SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 24, 2020

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. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW

HON. TRACEY A. BANNISTER

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED APRIL 24, 2020

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________	855	CA 18 01634	EASTVIEW MALL, LLC V GRACE HOLMES, INC.
________	1235	KA 01 01201	PEOPLE V DENNIS TIMMONS
________	1308	KA 15 01502	PEOPLE V RYAN J. NEWMAN
________	16	CA 19 00612	MAPLE-GATE ANESTHESIOLOGISTS, P.C. V DEIXY NASRIN
________	38	CA 19 01261	LISA FITZAK V
________	50	KA 16 01177	PEOPLE V CARL I. SHERMAN
________	51	KA 18 01104	PEOPLE V JEFFREY J. GIZOWSKI
________	57	CAF 19 00150	Mtr of JAMES L. H.
________	96	KA 16 01976	PEOPLE V JOSEPH HARRIS
________	98	KA 17 01699	PEOPLE V DAVONNE BECKWITH
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________	143	KA 19 00131	PEOPLE V LANCE A. RILEY
________	146	KA 18 01782	PEOPLE V EULESE CRUZ
________	150	KA 16 00193	PEOPLE V MARQUIS D. HARRINGTON
________	151	CAF 19 00219	JACQUELYN M. GRABOWSKI V JAY CRAIG SMITH, JR.
________	166	KA 17 00558	PEOPLE V ANDREW L. CAMPBELL
________	167	KA 17 00559	PEOPLE V ANDREW L. CAMPBELL
________	184	KA 15 01848	PEOPLE V STANLEY LOSTUMBO
________	222	CA 19 01478	SHERRY L. GARR ANDERSON V LINDA J. GARR
________	223	CA 19 01093	SIDNEY L MANES V STATE OF NEW YORK
________	223.1	CA 20 00181	SIDNEY L MANES V STATE OF NEW YORK
________	230	KA 18 01413	PEOPLE V ROBERT J. HEALY
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________	302	KA 17 01964	PEOPLE V CALIPH QUINN

________	303	KA 16 01333	PEOPLE V CORY REDMOND
________	304	KA 15 01937	PEOPLE V NIKEY J. HALL
________	310	CAF 19 00051	Mtr of MARIA P.
________	313	CA 19 00954	PATRICK DEERING V ROBERTA PROSSER
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________	337	KA 18 01793	PEOPLE V HUGH R. JACKSON
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________	433	CA 19 01198	THEODORE NALBONE V VANDERBILT PROPERTIES, INC.
________	437	CA 19 00505	TERRY L.M. V MARY L.M.
________	438	CA 19 00506	TERRY MACK V CENTER FOR ELDER LAW & JUSTICE
________	454	KA 19 00164	PEOPLE V CHRISTOPHER M. SWEM
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________	480	CAF 19 00425	Mtr of JACIEON M.
________	504	CAF 18 01947	LAURA B. RESKA V MICHAEL P. BROWNE
________	506	CAF 18 02324	Mtr of MICHAEL S.

________	507	CAF 19 01086	Mtr of JALYCE S.
________	508	CA 19 01268	KEION PIERRE V ANTHONY ANNUCCI
________	514	CA 19 00520	BRIAN S. RACHUNA V SHAN HUANG
________	534	CA 19 01568	MICHAEL J. CARLSON, SR. V AMERICAN INTERNATIONAL G
________	536	CA 19 00874	RICHARD TIMMONS V STATE OF NEW YORK
________	548	CA 19 00900	DAWN M. MILLER V CITY OF BUFFALO
________	559	TP 19 02228	NURI OZDEN, M.D. V SUNY UPSTATE MEDICAL UNIVERSITY

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

855/19
CA 18-01634
PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

EASTVIEW MALL, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GRACE HOLMES, INC., DOING BUSINESS AS J. CREW,
AND J. CREW GROUP, INC., DEFENDANTS-APPELLANTS.

MORRISON COHEN LLP, NEW YORK CITY (DANIELLE C. LESSER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WEAVER MANCUSO FRAME PLLC, ROCHESTER (JOHN A. MANCUSO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Matthew A. Rosenbaum, J.), entered September 6, 2018. The order, inter alia, granted that part of the motion of plaintiff seeking a preliminary injunction.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied and the preliminary injunction is vacated.

Memorandum: Defendants entered into a 10-year lease agreement with plaintiff, the owner and operator of a mall. The lease provides, inter alia, that if defendants' annual "gross sales"—a term specifically defined by the lease—were less than a certain threshold amount during the lease's fifth year, defendants could terminate the lease before its natural expiration date. Five years after the commencement of the lease, defendants informed plaintiff that their annual gross sales had failed to equal or exceed the threshold amount. Rather than terminating the lease at that time, the parties executed a lease modification agreement that reduced the amount of rent owed by defendants and extended the termination option for another year.

One year later, defendants again informed plaintiff that their annual gross sales did not equal or exceed the threshold amount and that they were thus exercising their option to terminate the lease. In response, plaintiff asserted that it had learned, via an auditor's reports, that defendants had wrongly excluded certain sales from their calculation of gross sales and were thus precluded from exercising the option to terminate the lease.

Plaintiff thereupon commenced this action seeking a declaratory judgment and asserting causes of action for, inter alia, breach of

contract and anticipatory repudiation. Defendants appeal from an order that, among other things, granted that part of plaintiff's motion seeking a preliminary injunction enjoining defendants from ceasing business operations or otherwise taking steps to terminate the lease. We reverse.

"[T]o prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of the equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]; *see generally Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Whether a party is entitled to a preliminary injunction is a determination entrusted to the sound discretion of the motion court (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009]). It is well settled that "[p]reliminary injunctive relief is a drastic remedy [that] is not routinely granted" (*Delphi Hospitalist Servs. LLC v Patrick*, 163 AD3d 1441, 1441 [4th Dept 2018] [internal quotation marks omitted]).

Even assuming, arguendo, that plaintiff demonstrated a likelihood of success on the merits, we conclude that plaintiff did not establish that it would sustain irreparable injury without a preliminary injunction (*see Kolodziej v Martin*, 249 AD2d 941, 942 [4th Dept 1998], *lv dismissed* 92 NY2d 919 [1998]) or that a balance of the equities favors plaintiff.

It is an anodyne proposition that "[i]rreparable injury, for purposes of equity, . . . mean[s] any injury for which money damages are insufficient" (*Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 [2d Dept 2009] [internal quotation marks omitted]). Thus, where "any loss of sales [caused] by the allegedly improper conduct of [the] defendant can be calculated," a plaintiff has an adequate remedy in the form of money damages and is not entitled to injunctive relief (*Eastman Kodak Co.*, 77 AD3d at 1436; *see Di Fabio*, 66 AD3d at 637).

Here, the lease contains a liquidated damages provision that entitles plaintiff to certain money damages if defendants prematurely vacate the premises and cease operations. The lease also contains an integration clause stating that the lease is "the entire and only agreement between the parties." Thus, because the lease specifically provides that plaintiff is entitled to certain money damages in the event that defendants vacate the premises in breach of the agreement—the very injury that serves as the predicate for plaintiff's action—we conclude that plaintiff has an adequate remedy at law and, moreover, that plaintiff has not suffered irreparable harm because the liquidated damages clause was intended as the sole remedy for such a breach (*cf. Karpinski v Ingrasci*, 28 NY2d 45, 52-53 [1971]; *Picotte Realty, Inc. v Gallery of Homes, Inc.*, 66 AD2d 978, 979 [3d Dept 1978]).

We disagree with our dissenting colleagues that plaintiff established a likelihood of irreparable injury from the loss of goodwill that would occur if defendants were to cease operations by prematurely terminating the lease. The "loss of goodwill and damage to customer relationships, unlike the loss of specific sales, is not easily quantified or remedied by money damages" (*Marcone v APW, LLC v Servall Co.*, 85 AD3d 1693, 1697 [4th Dept 2011]) and may warrant a finding of irreparable injury in cases such as those involving unfair competition tort claims (*see e.g. id.*; *FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 AD3d 145, 146 [1st Dept 2004]), the proposed demolition or alteration of the premises (*see e.g. Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 432 [1st Dept 2016]; *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 272-273 [1st Dept 2009]), or the issuance of a *Yellowstone* injunction, in which it is a *tenant*, not the landlord, who seeks to enjoin the termination of a lease (*see Waldbaum, Inc. v Fifth Ave. of Long Is. Realty Assoc.*, 85 NY2d 600, 607 [1995]; *Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). No such scenario is implicated here and, moreover, as already noted, the specific injury complained of by plaintiff was accounted for by the terms of the lease agreement.

We further conclude that the balance of the equities tips in favor of defendants. In considering this element when "ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public as well as the interests of the parties to the litigation" (*Destiny USA Holdings, LLC*, 69 AD3d at 223 [internal quotation marks omitted]). In balancing the equities, a court must inquire into whether "the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction" (*Felix v Brand Serv. Group LLC*, 101 AD3d 1724, 1726 [4th Dept 2012] [internal quotation marks omitted]). Here, we conclude that the harm defendants will suffer if forced to keep their 6,000-square-foot store open against their will is greater than the injury plaintiff will suffer from the loss of one tenant in the mall, especially because plaintiff may still recoup its loss via the liquidated damages provision.

In light of our determination, we do not address defendants' remaining contentions.

All concur except SMITH and WINSLOW, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent. It is well established that "[a] motion for a preliminary injunction is addressed to the sound discretion of the trial court[,] and the decision of the trial court on such a motion will not be disturbed on appeal, unless there is a showing of an abuse of discretion" (*Destiny USA Holdings, LLC v Citigroup Global Mkts. Realty Corp.*, 69 AD3d 212, 216 [4th Dept 2009] [internal quotation marks omitted]; *see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). It is also well settled that a moving party's entitlement to preliminary injunctive relief "depends upon probabilities, any or all of which may be disproven when the action is tried on the merits" (*J.A. Preston Corp. v Fabrication*

Enters., 68 NY2d 397, 406 [1986]). We conclude that Supreme Court did not abuse its discretion in determining that plaintiff established its entitlement to a preliminary injunction (*see Destiny USA Holdings, LLC*, 69 AD3d at 224-225; *see also Tucker v Toia*, 54 AD2d 322, 325-326 [4th Dept 1976]). We therefore would affirm the order.

Initially, we conclude that plaintiff met its burden of demonstrating, by clear and convincing evidence, a likelihood of success on the merits of its causes of action for declaratory judgment and breach of contract (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]). On a motion for a preliminary injunction, a prima facie showing of the movant's right to relief is sufficient (*see Gambar Enters. v Kelly Servs.*, 69 AD2d 297, 306 [4th Dept 1979]), and the actual proving of the case "should be left to the full hearing on the merits" (*Tucker*, 54 AD2d at 326).

The parties' 10-year lease for retail space contains an early termination option applicable if defendants' annual "gross sales," as defined in the lease, are less than a certain threshold amount during a specified measuring period. After plaintiff determined through its auditor that defendants had improperly excluded more than $900,000 in sales from their certified calculation of gross sales, plaintiff commenced this action and thereafter moved for a preliminary injunction enjoining defendants from taking steps to exercise their option to terminate the lease. The crux of the parties' dispute is whether promotional discounts are to be included in the calculation of gross sales. In defendants' view, gross sales means the amount actually received by defendants, and thus promotional and other discounts are *not* to be included in the calculation of gross sales. In plaintiff's view, however, defendants' interpretation of gross sales to mean "gross cash or credit actually received" conflates gross sales with net sales. Gross sales, in plaintiff's view, means the grand total of the sales transactions *before* the deduction of sales allowances, discounts, or returns. Thus, all amounts attributable to the total selling price of the merchandise are to be included in the initial calculation of gross sales, which is then adjusted by the amount of the exclusions and deductions specified in the lease.

The determination of the parties' dispute "rests solely on matters of contractual interpretation," and "[t]he interpretation of an unambiguous contractual provision is a function for the court" (*Destiny USA Holdings, LLC*, 69 AD3d at 218 [internal quotation marks omitted]). Here, the lease broadly defines gross sales to include "the total gross sales prices of any and all merchandise . . . in all cases whether said sales . . . are for cash or credit or otherwise, and without reserve or deduction for inability or failure to collect." That expansive definition is followed by a list of 17 specific exclusions and deductions, such as sums collected for taxes, returns, and refunds. The term "promotional discounts" is not mentioned in the broad definition of gross sales, nor is it listed among the itemized exclusions and deductions (*see generally Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403-404 [1984]). Thus, pursuant to

the unambiguous language of the lease, promotional discounts must be included in the calculation of defendants' gross sales.

In support of its motion, plaintiff submitted evidence establishing that defendants failed to substantiate all of the exclusions and deductions from gross sales that they claimed, despite the requirement in the lease for them to do so. Plaintiff's experts opined that, when those unsubstantiated exclusions and deductions were added to the calculation of defendants' gross sales, defendants' actual gross sales for the measuring period exceeded the threshold amount and, thus, defendants were not entitled to exercise their option to terminate the lease prior to its natural expiration. We therefore conclude that plaintiff established a reasonable likelihood of success on the merits of its causes of action for breach of contract and declaratory judgment.

Plaintiff also demonstrated a likelihood of success on the merits of its cause of action for anticipatory repudiation by submitting evidence establishing that defendants had unequivocally expressed their intent not to perform the remainder of the lease (*see Tenavision, Inc. v Neuman*, 45 NY2d 145, 150 [1978]). " 'An anticipatory breach of contract by a promisor is a repudiation of [a] contractual duty before the time fixed in the contract for . . . performance has arrived' " (*Princes Point LLC v Muss Dev. L.L.C.*, 30 NY3d 127, 133 [2017], quoting 10-54 Corbin on Contracts § 54.1 [2017]). "[W]hen a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, the repudiation entitles the nonrepudiating party to claim damages for total breach" (*Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-463 [1998] [internal quotation marks omitted]).

With respect to the second prong of the test for a preliminary injunction, we likewise conclude that the court did not abuse its discretion in determining that plaintiff established, by clear and convincing evidence, a danger of irreparable injury in the absence of injunctive relief (*see generally Nobu Next Door, LLC*, 4 NY3d at 840; *Eastman Kodak Co.*, 77 AD3d at 1435). Assuming, arguendo, that defendants' gross sales during the measuring period did not fall below the threshold amount and thus that defendants are not entitled to exercise their option to terminate the lease, we agree with the majority that the liquidated damages provision in the lease entitles plaintiff to collect certain monetary damages if defendants breach the lease by prematurely vacating the premises and ceasing to conduct business operations. We disagree with the majority's determination, however, that the court abused its discretion in considering, for the purpose of determining whether provisional relief is warranted, if plaintiff will suffer irreparable injury not adequately remedied by monetary compensation if preliminary injunctive relief is not granted. We reject the view of the majority that the court erred in determining that defendants' breach would cause irreparable injury to plaintiff in the form of a loss of goodwill and damage to customer relationships under those circumstances.

Plaintiff submitted evidence establishing that defendants’ store is a premier retailer in the mall and that their tenancy impacts the leases of other tenants of the mall. Defendants’ store is included in an exclusive list of “Named Retail Tenants” defined in co-tenancy provisions of some leases, and other leases refer to defendants’ store as a “Suitable or Successor Replacement Anchor Store,” as a “Required Tenant,” or as an “Upscale Tenant” for purposes of plaintiff maintaining business operations with those other tenants. Unless anchor stores or suitable or successor replacements for those anchor stores, such as defendants’ store, continue to occupy a certain amount of leaseable space within the mall, other tenants are not required to continue to operate under their lease agreements. Thus, the potential injury to plaintiff is not limited to the loss of rental income from one of approximately 150 tenants in the mall, a loss that is easily quantified and remedied by monetary compensation pursuant to the lease. Here, the potential injury to plaintiff includes a domino effect involving other tenants in the mall. Stated simply, if defendants breach the lease by vacating the mall prior to the expiration of their lease term, plaintiff will be entitled to recover liquidated damages based on that breach. Plaintiff’s other tenants in the mall whose co-tenancy provisions in their leases depend on defendants’ continued occupancy in the mall throughout its lease term, however, will have the ability to terminate their leases based on defendants’ premature departure, thereby causing irreparable harm to plaintiff. In our view, plaintiff sufficiently demonstrated that the premature termination of defendants’ lease will cause a loss of goodwill and damage to plaintiff’s customer relationships that will not be remedied by an award of liquidated damages and thus that temporary injunctive relief is appropriate.

Although we agree with the majority that the lease provides for certain monetary damages to plaintiff in the event of defendants’ breach, we reject the implication by the majority that the lease’s liquidated damages clause and integration clause somehow preclude plaintiff from seeking intervention by the court in order to prevent, or at least mitigate, their damages by attempting to enjoin defendants from breaching the lease. Nothing in the lease prevents plaintiff from seeking to hold defendants to the terms of the lease agreement or from protecting its own interests by attempting to prevent a breach.

Finally, we conclude that the court did not abuse its discretion in determining that plaintiff met its burden of establishing, by clear and convincing evidence, a balance of equities in its favor (*see generally Nobu Next Door, LLC*, 4 NY3d at 840; *Eastman Kodak Co.*, 77 AD3d at 1435). Contrary to the determination of our colleagues that the injury to be sustained by plaintiff will be remedied by defendants’ payment of liquidated damages and is limited to “the loss of one tenant in the mall,” we conclude that “the irreparable injury to be sustained . . . is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction” (*Felix v Brand Serv. Group LLC*, 101 AD3d 1724, 1726 [4th Dept 2012] [internal quotation marks omitted]).

