
ET AL., DEFENDANTS,
AND CHARLES BROWN, DEFENDANT-APPELLANT.

SCOTT L. BRAUM & ASSOCIATES, LTD., DAYTON, OHIO (SCOTT L. BRAUM, OF THE OHIO BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND BARCLAY DAMON LLP, BUFFALO, FOR DEFENDANT-APPELLANT.

BRADY CENTER TO PREVENT GUN VIOLENCE, LEGAL ACTION PROJECT, WASHINGTON, D.C. (JONATHAN E. LOWY, OF THE WASHINGTON, D.C. BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND CONNORS & VILARDO, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered July 20, 2016. The order denied the motion of defendant Charles Brown for summary judgment dismissing the first amended complaint against him.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, and the first amended complaint is dismissed against defendant Charles Brown.

Opinion by PERADOTTO, J.P.:

In this appeal, we must determine whether defendant Charles Brown, an out-of-state seller of firearms who sold a gun that was transported to New York and used in a shooting, is subject to personal jurisdiction in this state. We hold that the exercise of personal jurisdiction under New York's long-arm statute does not comport with federal due process under the circumstances of this case.

I

As we explained when this case was previously before us in the context of motions to dismiss by three defendants (*Williams v Beemiller, Inc.*, 100 AD3d 143 [4th Dept 2012], *amended on rearg* 103 AD3d 1191 [4th Dept 2013]), plaintiffs commenced this action seeking damages for injuries sustained by Daniel Williams (plaintiff) in an

August 2003 shooting in Buffalo. Plaintiff, a high school student, was shot in the abdomen by defendant Cornell Caldwell, who apparently misidentified plaintiff as a rival gang member. The gun used to shoot plaintiff was identified as a Hi-Point 9mm semiautomatic pistol manufactured by defendant Beemiller, Inc., doing business as Hi-Point (Beemiller), an Ohio corporation and a federally licensed firearms manufacturer. Beemiller sold the gun to defendant MKS Supply, Inc. (MKS), an Ohio corporation and a federally licensed wholesale distributor of firearms. MKS then sold the gun to Brown, who held a federal firearms license (FFL) in Ohio and sold guns at retail as Great Lakes Products (Great Lakes).

During several sales at Ohio gun shows in 2000, Brown sold 181 guns, including the gun at issue, to defendants James Nigel Bostic and his associates, including Kimberly Upshaw. According to plaintiffs, Bostic was a gun trafficker who regularly traveled to Ohio and used "straw purchasers"—such as Upshaw—to obtain large numbers of handguns for resale on the streets of Buffalo. Indeed, Bostic eventually pleaded guilty to federal firearms trafficking violations and was sentenced to 87 months in prison.

In the first amended complaint (hereafter, complaint), plaintiffs alleged, inter alia, that Beemiller, MKS, and Brown (collectively, defendants) "negligently distributed and sold the Hi-Point handgun in a manner that caused it to be obtained by Caldwell, an illegal and malicious gun user and possessor, and then to be used to shoot [plaintiff]." According to plaintiffs, Beemiller and MKS intentionally supplied handguns to irresponsible dealers, including Brown, because they profited from sales to the criminal gun market. Brown, in turn, sold numerous handguns, including the subject gun, to Bostic and Upshaw, even though he knew or should have known that they "intended to sell these multiple guns on the criminal handgun market, to supply prohibited persons and criminals such as Caldwell with handguns." Plaintiffs alleged six causes of action against defendants.

In lieu of answering, defendants each moved to dismiss the complaint against them and, in his motion, Brown asserted, inter alia, that he was not subject to personal jurisdiction in New York (*see id.* at 152). Supreme Court dismissed the action against Brown for lack of jurisdiction, but we reversed on appeal, holding in relevant part that plaintiffs made a sufficient start to warrant further disclosure on the issue whether personal jurisdiction could be established over Brown (*see id.* at 152-154.1).

In his subsequent answer, Brown asserted various affirmative defenses, including that the court lacked personal jurisdiction over him. Following jurisdictional discovery, Brown moved for summary judgment dismissing the complaint against him. In its bench decision, the court concluded that plaintiffs had established the requisite elements for the exercise of long-arm personal jurisdiction over Brown under CPLR 302 (a) (3), including that Brown derived substantial revenue from guns used in New York and from interstate commerce. The court also concluded that plaintiffs had demonstrated that "Brown had

some knowledge that guns would end up in New York" inasmuch as the submissions showed that a significant number of guns sold by Brown were used in criminal activity in Buffalo and that a statement was made to Brown that Bostic and Upshaw planned to open a gun store in Ohio and one in Buffalo. Brown appeals from the order denying his motion for summary judgment.

II

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Thus, "[a] party moving for summary judgment must demonstrate that 'the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment' in the moving party's favor" (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014], quoting CPLR 3212 [b]). "This burden is a heavy one and on a motion for summary judgment, 'facts must be viewed in the light most favorable to the non-moving party' " (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]), "and every available inference must be drawn in the [non-moving party's] favor" (*De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]). If the moving party makes a prima facie showing, "the burden then shifts to the non-moving party to 'establish the existence of material issues of fact which require a trial of the action' " (*Jacobsen*, 22 NY3d at 833). To the extent that the parties dispute the applicable standard, we note that the same burden-shifting framework applies where, as here, a defendant moves for summary judgment on the affirmative defense of lack of long-arm personal jurisdiction (*see e.g. Andrew Greenberg, Inc. v Sirtech Can., Ltd.*, 79 AD3d 1419, 1421 [3d Dept 2010]; *Dreznick v Lenchner*, 41 AD3d 769, 770 [2d Dept 2007]; *Kesterson v Cambo Fotografische Industrie BV*, 30 AD3d 301, 301 [1st Dept 2006]; *Schultz v Hyman*, 201 AD2d 956, 957-958 [4th Dept 1994]).

In determining whether the exercise of personal jurisdiction over a nondomiciliary defendant is proper, a court must assess whether the requirements of New York's long-arm statute have been met and, if so, whether a finding of personal jurisdiction comports with federal due process (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 216 [2000]).

III

CPLR 302 (a) (3) provides, as relevant here, that a court may exercise personal jurisdiction over a nondomiciliary

> "who in person or through an agent . . . commits a tortious act without the state causing injury to person or property within the state . . . if he [or she] (i) . . . derives substantial revenue from goods used or consumed . . . in the state, or (ii) expects or should reasonably expect the act

> to have consequences in the state and derives substantial revenue from interstate or international commerce."

On appeal, Brown does not challenge the assertion of statutory long-arm jurisdiction on the ground that he did not commit a tortious act outside New York that caused injury to a person inside New York (*see id.*; *see generally Penguin Group [USA] Inc. v American Buddha*, 16 NY3d 295, 302 [2011]; *LaMarca*, 95 NY2d at 214). In any event, the record evidence suggests that Brown improperly sold the subject gun in Ohio to a gun trafficking ring (*see e.g. Shawano Gun & Loan, LLC v Hughes*, 650 F3d 1070, 1073 [7th Cir 2011]; *see generally* 18 USC §§ 2 [a]; 922 [m]), and establishes that the gun was later used to shoot and injure plaintiff in New York.

Statutory long-arm jurisdiction thus turns on whether Brown "derives substantial revenue from goods used or consumed . . . in [New York]" (CPLR 302 [a] [3] [i]), or whether he "expects or should reasonably expect [his tortious] act to have consequences in [New York] and derives substantial revenue from interstate or international commerce" (CPLR 302 [a] [3] [ii]; *see Penguin Group [USA] Inc.*, 16 NY3d at 302; *Ingraham v Carroll*, 90 NY2d 592, 596 [1997]). Even assuming, arguendo, that Brown met his initial burden by establishing that he did not derive substantial revenue from goods used or consumed in New York or from interstate/international commerce, we conclude for the reasons that follow that plaintiffs' submissions in opposition to the motion established those statutory requisites.

Although "[a] uniformly dependable yardstick for what is or is not 'substantial' has not yet been devised," courts have applied both a proportion test and a quantity test to determine what constitutes substantial revenue within the meaning of CPLR 302 (a) (3) (Siegel, NY Prac § 88 at 165 [5th ed 2011]; *see Allen v Canadian Gen. Elec. Co.*, 65 AD2d 39, 41-43 [3d Dept 1978], *affd* 50 NY2d 935 [1980]; *Tonns v Spiegel's*, 90 AD2d 548, 549 [2d Dept 1982]; *Allen v Auto Specialties Mfg. Co.*, 45 AD2d 331, 333 [3d Dept 1974]). Under the former test, the defendant's overall revenue is compared to revenue from New York or interstate/international commerce (*see Tonns*, 90 AD2d at 549; *Allen*, 45 AD2d at 333; *see also* Siegel, NY Prac § 88 at 165-166). Under the latter test, revenue may be deemed "substantial" where the amount of revenue the defendant derives from New York or interstate/international commerce is great, even though it comprises only a small proportion of the defendant's overall business (*see Allen*, 65 AD2d at 42-43; *see also* Siegel, NY Prac § 88 at 165). In any case, the inquiry is fact-specific (*see Allen*, 65 AD2d at 42; Siegel, NY Prac § 88 at 165).