As discussed above, the denial of a preliminary injunction will

cause additional harm to plaintiff beyond the loss of defendants' store as a tenant in the mall. Although the injunction requires defendants to continue to operate under the terms of their existing lease and prohibits them from vacating the mall while the action is pending, defendants' employees keep their jobs and defendants' internal accounting records show that defendants continue to generate a profit from their sales in the mall. Thus, we conclude that the court did not abuse its discretion in determining that the equities tip in favor of plaintiff obtaining a preliminary injunction to maintain the status quo during the pendency of the action (*see AJMRT, LLC v Kern*, 154 AD3d 1288, 1290 [4th Dept 2017]).

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

1235
KA 01-01201
PRESENT: CENTRA, J.P., PERADOTTO, CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DENNIS TIMMONS, DEFENDANT-APPELLANT.

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

DENNIS TIMMONS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Stephen R. Sirkin, J.), entered April 3, 2001. The appeal was held by this Court by order entered October 5, 2018, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (165 AD3d 1597 [4th Dept 2018]). The proceedings were held and completed.

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

Memorandum: On a prior appeal (*People v Timmons*, 299 AD2d 861 [4th Dept 2002], *lv denied* 99 NY2d 585 [2003]), we affirmed the judgment convicting defendant upon a jury verdict of murder in the second degree (Penal Law § 125.25 [2]). We subsequently granted defendant’s motion for a writ of error coram nobis on the ground that appellate counsel had failed to raise an issue on appeal that may have merit, i.e., whether County Court (Sirkin, J.; hereafter, trial court) erred when it allegedly failed to comply with CPL 310.30 in regard to court exhibit 3, a note from the jury during its deliberations (*People v Timmons*, 142 AD3d 1400 [4th Dept 2016]), and we vacated our prior order.

Upon our consideration of the appeal de novo (*People v Timmons*, 165 AD3d 1597 [4th Dept 2018]), defendant contended that the trial court committed a mode of proceedings error by failing to provide defense counsel with meaningful notice of the specific content of the jury note requesting readbacks of the testimony of five witnesses, some of which the jury requested be provided in a particular order. We concluded that “the trial transcript indicate[d] that the [trial] court informed defense counsel of the existence of the note and most of its contents, but ‘there [was] no indication that the entire contents of the note were shared with counsel’ ” (*id.* at 1598, quoting

People v Walston, 23 NY3d 986, 990 [2014]). Rather, "the transcript reflect[ed] that the [trial] court initially paraphrased the note outside the presence of the jury and then read part of the note verbatim in the jury's presence, but in each instance the [trial] court entirely omitted any reference to the jury's request for the testimony of the medical examiner and for that witness's testimony to be read first" (*id.*). Nonetheless, upon taking judicial notice of our own records in the form of a court reporter's affidavit submitted by the People in opposition to defendant's motion for a writ of error coram nobis, we further concluded that the affidavit "indicate[d] that a stenographic error may have resulted in a transcript that [did] not accurately reflect whether the [trial] court read the entire content of the note verbatim in open court prior to responding to the jury" (*id.* at 1599-1600). We thus held the case, reserved decision, and remitted the matter to County Court (Renzi, J.; hereafter, hearing court) for the purpose of a reconstruction hearing regarding the alleged error in the transcript of the trial court's on-the-record reading of the jury note (*id.* at 1600).

During the reconstruction hearing, the court reporter testified that, upon review of her stenographic notes from the trial and other contemporaneous handwritten notes, she determined that she had inadvertently omitted portions of the trial court's reading of the jury note from the transcript. The court reporter thus prepared a revised transcript, which was admitted in evidence, reflecting that the trial court had, in fact, read the entire contents of the jury note both outside the presence of the jury and in the jury's presence, including the request for the testimony of the medical examiner and for that witness's testimony to be read first. The hearing court credited the court reporter's testimony and concluded that the revised transcript was a true and accurate record of what really happened at trial. We now affirm the judgment of conviction.

Defendant contends in his main and pro se supplemental briefs that the record does not support the hearing court's determination because the court reporter's testimony was not credible. We reject that contention. "Resolution of issues of credibility and the weight to be accorded to the evidence presented are primarily questions to be determined by the hearing court, which has the advantage of hearing and seeing the witnesses" (*People v James*, 221 AD2d 963, 963 [4th Dept 1995]; *see generally People v Prochilo*, 41 NY2d 759, 761 [1977]). Upon our review of the record of the reconstruction hearing, we perceive no basis to disturb the hearing court's credibility determination (*see People v Cohen*, 12 AD3d 1134, 1135 [4th Dept 2004]). We conclude that the People established by a preponderance of the evidence that the revised transcript accurately reflects the trial court's on-the-record reading of the jury note (*see generally id.*).

Inasmuch as the revised transcript establishes that the trial court "complied with its core responsibility to give counsel meaningful notice of the jury[ ] note[,] . . . no mode of proceedings error occurred, and counsel was required to object in order to preserve a claim of error for appellate review," which defense counsel failed to do here (*People v Nealon*, 26 NY3d 152, 160 [2015]). In any

event, the revised transcript establishes that the trial court complied with CPL 310.30 in accordance with the procedure set forth in *People v O'Rama* (78 NY2d 270 [1991]; *see People v Geroyianis*, 96 AD3d 1641, 1643 [4th Dept 2012], *lv denied* 19 NY3d 996 [2012], *reconsideration denied* 19 NY3d 1102 [2012]). Defendant also failed to preserve for our review his contention that the trial court did not provide a meaningful response to the jury's request for readbacks of testimony (*see People v Morris*, 27 NY3d 1096, 1098 [2016]), and the trial court's alleged failure does not constitute a mode of proceedings error for which preservation is not required (*see People v Mack*, 27 NY3d 534, 540-541 [2016], *rearg denied* 28 NY3d 944 [2016]; *People v Newton*, 147 AD3d 1463, 1464 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). 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]).

Defendant failed to preserve for our review his further contention that he was deprived of a fair trial by prosecutorial misconduct on summation inasmuch as he did not object to any alleged instances thereof (*see People v Black*, 137 AD3d 1679, 1680 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]). In any event, we conclude that most of the alleged improprieties "were fair comment on the evidence and fair response to defense counsel's summation . . . and, to the extent that the prosecutor made inappropriate remarks, . . . they were 'not so pervasive or egregious as to deny defendant a fair trial' " (*People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]). Contrary to defendant's related contention, inasmuch as he was not denied a fair trial by any alleged improper comments during the prosecutor's summation, we further conclude that " 'defense counsel's failure to object to those [comments] does not constitute ineffective assistance of counsel' " (*People v Swan*, 126 AD3d 1527, 1527 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see Edwards*, 159 AD3d at 1426).

Defendant failed to preserve for our review his contention that the jury instructions and verdict sheet were erroneous (*see People v Bolling*, 49 AD3d 1330, 1332 [4th Dept 2008]; *People v Man Kwong Yeung*, 216 AD2d 953, 953 [4th Dept 1995], *lv denied* 86 NY2d 873 [1995], *reconsideration denied* 88 NY2d 967 [1996]; *see generally People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's related contention that defense counsel was ineffective for failing to object to the jury instructions and verdict sheet inasmuch as "[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]; *see generally Bolling*, 49 AD3d at 1332).

Finally, we conclude that the remaining contention in defendant's pro se supplemental brief is not properly before us (*see People v Wilson*, 14 NY3d 895, 897 [2010]; *People v Cameron*, 209 AD2d 159, 160

[1st Dept 1994]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

1308
KA 15-01502
PRESENT: WHALEN, P.J., PERADOTTO, TROUTMAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN J. NEWMAN, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (HELEN SYME 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 (Christopher S. Ciaccio, J.), rendered May 27, 2015. The judgment convicted defendant upon a jury verdict of menacing a police officer or peace officer (two counts) and criminal trespass in the third degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Monroe County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of two counts of menacing a police officer or peace officer (Penal Law § 120.18) and one count of criminal trespass in the third degree (§ 140.10 [a]). The conviction arose from an incident in which uniformed sheriff's deputies responded to defendant's house after receiving a 911 call that defendant had entered another person's property, thrown a brick through a garage door window, and entered the garage without the owner's permission. Two deputies approached the front door of defendant's house, and one of the deputies knocked on the door and announced their presence. Defendant then opened the door holding a shotgun in the "low ready position" in the direction of the two deputies. According to the testimony at trial, defendant maintained that position for between 5 and 15 seconds while the deputies ordered him to drop the shotgun, after which he complied with the deputies' orders.

We agree with defendant that County Court erred in summarily denying his motion to set aside the verdict pursuant to CPL 330.30 (2) on the ground of misconduct during jury deliberations. "Generally, a jury verdict may not be impeached by probes into the jury's deliberative process; however, a showing of improper influence provides a necessary and narrow exception to the general proposition" (*People v Maragh*, 94 NY2d 569, 573 [2000]; *see People v Brown*, 48 NY2d 388, 393 [1979]). Improper influence encompasses "even

well-intentioned jury conduct which tends to put the jury in possession of evidence not introduced at trial" (*Brown*, 48 NY2d at 393). Inasmuch as "juror misconduct can take many forms, no ironclad rule of decision is possible. In each case the facts must be examined to determine the nature of the material placed before the jury and the likelihood that prejudice would be engendered" (*id.* at 394). Where, as here, the alleged juror misconduct involves a reenactment, "the court must inquire whether the conduct in question was a conscious, contrived experiment rather than an application of everyday experience; whether it was directly material to a [critical] point at issue in the trial; and whether it created a risk of prejudice to the defendant by coloring the other jurors' views" (*People v Pino*, 264 AD2d 571, 572 [1st Dept 1999], *lv denied* 94 NY2d 906 [2000]; *see People v Legister*, 75 NY2d 832, 833 [1990]; *Brown*, 48 NY2d at 394-395). When presented with evidence of such conduct by the jury, the better practice is for the trial court "to hold a hearing in order to ascertain exactly what transpired, rather than to rely upon attorneys' affidavits concerning what" the jury may have done (*People v Smith*, 59 NY2d 988, 990 [1983]). Indeed, the trial court is vested "with discretion and posttrial fact-finding powers to ascertain and determine whether the activity during deliberations constituted misconduct and whether the verdict should be set aside and a new trial ordered" (*Maragh*, 94 NY2d at 574).

Here, in support of the motion, defendant submitted the affirmation of his attorney. Defendant's attorney alleged that, during post-verdict discussions with the jury, he learned that the jurors had attempted during their deliberations to determine whether defendant was aware that the people knocking at his door were sheriff's deputies by using the bathroom door in the deliberation room to reenact the moment when one of the deputies knocked on defendant's door and announced the deputies' presence. The court did not conduct a hearing and instead summarily denied the motion, ruling that, although the alleged jury reenactment constituted a conscious, contrived experiment that placed before the jury evidence not introduced at trial, the experiment was not directly material to any critical point at issue. That was error.

As defendant correctly contends, whether he could hear the announcement by the deputy was directly material to a critical point at issue in the trial—indeed, to an element of menacing a police officer—i.e., whether defendant "knew or reasonably should have known" that the people at his door were sheriff's deputies (Penal Law § 120.18; *see Legister*, 75 NY2d at 833; *Brown*, 48 NY2d at 394-395). We conclude under the circumstances of this case that a hearing is required to ascertain whether and in what manner the alleged reenactment occurred, and whether such conduct "created a substantial risk of prejudice to the rights of the defendant by coloring the views of the . . . jur[y]" (*Brown*, 48 NY2d at 394; *see generally Smith*, 59 NY2d at 990). We therefore hold the case, reserve decision and remit the matter to County Court for a hearing on defendant's CPL 330.30

motion.

Entered: April 24, 2020

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 19-00612
PRESENT: WHALEN, P.J., CENTRA, LINDLEY, TROUTMAN, AND WINSLOW, JJ.

MAPLE-GATE ANESTHESIOLOGISTS, P.C.,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DEIXY NASRIN AND DOUGLAS BRUNDIN,
DEFENDANTS-RESPONDENTS.

BARCLAY DAMON LLP, BUFFALO (ROBERT J. PORTIN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HURWITZ & FINE, P.C., BUFFALO (AMBER E. STORR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered March 22, 2019. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action against defendants, its former employees, alleging that it is entitled to certain proceeds paid to defendants by the Medical Liability Mutual Insurance Company (MLMIC) as a result of MLMIC’s conversion from a mutual insurance company to a stock insurance company (demutualization). Pursuant to defendants’ employment contracts, plaintiff agreed to provide to defendants the annual premiums for their professional liability insurance as part of their compensation packages. Plaintiff purchased professional liability insurance for defendants and all of its employees through MLMIC. Each defendant was named as the “insured” or “policyholder” on his or her MLMIC policy, and plaintiff was formally designated by defendants as the “Policy Administrator.” Defendants assigned certain policyholder rights to plaintiff as the Policy Administrator, namely, the right to receive any dividends and return premiums, and also assigned certain policyholder duties, namely, the duty to pay all premiums.

In 2018, after defendants had left their employment with plaintiff, MLMIC made certain demutualization payments to defendants because of their status as former policyholders. When defendants refused plaintiff’s request to pay it 50% of those payments, plaintiff commenced this action, asserting causes of action for conversion and unjust enrichment and alleging that it was the rightful recipient of

the demutualization payments. Thereafter, defendants moved to dismiss the complaint pursuant to, inter alia, CPLR 3211 (a) (1). Supreme Court granted the motion, and we affirm.

"On a motion to dismiss pursuant to CPLR 3211, pleadings are to be liberally construed . . . The court is to accept the facts as alleged in the [pleading] as true . . . [and] accord [the proponent of the pleading] the benefit of every possible favorable inference" (*Baumann Realtors, Inc. v First Columbia Century-30, LLC*, 113 AD3d 1091, 1092 [4th Dept 2014] [internal quotation marks omitted]). "A motion to dismiss pursuant to CPLR 3211 (a) (1) will be granted if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the [plaintiff's] claim[s]" (*Lots 4 Less Stores, Inc. v Integrated Props., Inc.*, 152 AD3d 1181, 1182 [4th Dept 2017] [internal quotation marks omitted]).

Here, contrary to plaintiff's contention, the court properly granted the motion because the documentary evidence established as a matter of law that plaintiff had no legal or equitable right of ownership to the demutualization payments (*see La Barte v Seneca Resources Corp.*, 285 AD2d 974, 976 [4th Dept 2001]; *Di Siena v Di Siena*, 266 AD2d 673, 674 [3d Dept 1999]; *see generally Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]; *Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Insurance Law § 7307 (e) (3) provides that, when a mutual insurance company converts to a stock insurance company, the plan of conversion: "shall . . . provide that each person who had a policy of insurance in effect at any time during the three year period immediately preceding the date of adoption of the resolution [seeking approval of the conversion] shall be entitled to receive in exchange for such equitable share, without additional payment, consideration payable in voting common shares of the insurer or other consideration, or both." In support of their motion, defendants submitted the MLMIC plan of conversion (plan), which, in accordance with that provision of the Insurance Law, provided that cash distributions were required to be made to those policyholders who had coverage during the relevant period prior to demutualization in exchange for the "extinguishment of their Policyholder Membership Interests." The plan stated that the cash distribution would be made to the policyholder unless he or she "affirmatively designated a Policy Administrator . . . to receive such amount on [his or her] behalf." Additional documentary evidence demonstrated that defendants were the policyholders of the relevant MLMIC policies and that, although defendants had assigned some of their rights as policyholders to plaintiff as Policy Administrator, they had not designated plaintiff to receive demutualization payments. Even assuming, arguendo, that plaintiff could be entitled to the demutualization payments without the express designation contemplated by the plan, we conclude that plaintiff has not alleged any facts or circumstances from which it could be established that it was entitled to any such payments. The mere fact that plaintiff paid the annual premiums on the policies on defendants' behalf does not entitle it to the demutualization payments (*cf. Matter of Schaffer, Schonholz &*

Drossman, LLP v Title, 171 AD3d 465, 465 [1st Dept 2019]).

Entered: April 24, 2020

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 19-01261

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

IN THE MATTER OF THE ESTATE OF HOWARD MAX BRUSIE, ALSO KNOWN AS HOWARD M. BRUSIE, DECEASED. MEMORANDUM AND ORDER

LISA FITZAK, PETITIONER-APPELLANT.

DONOHUE LAW OFFICES, TONAWANDA (BARRY J. DONOHUE OF COUNSEL), FOR PETITIONER-APPELLANT.

Appeal from an order of the Surrogate's Court, Orleans County (Sanford A. Church, S.), entered June 28, 2019. The order denied and dismissed the petition for probate and vacated the order issuing preliminary letters testamentary.

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

Memorandum: Petitioner commenced this proceeding seeking admission to probate of the will of Howard Max Brusie, also known as Howard M. Brusie (decedent), and the issuance of letters testamentary. She also requested the issuance of preliminary letters testamentary. Surrogate's Court granted the request for preliminary letters testamentary and issued a citation to each of decedent's four children, including a daughter who lived in Florida (nondomiciliary daughter). Petitioner sent the citation to the nondomiciliary daughter at her residence in Florida via certified mail, return receipt requested, pursuant to SCPA 307 (2). However, it was not the nondomiciliary daughter who signed the receipt but her purported daughter-in-law, who allegedly lived with her. The Surrogate determined that he lacked jurisdiction over the nondomiciliary daughter in the absence of evidence establishing that she actually received the citation and directed petitioner to provide such evidence. Petitioner failed to comply with the Surrogate's directive. Petitioner appeals from an order that denied and dismissed the petition for probate and vacated the order issuing preliminary letters testamentary. We affirm.

We reject petitioner's contention that the Surrogate erred in concluding that he lacked jurisdiction over decedent's nondomiciliary daughter. Although proof that the nondomiciliary daughter actually received the citation is not required under SCPA 307 (2) (*see Matter of Daly*, NYLJ, Mar. 31, 2003 at 7, col 1 [Sur Ct, Dutchess County 2003]), the Surrogate had broad discretion under SCPA 307 (3) and 309 (2) to direct that proof of actual receipt be submitted (*see generally*

Dobkin v Chapman, 21 NY2d 490, 498-499 [1968]; *Matter of Behm*, NYLJ, May 15, 2018 at 27, col 4 [Sur Ct, Richmond County 2018]; *Matter of Ramon, P.L.*, 147 Misc 2d 601, 602 [Sur Ct, Nassau County 1990]; *Matter of Mackey*, 91 Misc 2d 736, 737-738 [Sur Ct, Dutchess County 1977]). Petitioner’s failure to comply with that directive permitted the Surrogate to conclude that he lacked jurisdiction (*see generally* SCPA 307 [3]).

We similarly reject petitioner’s contention that the Surrogate erred in vacating the award of preliminary letters testamentary. Contrary to petitioner’s view, the Surrogate acted within his discretion in determining that preliminary letters were not in the best interest of the estate because jurisdiction had not been obtained over all necessary parties (*see Matter of Bayley*, 72 Misc 2d 312, 316 [Sur Ct, Suffolk County 1972], *affd* 40 AD2d 843 [2d Dept 1972], *appeal dismissed* 31 NY2d 1025 [1973]), and although the Surrogate could have issued preliminary letters to the public administrator, the Surrogate was not required to do so (*see generally Matter of Mandelbaum*, 7 Misc 3d 539, 541-542 [Sur Ct, Nassau County 2005]).

Entered: April 24, 2020 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 16-01177

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CARL I. SHERMAN, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (JEFFREY WICKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered April 4, 2016. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts) and reckless endangerment in the first degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon a jury verdict, of two counts each of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]) and reckless endangerment in the first degree (§ 120.25), defendant contends that he was denied effective assistance of counsel and that the verdict is against the weight of the evidence. We reject those contentions.

With respect to the former contention, defendant cites to a single comment by defense counsel during voir dire. When asked by a prospective juror why a defendant might not testify, defense counsel initially responded that it was because “the Constitution says you don’t have to testify.” He then said, “[n]o one has to incriminate themselves.” According to defendant, the latter statement, standing alone, was so damaging as to deprive him of effective assistance of counsel.

“[I]n order to prevail on a claim of ineffective assistance of counsel based on a single error or omission, a defendant must demonstrate that the error was ‘so egregious and prejudicial’ as to deprive defendant of a fair trial” (*People v Cummings*, 16 NY3d 784, 785 [2011], *cert denied* 565 US 862 [2011]; *see People v Hobot*, 84 NY2d 1021, 1022 [1995]). “The test is ‘reasonable competence, not perfect representation’ ” (*People v Oathout*, 21 NY3d 127, 128 [2013]). Here,

we conclude that defense counsel’s challenged statement, although unwise, was not so prejudicial to defendant as to deprive him of a fair trial, especially considering that the challenged statement was preceded and followed by defense counsel’s correct statements of law concerning a defendant’s rights and the People’s burden of proof. Thus, although defense counsel’s representation was not perfect, viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

We also reject defendant’s contention that the verdict is contrary to the weight of the evidence. Based on the evidence at trial, which included surveillance video and defendant’s own statements to police, it is undisputed that defendant was engaged in a verbal altercation with the two victims at the date and time that shots were fired. The two victims identified defendant as the shooter, but the video does not establish the identity of the person who fired the shots. Nevertheless, bullet casings were found near defendant’s house, and bullet holes and a bullet were found in the path that bullets would have taken if they were being fired from defendant’s house toward the victims’ residence. Where, as here, the credibility of the witnesses “is of paramount importance to the determination of guilt or innocence, [we] must give ‘[g]reat deference . . . [to the] fact-finder’s opportunity to view the witnesses, hear the testimony and observe demeanor’ ” (*People v Harris*, 15 AD3d 966, 967 [4th Dept 2005], *lv denied* 4 NY3d 831 [2005], quoting *People v Bleakley*, 69 NY2d 490, 495 [1987]), because the fact-finder can “see and hear the witnesses [and] can assess credibility and reliability in a manner that is far superior to that of reviewing judges[,] who must rely on the printed record” (*People v Lane*, 7 NY3d 888, 890 [2006]).

In our view, the “ ‘[i]ssues of credibility . . . , including the weight to be given the backgrounds of the People’s witnesses and [any] inconsistencies in their testimony, were properly considered by the jury and there is no basis for disturbing its determinations’ ” (*People v Baez*, 175 AD3d 982, 986 [4th Dept 2019], *lv denied* 34 NY3d 1015 [2019]; *see People v Cross*, 174 AD3d 1311, 1315 [4th Dept 2019], *lv denied* 34 NY3d 950 [2019]). 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 Bleakley*, 69 NY2d at 495).

Entered: April 24, 2020

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 18-01104

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JEFFREY J. GIZOWSKI, DEFENDANT-APPELLANT.

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

PATRICK E. SWANSON, DISTRICT ATTORNEY, MAYVILLE (JOHN C. ZUROSKI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (Susan M. Eagan, A.J.), rendered March 20, 2018. The judgment convicted defendant, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer.

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of attempted aggravated assault upon a police officer or a peace officer (Penal Law §§ 110.00, 120.11), defendant contends that County Court erred both in denying his motion to withdraw his guilty plea and in refusing to assign him a new lawyer in connection with that motion. Preliminarily, because defendant's appellate contentions would survive even a valid, unrestricted waiver of the right to appeal (*see People v Truitt*, 170 AD3d 1591, 1591-1592 [4th Dept 2019], *lv denied* 33 NY3d 1036 [2019]; *see also People v Weinstock*, 129 AD3d 1663, 1663-1664 [4th Dept 2015], *lv denied* 26 NY3d 1012 [2015]), we need not consider his challenge to the validity of that waiver.

We reject defendant's contentions on the merits. "[P]ermission to withdraw a guilty plea rests solely within the court's discretion . . . , and refusal to permit withdrawal does not constitute an abuse of that discretion unless there is some evidence of innocence, fraud, or mistake in inducing the plea" (*People v Williams*, 170 AD3d 1666, 1666 [4th Dept 2019] [internal quotation marks omitted]). Here, defendant's unsubstantiated allegations of injustice and police misconduct are conclusory and belied by his own sworn statements at the plea colloquy. The court thus did not abuse its discretion in denying defendant's motion to withdraw his plea (*see People v Jackson*, 170 AD3d 1040, 1040-1041 [2d Dept 2019], *lv denied* 33 NY3d 1070

[2019]; *Truitt*, 170 AD3d at 1592; *Williams*, 170 AD3d at 1667). Defendant did not seek to vacate his plea on the ground of ineffective assistance of counsel, and his appellate contention that vacatur is warranted on that basis is therefore unpreserved for our review (*see People v Frazier*, 63 AD3d 1633, 1633-1634 [4th Dept 2009], *lv denied* 12 NY3d 925 [2009]).

Contrary to defendant's further contention, the court was not obligated to ask more probing questions regarding his motion to withdraw the guilty plea or to conduct an evidentiary hearing on the motion. "Only in the rare instance will a defendant be entitled to an evidentiary hearing" on a motion to withdraw a guilty plea, and this matter falls within the category of cases in which "a limited interrogation by the court will suffice" (*People v Tinsley*, 35 NY2d 926, 927 [1974]; *see Truitt*, 170 AD3d at 1592; *People v Fulmore*, 189 AD2d 823, 823 [2d Dept 1993]).

Finally, because defense counsel did not take a position adverse to defendant and the record does not reveal any good cause for the appointment of a new attorney, the court did not err in denying defendant's request to substitute counsel in connection with defendant's motion to withdraw his plea (*see People v Puccini*, 145 AD3d 1107, 1109 [3d Dept 2016], *lv denied* 29 NY3d 1035 [2017]; *People v Bethany*, 144 AD3d 1666, 1669 [4th Dept 2016], *lv denied* 29 NY3d 996 [2017], *cert denied* — US —, 138 S Ct 1571 [2018]).

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

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CAF 19-00150
PRESENT: CENTRA, J.P., PERADOTTO, LINDLEY, NEMOYER, AND BANNISTER, JJ.

IN THE MATTER OF JAMES L.H.

OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;
MEMORANDUM AND ORDER
LISA H. AND JASON H., RESPONDENTS-APPELLANTS.

ROBERT J. GALLAMORE, OSWEGO, FOR RESPONDENT-APPELLANT LISA H.

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-APPELLANT JASON H.

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

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

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered December 12, 2018 in a proceeding pursuant to Family Court Act article 10. The order adjudged that respondents had abused the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 10, respondent father and respondent stepmother appeal from an order that adjudged that the subject child was an abused child. We affirm.

Contrary to respondents' contentions, Family Court's finding that they sexually abused the child is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]; *see Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]). "A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142 [2d Dept 2008]; *see* § 1046 [a] [vi]; *Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987], *rearg denied* 71 NY2d 890 [1988]). "Courts have considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and whether the record as a whole supports a finding of abuse . . . , and [t]he Legislature has expressed a clear intent that a relatively low degree of corroborative evidence is sufficient in

abuse proceedings" (*Nicholas J.R.*, 83 AD3d at 1490 [internal quotation marks omitted]).

Here, the out-of-court statements of the child were sufficiently corroborated by the evidence that the father had sexually abused his other child (*see Nicole V.*, 71 NY2d at 118), the child's "age-inappropriate knowledge of sexual matters" (*Matter of Brooke T. [Justin T.]*, 156 AD3d 1410, 1411 [4th Dept 2017]), the testimony of the child's play therapist that the child's behavior following the alleged abuse was consistent with that of a child who has been sexually abused (*see Matter of Lydia C. [Albert C.]*, 89 AD3d 1434, 1435 [4th Dept 2011]), and the opinions of the child's play and trauma therapists that the child's out-of-court statements were credible and consistent in describing the sexual conduct (*see id.*). Furthermore, "the child gave multiple, consistent descriptions of the abuse and, [a]lthough repetition of an accusation by a child does not corroborate the child's prior account of [abuse] . . . , the consistency of the child['s] out-of-court statements describing [the] sexual conduct enhances the reliability of those out-of-court statements" (*Brooke T.*, 156 AD3d at 1411 [internal quotation marks omitted]). In addition, "[t]he fact that the child[ ] at times recanted the allegations of abuse does not render [his] initial statements incredible as a matter of law . . . , particularly in view of the evidence that the child[ ] recanted" as a result of prompting by the father (*Matter of Shawn P.*, 266 AD2d 907, 908 [4th Dept 1999], *lv denied* 94 NY2d 760 [2000]). The court, based principally upon the testimony of the child's therapists, credited the child's out-of-court statements disclosing the abuse, and we conclude that there is no basis on this record to disturb the court's resolution of credibility issues (*see Matter of Lakeesha R.*, 229 AD2d 965, 965-966 [4th Dept 1996]).

Entered: April 24, 2020

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 16-01976
PRESENT: SMITH, J.P., PERADOTTO, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HARRIS, DEFENDANT-APPELLANT.

PETER J. DIGIORGIO, JR., UTICA, 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 (Dennis S. Cohen, J.), rendered September 1, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third 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 his plea of guilty, of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]) and criminal possession of stolen property in the fifth degree (§ 165.40). Defendant was charged in an eight-count indictment with a series of charges, and he originally pleaded guilty to attempted criminal possession of a weapon in the third degree and attempted promoting prison contraband in the first degree (§§ 110.00, 205.25 [2]) as lesser included offenses of the crimes charged in the third and eighth counts of the indictment, respectively, in full satisfaction of the indictment. On a prior appeal, however, we vacated that part of the plea of guilty to attempted promoting prison contraband because defendant expressly stated during his plea colloquy that he did not knowingly possess any contraband, and County Court failed to inquire further to ensure that defendant's guilty plea was knowing and voluntary (*People v Harris*, 134 AD3d 1587, 1587-1588 [4th Dept 2015], *lv denied* 27 NY3d 998 [2016]). We remitted the matter to County Court for further proceedings on count eight of the indictment, and we noted that, because we vacated part of the plea, "the People have been deprived of the benefit of their bargain" (*id.* at 1588). Thus, we directed that, "upon remittal, the court should entertain a motion by the People, should the People be so disposed, to vacate the plea . . . in its entirety" (*id.* [internal quotation marks omitted]). After the People so moved upon remittal, the court granted the motion, vacated

the judgment of conviction, and reinstated the indictment in its entirety. Defendant later pleaded guilty to the crimes stated above, again in full satisfaction of the indictment. We affirm.

Defendant failed to move to withdraw his plea or to vacate the judgment of conviction, and thus he failed to preserve his contention that his plea of guilty on remittal was not knowingly, voluntarily, and intelligently entered (*see People v Boyden*, 112 AD3d 1372, 1372-1373 [4th Dept 2013], *lv denied* 23 NY3d 960 [2014]). We conclude that this case does not fall within the narrow exception to the preservation requirement because the plea colloquy did not "clearly cast[] significant doubt upon the defendant's guilt or otherwise call[] into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]). In any event, the evidence in the record demonstrates that defendant knowingly, voluntarily, and intelligently entered the guilty plea (*see People v Seeber*, 4 NY3d 780, 781-782 [2005]; *People v Weakfall*, 108 AD3d 1115, 1116 [4th Dept 2013], *lv denied* 21 NY3d 1078 [2013]).

Contrary to defendant's contention, his failure to admit the elements of the crimes to which he pleaded guilty does not invalidate his guilty plea. It is well settled that "an allocution based on a negotiated plea need not elicit from a defendant specific admissions as to each element of the charged crime" (*People v Goldstein*, 12 NY3d 295, 301 [2009]). Indeed, the Court of Appeals has "refused to disturb pleas by canny defendants even [where, as here,] there has been absolutely no elicitation of the underlying facts of the crime . . . It is enough that the allocution shows that the defendant understood the charges and made an intelligent decision to enter a plea" (*id.*). Here, "the allocution was adequate to meet these purposes" (*id.*).

We reject defendant's contention that, on remittal, the court erred in granting the People's motion seeking, inter alia, to vacate his prior plea in its entirety. The People were deprived of the benefit of the original plea agreement when this Court vacated defendant's plea of guilty with respect to one of the crimes to which defendant pleaded guilty, and thus they were entitled to withdraw their consent to that plea agreement (*see generally* CPL 220.10 [3], [4]). Accordingly, the court properly exercised its discretion on remittal by granting the People's motion, vacating defendant's prior judgment of conviction, and reinstating the indictment in its entirety (*see People v Farrar*, 52 NY2d 302, 307-308 [1981]; *People v Speed*, 13 AD3d 1083, 1084 [4th Dept 2004], *lv denied* 5 NY3d 795 [2005]; *People v Irwin*, 166 AD2d 924, 925 [4th Dept 1990]).

Although we agree with defendant that his double jeopardy claim, asserted in a preplea motion, was not forfeited by his subsequent guilty plea (*see People v Hansen*, 95 NY2d 227, 231 n 2 [2000]), we reject his contention that the indictment's reinstatement violated his right to be protected from double jeopardy under the federal and state constitutions. It is well established that a defendant who succeeds, as defendant did here, in having a conviction reversed on appeal may be retried for the same offense without contravening double jeopardy

principles (*see Matter of Suarez v Byrne*, 10 NY3d 523, 534 [2008], *rearg denied* 11 NY3d 753 [2008]). Moreover, double jeopardy does not apply under the circumstances here because defendant's prior judgment of conviction was vacated on remittal, thereby rendering the conviction a nullity (*see Matter of De Canzio v Kennedy*, 67 AD2d 111, 116 [4th Dept 1979], *lv denied* 47 NY2d 709 [1979]; *People v Yaghoubi*, 10 Misc 3d 406, 411 [Nassau Dist Ct 2005]).

We reject defendant's contention that the court erred in denying his motion, upon remittal, asking that the court recuse itself. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405 [1987]; *see People v Chess*, 162 AD3d 1577, 1578 [4th Dept 2018]). Here, defendant did not allege a legal disqualification under Judiciary Law § 14; rather, his contention that the court was biased arose from the court's participation in the prior plea, which is not an extrajudicial source of bias that serves as a basis for recusal (*see People v Terborg*, 156 AD3d 1320, 1321 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]).

Defendant's further contention that the court failed to make a sufficient inquiry into his request for substitution of counsel "is encompassed by the plea . . . except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]; *see People v Sallard*, 175 AD3d 1839, 1839-1840 [4th Dept 2019]). Defendant nonetheless abandoned that request when he "decid[ed] . . . to plead guilty while still being represented by the same attorney" (*People v Kates*, 162 AD3d 1627, 1629 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019] [internal quotation marks omitted]). In any event, that contention lacks merit. Defendant failed to demonstrate the requisite "good cause for substitution . . . inasmuch as his objections to his assigned counsel were vague and unsubstantiated" (*People v Farmer*, 132 AD3d 1238, 1239 [4th Dept 2015], *lv denied* 27 NY3d 1068 [2016]).