Here, with respect to CPLR 302 (a) (3) (i), we agree with plaintiffs that Brown's sales to the gun trafficking ring establish that he derived substantial revenue from guns used or consumed in New York. Plaintiffs' evidentiary submissions, in particular the copies of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) Form 4473 for each transaction (*see* 27 CFR 478.124 [a]), establish that Brown sold 181 guns to Bostic and his associates between May and

October 2000. Plaintiffs further provided evidence demonstrating that the guns sold to Bostic and his associates were " 'used or consumed'—i.e., possessed or discharged—in New York" (*Williams*, 100 AD3d at 154; *see* CPLR 302 [a] [3] [i]). Among other things, in his federal plea agreement, Bostic and the government agreed that, "after each purchase, [Bostic] took possession of all the firearms," which he then transported to Buffalo where he would "store the firearms at relatives' houses until he could find a buyer" and, by himself and through others, sell the guns for profit, usually at a rate of "double what he originally paid."

The evidence submitted by plaintiffs also establishes that the 181 guns sold to Bostic and his associates constituted approximately 34% of Brown's gun sales by volume in 2000. In addition, even considering as accurate plaintiffs' higher figure of over 4,100 total guns sold by Brown for the period 1996 to 2005, which includes additional retail sales and certain non-retail transfers reflected in the record that Brown does not count in his calculation, the 181 guns sold to Bostic and his associates represents 4.4% of Brown's total gun sales for that period (*see generally Tonns*, 90 AD2d at 549). As plaintiffs point out, Brown was largely unable to produce sales receipts during jurisdictional discovery, which would have contained the price of the guns. Nonetheless, Brown testified during his deposition in this case that the majority of the guns purchased by Bostic and his associates were of a discontinued model that sold at a discounted price of approximately $85 while other models were sold at a higher price. Even if all of the 181 guns obtained by Bostic and his associates had been sold by Brown at the discounted price, Brown would have generated revenue of over $15,000 from those sales. Although revenue in that range may not be particularly large in absolute terms relative to some other cases (*cf. e.g. LaMarca*, 95 NY2d at 213), we conclude under the circumstances of this case that the quantity of guns sold to Bostic and his associates, which constitutes approximately one-third of Brown's total sales in 2000, along with the evidence establishing the general price of the guns, is sufficient to establish that Brown derived substantial revenue from goods used or consumed in New York within the meaning of CPLR 302 (a) (3) (i) (*cf. Murdock v Arenson Intl. USA*, 157 AD2d 110, 113-114 [1st Dept 1990]).

In contrast to the substantial revenue requirement of CPLR 302 (a) (3) (i), the interstate/international commerce prong of CPLR 302 (a) (3) (ii) "requires no direct contact with New York" inasmuch as the other prong, i.e., the expectation of New York consequences, serves to "ensure[] that the defendant has some direct contact with New York" (*Ingraham*, 90 NY2d at 598-599). Rather, the interstate/international commerce prong of subdivision (a) (3) (ii) "narrows the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but 'whose business operations are of a local character' " (*Ingraham*, 90 NY2d at 599, quoting 12th Ann Report of NY Jud Conf, at 342-343; *see* Siegel, NY Prac § 88 at 168).

Here, even if the sales to Bostic and his associates were not counted as out-of-state sales, plaintiffs submitted evidence

establishing that, from 1996 to 2005, Brown sold and transferred 404 guns to out-of-state purchasers. Such interstate transactions constitute over 9.8% of Brown's total sales by volume for that period, and that percentage would be 14.3% if the Bostic sales were included as out-of-state sales (*see Darienzo v Wise Shoe Stores*, 74 AD2d 342, 344-346 [2d Dept 1980]). In addition, even if we were to accept the admittedly incomplete figure set forth by Brown reflecting 190 out-of-state purchases during the relevant period, such interstate activity would constitute 5.3% of Brown's claimed sales by volume. Furthermore, as plaintiffs contend, Brown's deposition testimony establishes that Great Lakes attended various gun shows along the "I-75 corridor," which was accessible to buyers from states in the region such as Indiana and Kentucky, and Brown made legal sales of long guns to out-of-state residents as well. The gun shows provided approximately 85% of Brown's sales from 1996 to 2005. Given this evidence and the number of guns sold to out-of-state residents during the relevant period, we agree with plaintiffs that Brown's "business can hardly be characterized as 'local' " (*LaMarca*, 95 NY2d at 215; *cf. Ingraham*, 90 NY2d at 599-600).

The other prong of CPLR 302 (a) (3) (ii) requires an evaluation of whether Brown "expect[ed] or should reasonably [have] expect[ed his] act[s] to have consequences in [New York]." Even if the record arguably establishes that Brown expected or should have expected the sale of guns to Bostic and his associates to have consequences in New York, the evaluation of this prong implicates due process considerations under the circumstances of this case (*see generally* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:3; Vincent C. Alexander, 2014 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C302:2; Siegel, NY Prac § 88 at 91-92 [Jan. 2017 Supp]). We therefore proceed directly to an analysis of whether the exercise of personal jurisdiction under the long-arm statute comports with federal due process.

IV

We agree with Brown that principles of federal due process preclude New York from exercising personal jurisdiction over him. It is well established that the "[e]xercise of personal jurisdiction under the long-arm statute must comport with federal constitutional due process requirements" (*Rushaid v Pictet & Cie*, 28 NY3d 316, 330 [2016], *rearg denied* 28 NY3d 1161 [2017], citing *LaMarca*, 95 NY2d at 216). First, a defendant must have "minimum contacts" with the forum state such that the defendant "should reasonably anticipate being haled into court there" (*World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 291, 297 [1980]) and, second, the maintenance of the suit against the defendant in New York must comport with "traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington*, 326 US 310, 316 [1945] [internal quotation marks omitted]).

With respect to the first component, "[a] non-domiciliary tortfeasor has minimum contacts with the forum State–and may thus

reasonably foresee the prospect of defending a suit there–if [he or she] purposefully avails [himself or herself] of the privilege of conducting activities within the forum State" (*LaMarca*, 95 NY2d at 216 [internal quotation marks omitted]; *see World-Wide Volkswagen Corp.*, 444 US at 297). Thus, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State[; r]ather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" (*World-Wide Volkswagen Corp.*, 444 US at 297; *see Burger King Corp. v Rudzewicz*, 471 US 462, 474 [1985]; *Schaadt v T.W. Kutter, Inc.*, 169 AD2d 969, 970 [3d Dept 1991]). To adhere to those principles, the inquiry into minimum contacts necessarily "focuses on the relationship among the defendant, the forum, and the litigation" (*Walden v Fiore*, — US —, —, 134 S Ct 1115, 1121 [2014] [internal quotation marks omitted]). "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State" (*id.* at 1122, quoting *Burger King Corp.*, 471 US at 475). The Supreme Court has therefore "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State" (*id.*; *see Helicopteros Nacionales de Colombia, S.A. v Hall*, 466 US 408, 417 [1984]). Although "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties[,] . . . a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction" (*Walden*, — US at —, 134 S Ct at 1123). In sum, "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State" (*id.*, quoting *Burger King Corp.*, 471 US at 475; *see Waggaman v Arauzo*, 117 AD3d 724, 726 [2d Dept 2014], *lv denied* 24 NY3d 903 [2014]).

Applying the foregoing principles, we conclude that Brown lacks the minimum contacts with New York that are a prerequisite to the exercise of jurisdiction over him. Brown's submissions established that Great Lakes was an Ohio retailer permitted to sell guns within Ohio only and, during the relevant period from 1996 to 2005, it did not maintain a website, had no business telephone listing, did not advertise in New York, and made its retail sales and transfers to customers present in Ohio (*see World-Wide Volkswagen Corp.*, 444 US at 288-289; *Martinez v American Std.*, 91 AD2d 652, 653 [2d Dept 1982], *affd for the reasons stated* 60 NY2d 873 [1983]; *Schultz*, 201 AD2d at 957). The evidence submitted by plaintiffs in opposition does not tend to establish that Brown "purposefully 'reach[ed] out beyond' " Ohio and into New York (*Walden*, — US at —, 134 S Ct at 1122; *cf. Burger King Corp.*, 471 US at 479-480). Brown did not, for example, engage in a purposeful distribution arrangement thereby evincing an effort to serve the market for firearms in New York (*cf. LaMarca*, 95 NY2d at 213-214, 217; *Darrow v Hetronic Deutschland*, 119 AD3d 1142, 1144-1145 [3d Dept 2014]; *Halas v Dick's Sporting Goods*, 105 AD3d 1411, 1413 [4th Dept 2013]). Instead, Bostic and his associates came

to Ohio gun shows where they purchased guns from Brown and then unilaterally elected to transport them to Buffalo for resale on the illegal market (*see generally World-Wide Volkswagen Corp.*, 444 US at 298).

In seeking to establish the requisite minimum contacts with New York, plaintiffs rely upon Brown's testimony that Bostic mentioned being from Buffalo and discussed his purported intention or desire to open a gun store in Buffalo in addition to one in Ohio. Plaintiffs contend that Brown's knowledge that Bostic ostensibly planned or hoped to open a gun store in Buffalo gave Brown reason to believe that the guns would be resold in New York and indicated Brown's intent to serve the market there. We conclude, however, that Brown's knowledge that guns sold to Bostic might end up being resold in New York if Bostic's ostensible plan or hope came to fruition in the future is insufficient to establish the requisite minimum contacts with New York because such circumstances demonstrate, at most, Brown's awareness of the mere possibility that the guns could be transported to and resold in New York (*see World-Wide Volkswagen Corp.*, 444 US at 297). The Supreme Court has long rejected the notion that a defendant's amenability to suit simply "travel[s] with the chattel" (*id.* at 296; *see J. McIntyre Mach., Ltd. v Nicastro*, 564 US 873, 891 [2011, Breyer, J., concurring]). In addition, plaintiffs' proposed approach would impermissibly allow the contacts that Bostic, a third party, had with Brown and New York "to drive the jurisdictional analysis" (*Walden*, — US at —, 134 S Ct at 1125; *see J. McIntyre Mach., Ltd.*, 564 US at 891 [Breyer, J., concurring]). In short, Brown did not " 'purposefully avail[himself] of the privilege of conducting activities within [New York]' " (*World-Wide Volkswagen Corp.*, 444 US at 297) and, therefore, he lacks the requisite minimum contacts to permit the exercise of jurisdiction over him.

Furthermore, for the foregoing reasons, although Brown may have derived substantial revenue from the sale of guns in Ohio to Bostic and his associates that were then transported to and ultimately used or consumed in New York (*see* CPLR 302 [a] [3] [i]), such "financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction[where, as here,] they do not stem from a constitutionally cognizable contact with that State" (*World-Wide Volkswagen Corp.*, 444 US at 299).

In light of our determination, we have no occasion to reach the second component of the due process inquiry, i.e., whether exercising personal jurisdiction over defendant would comport with traditional notions of fair play and substantial justice (*see e.g. Carpino v National Store Fixtures*, 275 AD2d 580, 582 [3d Dept 2000], *lv denied* 95 NY2d 769 [2000]).

V

As an alternative ground for the exercise of personal jurisdiction over Brown, plaintiffs contend that New York has jurisdiction on the theory that MKS is Brown's agent and alter ego,

and MKS does not dispute jurisdiction. We reject that contention inasmuch as the evidence adduced during jurisdictional discovery does not support plaintiffs' assertions.

Plaintiffs' agency theory fails because, even if MKS acted as Brown's agent for purposes of distributing the subject guns to Great Lakes, the evidence establishes that MKS was *not* acting as Brown's agent in committing the tortious act in Ohio that caused injury to plaintiff in New York, i.e., improperly selling the guns to Bostic and his associates (*see* CPLR 302 [a] [3]; *cf. Darienzo*, 74 AD2d at 346; *Allen*, 45 AD2d at 332-333; *see generally Porter v LSB Indus.*, 192 AD2d 205, 212-215 [4th Dept 1993]).

Contrary to plaintiffs' further contention, the evidentiary submissions do not establish that MKS was Brown's alter ego at the time of the alleged tortious conduct, i.e., the sales to Bostic and his associates between May and October 2000. Brown was hired by MKS as a salesperson in 1993 and became a vice-president years later, but his responsibilities as an employee of MKS did not meaningfully change between 1993 and 2003. Brown was approached by the majority owners to purchase MKS in late 2002 or 2003. Brown obtained day-to-day control of MKS in 2003. Plaintiffs' assertion that Brown acknowledged during his deposition that MKS was a "one-man operation" from the beginning of his time at MKS in 1993 is without merit. A review of the deposition transcript in context reveals that, in response to a question regarding whether "anyone else at MKS ha[d] an FFL at that time," Brown responded that no one else at MKS, including the owners, had an FFL; Brown *did not* state that he was the only individual operating MKS. As a result, Brown is not subject to jurisdiction on the alternative theories proposed by plaintiffs.

VI

Accordingly, we conclude that the order should be reversed, Brown's motion should be granted, and the complaint against him should be dismissed.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1457

KA 14-00562

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

AYOTUNJI AKINLAWON, ALSO KNOWN AS JERRY MCCULLOUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered October 31, 2013. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of robbery in the first degree (Penal Law § 160.15 [4]). A person is guilty of robbery in the first degree when he or she "forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he [or she] or another participant in the crime . . . [d]isplays what *appears* to be a pistol, revolver, rifle, shotgun, machine gun or other firearm" (*id.* [emphasis added]).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, a charge of robbery in the first degree under Penal Law § 160.15 (4) does not obligate the People to prove that the object displayed was a loaded or an operable weapon, or that such object constituted a "firearm" within the meaning of section 265.00 (3) (*see People v Lopez*, 73 NY2d 214, 220 [1989]; *People v Saez*, 69 NY2d 802, 804 [1987]). Instead, the object displayed need only appear to be some type of firearm (*see Lopez*, 73 NY2d at 220). As the *Lopez* Court elaborated, a "towel wrapped around a black object . . . , a toothbrush held in a pocket . . . or even a hand consciously concealed in clothing may suffice . . . if under all the circumstances the defendant's conduct could reasonably lead the victim to believe

that a gun is being used during the robbery" (*id.*). Indeed, so long as the object displayed appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm, " 'the true nature of the object displayed is, as concerns criminality, *irrelevant*' " (*People v Smith*, 29 NY3d 91, 96 [2017], quoting *People v Baskerville*, 60 NY2d 374, 381 [1983] [emphasis added]). Here, it is undisputed that the robber displayed an object that appeared to be a firearm. Defendant's supposition that the object displayed might have been a BB gun is entirely consistent with the undisputed fact that the robber displayed an object that appeared to be a firearm (*see People v Howard*, 92 AD3d 176, 178-180 [1st Dept 2012], *affd* 22 NY3d 388 [2013]; *People v Stewart*, 140 AD3d 1654, 1654-1655 [4th Dept 2016], *lv denied* 28 NY3d 937 [2016]).

Defendant next contends that County Court erred in denying his request to charge the jury on the statutory affirmative defense to robbery in the first degree, to which a defendant is entitled if the object displayed "was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged" (Penal Law § 160.15 [4]; *see generally Lopez*, 73 NY2d at 219). We reject that contention. Even if, as defendant claims, the perpetrator displayed a BB gun during the robbery, a BB gun still qualifies as a "weapon which discharge[s] a shot . . . readily capable of producing serious physical injury" (*People v Richard*, 30 AD3d 750, 753 [3d Dept 2006], *lv denied* 7 NY3d 869 [2006]; *see People v Padua*, 297 AD2d 536, 539 [1st Dept 2002], *lv denied* 99 NY2d 562 [2002]; *see also United States v Rosa*, 507 F3d 142, 160-161 [2d Cir 2007]). As the Third Department has recognized, a BB gun is readily capable of causing serious physical injury "if shot at close range at a person's eye or temple" (*People v Perez*, 93 AD3d 1032, 1035 [3d Dept 2012], *lv denied* 19 NY3d 1000 [2012]; *see generally* § 10.00 [10]). Thus, when the object displayed is a BB gun, as defendant claims it was here, "the affirmative defense [in section 160.15 (4)] comes into play only when it is demonstrated by a preponderance of the evidence that the [BB] gun was *unloaded* or *inoperable*" (*Padua*, 297 AD2d at 539 [emphasis added]; *see Rosa*, 507 F3d at 160-161; *cf. People v Hall*, 50 AD3d 1467, 1468 [4th Dept 2008], *lv denied* 11 NY3d 789 [2008]; *People v Espinoza*, 253 AD2d 983, 983 [3d Dept 1998]; *but see People v Starks*, 91 AD3d 975, 976 [2d Dept 2012], *lv denied* 18 NY3d 998 [2012]; *People v Layton*, 302 AD2d 408, 408 [2d Dept 2003]). Here, there is no reasonable interpretation of the evidence, even when viewed in the light most favorable to defendant, that the BB gun allegedly displayed was unloaded or inoperable, and the court therefore properly denied defendant's request to charge the affirmative defense (*see People v Morales*, 36 AD3d 957, 958-959 [3d Dept 2007], *lv denied* 8 NY3d 988 [2007]).

We have examined defendant's remaining contentions and conclude that none warrants modification or reversal of the judgment.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1460

CA 16-02231

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

IN THE MATTER OF THE ESTATE OF ROBYN R. LEWIS, DECEASED.

JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS.

WITTENBURG LAW FIRM, LLC, SYRACUSE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR OBJECTANTS-APPELLANTS.

MENTER, RUDIN & TRIVELPIECE, P.C., SYRACUSE (JULIAN B. MODESTI OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered September 6, 2016. The decree determined that the last will and testament of Robyn R. Lewis, deceased, dated July 15, 1996, is the only original last will and testament executed on that date.

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

Memorandum: Robyn R. Lewis (decedent) married James A. Simmons (ex-husband) in Texas in August 1991. On July 15, 1996, decedent and the ex-husband executed several estate planning documents at the office of their attorney in Texas. In a last will and testament (1996 will), decedent appointed the ex-husband, who at that time was still married to her, as executor of the 1996 will and beneficiary of all of her property. Also pursuant to the 1996 will, in the event that the ex-husband predeceased decedent, petitioner, the ex-husband's father, was named as the alternate executor and alternate beneficiary.

Upon their divorce in 2007, decedent was awarded real property in Clayton, New York (Clayton property) that decedent and the ex-husband had purchased from decedent's mother and an uncle several years earlier. Decedent relocated permanently to that residence, and she lived there until her death in March 2010. No will was found during a diligent postmortem search of decedent's residence and possessions.