Finally, defendant's contention concerning his request for a change of venue was forfeited by his plea of guilty (*see People v Williams*, 14 NY2d 568, 570 [1964]; *People v Baker*, 175 AD3d 1113, 1114 [4th Dept 2019], *lv denied* 34 NY3d 978 [2019], *lv granted* 34 NY3d 1126 [2020]; *People v De Alvarez*, 59 AD3d 732, 732-733 [2d Dept 2009], *lv denied* 12 NY3d 852 [2009]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

98

KA 17-01699

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVONNE BECKWITH, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (LINDA M. CAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 30, 2017. The judgment convicted defendant upon a jury verdict of resisting arrest and perjury in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of perjury in the first degree and dismissing count five of the indictment and as modified the judgment is affirmed and the matter is remitted to Supreme Court, Onondaga County, for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of, inter alia, perjury in the first degree (Penal Law § 210.15), defendant contends that the verdict is against the weight of the evidence as to that crime. "A person is guilty of perjury in the first degree when he [or she] swears falsely and when his [or her] false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made" (*id.*). Insofar as relevant here, a "person 'swears falsely' when he [or she] intentionally makes a false statement which he [or she] does not believe to be true" (§ 210.00 [5]). We agree with defendant that the People failed to prove, beyond a reasonable doubt, that any of his allegedly perjurious statements to the grand jury were actually false. We therefore conclude that, viewing the evidence independently and in light of the elements of perjury in the first degree as charged to the trial jury, the verdict convicting defendant of that crime is against the weight of the evidence (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2011]; *People v Gonzalez*, 174 AD3d 1542, 1544-1545 [4th Dept 2019]). As we recently observed in analogous circumstances, "[a]lthough the People may have proved that defendant is probably guilty, the burden of proof in a criminal action is, of course, much

higher than probable cause; the prosecution is required to prove a defendant’s guilt beyond a reasonable doubt, and the evidence in this case does not meet that high standard” (*People v Carter*, 158 AD3d 1105, 1106 [4th Dept 2018]). We thus modify the judgment accordingly. Defendant’s remaining contentions do not require reversal or further modification of the judgment.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

99

KA 18-00713

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DETAVION MAGEE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered July 13, 2017. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, after a nonjury trial, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). We affirm.

Insofar as defendant contends that the People failed to present legally sufficient evidence establishing that the handgun allegedly in his possession was operable and loaded with live ammunition, we conclude that he failed to preserve that contention for our review (*see* CPL 470.05 [2]; *People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). Although defendant preserved for our review his contention that the evidence is legally insufficient to establish that he possessed a loaded firearm at all, we reject that contention (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495; *People v Nicholas*, 130 AD3d 1314, 1315 [3d Dept 2015]). The victim's teenage sister testified that she saw defendant fire a handgun during a gunfight that took place near her home, and two other witnesses testified that they saw a man matching defendant's description fire a handgun. Although the police did not recover a handgun, they did recover several shell

casings, including some from a small caliber gun. Thus, "the People supplied the necessary proof through circumstantial evidence, i.e., 'eyewitness testimony and surrounding circumstances,' " establishing that defendant possessed a loaded and operable firearm at the location and time of the incident (*Spears*, 125 AD3d at 1402; *see People v Butler*, 140 AD3d 1610, 1610-1611 [4th Dept 2016], *lv denied* 28 NY3d 969 [2016]; *People v Singletary*, 11 AD3d 567, 568 [2d Dept 2004], *lv denied* 4 NY3d 748 [2004]). Although defendant contends that the victim's sister was not credible, County Court explicitly found her testimony to be "credible and compelling," and such a determination is entitled to great deference (*see People v Howard*, 101 AD3d 1749, 1750 [4th Dept 2012], *lv denied* 21 NY3d 944 [2013]), given the court's "opportunity to 'view the witness, hear the testimony and observe demeanor' " (*People v Collins*, 70 AD3d 1366, 1367 [4th Dept 2010], *lv denied* 14 NY3d 839 [2010]).

We similarly reject defendant's contention that he was denied effective assistance of counsel. With respect to defense counsel's alleged conflict of interest, defendant did not meet his burden of "establishing that the conduct of his defense was in fact affected by the operation of the [alleged] conflict of interest" (*People v Pohl*, 160 AD3d 1453, 1454 [4th Dept 2018], *lv denied* 32 NY3d 940 [2018] [internal quotation marks omitted]; *see People v Pandajis*, 147 AD3d 1469, 1470 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]). In any event, the record establishes that the court, upon learning of the potential conflict of interest, conducted an inquiry "to ascertain, on the record, [that defendant] had an awareness of the potential risks involved in his continued representation by the attorney and had knowingly chosen to continue such representation" (*People v Lombardo*, 61 NY2d 97, 102 [1984]; *see generally People v Gomberg*, 38 NY2d 307, 313 [1975]).

With respect to defense counsel's conversation with the court regarding a letter that defendant had sent to the court, defendant failed to demonstrate the " 'absence of strategic or other legitimate explanations' " for defense counsel's allegedly deficient conduct (*People v Benevento*, 91 NY2d 708, 712 [1998]), especially in light of the fact that "defendant [repeatedly] indicated [at trial] that he was satisfied with the legal services provided to him" (*People v Terry*, 55 AD3d 1149, 1150 [3d Dept 2008], *lv denied* 11 NY3d 931 [2009]). In addition, with respect to defense counsel's alleged failure to call a potentially exculpatory witness, we conclude that defense counsel made a reasonable strategic decision not to call the witness in question based on an assessment that the witness was not present at the scene until after the gunfight ended and thus would not have provided testimony refuting the People's theory that defendant fired a handgun during the gunfight (*see generally People v Grayson*, 266 AD2d 740, 740-741 [3d Dept 1999], *lv denied* 94 NY2d 920 [2000]; *People v Castricone*, 239 AD2d 929, 929 [4th Dept 1997], *lv denied* 90 NY2d 1010 [1997]). Viewing the evidence, the law, and the circumstances of this case in totality and as of the time of the representation, we conclude that defense counsel provided defendant with meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

143
KA 19-00131
PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LANCE A. RILEY, DEFENDANT-APPELLANT.

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

LANCE A. RILEY, DEFENDANT-APPELLANT PRO SE.

DONALD G. O'GEEN, DISTRICT ATTORNEY, WARSAW (VINCENT A. HEMMING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered May 10, 2018. The judgment convicted defendant upon his plea of guilty of 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 rape in the first degree (Penal Law § 130.35 [1]). As the People correctly concede, even if we assume that the waiver of the right to appeal executed by defendant is valid, " 'none of the issues [defendant] raises would be foreclosed by [that] valid waiver of the right to appeal' " (*People v Williams*, 170 AD3d 1666, 1666 [4th Dept 2019]; *see People v Beardsley*, 173 AD3d 1722, 1723 [4th Dept 2019], *lv denied* 34 NY3d 739 [2019]).

Defendant contends that his guilty plea was not knowingly, intelligently and voluntarily entered and that County Court abused its discretion in denying his motion to withdraw his plea without first conducting a hearing. We reject defendant's contention that the court should have conducted a hearing on his motion (*see generally Williams*, 170 AD3d at 1666). Contrary to defendant's further contention, the court properly denied his motion. Defendant's contention that his plea was not knowing, intelligent or voluntary because of coercion, ineffective assistance of counsel and innocence is based on conclusory and unsubstantiated statements made in defendant's affidavit in support of his motion and is belied by the plea colloquy, wherein defendant admitted his guilt and stated, inter alia, that he was fully advised of the consequences of his plea, he was confident in his attorney's abilities, and he was not coerced into entering the plea

(*see id.* at 1666-1667; *People v Goodwin*, 159 AD3d 1433, 1434 [4th Dept 2018]).

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

146

KA 18-01782

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EULESE CRUZ, DEFENDANT-APPELLANT.

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

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (ZAKARY I. WOODRUFF OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 11, 2018. The judgment convicted defendant upon his plea of guilty of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). As the People correctly concede, defendant's waiver of the right to appeal is invalid inasmuch as the perfunctory inquiry made by County Court was "insufficient to establish that the court engage[d] . . . defendant in an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Soutar*, 170 AD3d 1633, 1634 [4th Dept 2019], *lv denied* 34 NY3d 938 [2019] [internal quotation marks omitted]; *see People v Lewis* [appeal No. 1], 161 AD3d 1588, 1588 [4th Dept 2018]; *People v Brown*, 296 AD2d 860, 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]). Although defendant signed a written waiver of the right to appeal, the court did not "explain the written waiver to defendant or ascertain that he understood its contents" (*People v Madden*, 148 AD3d 1576, 1577 [4th Dept 2017], *lv denied* 29 NY3d 1034 [2017]; *see People v Peterkin*, 153 AD3d 1568, 1569 [4th Dept 2017]), and a "written waiver does not, standing alone, provide sufficient assurance that the defendant is knowingly, intelligently and voluntarily giving up his or her right to appeal" (*People v Banks*, 125 AD3d 1276, 1277 [4th Dept 2015], *lv denied* 25 NY3d 1159 [2015] [internal quotation marks omitted]; *see People v Wilson*, 159 AD3d 1542, 1543 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]).

Defendant correctly concedes that, by failing to move to withdraw

his guilty plea or to vacate the judgment of conviction, he failed to preserve for our review his contention that the plea was not voluntarily, knowingly, and intelligently entered (*see People v Graham*, 175 AD3d 1823, 1824 [4th Dept 2019], *lv denied* 34 NY3d 1159 [2020]; *People v Jones*, 175 AD3d 1845, 1845-1846 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]) and, contrary to defendant's contention, nothing in the plea colloquy "casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea" (*People v Lopez*, 71 NY2d 662, 666 [1988]). We therefore conclude that this case does not fall within the rare exception to the preservation requirement (*see id.*).

Contrary to the further contention of defendant, the sentence is not unduly harsh or severe. As the People correctly concede, however, the certificate of conviction and the uniform sentence and commitment form should be amended because they incorrectly reflect that defendant was sentenced as a second felony offender when he was actually sentenced as a second felony drug offender (*see People v Ortega*, 175 AD3d 1810, 1811 [4th Dept 2019]; *People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

150

KA 16-00193

PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARQUIS D. HARRINGTON, DEFENDANT-APPELLANT.

JEFFREY WICKS, PLLC, ROCHESTER (CHARLES D. STEINMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 11, 2016. The judgment convicted defendant upon a jury verdict of robbery in the first degree, attempted robbery in the first degree, robbery in the second degree (two counts), criminal possession of a weapon in the second degree (two counts) and criminal use of a firearm 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, inter alia, robbery in the first degree (Penal Law § 160.15 [4]). We affirm.

This case arises from an incident where two men used a firearm to steal a motor vehicle. Shortly thereafter, a police officer spotted the stolen vehicle and pursued it in his patrol vehicle. The pursuit ended when the driver of the stolen vehicle parked and fled on foot towards a large house. Although the officer lost sight of the suspect, a bystander told the officer that the suspect had entered the house. The police surrounded the house and ordered its occupants outside, whereupon a woman, several children, defendant, and another man exited the house. The police arrested defendant and transported him to the scene of the crime for a show-up identification procedure. One victim and another eyewitness identified defendant as one of the perpetrators. Investigators searched the house and found a wallet containing defendant’s identification secreted in a hole in the wall of the unfinished attic. Defendant confirmed during the booking process that he lived at a different address.

Defendant contends that County Court erred in allowing inadmissible hearsay testimony when the police officer was allowed to

testify at trial that the bystander told him that the fleeing suspect ran into the house. We agree. The statement of the bystander was inadmissible hearsay because it was admitted for the truth of the matters asserted therein (*see People v Meadow*, 140 AD3d 1596, 1598-1599 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016], *reconsideration denied* 28 NY3d 972 [2016]; *cf. People v Medley*, 132 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 26 NY3d 1110 [2016], *reconsideration denied* 27 NY3d 967 [2016]). Indeed, the import of the bystander's statement was to confirm that the suspect had indeed fled into the house, and thereby confirm that someone inside the house, i.e., defendant, perpetrated the crime. Nevertheless, we conclude that the error was harmless because the evidence of defendant's guilt is overwhelming and there is no significant probability that defendant would have been acquitted but for the admission of the hearsay testimony (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Defendant was identified by the victim and the other eyewitness as a perpetrator of the robbery, which had occurred in broad daylight, close in time to the show-up identification procedure. Those identifications of defendant were corroborated by testimony of the police officer, who observed the suspect flee from the stolen vehicle toward the house where defendant was apprehended. Moreover, the evidence strongly supported an inference that defendant was not in the house for innocent purposes because he did not live at that address and had tried to conceal his identification in an uninhabited part of the house.

Insofar as defendant contends that the admission of the hearsay testimony violated his constitutional right to confront witnesses, he failed to preserve his contention for our review (*see Medley*, 132 AD3d at 1256). In any event, that contention lacks merit because the declarant testified at trial and thus defendant had the opportunity to confront him (*see People v Tapia*, 33 NY3d 257, 270 [2019], *cert denied* — US —, 140 S Ct 643 [2019]).

Defendant failed to preserve for our review his contention that the court abused its discretion in refusing to grant him funds pursuant to County Law § 722-c for the retention of an expert in the field of eyewitness identification (*see* CPL 470.05 [2]; *cf. People v Walker*, 167 AD3d 1502, 1503 [4th Dept 2018], *lv denied* 33 NY3d 955 [2019]). In any event, that contention lacks merit because defendant failed to establish that the proposed expert testimony was "necessary" to his defense (County Law § 722-c; *see Walker*, 167 AD3d at 1503). The identifications by the victim and the other eyewitness were corroborated by evidence strongly linking defendant to the possession of the stolen vehicle (*see People v Young*, 7 NY3d 40, 43-45 [2006]; *see generally People v Abney*, 13 NY3d 251, 269 [2009]).

Finally, 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]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

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CAF 19-00219
PRESENT: WHALEN, P.J., CURRAN, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JACQUELYN M. GRABOWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAY CRAIG SMITH, JR., RESPONDENT-APPELLANT.

KIMBERLY M. SEAGER, ESQ., ATTORNEY FOR THE CHILD,
APPELLANT.

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

KIMBERLY M. SEAGER, FULTON, ATTORNEY FOR THE CHILD, APPELLANT PRO SE.

Appeals from an order of the Family Court, Onondaga County (William W. Rose, R.), entered November 19, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father and the Attorney for the Child (appellate AFC) appeal from an order that, inter alia, modified a prior custody and visitation order by awarding petitioner mother sole legal and physical custody of the subject child. Although Family Court did not expressly determine that there was a sufficient change in circumstances to warrant an inquiry into whether modification of the order would be in the child’s best interests, this Court may “independently review the record to ascertain whether the requisite change in circumstances existed” (*Matter of DeVore v O’Harra-Gardner*, 177 AD3d 1264, 1265 [4th Dept 2019] [internal quotation marks omitted]). Contrary to the contention of the father and the appellate AFC, our review of the record reveals “extensive findings of fact, placed on the record by [the court], which demonstrate unequivocally that a significant change in circumstances occurred since the entry of the consent custody order” (*Matter of Aronica v Aronica*, 151 AD3d 1605, 1605 [4th Dept 2017] [internal quotation marks omitted]). Specifically, affording great weight to the court’s assessment of the credibility of the witnesses (*see Matter of Paliani v Selapack*, 178 AD3d 1425, 1426 [4th Dept 2019]), we conclude that the mother established that her relationship with the father deteriorated to the

point where the existing joint custody arrangement was not feasible (*see Matter of Unczur v Welch*, 159 AD3d 1405, 1406 [4th Dept 2018], *lv denied* 31 NY3d 909 [2018]; *Matter of Ladd v Krupp*, 136 AD3d 1391, 1392 [4th Dept 2016]), the father violated the prior custody and visitation order (*see Matter of Moreno v Elliott*, 170 AD3d 1610, 1611 [4th Dept 2019]; *Matter of Green v Bontzolakes*, 111 AD3d 1282, 1283-1284 [4th Dept 2013]), and the father was engaging in an ongoing effort to alienate the child from the mother (*see Matter of Angela N. v Guy O.*, 144 AD3d 1343, 1345 [3d Dept 2016]).

Contrary to the further contention of the father and the appellate AFC, the court's determination to award the mother sole legal and physical custody is supported by a sound and substantial basis in the record. Here, the record establishes that the father was alienating the child from the mother, and "[a] concerted effort by one parent to interfere with the other parent's [relationship] with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as a custodial parent" (*Matter of Turner v Turner*, 260 AD2d 953, 954 [3d Dept 1999] [internal quotation marks omitted]; *see Matter of Cramer v Cramer*, 143 AD3d 1264, 1264 [4th Dept 2016], *lv denied* 28 NY3d 913 [2017]).