Following decedent's death, amended letters of administration were issued to decedent's parents, who thereafter renounced their interest in the Clayton property so that it would pass to decedent's

brothers. Several months later, petitioner commenced this proceeding seeking probate of the 1996 will and issuance of letters testamentary. Petitioner alleged that, because decedent's testamentary disposition with respect to the ex-husband had been revoked by operation of law upon their divorce (*see* EPTL 5-1.4 [a]), he was entitled to decedent's entire estate as the sole remaining beneficiary of the 1996 will. Objectants, who are decedent's parents and brothers, filed objections and supplemental objections to probate. Following a hearing, Surrogate's Court dismissed the objections and admitted the 1996 will to probate. Among his findings, the Surrogate noted that it was "not clear from the testimony of [the ex-husband] if the decedent and [the ex-husband] left the attorney's office with four original instruments or one original and three copies."

Upon appeal to this Court, the majority, as relevant to the present appeal, rejected the dissent's position that reversal was warranted on the ground that petitioner, by failing to account for all of the alleged copies of the 1996 will, failed to rebut the presumption that the 1996 will was revoked by an act of destruction performed by decedent (*see* EPTL 3-4.1 [a] [2] [A]) because objectants never raised such a challenge to probate of the 1996 will (*Matter of Lewis*, 114 AD3d 203, 207-208 [4th Dept 2014], *mod* 25 NY3d 456 [2015]; *see id.* at 219-224 [Peradotto, J., dissenting]). The dissent responded that "[w]here, as here, the testimony of *petitioner's own witnesses* raised a question of fact whether the will produced for probate was *the* original will, or one of several wills unproduced and unaccounted for, petitioner failed to meet [his] burden" as the proponent of admitting the 1996 will to probate (*id.* at 224). The dissent also asserted alternatively that, if it would be unfair to petitioner to decide the issue on appeal, then the appropriate remedy was to "remit the matter to Surrogate's Court to make a determination whether the 1996 will was executed in multiples" (*id.*).

On appeal, the Court of Appeals held, in pertinent part, that "the evidence before the Surrogate raised a most serious, and unresolved, question as to whether the 1996 will had been otherwise revoked, and while that question persisted the will should not have been admitted to probate" (*Lewis*, 25 NY3d at 462). More particularly, the Court of Appeals determined that it was "manifest that the Surrogate's attention was drawn to the existence of will duplicates, but the consequently arising issues as to the will's validity were not resolved as they should have been in accordance with" the Court's precedent (*id.* at 463; *see Crossman v Crossman*, 95 NY 145, 152 [1884]). The Court explained that "[p]etitioner was required not merely to exclude the possibility, but to rebut the legal presumption of revocation, sufficiently raised by the ex-husband's testimony as to the existence of will duplicates, one of which had been kept, but was not found after decedent's passing, at her post-divorce residence" (*Lewis*, 25 NY3d at 463). The Court further "recognize[d] that the crucial issues raised by the duplicate will testimony were not framed for resolution as they should have been and that this may have operated to deprive petitioner of a fair opportunity to avoid or rebut the presumption of revocation which otherwise must control the outcome

of this proceeding" (*id.*). Thus, the Court remitted the matter to the Surrogate for further proceedings (*see id.*; *see also id.* at 463-465 [Pigott, J., concurring]).

Following a hearing upon remittal from the Court of Appeals, the Surrogate determined that the 1996 will, which was previously admitted to probate, is decedent's only original will. We affirm.

Objectants contend that the Surrogate erred in failing to draw an adverse inference against petitioner based upon his failure to call the Texas attorney as a witness at the hearing upon remittal. We reject that contention. "[T]he missing witness rule may be applied in a nonjury civil trial, where the trial court, as finder of fact, is permitted to draw a negative inference against a party failing to call a witness" (*Matter of Adam K.*, 110 AD3d 168, 177 [2d Dept 2013]). "The preconditions for this [inference], applicable to both criminal and civil trials, may be set out as follows: (1) the witness's knowledge is material to the trial; (2) the witness is expected to give noncumulative testimony; (3) the witness is under the 'control' of the party against whom the [inference] is sought, so that the witness would be expected to testify in that party's favor; and (4) the witness is available to that party" (*DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013]). The party seeking a missing witness inference has the initial burden of setting forth the basis for the request " 'as soon as practicable' " (*People v Carr*, 14 NY3d 808, 809 [2010]; *see People v Gonzalez*, 68 NY2d 424, 428 [1986]; *Herman v Moore*, 134 AD3d 543, 545 [1st Dept 2015]; *Buttice v Dyer*, 1 AD3d 552, 552-553 [2d Dept 2003]). "The purpose of imposing such a burden is, in part, to permit the parties '[to] tailor their trial strategy to avoid substantial possibilities of surprise' " (*Herman*, 134 AD3d at 545, quoting *Gonzalez*, 68 NY2d at 428). "Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account both when the requesting party knew or should have known that a basis for a missing witness [inference] existed, and any prejudice that may have been suffered by the other party as a result of the delay" (*Carr*, 14 NY3d at 809). Once the party seeking the inference establishes prima facie entitlement to it, the opposing party can defeat the request by demonstrating that, among other things, the testimony would be cumulative, the witness would not be expected to testify in the opposing party's favor, or the witness is not available (*see Gonzalez*, 68 NY2d at 428; *Herman*, 134 AD3d at 545).

Here, contrary to objectants' contention, their request for an adverse inference was untimely (*see 3134 E. Tremont Corp. v 3100 Tremont Assoc., Inc.*, 37 AD3d 340, 340 [1st Dept 2007]; *Chary v State of New York*, 265 AD2d 913, 914 [4th Dept 1999]; *see also Midstate Mut. Ins. Co. v Camp Rd. Transmissions, Inc.*, 103 AD3d 1176, 1177 [4th Dept 2013]; *see generally Carr*, 14 NY3d at 809). The record establishes that objectants, through direct contact with the attorney, were aware at the time of the initial hearing that the attorney may have had material information, but that he was uncooperative. During the hearing upon remittal, the ex-husband testified at length about the attorney's involvement in drafting and supervising the execution of

the 1996 will, and objectants' counsel elicited testimony from the ex-husband on cross-examination that the attorney would have material information. Nonetheless, objectants did not request a missing witness inference at any point during petitioner's direct case or before the conclusion of the hearing, including after petitioner's counsel indicated that petitioner had no other witnesses. Instead, objectants requested an adverse inference for the first time in their written closing statement submitted several months after the hearing. As a result of the delay, objectants deprived petitioner of "any opportunity to account for [the attorney's] absence, argue that [he] did not have the requisite control over [the attorney], or attempt to procure [the attorney's] appearance" (*Herman*, 134 AD3d at 545; *see Mereau v Prentice*, 139 AD3d 1209, 1211-1212 [3d Dept 2016]; *see generally Carr*, 14 NY3d at 809).

We also conclude that objectants did not meet their burden inasmuch as they failed to establish that the attorney would be expected to provide favorable testimony to petitioner (*see Holbrook v Pruiksma*, 43 AD3d 603, 605-606 [3d Dept 2007]; *Sandoval v Stanley Works & Tools Div.*, 261 AD2d 885, 885 [4th Dept 1999]), and that the attorney was available to testify (*see Pasquaretto v Cohen*, 37 AD3d 440, 441 [2d Dept 2007], *lv denied* 9 NY3d 801 [2007]; *Cohen v Lukacs*, 272 AD2d 501, 501 [2d Dept 2000]).

Objectants further contend that the Surrogate erred in finding that decedent executed only one original will because the ex-husband's testimony, which was credited by the Surrogate, was inconsistent and unreliable. We reject that contention. "A will may . . . be revoked not only by means of a writing executed in the manner of a will, but by the testator's act of destroying it with revocatory intent (EPTL 3-4.1 [a] [2] [A] [i]), which act achieves the revocatory purpose even if there remain will duplicates outstanding" (*Lewis*, 25 NY3d at 462; *see Crossman*, 95 NY at 152). The fact that a testator has "revoked a will by destruction is strongly presumed where the will, although once possessed by the testator, cannot be found posthumously despite a thorough search" (*Lewis*, 25 NY3d at 462; *see e.g. Matter of Fox*, 9 NY2d 400, 407-408 [1961]; *Matter of Staiger*, 243 NY 468, 472 [1926]). "The presumption, once raised, 'stands in the place of positive proof' . . . and must be rebutted by the will's proponent as a condition of probate" (*Lewis*, 25 NY3d at 462, quoting *Staiger*, 243 NY at 472). Here, however, if petitioner could establish that decedent executed only one original will, he would "avoid . . . the presumption of revocation which otherwise must control the outcome of this proceeding" (*Lewis*, 25 NY3d at 463; *see id.* at 464 [Pigott, J., concurring]).

Upon our review of the record, we see no reason to disturb the Surrogate's findings, "which are entitled to great weight inasmuch as they hinged on the credibility" of the ex-husband, the sole witness to testify at the hearing (*Matter of Lee*, 107 AD3d 1382, 1384 [4th Dept 2013] [internal quotation marks omitted]; *see Matter of Witherill*, 37 AD3d 879, 881 [3d Dept 2007]). Contrary to objectants' contention, it cannot be said that the Surrogate erred in crediting the ex-husband's testimony that he and decedent each signed *one* original will, *one*

original power of attorney, and *one* original health care proxy, and that the attorney's office made three photocopies of each of those estate planning documents. Despite the uncertainty with respect to the ex-husband's testimony at the initial hearing, his testimony at the hearing upon remittal unequivocally clarified that there was only *one* original of each of six estate planning documents, i.e., his will, power of attorney, and health care proxy, and decedent's will, power of attorney, and health care proxy. We conclude that the other instances of inconsistent testimony alleged by objectants have no bearing on the issue whether decedent executed only one original will and were otherwise adequately clarified by the ex-husband.

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1473

CA 16-01513

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

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

V OPINION AND ORDER

GEORGE N., RESPONDENT-APPELLANT.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, BUFFALO (VICKY L. VALVO OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 3, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, revoked respondent's release to strict and intensive supervision and treatment and committed respondent to a secure treatment facility.

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

Opinion by NEMOYER, J.:

The State may not civilly confine a sex offender in a locked treatment facility unless it proves that he or she has an "inability" to control sexual misconduct (Mental Hygiene Law § 10.03 [e]). The statute means what it says, and the State's proof falls short of that threshold in this case.

FACTS

Respondent, now 61 years old, has been convicted of several sexually-related crimes dating back to the early 1980s. His most recent conviction stems from an incident that occurred in 1995, and it is undisputed that he has not offended sexually since then. It is likewise undisputed that respondent has made excellent progress in sex offender treatment.

In 2010, the State filed a civil management petition against respondent pursuant to Mental Hygiene Law article 10. In connection with this proceeding, respondent was diagnosed with anti-social personality disorder (with psychopathic traits) and alcohol abuse

disorder.[1] Respondent subsequently admitted that he suffers from a " 'mental abnormality' " within the meaning of Mental Hygiene Law § 10.03 (i), and he was eventually released to a regimen of strict and intensive supervision and treatment (hereafter, SIST).

Respondent thereafter consumed alcohol. That was a violation of his SIST conditions, and the State filed a SIST revocation petition pursuant to Mental Hygiene Law § 10.11 (d) seeking respondent's civil confinement. Supreme Court conducted an evidentiary hearing on the petition; the object of this hearing was to determine whether respondent was a " 'dangerous sex offender requiring confinement' " under section 10.03 (e), or whether he remained a " 'sex offender requiring [SIST]' " under section 10.03 (r) (*see* § 10.11 [d] [4]). The State bore the burden of proof on this issue by clear and convincing evidence (*see* § 10.07 [f]). The court found that respondent is a dangerous sex offender requiring confinement, and it therefore committed him to a locked treatment facility maintained by the Department of Mental Hygiene.

Respondent appeals, and we now reverse.

DISCUSSION

A " 'dangerous sex offender requiring confinement' " is a person who, inter alia, suffers from a "mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that [he or she] is likely to be a danger to others and to commit sex offenses if not confined" (Mental Hygiene Law § 10.03 [e]). The word "inability" takes center stage in this definition. In *Matter of State of New York v Michael M.* (24 NY3d 649 [2014]), the Court of Appeals wrote that the article 10 framework "clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and *only the latter may be confined*" (*Michael M.*, 24 NY3d at 659 [emphasis added]). Thus, to prove that an offender is a " 'dangerous sex offender requiring confinement' " within the meaning of section 10.03 (e), the State must show that he or she has an "*inability* to control sexual misconduct" (*Michael M.*, 24 NY3d at 659 [emphasis added]).

In *Michael M.*, the offender violated the terms of his SIST in multiple (but exclusively nonsexual) ways, and the expert testimony at the SIST revocation hearing "tended to show only that [he] was struggling with his sexual urges, not that he was unable to control himself" (*id.* at 659). That, held the Court of Appeals, was insufficient to show that Michael M. was a dangerous sex offender requiring confinement within the meaning of Mental Hygiene Law § 10.03 (e). "Notably, the record reveals nothing relevant to the issue of

[1] Respondent also suffers from a number of physical ailments, including blindness, cirrhosis of the liver, and degenerative disc disease.

[Michael M.'s] sexual control that occurred between November 15, 2011, when Supreme Court imposed SIST rather than civil confinement, and April 19, 2012, when Supreme Court ordered confinement," and "[w]hatever else might be said about the personality traits or the social circumstances that led [Michael M.] so inexorably to [violating SIST], they do not give any support to the proposition that he had become unable to govern his sexual conduct" (*Michael M.*, 24 NY3d at 659). The Court of Appeals therefore reversed the confinement order and effectively denied the State's SIST revocation petition.

Like our sister Departments, we have rejected the notion that *Michael M.*'s "inability to control" standard can be satisfied only with evidence of sexually inappropriate behavior while on SIST (*see Matter of State of New York v William J.*, 151 AD3d 1890, 1891-1892 [4th Dept 2017]; *accord Matter of State of New York v Jason H.*, 82 AD3d 778, 780 [2d Dept 2011]; *Matter of State of New York v Donald N.*, 63 AD3d 1391, 1393-1395 [3d Dept 2009]). Just as police officers need not await the "glint of steel" before conducting a protective frisk (*People v Benjamin*, 51 NY2d 267, 271 [1980]), the State need not await further sexual offending before it concludes that an offender is unable to control his sexual behavior. But *William J.* should not be read too broadly, for the statutes and case law do not permit the State to confine any sex offender who drinks a beer, smokes marihuana, or jumps a turnstile while on SIST. SIST, after all, is not felony probation, and it should not be treated as such.

Properly understood, our decision in *William J.* did not (and given *Michael M.*, could not) dispense with the State's ultimate obligation to prove the offender's "inability" to control his sexual conduct. A mere tendency to engage in risky or socially undesirable conduct — even if that conduct provides an opportunity for, or increases the likelihood of, sexual offending — is quintessentially insufficient to establish "inability" under the *Michael M.* formulation, and *William J.* does nothing to disturb that rule. Thus, in the absence of evidence of sexually inappropriate conduct while on SIST, it becomes incumbent on the State to demonstrate a persuasive link between a nonsexual SIST violation and the offender's ability to control his sexual behavior (*see William J.*, 151 AD3d at 1891-1892).

Contrary to the State's contention, not just any link will do. In *William J.*, the State sufficiently linked the offender's nonsexual SIST violation (smoking crack cocaine) to his sex offending with expert testimony that his "sexual arousal has become *conditioned* to his cocaine usage" (*id.* at 1891 [emphasis added]). Indeed, according to the record on appeal in that case, William J. admitted to a fixation with receiving oral sex while smoking crack cocaine,[2] which respondent's counsel aptly characterized at oral argument in this case as "Pavlovian." This strong fusion between sex offending and smoking crack cocaine was decisive for the majority in *William J.*

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[2] We may take judicial notice of our records (*see People v Pierre*, 129 AD3d 1490, 1492 [4th Dept 2015]).

Our decision in *Matter of State of New York v Husted* (145 AD3d 1637 [4th Dept 2016]) illustrates the other side of the coin. In *Husted*, the offender violated the terms of his SIST by smoking marihuana and drinking alcohol, and he was thereafter discharged from sex offender treatment due solely to those missteps. As a result, Supreme Court found that Husted required confinement within the meaning of Mental Hygiene Law § 10.03 (e) and granted the State's SIST revocation petition. But we unanimously reversed. Emphasizing the "undisputed" fact that the "alleged violations of [Husted's] SIST conditions related solely to his use of alcohol and marihuana, and not to any alleged sexual conduct," we held that the evidence, even when viewed in the light most favorable to the State, was " 'insufficient to support the trial court's finding that [Husted] had such an inability to control his behavior that he was likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility' " (*id.* at 1638, quoting *Michael M.*, 24 NY3d at 660).

Critically, our reversal in *Husted* was not predicated on the complete absence of any link between the offender's substance abuse and his sex offending. Quite the contrary; according to the record on appeal in that case, the State's expert testified that Husted's substance abuse resulted in an increased risk of reoffending because it was part of his offense cycle and thus could more easily allow him to engage in sex offending behavior. But that link was not strong enough to prove the requisite "inability to control" under *Michael M.* because it did not suggest that Husted's substance abuse was causing him to become unable to govern his sexual conduct.

The interplay between *William J.* and *Husted* demonstrates that a Mental Hygiene Law § 10.03 (e) finding of "inability" based on nonsexual SIST violations will satisfy the *Michael M.* standard only when such violations bear a close causative relationship to sex offending. Such a relationship is missing here. It is simply not true — as the State claims — that "there is a significant link between respondent's alcohol use disorder and his sex offenses" or that his sex offending is "fueled by his drug and alcohol use." A review of the record citations upon which the State relies for those propositions reveals only that respondent was intoxicated during his sex offending decades ago, and that alcohol use "increases his impulsivity and makes [him] more likely to act out." Unlike in *William J.*, however, no expert has testified that respondent's substance abuse is "strongly fused" or otherwise inextricably intertwined with his sex offending.[3] At most, the expert testimony in this case shows that respondent's alcohol use is colocated with his sex offending (and, for that matter, with every other facet of his life), and that alcohol disinhibits him from resisting the urge to offend sexually. But this testimony is virtually identical to the expert testimony in *Husted*, and *that*, of course, proved inadequate to meet the State's burden under *Michael M.*

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[3] See record on appeal, *Matter of State of New York v William J.* (Case No. CA 16-00794).