Contrary to the contention of the appellate AFC, the fact that the Attorney for the Child who represented the child during the proceeding on the mother's petition (trial AFC) advocated a position contrary to the child's wishes did not deprive the child of effective assistance of counsel. We similarly conclude that, contrary to the contention of the appellate AFC, the court did not err in denying the father's motion to remove the trial AFC. The 10-year-old child's stated wishes were to have no contact with the mother, and to follow those wishes "would be tantamount to severing [the child's] relationship with her [mother], and [that] result would not be in [the child's] best interest[s]" (*Matter of Viscuso v Viscuso*, 129 AD3d 1679, 1680 [4th Dept 2015] [internal quotation marks omitted]). Although generally an AFC must " 'zealously advocate the child's position' " (*Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1147 [4th Dept 2016], quoting 22 NYCRR 7.2 [d]), a contrary rule arises "where, as here, 'the [AFC] is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child[.] [In such circumstances, the AFC] would be justified in advocating a position that is contrary to the child's wishes' " (*Viscuso*, 129 AD3d at 1680, quoting 22 NYCRR 7.2 [d] [3]). Based on the child's age (*see generally Matter of Rosso v Gerouw-Rosso*, 79 AD3d 1726, 1727-1728 [4th Dept 2010]), and the fact that "the [father's] persistent and pervasive pattern of alienating the child from the [mother] 'is likely to result in a substantial risk of imminent, serious harm to the child' " (*Viscuso*, 129 AD3d at 1680-1681, quoting 22 NYCRR 7.2 [d] [3]), we conclude that the trial AFC acted in accordance with her ethical duties (*see id.* at 1681) and the child was not denied effective assistance of counsel (*see generally Brian S.*, 141 AD3d at 1147-1148).

Finally, to the extent that the father contends that the court erred in finding that he willfully violated a court order, that contention is not before us. There is no finding of contempt against the father in the order appealed from, and there is no other order in the record containing such a finding. There is thus " 'no appealable civil contempt determination' " (*Ferris v Ferris*, 121 AD3d 1544, 1545 [4th Dept 2014]; *see Matter of Mercado v Frye*, 104 AD3d 1340, 1342 [4th Dept 2013], *lv denied* 21 NY3d 859 [2013]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

166
KA 17-00558
PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW CAMPBELL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered February 7, 2017. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree (two counts) 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: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of two counts of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and two counts of criminal possession of a controlled substance in the third degree (§ 220.16 [1]), arising from his sale of cocaine to a confidential informant during two separate controlled buys. In appeal No. 2, he appeals from a judgment convicting him upon a guilty plea of grand larceny in the fourth degree (§ 155.30 [4]).

Addressing first the judgment in appeal No. 1 and viewing the evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of the crimes proved beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see id.*), we reject defendant’s further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant failed to preserve for our review his contention that the People infringed on his right to present a defense by failing to

record and provide him with the serial numbers listed on the buy money for the first transaction (*see People v Burton*, 126 AD3d 1324, 1325 [4th Dept 2015], *lv denied* 25 NY3d 1199 [2015]). In any event, we note that "the People have no duty to seek evidence for defendant's benefit or to protect evidence prior to their possession of it" (*id.* at 1326). Furthermore, the exculpatory value of the evidence sought by defendant is purely speculative (*see People v Porter*, 179 AD2d 1018, 1018-1019 [4th Dept 1992], *lv denied* 79 NY2d 1006 [1992]) and the record does not demonstrate that "the People acted in bad faith in failing to preserve the missing evidence" (*id.* at 1019).

Defendant further contends that he was deprived of a fair trial by three instances of alleged misconduct by the prosecutor. First, defendant contends that the People improperly elicited *Molineux* evidence through the confidential informant's testimony that defendant was present at the location of one of the subject drug sales on prior occasions while drug deals were occurring. That contention was not preserved for our review (*see People v Williams*, 107 AD3d 1516, 1516 [4th Dept 2013], *lv denied* 21 NY3d 1047 [2013]) and, in any event, lacks merit inasmuch as the testimony of the confidential informant did not establish that defendant was participating in drug sales on those prior occasions and thus did not constitute evidence of uncharged crimes (*see People v Williams*, 12 AD3d 183, 184 [1st Dept 2004], *lv denied* 4 NY3d 769 [2005]; *see generally People v Martinez*, 164 AD3d 1260, 1262 [2d Dept 2018], *lv denied* 32 NY3d 1207 [2019]). Contrary to defendant's second contention, the delayed disclosure of the photograph of the buy money used in the first transaction did not deprive defendant of a fair trial nor did it constitute a *Brady* violation. The exculpatory value of the photograph was speculative (*see People v Dark*, 104 AD3d 1158, 1159 [4th Dept 2013]; *People v Smith*, 306 AD2d 861, 862 [4th Dept 2003], *lv denied* 100 NY2d 599 [2003]). Moreover, "[u]ntimely or delayed disclosure will not prejudice a defendant or deprive him or her of a fair trial where the defense is provided with 'a meaningful opportunity to use the allegedly exculpatory material to cross-examine the People's witnesses or as evidence during his [or her] case' " (*People v Carter*, 131 AD3d 717, 718-719 [3d Dept 2015], *lv denied* 26 NY3d 1007 [2015]). Here, upon disclosure of the photograph, defendant was given a meaningful opportunity to review it, subject the People's witnesses to cross-examination, and comment on the same during summation (*id*. at 719-720). Defendant did not object to any of the alleged instances of prosecutorial misconduct during the prosecutor's summation and therefore failed to preserve for our review his third contention, i.e., that he was thereby deprived of a fair trial (*see People v Lane*, 106 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]). In any event, upon our review of the record, we conclude that the prosecutor's summation was "either a fair response to defense counsel's summation or fair comment on the evidence" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]).

Inasmuch as we conclude that there was no prosecutorial misconduct, we reject defendant's further contention that he was

denied effective assistance of counsel based on defense counsel's failure to object to the alleged improprieties (*see People v Townsend*, 171 AD3d 1479, 1481 [4th Dept 2019], *lv denied* 33 NY3d 1109 [2019]). With respect to defendant's remaining claim of ineffective assistance of counsel, we conclude that it lacks merit and that defendant was afforded "meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's contention in appeal Nos. 1 and 2, the sentence is not unduly harsh or severe.

Entered: April 24, 2020

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 17-00559

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDREW CAMPBELL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered February 7, 2017. The judgment convicted defendant upon a plea of guilty of grand larceny in the fourth degree.

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

Same memorandum as in *People v Campbell* ([appeal No. 1] — AD3d — [Apr. 24, 2020] [4th Dept 2020]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

184

KA 15-01848

PRESENT: WHALEN, P.J., CURRAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STANLEY LOSTUMBO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered October 27, 2015. The judgment convicted defendant upon a nonjury verdict of sexual abuse in the first degree, unlawful imprisonment in the second degree, intimidating a victim or witness in the third degree and criminal contempt in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury trial of sexual abuse in the first degree (Penal Law § 130.65 [1]), unlawful imprisonment in the second degree (§ 135.05), intimidating a victim or witness in the third degree (§ 215.15 [1]), and two counts of criminal contempt in the second degree (§ 215.50 [3]). We affirm.

We reject defendant’s contention that Supreme Court erred in denying his motion to dismiss the indictment on the ground that the People did not provide him with reasonable notice of the grand jury proceedings pursuant to CPL 190.50 (5) (a) (*see generally* CPL 190.50 [5] [c]). “CPL 190.50 (5) (a) does not mandate a specific time period for notice; rather, ‘reasonable time’ must be accorded to allow a defendant an opportunity to consult with [defense] counsel and decide whether to testify before a [g]rand [j]ury” (*People v Sawyer*, 96 NY2d 815, 816 [2001], *rearg denied* 96 NY2d 928 [2001]; *see People v Gelling*, 163 AD3d 1489, 1491 [4th Dept 2018], *amended on rearg on other grounds* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]). Here, the record establishes that the People orally gave defendant and his attorney approximately five days’ notice that the matter would be presented to the grand jury, which constituted reasonable notice under these circumstances (*see People v Ballard*, 13

AD3d 670, 671 [3d Dept 2004], *lv denied* 4 NY3d 796 [2005]; *People v Pugh*, 207 AD2d 503, 503 [2d Dept 1994]). Additionally, the written notice provided by the People to defense counsel approximately 1½ days prior to the grand jury proceedings also provided defendant with a reasonable amount of time to consult with defense counsel and decide whether to testify at those proceedings (*see Sawyer*, 96 NY2d at 816-817; *Gelling*, 163 AD3d at 1491).

Defendant's contention that the evidence is legally insufficient to support his conviction of sexual abuse in the first degree, unlawful imprisonment in the second degree, and intimidating a victim or witness in the third degree is unpreserved because he did not renew his motion for a trial order of dismissal at the close of his case (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]; *People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]). We further conclude that, viewing the evidence in light of the elements of those crimes in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict convicting him of those crimes is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]; *People v Nicholas*, 130 AD3d 1314, 1315 [3d Dept 2015]). We reject defendant's contention that the victim's trial testimony was incredible as a matter of law due to her past drug use and failure to remember the specific date of one of the alleged incidents (*see People v Saxe*, 174 AD3d 958, 959-960 [3d Dept 2019]; *People v Edwards*, 159 AD3d 1425, 1426 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]; *People v Barnes*, 158 AD3d 1072, 1072 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Her testimony merely "presented issues of credibility for the factfinder to resolve" (*People v Williams*, 179 AD3d 1502, 1503 [4th Dept 2020]), and we see no reason to disturb the court's credibility determinations here.

Defendant's contention that the court rendered its verdict based on improper legal criteria is unpreserved because he did not object to the court's alleged error or raise that contention in his CPL 330.30 motion (*see* CPL 470.05 [2]; *People v Bridenbaker*, 266 AD2d 875, 875 [4th Dept 1999], *lv denied* 94 NY2d 917 [2000]). Defendant's contention that he was deprived of a fair trial by instances of prosecutorial misconduct is also unpreserved because defendant did not object to any of those alleged instances at trial (*see People v Simmons*, 133 AD3d 1227, 1228 [4th Dept 2015]; *People v Easley*, 124 AD3d 1284, 1285 [4th Dept 2015], *lv denied* 25 NY3d 1200 [2015]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's further contention that he was deprived of effective assistance of counsel based on several acts or omissions on the part of defense counsel throughout the underlying proceedings. With respect to defendant's claim that defense counsel was ineffective for purportedly failing to facilitate defendant's testimony before the grand jury, defendant did not establish that he was prejudiced by that purported failure or that the outcome would have been different if he had testified (*see People v Robinson*, 151 AD3d 1701, 1701 [4th Dept

2017], *lv denied* 29 NY3d 1133 [2017]). To that end, we note that defendant did testify at trial and was nonetheless found guilty (*see People v Hogan*, 26 NY3d 779, 787 [2016]).

Additionally, defense counsel was not ineffective in failing to request a mistrial based on the admission of certain prejudicial phone calls between defendant and the victim. At a bench trial, the "court is presumed capable of disregarding the prejudicial aspect of the evidence" admitted therein (*People v Tong Khuu*, 293 AD2d 424, 425 [1st Dept 2002], *lv denied* 98 NY2d 714 [2002]), and here the court specifically disregarded the prejudicial parts of the calls and chastised the People for playing those parts of the calls. Moreover, defense counsel's failure to move for a mistrial based on admission of that evidence did not render him ineffective because such a motion would have had " 'little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152 [2005]; *see generally People v Alexander*, 109 AD3d 1083, 1085 [4th Dept 2013]). Defense counsel was also not ineffective in failing to object to alleged hearsay testimony of the victim because any error caused by its introduction—which the court is presumed to have disregarded—was harmless (*see People v Pabon*, 126 AD3d 1447, 1448 [4th Dept 2015], *affd* 28 NY3d 147 [2016]).

Defendant further contends that defense counsel was ineffective in failing to obtain deleted text messages between defendant and the victim. We reject that contention because the text messages were of minimal "exculpatory value" (*People v Mitchell*, 34 AD3d 358, 359 [1st Dept 2006], *lv denied* 8 NY3d 988 [2007]). Moreover, to the extent that those messages could have been used during cross-examination to impeach the victim regarding her potential motives to fabricate accusations against defendant, defense counsel was able to elicit information concerning those motives even without the text messages. Therefore, defendant was not prejudiced by defense counsel's failure to obtain those messages at trial (*see People v Castleberry*, 265 AD2d 921, 921-922 [4th Dept 1999], *lv denied* 94 NY2d 902 [2000]).

With respect to defendant's final claim concerning ineffective assistance of counsel, we conclude that he was not denied effective assistance due to defense counsel's failure to preserve defendant's challenge to the legal sufficiency of the evidence inasmuch as that "challenge[] would not have been meritorious" (*People v Person*, 153 AD3d 1561, 1563-1564 [4th Dept 2017], *lv denied* 30 NY3d 1118 [2018]).

We further reject defendant's contention that the court erred in denying his CPL 330.30 motion to set aside the verdict on the ground of newly discovered evidence. The relevant evidence—i.e., deleted text messages between defendant and the victim—was not newly discovered evidence inasmuch as defendant knew about those messages prior to trial, and there was no evidence that defendant was unable to produce the messages "at the trial even with due diligence on his part" (CPL 330.30 [3]; *see People v Brown*, 104 AD3d 1203, 1204 [4th Dept 2013], *lv denied* 21 NY3d 1014 [2013]; *cf. People v Bailey*, 144 AD3d 1562, 1564 [4th Dept 2016]). Moreover, we conclude that the text messages could be used merely to impeach or contradict the victim's

testimony, and defendant failed to establish that admission of those messages would have created the probability of a more favorable verdict (*see Brown*, 104 AD3d at 1204; *see generally* CPL 330.30 [3]; *People v Salemi*, 309 NY 208, 215-216 [1955], *cert denied* 350 US 950 [1956]).

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

222
CA 19-01478
PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF SHERRY L. GARR ANDERSON, SUCCESSOR TRUSTEE OF TRUST B CREATED PURSUANT TO THE PROVISIONS OF THE GARR REVOCABLE TRUST DATED SEPTEMBER 19, 1994, PHYLLIS A. GARR-ALLEN, SUCCESSOR CO-TRUSTEE OF THE GLADYS M. GARR REVOCABLE TRUST, DATED OCTOBER 19, 2001, SHERRY L. GARR ANDERSON, SUCCESSOR CO-TRUSTEE OF THE GLADYS M. GARR REVOCABLE TRUST, DATED OCTOBER 19, 2001, SHERRY L. GARR ANDERSON, CO-EXECUTOR OF THE ESTATE OF GLADYS M. GARR, PHYLLIS A. GARR-ALLEN, CO-EXECUTOR OF THE ESTATE OF GLADYS M. GARR, SHERRY L. GARR ANDERSON, INDIVIDUALLY, PHYLLIS A. GARR-ALLEN, INDIVIDUALLY, AND RICHARD M. GARR, INDIVIDUALLY, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

LINDA J. GARR, RESPONDENT-RESPONDENT.

BOYLE & ANDERSON, P.C., AUBURN (ROBERT E. BARRY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (CECELIA R.S. CANNON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Cayuga County (Ann Marie Taddeo, J.), entered November 8, 2017. The order, among other things, granted respondent's motion to dismiss the petition.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the motion and reinstating the petition, and as modified the order is affirmed without costs.

Memorandum: Respondent and petitioners Sherry L. Garr Anderson, individually, Phyllis A. Garr-Allen, individually, and Richard M. Garr, individually, are siblings who, as beneficiaries of two trusts, acquired an interest in certain real property. Pursuant to the terms of the trusts, respondent also has the right to live rent-free in an apartment on the property during her life. Petitioners commenced this proceeding pursuant to RPAPL article 16 seeking, among other things, an order authorizing the sale of the property. Respondent answered and subsequently moved to dismiss the petition, and petitioners cross-moved for partial summary judgment directing, among other things, the sale of the property and the valuation of respondent's right of

occupancy. Petitioners appeal from an order that granted the motion and denied the cross motion.

Initially, we note that, although Supreme Court stated that it was granting respondent's motion, it did not do so on the grounds asserted in the motion. Rather, the court based its determination on its conclusion that the sale would not be "expedient" because it would be counter to the intent of the grantors, which was to give respondent a place to live for her life, and it would cause great prejudice to respondent.

RPAPL 1604 provides that the court may grant an application to sell an interest in real property where it is satisfied that the sale is "expedient," which is defined as "characterized by suitability, practicality, and efficiency in achieving a particular end[, which is] proper or advantageous under the circumstances" (*Matter of Talmage*, 64 AD3d 662, 663 [2d Dept 2009], *lv denied* 14 NY3d 705 [2010] [internal quotation marks omitted]). The court may grant the application even if it is opposed by one or more persons having an interest in the property and even if the sale would contravene a provision of the instrument creating the interest in the affected real property (*see* RPAPL 1604).

Contrary to petitioners' contention, the court properly determined that petitioners failed to meet their initial burden on their cross motion of establishing that the sale would be expedient (*see Talmage*, 64 AD3d at 663). The record establishes that the intent of the grantors was, inter alia, to provide respondent with a place to live for the remainder of her life, and petitioners failed to present evidence that there was a proposed buyer of the property and that the sale of the property would adequately compensate respondent for the value of her right of occupancy. We agree with petitioners, however, that the court erred in determining that respondent is entitled to summary judgment dismissing the petition. There are triable issues of fact whether the sale of the property can achieve the intended purpose of the grantors by compensating respondent for the value of her right of occupancy, and we therefore modify the order by denying the motion and reinstating the petition.

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

223.1
CA 20-00181
PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

SIDNEY MANES, AS ADMINISTRATOR OF THE ESTATE
OF HECTOR RIVAS, DECEASED, CLAIMANT-APPELLANT,

V   MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 131715.)
(APPEAL NO. 2.)

BLOCK, O'TOOLE & MURPHY, LLP, NEW YORK CITY (AMEER BENNO OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered July 17, 2019. The order granted claimant's motion insofar as it sought leave to reargue and, upon reargument, adhered to the prior determination to grant defendant's motion to dismiss claimant's claim.