In arguing for affirmance, the State's brief goes on at length about respondent's underlying crimes (which, as in all Mental Hygiene Law article 10 cases, are necessarily heinous and repugnant), his vaguely-defined and broadly-applicable psychiatric diagnoses, and its own expert's conclusory and often counterfactual prognostications about respondent's future dangerousness. The State also places inordinate emphasis on a single de-contextualized line from the revised written report of respondent's expert, which was subsequently clarified and disavowed at the hearing. By emphasizing these essentially uncontested background facts, the State effectively elides the key question in this appeal: did it adequately prove that respondent is presently "unable" to control his sexual conduct?

In our view, the answer to that question is simply "no." Like Husted, respondent has not offended sexually for years despite a chronic inability to remain sober. Like Husted, respondent has made excellent progress in sex offender treatment and does not display any signs of resuming a cycle of deviant arousal. And like both Husted and Michael M., respondent's wholly nonsexual SIST violations were not connected in any specific manner to sex offending (*compare William J.*, 151 AD3d at 1891-1892). The State has therefore failed to prove, by clear and convincing evidence, that respondent is now "*unable* to govern his sexual conduct" (*Michael M.*, 24 NY3d at 659 [emphasis added]).

CONCLUSION

Even when viewed in the light most favorable to the State, the evidence at the hearing was legally insufficient to demonstrate that respondent is a " 'dangerous sex offender requiring confinement' " within the meaning of Mental Hygiene Law § 10.03 (e). Accordingly, the order appealed from should be reversed and the State's petition to revoke respondent's SIST should be denied.[4]

[4] Respondent's remaining contention is not properly before us (*see Matter of State of New York v Breeden*, 140 AD3d 1649, 1649 [4th Dept 2016]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1477

KA 16-01371

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES MURRAY, DEFENDANT-APPELLANT.

FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered August 2, 2016. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree and criminal possession of a forged instrument in the second degree (13 counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed for grand larceny in the second degree to an indeterminate term of incarceration of 3 to 9 years and by directing that the terms of imprisonment imposed on counts 8, 16 and 17 shall run concurrently with each other and as modified the judgment is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of grand larceny in the second degree (Penal Law § 155.40 [1]) and 13 counts of criminal possession of a forged instrument in the second degree (§ 170.25), arising from him having stolen money from his mother-in-law while he was managing her finances.

We reject defendant's contention that the imposition of consecutive sentences for 3 of the 13 counts of criminal possession of a forged instrument violated Penal Law § 70.25 (2). Defendant committed 13 distinct acts that formed the basis for those counts, and thus County Court was authorized to impose consecutive sentences for counts 8, 16, and 17 of the indictment (*see People v Day*, 73 NY2d 208, 210-211 [1989]; *People v Boyzuck*, 72 AD3d 1530, 1530 [4th Dept 2010]).

We also reject defendant's contention that the sentence was imposed as punishment for rejecting previous plea offers, inasmuch as there is no evidence in the record that defendant was given a lengthier sentence solely as punishment for exercising his right to a trial (*see People v Pope*, 141 AD3d 1111, 1112 [4th Dept 2016], *lv*

denied 29 NY3d 951 [2017]; *People v Aikey*, 94 AD3d 1485, 1486 [4th Dept 2012], *lv denied* 19 NY3d 956 [2012]).

However, we agree with defendant that the sentence imposed, with an aggregate minimum of six years and an aggregate maximum of 18 years, is unduly harsh and severe. This Court's " 'sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court' " (*People v Meacham*, 151 AD3d 1666, 1670 [4th Dept 2017], *lv denied* 30 NY3d 981 [2017], quoting *People v Delgado*, 80 NY2d 780, 783 [1992]). We conclude that a reduction in the sentence is appropriate and, as a matter of discretion in the interest of justice, we modify the judgment by reducing the sentence imposed for the count of grand larceny in the second degree to an indeterminate term of incarceration of 3 to 9 years (*see* Penal Law § 70.00 [3] [b]), and by directing that the terms of imprisonment imposed on counts 8, 16 and 17 shall run concurrently with each other (*see generally* CPL 470.20 [6]; *People v Johnson*, 136 AD3d 1417, 1418 [4th Dept 2016], *lv denied* 27 NY3d 1134 [2016]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1480

KA 16-00233

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK M. BOOTH, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

PATRICK M. BOOTH, DEFENDANT-APPELLANT PRO SE.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (HARMONY A. HEALY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 13, 2015. 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]). We agree with defendant that the waiver of the right to appeal was not valid. County Court did not engage defendant in an adequate colloquy to ensure that the waiver was knowing and voluntary (*see People v Ricks*, 145 AD3d 1610, 1610 [4th Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]). While the record contains a written appeal waiver, the written waiver, standing alone, offers no assurance that defendant knowingly, voluntarily and intelligently gave up his right to appeal (*see People v Welcher*, 138 AD3d 1481, 1482 [4th Dept 2016], *lv denied* 28 NY3d 938 [2016]) inasmuch as the court only asked defendant whether he signed the waiver, not whether he had read or understood its contents (*see People v Peterkin*, 153 AD3d 1568, 1569 [4th Dept 2017]; *Ricks*, 145 AD3d at 1610).

We reject defendant's contention in his main and pro se supplemental briefs that the court improperly refused to suppress items of tangible evidence obtained from him by police officers following the stop of the vehicle in which he was the back seat passenger. The officers were authorized to stop the vehicle based upon their observation of an inoperable brake light, which was a

violation of Vehicle and Traffic Law § 375 (40) (b) (*see People v John*, 119 AD3d 709, 710 [2d Dept 2014], *lv denied* 24 NY3d 1003 [2014]; *People v Garcia*, 30 AD3d 833, 834 [3d Dept 2006]). When one of the officers looked into the area of the back seat, he recognized, based upon his training and experience, items that could be utilized for the production of methamphetamine. The officer had an objective credible reason at that point to request information from defendant (*see People v De Bour*, 40 NY2d 210, 223 [1976]). The officer could have also requested that defendant step out of the vehicle (*see People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]; *People v McLaurin*, 70 NY2d 779, 781-782 [1987]), but the court credited the officer's testimony that defendant spontaneously and voluntarily exited the vehicle.

When defendant was out of the vehicle, the officer noticed on defendant's clothing a distinct chemical odor that the officer associated with the production of methamphetamine. Before the officer spoke to him, defendant made repeated movements toward a large bulge in his front jacket pocket, despite the officer's repeated request that defendant keep his hands out of his pocket, prompting the officer to become reasonably concerned for his safety (*see People v Glover*, 87 AD3d 1384, 1384-1385 [4th Dept 2011], *lv denied* 19 NY3d 960 [2012]; *People v Robinson*, 278 AD2d 808, 809 [4th Dept 2000], *lv denied* 96 NY2d 787 [2001]). That concern increased when, upon being advised by the officer that he was going to pat defendant down for weapons, defendant became tense and immediately reached for another pocket (*see People v Wiggins*, 126 AD3d 1369, 1369-1370 [4th Dept 2015]). The patdown produced a switchblade knife, which provided probable cause for defendant's arrest (*see* Penal Law § 265.01 [1]). As the court concluded, the remaining evidence seized from defendant's person could have been lawfully obtained pursuant to his lawful arrest (*see People v Johnson*, 132 AD3d 1295, 1297 [4th Dept 2015], *lv denied* 27 NY3d 1134 [2016]), but the officer, exhibiting an abundance of caution, obtained a warrant. In sum, therefore, we agree with the suppression court that the police conduct "was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835 [4th Dept 1998], *lv denied* 92 NY2d 858 [1998], citing *De Bour*, 40 NY2d at 215).

Finally, we reject defendant's contention in his main and pro se supplemental briefs that he was denied effective assistance of counsel. " 'In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel' " (*People v Singletary*, 51 AD3d 1334, 1335 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]). Here, defense counsel negotiated a favorable plea, and defendant has not demonstrated "the absence of strategic or other legitimate explanations" for counsel's alleged shortcomings in his conduct of the suppression hearing (*People v Rivera*, 71 NY2d 705, 709 [1988]). Finally, we reject defendant's contention that he was denied effective assistance of counsel based upon the appearance of retained counsel's

associate to represent defendant at the plea proceeding.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1482

KA 14-01983

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SAMUEL F. CRAWFORD, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ZACHARY S. MAURER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Frederick G. Reed, A.J.), rendered September 25, 2014. The judgment convicted defendant, upon a jury verdict, of arson in the third degree, attempted insurance fraud in the fifth degree, conspiracy in the fifth degree, and arson in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of arson in the third degree (Penal Law § 150.10 [1]), attempted insurance fraud in the fifth degree (§§ 110.00, 176.10), conspiracy in the fifth degree (§ 105.05 [1]), and two counts of arson in the fourth degree (§ 150.05 [1]), based on evidence that he conspired with others to set fire to his vacant rental property in order to collect insurance money. The fire destroyed defendant's property and caused damage to two neighboring properties. Contrary to defendant's contention, we conclude that County Court properly refused to suppress his statements to the police. The People proved beyond a reasonable doubt that the statements were not products of coercion, but rather were the "result of a 'free and unconstrained choice' " by defendant (*People v Thomas*, 22 NY3d 629, 641 [2014]; *see People v Buchanan*, 136 AD3d 1293, 1293-1294 [4th Dept 2016], *lv denied* 27 NY3d 1129 [2016]).