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

Memorandum: Claimant, as administrator of the estate of Hector Rivas, commenced this action pursuant to Court of Claims Act § 8-b, seeking damages based on allegations that Rivas was unjustly convicted and imprisoned by defendant, State of New York (State). The State moved to dismiss the claim. Claimant did not submit any papers in opposition to the motion, and the Court of Claims granted the motion and dismissed the claim on, inter alia, the ground that Rivas's conviction was not vacated on one of the grounds enumerated in section 8-b. Claimant thereafter moved to vacate the order dismissing the claim or, in the alternative, for leave to reargue his opposition to the State's motion, and the court denied the motion insofar as it sought to vacate the prior order. In appeal No. 1, claimant appeals from the order granting the State's motion to dismiss the claim. In appeal No. 2, claimant appeals from the order denying his motion insofar as it sought to vacate the prior order of dismissal.

At the outset, we note that, in his efforts to secure relief from the order in appeal No. 1, claimant characterized his motion as one to vacate a "default" order pursuant to CPLR 5015 as well as a motion for leave to reargue pursuant to CPLR 2221 (d). In deciding claimant's

motion, the court considered and rejected the substantive arguments that claimant would have raised in opposition to the State's motion to dismiss had he submitted opposition papers. Therefore, although the order in appeal No. 2 does not state as much, it is clear to this Court that the court, in effect, granted claimant's motion insofar as it sought leave to reargue and, upon reargument, adhered to its original determination. We therefore dismiss the appeal from the order in appeal No. 1 (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985 [4th Dept 1990]).

Addressing claimant's contentions in appeal No. 2, we conclude that the State's omission of a return date from its notice of motion to dismiss the claim should be disregarded (*see Brummer v Barnes Firm, P.C.*, 56 AD3d 1177, 1178-1179 [4th Dept 2008]; *see also Matter of Bender v Lancaster Cent. Sch. Dist.*, 155 AD3d 1590, 1591 [4th Dept 2017]; *see generally* CPLR 2001). We note that any prejudice initially faced by claimant as a result of his failure to oppose the State's motion was cured when the court accepted and considered the substance of that opposition in determining claimant's subsequent motion.

We reject claimant's further contention that the court erred in granting the State's motion to dismiss the claim. As relevant here, "[t]o recover under Court of Claims Act § 8-b in the absence of an acquittal upon retrial, . . . the criminal judgment must have been reversed or vacated on one or more statutorily enumerated grounds" (*Jeanty v State of New York*, 175 AD3d 1073, 1074 [4th Dept 2019]; *see* § 8-b [3] [b] [ii]; *Long v State of New York*, 7 NY3d 269, 274 [2006]), i.e., those set forth in CPL 440.10 (1) (a), (b), (c), (e), and (g) (*see* Court of Claims Act § 8-b [3] [b] [ii]). Here, however, the United States Court of Appeals, Second Circuit, reversed Rivas's judgment of conviction based solely upon that Court's conclusion that Rivas received ineffective assistance of counsel (*Rivas v Fischer*, 780 F3d 529, 552 [2d Cir 2015]). Ineffective assistance of counsel implicates only CPL 440.10 (1) (h), which is not a ground enumerated in Court of Claims Act § 8-b (3) (b) (ii) (*see Baba-Ali v State of New York*, 19 NY3d 627, 636 [2012]). Therefore, the court properly dismissed the claim (*see Hicks v State of New York*, 179 AD3d 1521, 1522 [4th Dept 2020]; *Jeanty*, 175 AD3d at 1075).

We also reject claimaint's contention that he alleged a sufficient Court of Claims Act § 8-b claim because the Second Circuit's decision implicitly supports reversal of Rivas's conviction based on one or more of the statutorily enumerated grounds. Section 8-b "looks only to the *actual basis* for the vacatur of the underlying criminal judgment, not to the alternative potential grounds for vacatur" (*Jeanty*, 175 AD3d at 1075 [emphasis added], citing *Baba-Ali*, 19 NY3d at 636-637).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

223
CA 19-01093
PRESENT: SMITH, J.P., PERADOTTO, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

SIDNEY MANES, AS ADMINISTRATOR OF THE ESTATE
OF HECTOR RIVAS, DECEASED, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 131715.)
(APPEAL NO. 1.)

BLOCK, O'TOOLE & MURPHY, LLP, NEW YORK CITY (AMEER BENNO OF COUNSEL), FOR CLAIMANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Richard E. Sise, J.), entered November 16, 2018. The order granted defendant's motion to dismiss the claimant's claim.

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

Same memorandum as in *Manes v State of New York* ([appeal No. 2] — AD3d — [Apr. 24, 2020] [4th Dept 2020]).

Entered: April 24, 2020 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 18-01413

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT J. HEALY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 14, 2017. The judgment convicted defendant upon a jury verdict of rape in the second degree (three counts), criminal sexual act in the second degree (two counts) and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him after a jury trial of three counts of rape in the second degree (Penal Law § 130.30 [1]), two counts of criminal sexual act in the second degree (§ 130.45 [1]), and one count of endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as his general motion for a trial order of dismissal was not " 'specifically directed' at" the alleged shortcomings in the evidence asserted on appeal (*People v Contreras*, 154 AD3d 1320, 1320 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018], quoting *People v Gray*, 86 NY2d 10, 19 [1995]; *see People v Williams*, 110 AD3d 1458, 1459 [4th Dept 2013], *lv denied* 22 NY3d 1160 [2014]). 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]; *People v Muscarella*, 132 AD3d 1288, 1289 [4th Dept 2015], *lv denied* 26 NY3d 1147 [2016]).

We reject defendant's further contention that Supreme Court abused its discretion in refusing to direct production of the complainant's psychiatric records. Defendant failed to show " 'a reasonable likelihood that the records might contain material bearing

on the reliability and accuracy of the [complainant's trial] testimony' " (*People v Duwe*, 164 AD3d 1256, 1257 [2d Dept 2018], *lv denied* 32 NY3d 1110 [2018], *reconsideration denied* 32 NY3d 1203 [2019]; *see People v Duran*, 276 AD2d 498, 498 [2d Dept 2000]; *see generally People v Cox*, 145 AD3d 1507, 1508 [4th Dept 2016], *lv denied* 29 NY3d 1030 [2017]).

We also reject defendant's contention that he was denied effective assistance of counsel. Defendant's contention that defense counsel was ineffective during the argument on defendant's motion seeking the production of the complainant's psychiatric records, the cross-examination of certain witnesses, and summation constitute a " 'simple disagreement with strategies, tactics or the scope of possible cross-examination, weighed long after the trial,' " and thus does not rise to the level of ineffective assistance (*People v Biro*, 85 AD3d 1570, 1571 [4th Dept 2011]; *see People v Powell*, 81 AD3d 1307, 1307 [4th Dept 2011], *lv denied* 17 NY3d 799 [2011]; *People v Adams*, 59 AD3d 928, 929 [4th Dept 2009], *lv denied* 12 NY3d 813 [2009]). Nor was defendant denied effective assistance by defense counsel's failure to call a witness to rebut the People's expert witness (*see People v Nicholson*, 118 AD3d 1423, 1425 [4th Dept 2014], *affd* 26 NY3d 813 [2016]; *People v Washington*, 122 AD3d 1406, 1406-1407 [4th Dept 2014], *lv denied* 25 NY3d 1173 [2015]).

We likewise reject defendant's contention that defense counsel was ineffective for failing to object to testimony that defendant was previously incarcerated. Such testimony was admissible in evidence inasmuch as it was relevant to a "material issue, other than the defendant's criminal propensity" and its "probative value [outweighed] its potential for undue prejudice" (*People v Cass*, 18 NY3d 553, 560 [2012]). Thus, defense counsel was not ineffective for failing to object to that testimony because there can be no denial of effective assistance of counsel arising from counsel's failure to raise an objection or argument that had little or no chance of success (*see generally People v Loomis*, 126 AD3d 1394, 1394 [4th Dept 2015]). Similarly, and contrary to defendant's contention, a nurse's testimony that the complainant disclosed defendant's conduct to her was admissible in evidence (*see People v Spicola*, 16 NY3d 441, 451 [2011], *cert denied* 565 US 942 [2011]), and thus counsel was not ineffective for failing to raise an objection to the nurse's testimony (*see generally Loomis*, 126 AD3d at 1394). Assuming, arguendo, that the testimony of the complainant's friend that complainant first disclosed defendant's conduct about eight months after the final alleged incident could not be admitted in evidence under the "prompt outcry" exception to the rule against hearsay (*cf. People v Caban*, 126 AD3d 808, 808-809 [2d Dept 2015], *lv denied* 27 NY3d 994 [2016]), we conclude that defense counsel's failure to object to that testimony did not constitute ineffective assistance inasmuch as the testimony may have been properly admitted for the purpose of completing the narrative and explaining the investigation (*see People v Gross*, 26 NY3d 689, 694-695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014]). Additionally, allowing such testimony could have been part of a trial strategy of attempting to undermine the complainant's credibility by

establishing that the complainant did not make a disclosure contemporaneous with the alleged abuse (*see generally People v Anderson*, 159 AD3d 1592, 1594 [4th Dept 2018], *lv denied* 31 NY3d 1077 [2018], *reconsideration denied* 32 NY3d 934 [2018]; *Biro*, 85 AD3d at 1571).

Defendant's further contention that he was denied effective assistance of counsel based on defense counsel's alleged lack of trial preparedness, and his contention that defense counsel failed to bring to the court's attention that a juror was allegedly sleeping during the course of the trial, concern matters outside the record and must therefore be raised by way of a motion pursuant to CPL article 440 (*see generally Nicholson*, 118 AD3d at 1425; *People v Moore*, 41 AD3d 1149, 1150 [4th Dept 2007], *lv denied* 9 NY3d 879 [2007], *reconsideration denied* 9 NY3d 992 [2007]).

We reject defendant's contention that, because the conduct alleged in counts two, three, and four of the indictment occurred during the same incident, the court erred in imposing consecutive sentences on those counts. Where, as here, " 'the crimes are committed through separate and distinct acts, even though part of a single transaction, consecutive sentences are possible regardless of whether the statutory elements of the offenses overlap' " (*People v Jackson*, 101 AD3d 1685, 1685 [4th Dept 2012], *lv denied* 21 NY3d 1005 [2013]; *see People v Lucie*, 49 AD3d 1253, 1255 [4th Dept 2008], *lv denied* 10 NY3d 936 [2008]; *People v Gaffney*, 30 AD3d 1096, 1097 [4th Dept 2006], *lv denied* 7 NY3d 789 [2006]). Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

253

KA 15-01898

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES A. RILEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered May 26, 2015. The judgment convicted defendant upon a nonjury verdict of predatory sexual assault against a child (three counts).

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of three counts of predatory sexual assault against a child (Penal Law § 130.96), defendant contends that the victim's trial testimony rendered duplicitous count two of the indictment. Defendant failed to preserve that contention for our review (*see People v Allen*, 24 NY3d 441, 449-450 [2014]; *People v Box*, 145 AD3d 1510, 1512-1513 [4th Dept 2016], *lv denied* 29 NY3d 1076 [2017]). In any event, we conclude that reversal is not required. Counts one and three of the indictment alleged that defendant engaged in sexual intercourse with the victim on two separate occasions, each happening in a different time frame. Count two alleged that, during the same time frame in which the incident addressed in count one occurred, defendant also engaged in one act of anal sexual conduct with the victim. Even assuming, arguendo, that the victim's testimony established that there were two separate incidents of anal sexual conduct (*see* Penal Law § 130.00 [2] [b]), we conclude that, based on the evidence presented at trial, there is an adequate basis in the record to connect count two of the indictment to a particular incident of anal sexual conduct, and there is no danger that Supreme Court, sitting as the finder of fact, convicted defendant of that count based on a different incident of anal sexual conduct from that alleged in the indictment (*see People v Sinha*, 84 AD3d 35, 44 [1st Dept 2011], *affd* 19 NY3d 932 [2012]; *People v Ramirez*, 99 AD3d 1241, 1242 [4th Dept 2012], *lv denied* 20 NY3d 988 [2012]; *cf. People v Dukes*, 122 AD3d 1370, 1371-1372 [4th

Dept 2014], *lv denied* 26 NY3d 928 [2015]). The testimony and the prosecutor's summation "made it clear" that defendant's charge of anal sexual conduct stemmed from the same incident as count one and, as a result, "there is no reasonable possibility that the [court] may have convicted defendant of [a] different act[]" (*People v Kessler*, 122 AD3d 1402, 1405 [4th Dept 2014], *lv denied* 25 NY3d 990 [2015]).

We reject defendant's further contention that reversal is required based on the alleged variance between the time frames of the incidents alleged in the indictment and the victim's testimony with respect to those time frames. The victim's confusion concerning which of the incidents occurred first did not deprive defendant of the right to a fair trial or the right to present a defense inasmuch as corroborating details established that the incidents occurred at or around the time frames set forth in the indictment. Moreover, with respect to each offense, "the time of the offense is not a material element," and any variance between the time frames alleged in the indictment and the victim's testimony was "relatively minor" (*People v Davis*, 15 AD3d 920, 921 [4th Dept 2005], *lv denied* 4 NY3d 885 [2005], *reconsideration denied* 5 NY3d 787 [2005]; *see People v La Marca*, 3 NY2d 452, 458-459 [1957], *mot to amend remittitur granted* 3 NY2d 933-934, 942 [1957], *rearg denied* 3 NY2d 942 [1957], *cert denied* 355 US 920 [1958], *rearg denied* 4 NY2d 960 [1958]; *cf. People v Bigda*, 184 AD2d 993, 993-994 [4th Dept 1992]).

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 (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that he was denied effective assistance of counsel based upon several acts or omissions on the part of defense counsel. Regarding defense counsel's decision to waive a *Huntley* hearing, defendant has failed to show that a request for suppression "would have been successful and that defense counsel's failure to [seek suppression] deprived him of meaningful representation" (*People v Marcial*, 41 AD3d 1308, 1308 [4th Dept 2007], *lv denied* 9 NY3d 878 [2007]; *see People v Snyder*, 100 AD3d 1367, 1369-1370 [4th Dept 2012], *lv denied* 21 NY3d 1010 [2013]; *People v Blair*, 45 AD3d 1443, 1445 [4th Dept 2007], *lv denied* 10 NY3d 838 [2008]). We note that it does not appear that defendant was in custody when he spoke to the police, and he was not arrested until a later date.

We have reviewed defendant's remaining challenges to defense counsel's representation and conclude that they lack merit. Viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defense counsel provided meaningful representation (*see generally People v*

Baldi, 54 NY2d 137, 147 [1981]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

302

KA 17-01964

PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALIPH QUINN, DEFENDANT-APPELLANT.

LORENZO NAPOLITANO, ROCHESTER, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Melchor E. Castro, A.J.), rendered October 13, 2017. The judgment convicted defendant upon a jury verdict of assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [1]), defendant contends that County Court erred in refusing his request to charge intentional assault in the third degree (§ 120.00 [1]) and reckless assault in the third degree (§ 120.00 [2]) as lesser included offenses (*see generally People v Glover*, 57 NY2d 61, 63 [1982]). We reject that contention.

Here, the trial testimony established that, following a verbal altercation, defendant pushed the victim onto a bed and held her down. Defendant put his thumb into the victim's mouth and ripped her mouth open, tearing muscles from her lip to her chin. Testimony from the victim's treating physician established that "the inside of [the victim's] oral mucosa . . . as well as the outside of [her] mouth . . . [were torn] entirely through" and that it would have taken a "large amount of force" to cause such an injury. According to the victim, her resulting pain was initially a 10 out of 10 on the pain scale. Furthermore, she continued to suffer pain for months after the assault, and she eventually underwent plastic surgery to repair her injury.

Viewing the evidence in the light most favorable to defendant (*see generally People v Van Norstrand*, 85 NY2d 131, 135 [1995]), we conclude that, contrary to defendant's contention, there is no reasonable view of the evidence that he recklessly caused physical injury to the victim, or that he intended to cause physical injury

rather than serious physical injury to the victim (*see* Penal Law §§ 10.00 [9], [10]; 15.05 [1], [3]). Moreover, there is no reasonable view of the evidence that could support a finding that the victim sustained anything less than a serious physical injury (*see* § 10.00 [10]; *People v Sipp*, 33 NY3d 1119, 1120 [2019]).

Finally, we reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to pursue an intoxication defense. Under the circumstances of this case, we conclude that defendant failed "to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's alleged shortcoming in that respect (*People v Russell*, 133 AD3d 1199, 1201 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]; *see generally People v Robetoy*, 48 AD3d 881, 882 [3d Dept 2008]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

303
KA 16-01333
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CORY REDMOND, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (PAUL A. MEABON OF COUNSEL), FOR DEFENDANT-APPELLANT.

CORY REDMOND, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered May 20, 2016. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree, menacing a police officer or peace officer, assault in the second degree, criminal mischief in the second degree and menacing 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, inter alia, criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), menacing a police officer or peace officer (§ 120.18), assault in the second degree (§ 120.05 [2]), and criminal mischief in the second degree (§ 145.10). Defendant's conviction stems from a series of incidents in which he, inter alia, engaged in threatening behavior toward members of the Onondaga County Sheriff's Office. In his main brief, defendant contends that Supreme Court erred in allowing the People, on cross-examination of a defense witness, to play portions of a recorded jailhouse telephone call between defendant and that witness to establish that she lied during her testimony regarding whether she had called a prosecution witness about one of the incidents. Defendant's contention is not preserved for our review inasmuch as he objected at trial on different grounds from those raised on appeal (*see* CPL 470.05 [2]). In any event, we conclude that his contention is without merit. In general, a party who is cross-examining a witness cannot contradict the witness's answers concerning collateral matters by introducing extrinsic evidence for the sole purpose of impeaching the witness's credibility (*see People v Pavao*, 59 NY2d 282, 288-289 [1983]).