Contrary to defendant's further contention, the trial testimony regarding his parole status was properly admitted in evidence to complete the narrative of the events leading up to the charged crimes (*see People v Ramos*, 287 AD2d 471, 472 [2d Dept 2001], *lv denied* 97 NY2d 657 [2001]). Although we agree with defendant that the court abused its discretion in precluding defendant from cross-examining a prosecution witness concerning that witness's alleged prior threat to

burn down another person's house (*see generally People v Smith*, 27 NY3d 652, 668 [2016]), we conclude that the error is harmless because the evidence of defendant's guilt, including his videotaped confession, is overwhelming and there is no significant probability that defendant otherwise would have been acquitted (*see People v Morales*, 25 AD3d 624, 625 [2d Dept 2006], *lv denied* 6 NY3d 815 [2006]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant's contention that he was deprived of a fair trial by prosecutorial misconduct during the cross-examination of defendant and on summation is not preserved for our review (*see People v Brown*, 120 AD3d 1545, 1545 [4th Dept 2014], *lv denied* 24 NY3d 1082 [2014]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). 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]).

Defendant's contention with respect to the court's alleged violation of his right to due process in imposing the maximum sentence is patently without merit. Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1491

CA 17-01211

PRESENT: WHALEN, P.J., SMITH, CARNI, TROUTMAN, AND WINSLOW, JJ.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-HE7, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-HE7, PLAINTIFF-RESPONDENT,

V ORDER

CHRISTINE M. BATCHO, DEFENDANT-APPELLANT, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, ET AL., DEFENDANTS.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (DANIEL WEBSTER OF COUNSEL), FOR DEFENDANT-APPELLANT.

LEOPOLD & ASSOCIATES, PLLC, ARMONK (ERIN E. WIETECHA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 6, 2017. The order denied the motion of defendant Christine M. Batcho to dismiss the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for plaintiff and defendant-appellant on January 16 and 22, 2018,

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

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1516

KA 16-00158

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRYANT CUNNINGHAM, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered July 1, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted burglary in the second degree, criminal contempt in the second degree, and tampering with a witness 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 attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), criminal contempt in the second degree (§ 215.50 [3]), and tampering with a witness in the fourth degree (§ 215.10 [a]). The conviction arises from an incident in which defendant broke into the home of his former girlfriend in violation of an order of protection and threatened to distribute nude photographs of her if she testified against him in a Town Court proceeding related to an earlier alleged assault of her by defendant.

Contrary to defendant's contention, the record establishes that he made a knowing, intelligent and voluntary waiver of his right to appeal (*see People v Walker*, 151 AD3d 1730, 1730 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017], *reconsideration denied* 30 NY3d 984 [2017]; *People v Harris* [appeal No. 4], 147 AD3d 1375, 1376 [4th Dept 2017], *lv denied* 29 NY3d 998 [2017]; *see generally People v Sanders*, 25 NY3d 337, 341-342 [2015]). We reject defendant's contention that the explanations of the waiver provided to him by Supreme Court were confusing (*see Walker*, 151 AD3d at 1731; *see also People v Ramos*, 135 AD3d 1234, 1235 [3d Dept 2016], *lv denied* 28 NY3d 935 [2016]), and there is no indication in the record that he was confused when he waived his right to appeal (*see generally People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013]).

Defendant's valid waiver of his right to appeal with respect to both his conviction and his sentence forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *Walker*, 151 AD3d at 1731).

Finally, defendant contends that the court erred in calculating the expiration date of the order of protection entered against him. Given that defendant expressly acknowledged that his waiver of the right to appeal would extend to "any orders of protection that were issued as to form, duration or content," we conclude that the waiver encompasses his contention that the order's expiration date is incorrect (*see People v Fontaine*, 144 AD3d 1658, 1658-1659 [4th Dept 2016], *lv denied* 29 NY3d 997 [2017]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1522

CAF 16-01053

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

IN THE MATTER OF THE ADOPTION OF NOAH W.

LAURA B.F., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
AMBER W., RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 1.)

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

DANIEL J. HARTMAN, BUFFALO, FOR RESPONDENT-RESPONDENT AMBER W.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Children to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the petition with respect to the claim for photographs of the subject child, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the following memorandum: On October 26, 2010, petitioner mother conditionally surrendered her two children for adoption. The post-adoption contact agreement (agreement) between the mother, respondent Amber W. and Tad W. (the adoptive parents), and respondent Erie County Department of Social Services (DSS) provided, inter alia, that the mother could have two supervised visits with the children per year. The visits were to be supervised by Catholic Charities, and the mother had the obligation to schedule and pay any fees associated with the visits. The mother agreed that she would forfeit her right to such visits should she fail to schedule or attend any two visits for any reason. Independent of the visits, the adoptive parents agreed to send the mother a photograph of each child every spring. Finally, the mother agreed to notify the adoptive parents of any address changes. On February 22, 2016, the mother filed two petitions, one for each child, seeking photographs of and visitation with the children. In each petition, the mother alleged that there had been a failure of a material condition of the agreement inasmuch as no pictures of the children had

been provided to her, and that DSS and the adoptive parents had lied to her in some unspecified way regarding visitation. The Attorney for the Children (AFC) moved to dismiss the petitions. In appeal Nos. 1 and 3, the mother appeals from orders granting the motion and dismissing the petitions.

Contrary to the mother's contention in appeal Nos. 1 and 3, Family Court did not err in granting the motion with respect to those parts of the petitions seeking visitation with the children inasmuch as the petitions failed to set forth any reason for the mother's failure to schedule and attend visits with the children for several years (*see generally Matter of Carrie W. v Cayuga County Dept. of Health & Human Servs.*, 37 AD3d 1059, 1060 [4th Dept 2007], *lv denied* 8 NY3d 813 [2007]). The petitions similarly fail "to set forth the manner in which the visitation sought is in the best interests of the children" (*id.*). Thus, the petitions are facially insufficient with respect to visitation (*see id.*), and the court did not abuse its discretion in denying the request of the mother's attorney for an adjournment to amend the petitions (*see generally Matter of Steven B.*, 6 NY3d 888, 889 [2006]).

We agree with the mother in appeal Nos. 1 and 3, however, that the court erred in granting the motion with respect to those parts of the petitions seeking photographs of the children. Pursuant to the agreement, the mother's right to receive photographs was absolute. Moreover, the petitions alleged that the mother notified the adoptive parents of changes to her address, and the AFC's motion failed to explain why the mother's petitions were facially insufficient with respect to the request for photographs. We therefore modify the orders in appeal Nos. 1 and 3 accordingly, and remit the matter to Family Court for further proceedings with respect to those parts of the petitions seeking photographs of the children, including a hearing if necessary.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1523

CAF 16-01054

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

IN THE MATTER OF THE ADOPTION OF NOAH W.

LAURA B.F., PETITIONER-APPELLANT;

ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
AMBER W., RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 2.)

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

DANIEL J. HARTMAN, BUFFALO, FOR RESPONDENT-RESPONDENT AMBER W.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1524

CAF 16-01055

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

IN THE MATTER OF THE ADOPTION OF BRIANNA M.F.

LAURA B.F., PETITIONER-APPELLANT;

MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
AMBER W., RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 3.)

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

DANIEL J. HARTMAN, BUFFALO, FOR RESPONDENT-RESPONDENT AMBER W.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted the motion of the Attorney for the Children to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion in part and reinstating the petition with respect to the claim for photographs of the subject child, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Erie County, for further proceedings in accordance with the same memorandum as in *Matter of Noah W.* ([appeal No. 1] — AD3d — [Feb. 9, 2018] [4th Dept 2018]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1525

CAF 16-01056

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

IN THE MATTER OF THE ADOPTION OF BRIANNA M.F.

LAURA B.F., PETITIONER-APPELLANT;

ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
AMBER W., RESPONDENTS-RESPONDENTS,
ET AL., RESPONDENT.
(APPEAL NO. 4.)

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

DANIEL J. HARTMAN, BUFFALO, FOR RESPONDENT-RESPONDENT AMBER W.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 26, 2016 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Chendo O.*, 175 AD2d 635, 635 [4th Dept 1991]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1528

CA 17-01161

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

ADDY V. TAURO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GARY GAIT AND SYRACUSE UNIVERSITY,
DEFENDANTS-APPELLANTS.

BARCLAY DAMON, LLP, SYRACUSE (MATTHEW J. LARKIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JAMES B. FLECKENSTEIN, SYRACUSE, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered March 17, 2017. The order denied defendants' motion to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries that she sustained when she was struck in the head with a lacrosse ball thrown by defendant Gary Gait during a drill at a practice of the varsity women's lacrosse team at defendant Syracuse University. Plaintiff alleged in the complaint that Gait was the head coach of the lacrosse team, and that her injuries were caused solely by the "negligence and reckless conduct" of defendants.

Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) on the grounds that a waiver signed by plaintiff constituted documentary evidence establishing a complete defense to the allegations in the complaint, and that the complaint failed to state a cause of action because plaintiff assumed the risk of injury. In the waiver, plaintiff stated, inter alia, that she was "fully aware . . . that . . . participation [in lacrosse] involves risk of injury . . . These risks can come from causes which are many and varied . . . and may include negligent acts or omissions of others." She further acknowledged in the waiver that she "accept[ed], and assume[d] all such risks, whether or not presently foreseeable and whether or not caused by the negligent acts or omissions of others, and elect[ed] voluntarily to participate in intercollegiate athletics at Syracuse University." In opposition to the motion, plaintiff submitted an affidavit in which she stated that she was injured during a ground ball post drill, during which Gait and other coaches rolled lacrosse balls along the ground and the players were expected to pick up the

balls from the ground and pass them back to the coaches. Plaintiff further stated that, "[f]or no reason, without warning, in a manner never utilized before in any [prior] practices, defendant Gait overhanded a hard pass toward [her] head. Since [she] was expecting a ground ball, [she] was totally unprepared to receive a hard pass through the air . . . [Gait's] actions were totally inconsistent with the drill and as such, throwing the ball toward [her] head was grossly negligent and extremely reckless." Defendants appeal from an order denying the motion, and we affirm.

" 'In determining a CPLR 3211 motion, . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one . . . The court may also consider affidavits and other evidentiary material to establish conclusively that plaintiff has no cause of action . . . Any facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true' " (*Gerrish v State Univ. of N.Y. at Buffalo*, 129 AD3d 1611, 1612 [4th Dept 2015]). Here, plaintiff's complaint and affidavit include allegations that the actions of defendants were grossly negligent and extremely reckless. Contrary to defendants' contention, the written waiver does not bar plaintiff's action inasmuch as a waiver is not enforceable with respect to allegations of grossly negligent conduct (*see Gross v Sweet*, 49 NY2d 102, 106 [1979]).

With respect to defendants' contention that plaintiff's action is barred by the doctrine of assumption of the risk, it is well settled that a person who voluntarily participates in a recreational activity such as lacrosse "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). "Such a person, however, will not assume the risks of reckless or intentional conduct, nor will a claim be barred where the 'conditions caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent' in the activity" (*Connolly v Willard Mtn., Inc.*, 143 AD3d 1148, 1148 [3d Dept 2016]). Thus, accepting the allegations in the complaint and plaintiff's affidavit that defendants' conduct was reckless as true, and according plaintiff "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), we conclude that plaintiff's action, at this stage, is not barred by the doctrine of assumption of the risk (*see generally Connolly*, 143 AD3d at 1148).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1531

CA 17-01196

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

PETER GERMAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

SHEILA G. GERMAN, DEFENDANT-RESPONDENT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HANDELMAN, WITKOWICZ & LEVITSKY, LLP, ROCHESTER (STEVEN M. WITKOWICZ OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Daniel P. Majchrzak, R.), entered November 10, 2016 in a divorce action. The judgment, inter alia, equitably distributed marital property of the parties.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing defendant's share of the Canandaigua National Bank Investment Account to $36,780.25 and by vacating the fifth decretal paragraph and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Ontario County, for further proceedings in accordance with the following memorandum: Plaintiff husband appeals from a judgment of divorce that, inter alia, equitably distributed the parties' marital property. Initially, we agree with the husband that Supreme Court made a mathematical error regarding the value of the Canandaigua National Bank Investment Account, and we therefore modify the judgment by reducing defendant wife's share thereof to $36,780.25. Moreover, the court did not adequately enumerate the type or amount of the credits to which the husband is entitled as an offset against his retroactive maintenance obligations, nor did it set forth its rationale therefor, and we thus cannot intelligently review the parties' contentions with respect to those credits. We therefore further modify the judgment by vacating the fifth decretal paragraph and remit the matter to Supreme Court for clarification of the credits to which the husband is entitled (*see Klauer v Abeliovich*, 149 AD3d 617, 617-618 [1st Dept 2017]; *Harrington v Harrington*, 6 AD3d 799, 800 [3d Dept 2004], *lv dismissed* 3 NY3d 738 [2004]; *Kaplan v Kaplan*, 192 AD2d 343, 343-344 [1st Dept 1993]). We have reviewed the husband's remaining contentions and conclude that they are without merit.

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court

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

1544

KA 16-00774

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERIC D. ROBINSON, DEFENDANT-APPELLANT.

VAN HENRI WHITE, ROCHESTER, FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA, FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered June 1, 2016. The judgment convicted defendant, upon a jury verdict, of strangulation in the second degree and harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of strangulation in the second degree (Penal Law § 121.12) and harassment in the second degree (§ 240.26 [1]) based on an altercation he had with his adult son (victim). We reject defendant's contention that he was denied effective assistance of counsel by his attorney's failure to object to leading questions asked by the prosecutor, both because he has not established the absence of a strategic or other legitimate basis for the alleged failure (*see People v Madison*, 106 AD3d 1490, 1492 [4th Dept 2013]; *People v Leary*, 145 AD2d 732, 734 [3d Dept 1988], *lv denied* 73 NY2d 1017 [1989]; *see generally People v Pavone*, 26 NY3d 629, 646-647 [2015]), and because any error was not so egregious and prejudicial as to deny him a fair trial (*see People v Inoa*, 109 AD3d 765, 766 [1st Dept 2013], *affd* 25 NY3d 466 [2015]; *People v Lester*, 124 AD2d 1052, 1052 [4th Dept 1986], *lv denied* 69 NY2d 830 [1987]; *see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]).

Defendant further contends that County Court erred in failing to issue adequate curative instructions in response to two instances of testimony by the victim implying that defendant had a drug problem. That contention is not preserved for our review, inasmuch as the court issued a curative instruction in response to the first instance of testimony at issue and defendant did not object to the instruction or seek further relief (*see People v Townsend*, 100 AD3d 1029, 1030 [2d Dept 2012], *lv denied* 20 NY3d 1015 [2013]; *see generally People v Heide*, 84 NY2d 943, 944 [1994]), and defendant did not object to the

other instance of challenged testimony or request any instruction in response thereto (*see People v Stubbs*, 96 AD3d 1448, 1449 [4th Dept 2012], *lv denied* 19 NY3d 1001 [2012]; *see generally People v Nicholson*, 26 NY3d 813, 830 [2016]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). To the extent that defendant contends that his attorney was ineffective in failing to seek further curative instructions, we reject that contention (*see generally People v Rogers*, 70 AD3d 1340, 1340-1341 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010], *cert denied* 562 US 969 [2010]). Viewing defense counsel's representation in its totality, we conclude that defendant was afforded meaningful representation (*see People v Wragg*, 26 NY3d 403, 412 [2015]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's contention, the court properly denied that part of his CPL 330.30 motion to set aside the verdict in which he alleged that the People committed *Brady* and *Rosario* violations in failing to disclose records of a 911 call made by the victim regarding an incident that occurred prior to his altercation with defendant. Inasmuch as the *Brady* and *Rosario* claims were based on material outside the trial record, they were not reviewable pursuant to CPL 330.30 (1) (*see People v Wolf*, 98 NY2d 105, 118-119 [2002]; *People v Satlin*, 142 AD3d 920, 920 [1st Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v Nichols*, 35 AD3d 508, 509 [2d Dept 2006], *lv denied* 8 NY3d 925 [2007]), and "the court had no obligation to convert" the relevant part of the motion to one pursuant to CPL article 440 (*People v Spirles*, 294 AD2d 810, 811 [4th Dept 2002], *lv denied* 98 NY2d 713 [2002], *reconsideration denied* 99 NY2d 540 [2002]; *cf. People v Toland*, 2 AD3d 1053, 1055-1056 [3d Dept 2003], *lv denied* 2 NY3d 808 [2004]). In any event, although defendant made a specific pretrial discovery request for 911 records, there is no reasonable possibility that the nondisclosure of the records contributed to his conviction, and he thus "failed to establish materiality under *Brady* or prejudice under *Rosario*" (*People v Switts*, 148 AD3d 1610, 1612 [4th Dept 2017], *lv denied* 29 NY3d 1087 [2017]; *see* CPL 240.75; *People v Daniels*, 115 AD3d 1364, 1365 [4th Dept 2014], *lv denied* 23 NY3d 1019 [2014]; *People v Clarke*, 242 AD2d 948, 948 [4th Dept 1997], *lv denied* 91 NY2d 924 [1998]).

Finally, we reject defendant's contention that the verdict is against the weight of the evidence with respect to the count charging strangulation in the second degree (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury was entitled to credit the testimony of the victim over that of the main defense witness on the issues of justification and whether the victim lost consciousness (*see People v Ryder*, 146 AD3d 1022, 1025 [3d Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Wilmot*, 60 AD3d 1454, 1454 [4th Dept 2009], *lv denied* 12 NY3d 930 [2009], *reconsideration denied* 13 NY3d 864 [2009]; *see generally People v Reyes*, 144 AD3d 1683, 1684-1685 [4th Dept 2016]), and defendant's intent to impede the victim's normal breathing could be inferred from the evidence that he applied pressure to the victim's neck (*see People v Peterson*, 118 AD3d 1151, 1154 [3d Dept 2014], *lv denied* 24 NY3d 1087

[2014]; *Matter of Jesse Z.*, 116 AD3d 1105, 1107-1108 [3d Dept 2014]; *see generally People v Bracey*, 41 NY2d 296, 301 [1977], *rearg denied* 41 NY2d 1010 [1977]).

Entered: February 9, 2018

Mark W. Bennett
Clerk of the Court