However, extrinsic proof tending to establish a witness's bias or reason to fabricate is never collateral (*see People v Spencer*, 20 NY3d 954, 956 [2012]; *People v Anonymous*, 96 NY2d 839, 840 [2001]; *People v Hudy*, 73 NY2d 40, 56-57 [1988]). The court properly exercised its discretion in allowing the use of the jail call because it did not concern a collateral matter and tended to demonstrate the defense witness's bias (*see People v Nicholson*, 118 AD3d 1423, 1424 [4th Dept 2014], *affd* 26 NY3d 813 [2016]).

Defendant further contends in his main brief that he was denied a fair trial by prosecutorial misconduct. As defendant correctly concedes, most of the alleged instances of prosecutorial misconduct have not been preserved for our review (*see* CPL 470.05 [2]; *People v Davis*, 155 AD3d 1527, 1530 [4th Dept 2017], *lv denied* 31 NY3d 1012 [2018]). In any event, we conclude that any improprieties were not so egregious as to deny defendant a fair trial (*see People v Garner*, 145 AD3d 1573, 1574 [4th Dept 2016], *lv denied* 29 NY3d 1031 [2017]). We further conclude that defendant was not denied effective assistance of counsel based on counsel's failure to preserve that contention for our review (*see People v Smith*, 150 AD3d 1664, 1667 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]).

Defendant's final contention in his main brief is that the verdict with respect to assault in the second degree and criminal mischief in the second degree is against the weight of the evidence. Viewing the evidence in light of the elements of those crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict with respect to those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

In his pro se supplemental brief, defendant contends that, with respect to the last incident in question, the conviction of criminal possession of a weapon in the second degree is not supported by legally sufficient evidence that he possessed a loaded and operable firearm. We agree with defendant that his conviction of that crime required proof that he possessed a firearm that was both operable and loaded with live ammunition (*see* Penal Law § 265.03 [3]; *People v Longshore*, 86 NY2d 851, 852 [1995]; *People v Spears*, 125 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 25 NY3d 1172 [2015]). Viewing the evidence in the light most favorable to the People (*see generally People v Contes*, 60 NY2d 620, 621 [1983]), however, we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found the elements of that crime proved beyond a reasonable doubt (*see Spears*, 125 AD3d at 1402; *see also People v Butler*, 148 AD3d 1540, 1540 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]). Multiple prosecution witnesses testified that they saw defendant hold a gun in the air and discharge at least one shot from that gun. Contrary to the further contention of defendant in his pro se supplemental brief, viewing the evidence in light of the elements of criminal possession of a weapon in the second degree and menacing a police officer or peace officer as charged to the jury (*see Danielson*, 9 NY3d at 349), we conclude that the verdict is not against

the weight of the evidence with respect to those counts (*see generally Bleakley*, 69 NY2d at 495).

We reject defendant’s contention in his pro se supplemental brief that the court erred in refusing to sever counts of the indictment relating to the separate incidents. The offenses were properly joined under CPL 200.20 (2) (b), and thus the court lacked the statutory authority to sever (*see People v Clark*, 128 AD3d 1494, 1495 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *People v Cornell*, 17 AD3d 1010, 1011 [4th Dept 2005], *lv denied* 5 NY3d 805 [2005]). We reject defendant’s further contention in his pro se supplemental brief that the court erred in imposing consecutive sentences in connection with the last incident for criminal possession of a weapon in the second degree and menacing a police officer or peace officer. “[W]here a defendant is charged with criminal possession of a weapon pursuant to Penal Law § 265.03 (3), as well as a crime involving use of that weapon, ‘[s]o long as [the] defendant knowingly unlawfully possesses a loaded firearm before forming the intent to cause a crime with that weapon, the possessory crime has already been completed, and consecutive sentencing is permissible’ ” (*People v Lozada*, 164 AD3d 1626, 1627 [4th Dept 2018], *lv denied* 32 NY3d 1174 [2019], quoting *People v Brown*, 21 NY3d 739, 751 [2013]). Here, the trial testimony established that defendant was walking his sister’s dog while carrying a lacrosse stick when he came upon the scene of a fire. After several minutes of yelling and waving the lacrosse stick in the direction of the firefighters and officers, defendant pulled a gun from the area of his waist, raised the gun in the air, and fired at least one shot. We conclude that there was a completed possession of the firearm for purposes of section 265.03 (3) before defendant decided to fire a shot into the air, and thus consecutive sentences were permissible (*see People v Evans*, 132 AD3d 1398, 1399 [4th Dept 2015], *lv denied* 26 NY3d 1087 [2015]).

Finally, contrary to defendant’s contention in his pro se supplemental brief, the sentence imposed is not unduly harsh or severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

304

KA 15-01937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NIKEY J. HALL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered October 7, 2015. The judgment convicted defendant upon a jury verdict of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [3]), arising from an incident in which his 14-month-old daughter (victim) sustained a neurologically devastating traumatic brain injury while in his exclusive care. We affirm.

Contrary to defendant's contention, Supreme Court did not abuse its discretion in ruling that, although the People could not introduce on their direct case evidence of certain post-crime behavior by defendant, the prosecutor would be permitted to cross-examine defendant about that behavior if he chose to testify (*see generally People v Allen*, 198 AD2d 789, 789-790 [4th Dept 1993], *affd* 84 NY2d 982 [1994]; *People v Sandoval*, 34 NY2d 371, 376 [1974]).

Defendant also contends that the court erred in admitting in evidence recorded telephone conversations between defendant and the victim's mother and aunt. Initially, defendant failed to preserve for our review his claims that the recordings should have been redacted and that they contained inadmissible hearsay (*see* CPL 470.05 [2]; *People v McKenzie*, 161 AD3d 703, 704 [1st Dept 2018], *lv denied* 32 NY3d 1113 [2018]; *People v Wiley*, 67 AD3d 1370, 1371-1372 [4th Dept 2009], *lv denied* 14 NY3d 845 [2010]), and we decline to exercise our power to review those claims as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Contrary to defendant's further claim, even assuming, arguendo, that the recordings constitute

Molineux evidence (*see generally People v Ventimiglia*, 52 NY2d 350, 359 [1981]; *People v Molineux*, 168 NY 264, 293 [1901]), we conclude that such evidence was properly admitted inasmuch as it was relevant to defendant's state of mind and motive, as well as to provide necessary background information, and the court did not abuse its discretion in determining that the probative value thereof outweighed the potential for prejudice (*see People v Hansson*, 162 AD3d 1234, 1239 [3d Dept 2018], *lv denied* 32 NY3d 1004 [2018]; *People v Agee*, 57 AD3d 1486, 1487 [4th Dept 2008], *lv denied* 12 NY3d 813 [2009]). To the extent that defendant contends that the court erred in failing to give a limiting instruction with respect to the recordings, he failed to preserve that contention for our review (*see* CPL 470.05 [2]; *see People v Williams*, 241 AD2d 911, 912 [4th Dept 1997], *lv denied* 91 NY2d 837 [1997]), 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]).

Contrary to defendant's further contention, we conclude that the "evidence of prior injuries to the [victim] presented by the People was admissible to negate the defense of accident or mistake advanced by defendant," particularly in light of the fact that " 'the crime[s] charged . . . occurred in the privacy of the home and the facts are not easily unraveled' " (*People v Riley*, 23 AD3d 1077, 1077 [4th Dept 2005], *lv denied* 6 NY3d 817 [2006], quoting *People v Henson*, 33 NY2d 63, 72 [1973]; *see People v Holloway*, 185 AD2d 646, 647 [4th Dept 1992], *lv denied* 80 NY2d 1027 [1992]). We conclude that "the probative value of th[at] evidence outweighed its potential for prejudice" and, in addition, we note that the court minimized its prejudicial effect by providing limiting instructions that the jury was to consider the evidence only with respect to defendant's claim that the victim's injury arose from an accident (*Riley*, 23 AD3d at 1077; *see Hansson*, 162 AD3d at 1239). Furthermore, by failing to object to the testimony of a witness regarding her observation of certain prior injuries on the ground advanced on appeal, defendant failed to preserve for our review his additional challenge to that testimony (*see* CPL 470.05 [2]), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject defendant's contention that the court committed reversible error by admitting in evidence a photograph depicting a length of pipe that was discovered in defendant's residence. The court admitted the photograph for the "very limited purpose" of showing the object that defendant was questioned about by police investigators in a recorded interview that had already been played for the jury and cautioned that the photograph was not being offered to suggest that the pipe was an instrument used to inflict the injury on the victim. Contrary to defendant's contention, we conclude on this record that the court's cautionary instruction, which the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]), sufficiently alleviated any prejudicial effect of permitting the jury to view the photograph (*see People v Mendez*, 104 AD3d 1145, 1145 [4th Dept 2013], *lv denied* 21 NY3d 945 [2013]).

Defendant contends that the evidence is not legally sufficient to establish that he recklessly engaged in conduct that created a grave risk of death to the victim nor that his conduct evinced a depraved indifference to human life. Defendant also contends that the verdict is against the weight of the evidence for the same reasons and because the evidence that he caused the victim's injury was not credible. As an initial matter, defendant failed to preserve for our review his challenge to the legal sufficiency of the evidence, both because his motion for a trial order of dismissal was not specifically directed at the alleged deficiencies identified on appeal (*see People v Gray*, 86 NY2d 10, 19 [1995]) and because he failed to renew his motion after presenting evidence (*see People v Hines*, 97 NY2d 56, 61 [2001], *rearg denied* 97 NY2d 678 [2001]). Nonetheless, " 'we necessarily review the evidence adduced as to each of the elements of the crime[] in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349-350 [2007]). We conclude for the reasons that follow that defendant's challenge is without merit.

"A person is guilty of depraved indifference assault in the first degree when, '[u]nder circumstances evincing a depraved indifference to human life, [that person] recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes serious physical injury to another person' " (*People v Wilson*, 32 NY3d 1, 6 [2018], quoting Penal Law § 120.10 [3]). "To prove the requisite mens rea, the People must show both (1) recklessness creating a grave risk of death and (2) a depraved indifference to human life" (*id.*; *see People v Barboni*, 21 NY3d 393, 400 [2013]). A person "may be convicted of [a depraved indifference crime] when but a single person is endangered in only a few rare circumstances," primarily where the person exhibits "wanton cruelty, brutality or callousness directed against a particularly vulnerable victim, combined with utter indifference to the life or safety of the helpless target" (*People v Suarez*, 6 NY3d 202, 212-213 [2005]; *see People v Williams*, 24 NY3d 1129, 1132 [2015]). In other words, "depraved indifference is an utter disregard for the value of human life—a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (*Wilson*, 32 NY3d at 6 [internal quotation marks omitted]; *see People v Feingold*, 7 NY3d 288, 296 [2006]). "The mens rea of depraved indifference to human life can, like any other mens rea, be proved by circumstantial evidence" (*Feingold*, 7 NY3d at 296).

Here, viewing the evidence in light of the elements of the crime as charged to the jury (*see Danielson*, 9 NY3d at 349), although an acquittal would not have been unreasonable, 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 assertion, the credible medical evidence refuted his claim to police investigators and others that the victim's injury was the result of an accidental fall down the stairs (*see People v Waite*, 145 AD3d 1098, 1100 [3d Dept 2016], *lv denied* 29 NY3d 953 [2017]; *People v Bowman*, 48

AD3d 178, 180, 184-185 [1st Dept 2007], *lv denied* 10 NY3d 808 [2008]). Indeed, the treating pediatric doctors testified that the victim had sustained a brain injury that was consistent with the infliction of significant blunt trauma to the head with force similar in magnitude to a high-speed car accident and was inconsistent with an accidental fall down the stairs (*see People v Warrington*, 146 AD3d 1233, 1236 [3d Dept 2017], *lv denied* 29 NY3d 1038 [2017]; *Waite*, 145 AD3d at 1100; *see also People v Kuzdzal*, 144 AD3d 1618, 1619 [4th Dept 2016], *revd on other grounds* 31 NY3d 478 [2018]). In addition, the jury was justified in concluding beyond a reasonable doubt that defendant inflicted the injury upon the victim inasmuch as the undisputed evidence established that the victim was in defendant's exclusive care at the time the injury occurred (*see People v Keegan*, 133 AD3d 1313, 1316 [4th Dept 2015], *lv denied* 27 NY3d 1152 [2016]).

Defendant further asserts that the evidence is consistent only with the conclusion that the person who inflicted the victim's injury acted intentionally and, therefore, the evidence does not establish the requisite mens rea component of recklessness. That assertion lacks merit. Although "[i]t may be true that the evidence presented to the jury leads inexorably to the conclusion that [defendant] acted *voluntarily* in his . . . conduct against the [victim] . . . , it does not [lead to the exclusive conclusion] that he *intended* to cause death or serious physical injury, in the sense of having that as a conscious objective or purpose" (*Barboni*, 21 NY3d at 404; *see Wilson*, 32 NY3d at 8). The evidence in this case would not have "compelled the jury to infer that defendant's state of mind was one of intent rather than recklessness" (*Barboni*, 21 NY3d at 404-405). Instead, the jury was justified in concluding beyond a reasonable doubt that defendant was aware of and consciously disregarded a grave risk of death to the infant (*see* Penal Law §§ 15.05 [3]; 120.10 [3]; *People v Dallas*, 119 AD3d 1362, 1366 [4th Dept 2014], *lv denied* 24 NY3d 1083 [2014]).

Defendant further asserts that the People did not establish the requisite mens rea component of depraved indifference to human life because he sought assistance for the victim. We reject that assertion. Here, the evidence established that the injury was inflicted sometime between 2:00 p.m., when defendant was left as the sole adult caretaker of the victim, and 2:44 p.m., when defendant called his fiancée, and that defendant did not call 911 until 2:56 p.m. The evidence therefore established that defendant did not immediately seek medical assistance following the injury; instead, according to his own statements to police investigators, he placed the victim on the couch where she began to vomit, then took the victim upstairs to wash her off in the bathtub where she somewhat responded to the water, returned downstairs to change the victim's diaper, and eventually called his fiancée and thereafter waited until her arrival several minutes later to call 911. We conclude that "[k]nowing the brutal origin of the injuries and the force with which they were inflicted makes it much less likely that defendant was holding out hope . . . that the child's symptoms were merely signs of a trivial injury or illness. Thus . . . it is significant that defendant was the actor who had inflicted the injuries in the first place" (*Barboni*, 21 NY3d at 402; *see Dallas*, 119 AD3d at 1366). In light of the

totality of the credible evidence, including one of the recorded telephone conversations occurring less than a week before the incident in which defendant expressed that the victim was "[his] property" with which he could do whatever he wanted, thereby evincing his utter indifference to the victim's humanity, as well as "defendant's knowledge of how the injuries were inflicted and his failure to seek immediate medical attention," we conclude that the jury was justified in concluding that "defendant evinced a wanton and uncaring state of mind" (*Barboni*, 21 NY3d at 402; *see Dallas*, 119 AD3d at 1366).

Moreover, contrary to defendant's additional assertion, "the fact that [he may have appeared agitated,] panic-stricken and [emotional] by the time he finally did summon aid does not alter the case" (*Waite*, 145 AD3d at 1102). Here, "[t]he jury could rationally have concluded that he had the requisite mental state of callous indifference during the attack and the period in which he failed to seek [immediate] medical assistance . . . , and that he did not become [emotional] until he realized that the grievous harm he had inflicted could not be concealed" or remedied (*id.*). Defendant's " 'state of mind and the real reasons for [his later actions] . . . implicate[d] credibility questions' for the jury to resolve," and we conclude that there is no basis to disturb its determination that defendant's ostensible "belated expressions of concern did not reflect any interest in the victim's welfare" (*Warrington*, 146 AD3d at 1237).

Defendant further contends that he was denied effective assistance of counsel based on various alleged errors made by defense counsel. We reject that contention. " '[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for [defense] counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998], quoting *People v Rivera*, 71 NY2d 705, 709 [1988]), and defendant failed to meet that burden here. Viewing the evidence, the law, and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant's sentence is not unduly harsh or severe.

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

310
CAF 19-00051
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF MARIA P., SOFIA P., ANGELO P.,
AND CHRISTOPHER P.
-- MEMORANDUM AND ORDER
JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

ANTHONY P., RESPONDENT-APPELLANT.

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

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

SCOTT A. OTIS, WATERTOWN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Jefferson County (Eugene J. Langone, Jr., J.), entered December 4, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondent with respect to the subject children upon a finding of permanent neglect.

It is hereby ORDERED that said appeal is unanimously dismissed except insofar as respondent challenges the finding of permanent neglect and the order is affirmed without costs.

Memorandum: Respondent father appeals from an order terminating his parental rights with respect to the subject children. Although the order was entered on default given the father's failure to appear at the dispositional hearing and "[n]o appeal lies from an order entered upon the default of the appealing party" (*Matter of Heavenly A. [Michael P.]*, 173 AD3d 1621, 1622 [4th Dept 2019]), the appeal nevertheless brings up for review any issue that was subject to contest in the proceedings below, i.e., Family Court's fact-finding determination (*see id.*). On the merits, we reject the father's contention that petitioner failed to establish that he permanently neglected the subject children (*see Matter of Justain R. [Juan F.]*, 93 AD3d 1174, 1174-1175 [4th Dept 2012]). To the extent that they are properly before us, we have considered and rejected the father's remaining contentions.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

313
CA 19-00954
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, WINSLOW, AND BANNISTER, JJ.

PATRICK DEERING, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERTA PROSSER, DEFENDANT-RESPONDENT
AND KYLE MULLEN, DEFENDANT.

GROSS SHUMAN, P.C., BUFFALO (KATHERINE LIEBNER OF COUNSEL), AND SMALL LAW FIRM, FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered April 4, 2019. The order and judgment, among other things, denied in part the cross motion of plaintiff for summary judgment and granted the motion of defendant Roberta Prosser for summary judgment dismissing the complaint against her.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion of defendant Roberta Prosser and reinstating the complaint against her, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained in a motor vehicle accident. Plaintiff alleged that he sustained, inter alia, back injuries and claimed a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories of serious injury (*see* Insurance Law § 5102 [d]). Defendant Kyle Mullen moved for summary judgment dismissing the complaint against him, plaintiff cross-moved for, inter alia, summary judgment on the issues of negligence and serious injury, and Roberta Prosser (defendant) moved for summary judgment dismissing the complaint against her on the ground that plaintiff did not sustain a serious injury. Supreme Court granted Mullen’s motion and dismissed the complaint against him, granted that part of plaintiff’s cross motion on the issue of defendant’s negligence, and granted defendant’s motion and dismissed the complaint against her. Plaintiff now appeals from the order and judgment insofar as it denied his cross motion with respect to the issue of serious injury and granted defendant’s motion.

Contrary to plaintiff’s contention, he did not meet his initial

burden on the cross motion of establishing that he sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories of serious injury (*see Savilo v Denner*, 170 AD3d 1570, 1570 [4th Dept 2019]). "[A] plaintiff may not recover under the permanent consequential limitation of use and significant limitation of use categories where there is persuasive evidence that plaintiff's alleged pain and injuries were related to a preexisting condition" (*id.* at 1571 [internal quotation marks omitted]). In support of his cross motion, plaintiff submitted the report of Mullen's expert who examined plaintiff and opined that plaintiff had only mild limitations and degenerative disc disease. He found no objective evidence of any acute injury sustained as a result of the accident and found no objective evidence that the accident aggravated plaintiff's preexisting back condition. Thus, regardless of the remainder of plaintiff's submissions in support of his cross motion, that report raises at least a triable issue of fact whether plaintiff sustained a serious injury under the permanent consequential limitation of use and significant limitation of use categories as a result of the accident (*see generally Ehlers v Byrnes*, 147 AD3d 1465, 1465 [4th Dept 2017]; *Briody v Melecio*, 91 AD3d 1328, 1329 [4th Dept 2012]).

We agree with plaintiff, however, that the court erred in granting defendant's motion with respect to those two categories of serious injury, and we therefore modify the order and judgment accordingly. In support of her motion, defendant simply relied upon plaintiff's deposition testimony "and other admissible evidence submitted to" the court on Mullen's motion and plaintiff's cross motion. That "admissible evidence" included Mullen's expert report, described above, but it also included the affidavit of plaintiff's treating chiropractor, which was submitted by plaintiff in support of his cross motion. The chiropractor adequately addressed the opinion of Mullen's expert that plaintiff's injuries were not caused by the accident (*cf. Woodward v Ciamaricone*, 175 AD3d 942, 944 [4th Dept 2019]; *see generally Carrasco v Mendez*, 4 NY3d 566, 580 [2005]). Indeed, he addressed plaintiff's preexisting back condition and opined that the accident aggravated it. He further opined that plaintiff sustained an "acute/symptomatic disc injury" as a result of the accident and explained how plaintiff's symptoms and limitations before and after the accident were different. Defendant thus failed to meet the initial burden on her motion of establishing that plaintiff's back injury was not causally related to the accident inasmuch as her own submissions raised a triable issue of fact with respect thereto (*see generally Cuyler v Allstate Ins. Co.*, 175 AD3d 1053, 1053-1054 [4th Dept 2019]).

Defendant further failed to meet her initial burden of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories. Plaintiff's chiropractor set forth objective evidence of an injury in those categories (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]), i.e., a positive straight leg raise test (*see Harrity v Leone*, 93 AD3d 1204, 1206 [4th Dept 2012]) and muscle spasms (*see Limardi v McLeod*, 100 AD3d 1375, 1376-1377 [4th

Dept 2012]; *Harrity*, 93 AD3d at 1206). Defendant’s submissions also raised a triable issue of fact whether plaintiff’s alleged limitations and injuries were significant and consequential (*see Cuyler*, 175 AD3d at 1054). A significant limitation of use is “something more than a minor limitation of use” (*Licari v Elliott*, 57 NY2d 230, 236 [1982]). In plaintiff’s affidavit, which was part of the “admissible evidence submitted” to the court, he described all of the landscaping work that he was able to do at his job before the accident that he was unable to do after the accident. He also testified regarding those limitations during his deposition testimony. Plaintiff’s chiropractor noted plaintiff’s limitations at work, as well as the fact that plaintiff had difficulty standing more than 30 minutes. He further reported that plaintiff demonstrated radiculopathy during the physical examination (*see Cuyler*, 175 AD3d at 1054). Thus, defendant’s submissions raised an issue of fact whether plaintiff’s limitations and injuries were significant and consequential.

With respect to the 90/180-day category of serious injury, the court properly denied that part of plaintiff’s cross motion seeking summary judgment on that category, but erred in granting that part of defendant’s motion with respect to that category, and we therefore further modify the order and judgment accordingly. There is a triable issue of fact whether plaintiff “has been curtailed from performing his usual activities to a great extent rather than some slight curtailment” (*Licari*, 57 NY2d at 236; *see James v Thomas*, 156 AD3d 1440, 1441 [4th Dept 2017]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

324

KA 17-01970

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEARY MOORE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered June 9, 2017. The judgment convicted defendant, upon a plea of guilty, of conspiracy 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 conspiracy in the second degree (Penal Law § 105.15). Defendant contends that Supreme Court lacked the authority to enhance his agreed-upon sentence following defendant's alleged violation of the plea agreement. Although defendant's challenge is not, under the circumstances of this case, precluded by his waiver of the right to appeal (*see People v McDermott*, 68 AD3d 1453, 1453 [3d Dept 2009]; *People v Hastings*, 24 AD3d 954, 955 [3d Dept 2005]), defendant failed to preserve his contention for our review inasmuch as he did not object to the court's imposition of the enhanced sentence and did not move to withdraw his plea or vacate the judgment of conviction (*see People v Laurendi*, 126 AD3d 1401, 1402 [4th Dept 2015], *lv denied* 26 NY3d 1009 [2015]; *People v Viele*, 124 AD3d 1222, 1223 [4th Dept 2015]; *People v Scott*, 101 AD3d 1773, 1773-1774 [4th Dept 2012], *lv denied* 21 NY3d 1019 [2013]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

330
CAF 18-02258
PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF HANNAH W.

YATES COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

WILLIAM W., RESPONDENT-APPELLANT.

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

DANIELLE A. WARD, PENN YAN, FOR PETITIONER-RESPONDENT.

SUSAN E. GRAY, CANANDAIGUA, ATTORNEY FOR THE CHILD.

Appeal from an amended order of the Family Court, Yates County (Jason L. Cook, J.), entered October 29, 2018 in a proceeding pursuant to Social Services Law § 384-b. The amended order terminated respondent's parental rights with respect to the subject child.

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

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

We reject the contention of the father that petitioner failed to establish that it exercised diligent efforts, as required by Social Services Law § 384-b (7) (a), to encourage and strengthen the parent-child relationship. "Diligent efforts include reasonable attempts at providing counseling, scheduling regular visitation with the child, providing services to the parents to overcome problems that prevent the discharge of the child into their care, and informing the parents of their child's progress" (*Matter of Jessica Lynn W.*, 244 AD2d 900, 900-901 [4th Dept 1997]; *see Matter of Caidence M. [Francis W.M.]*, 162 AD3d 1539, 1539 [4th Dept 2018], *lv denied* 32 NY3d 905 [2018]). Here, petitioner established by clear and convincing evidence (*see* § 384-b [3] [g] [i]) that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the father's relationship with the child (*see Matter of Nicholas B. [Eleanor J.]*, 83 AD3d 1596, 1597 [4th Dept 2011], *lv denied* 17 NY3d 705 [2011]) by providing appropriate services to the father, including parenting

education, mental health counseling, sexual behavior counseling, and an alcohol evaluation. The father, however, failed to successfully complete the programs and services that were made available to him. In addition, petitioner maintained regular and consistent supervised visitation with coaching, even after the father repeatedly threatened and behaved inappropriately toward the visitation supervisor, thereby necessitating more intensive supervision and security. Despite petitioner's efforts, the father did not progress to a point where unsupervised visits could occur.

Contrary to the further contention of the father, "there is no evidence that [he] had a realistic plan to provide an adequate and stable home for the child[ ]" (*Matter of Christian C.-B. [Christopher V.B.]*, 148 AD3d 1775, 1777 [4th Dept 2017], *lv denied* 29 NY3d 917 [2017]; *see* Social Services Law § 384-b [7] [c]), and the court thus properly concluded that he permanently neglected the subject child.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

334
CAF 18-02255
PRESENT: PERADOTTO, J.P., TROUTMAN, WINSLOW, AND DEJOSEPH, JJ.

IN THE MATTER OF MAYKALA W.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARQUIS W., RESPONDENT-APPELLANT.

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

DENISE MORGAN, UTICA, FOR PETITIONER-RESPONDENT.

STEPHANIE N. DAVIS, OSWEGO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered November 20, 2018 in a proceeding pursuant to Social Services Law § 384-b. The order revoked a suspended judgment and terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent father appeals from an order that, inter alia, revoked a suspended judgment entered upon his admission that he had permanently neglected the subject child. "It is well established that, '[i]f the court determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Ashante H. [Meko H.]*, 169 AD3d 1454, 1454-1455 [4th Dept 2019]; *see Matter of Michael S. [Timothy S.]*, 159 AD3d 1378, 1379 [4th Dept 2018]). Contrary to the father's contention, we conclude that there is a sound and substantial basis in the record to support Family Court's determination that he failed to comply with the terms of the suspended judgment (*see Ashante H.*, 169 AD3d at 1455; *Michael S.*, 159 AD3d at 1379-1380).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

337
KA 18-01793
PRESENT: SMITH, J.P., CARNI, NEMOYER, CURRAN, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HUGH R. JACKSON, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 25, 2018. The judgment convicted defendant upon a jury verdict of attempted burglary in the second degree, criminal mischief in the fourth degree, possession of burglar's tools and unlawful possession of marihuana.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]), defendant contends that his conviction of that crime is not supported by legally sufficient evidence with respect to the issue of his intent to commit a crime in the dwelling at issue. We reject that contention. Viewing the evidence in the light most favorable to the People, as we must (*see People v Delamota*, 18 NY3d 107, 113 [2011]; *People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences from which a rational jury could have found that element of the crime proved beyond a reasonable doubt (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). The jury may infer such intent from the defendant's conduct and the surrounding circumstances (*see People v Pendarvis*, 143 AD3d 1275, 1275 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *see generally People v Mackey*, 49 NY2d 274, 280-281 [1980]; *People v Jacobs*, 37 AD3d 868, 870 [3d Dept 2007], *lv denied* 9 NY3d 923 [2007]), including the "defendant's actions . . . when confronted" (*People v Maier*, 140 AD3d 1603, 1603-1604 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]). Here, those factors include defendant's unexplained presence on the premises (*see People v Carducci*, 143 AD3d 1260, 1261-1262 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *People v Ostrander*, 46 AD3d

1217, 1218 [3d Dept 2007]), his actions in cutting and removing the screen in a door on the victim's back porch while wearing latex gloves (*see People v Gelling*, 163 AD3d 1489, 1492 [4th Dept 2018], *amended on rearg* 164 AD3d 1673 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]; *People v Hunter*, 55 AD3d 1052, 1053 [3d Dept 2008], *lv denied* 11 NY3d 898 [2008]), and his flight when the homeowner confronted him (*see Gelling*, 163 AD3d at 1492). Furthermore, viewing the evidence in light of the elements of attempted burglary in the second degree as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the evidence with respect to that crime (*see generally Bleakley*, 69 NY2d at 495).

Defendant's contentions with respect to County Court's jury charge are not preserved for our review inasmuch as defendant did not object to the jury charge as given (*see People v Clark*, 142 AD3d 1339, 1340 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *see generally* CPL 470.05 [2]; *People v Robinson*, 88 NY2d 1001, 1001-1002 [1996]), and we decline to exercise our power to reach those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

338

KA 17-02055

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FLOYD JOHNSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered April 11, 2017. 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: On appeal from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]), defendant contends that Supreme Court erred in denying his motion to withdraw his guilty plea on the ground that defense counsel coerced him into pleading guilty (*see generally People v Gast*, 114 AD3d 1270, 1271 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). We disagree.

" 'In the absence of some evidence of innocence, fraud, or mistake in the inducement of the plea, the decision whether to permit a defendant to withdraw a plea of guilty rests solely within the court's discretion' " (*People v Anderson*, 63 AD3d 1617, 1618 [4th Dept 2009], *lv denied* 13 NY3d 858 [2009]). Additionally, " '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]). Here, the court granted defendant a hearing on his motion, and thus the court was entitled to decide the motion by resolving any issues of credibility that arose therein (*see People v Henderson*, 148 AD3d 1779, 1780 [4th Dept 2017]). We conclude that, based on the testimony adduced at the hearing, the court did not abuse its discretion in determining that defense counsel had not coerced defendant into entering his guilty plea such that the plea was not knowingly, intelligently, and voluntarily entered (*see generally Gast*, 114 AD3d at 1271).

Although we agree with defendant that his purported waiver of the right to appeal is invalid (*see People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *6-7 [2019]), we reject defendant's contentions that the court abused its discretion in denying him youthful offender status (*see generally People v Randleman*, 60 AD3d 1358, 1358 [4th Dept 2009], *lv denied* 12 NY3d 919 [2009]), and that his sentence is unduly harsh and severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

361

KA 18-00574

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

IRYN B. MEYERS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

IRYN B. MEYERS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.), rendered October 18, 2017. The judgment convicted defendant upon a jury verdict of murder in the second degree, arson in the first degree (two counts), falsifying business records in the first degree, attempted insurance fraud in the second degree, insurance fraud in the fifth degree and conspiracy in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating that part of the sentence ordering restitution and as modified the judgment is affirmed and the matter is remitted to Steuben County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, two counts of arson in the first degree (Penal Law § 150.20 [1] [a] [i], [ii]) and one count of murder in the second degree (§ 125.25 [3]), arising from her involvement with a fire at a home upon which she had property insurance that killed a man (victim) for whom she was the beneficiary on a life insurance policy.

Defendant contends in her main brief that she was denied effective assistance of counsel. We reject that contention. “Where, as here, a defendant contends that he or she was denied the right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, we evaluate the claim using the state standard, which affords greater protection than its federal counterpart” (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282 [2004], *rearg denied* 3 NY3d 702 [2004]). Under the state standard,

"[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). A "defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure" (*People v Pavone*, 26 NY3d 629, 646 [2015]; *see People v Barboni*, 21 NY3d 393, 405-406 [2013]; *People v Caban*, 5 NY3d 143, 152 [2005]). "However, a reviewing court must be careful not to 'second-guess' counsel, or assess counsel's performance 'with the clarity of hindsight,' effectively substituting its own judgment of the best approach to a given case" (*Pavone*, 26 NY3d at 647, quoting *Benevento*, 91 NY2d at 712; *see People v Parson*, 27 NY3d 1107, 1108 [2016]).

Contrary to defendant's contention, she was not denied effective assistance of counsel by the decision of her first defense counsel (first counsel) to withdraw a request for a *Huntley* hearing. 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' " (*Caban*, 5 NY3d at 152) and, here, defendant failed to show that a *Huntley* hearing would have resulted in the suppression of her statements to the fire and police investigators (*see People v Burns*, 122 AD3d 1435, 1436-1437 [4th Dept 2014], *lv denied* 26 NY3d 927 [2015]). To the contrary, the record establishes that first counsel's decision was based upon "a reasonable conclusion . . . that there [was] no colorable basis for a hearing" (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Blair*, 45 AD3d 1443, 1445 [4th Dept 2007], *lv denied* 10 NY3d 838 [2008]). Similarly, contrary to defendant's further contention, she was not denied effective assistance when neither first counsel nor the defense counsel who represented defendant at trial (trial counsel) challenged the search warrants that were obtained on the basis of defendant's statements (*see People v Thomas*, 176 AD3d 1639, 1641 [4th Dept 2019], *lv denied* 34 NY3d 1082 [2019]; *see generally Caban*, 5 NY3d at 152).

We reject defendant's contention that first counsel and trial counsel were ineffective in failing to request a *Frye* hearing with respect to the admission of expert testimony regarding cell phone tracking and GPS evidence. The testimony of the People's expert " 'did not concern a novel scientific theory, technique, or procedure, but instead involved deductions made from cell phone site data in a manner consistent with a generally accepted scientific process' " (*People v Clayton*, 175 AD3d 963, 967-968 [4th Dept 2019]) and, thus, a request for a *Frye* hearing had " 'little or no chance of success' " (*Caban*, 5 NY3d at 152; *see People v Wallace*, 60 AD3d 1268, 1270-1271 [4th Dept 2009], *lv denied* 12 NY3d 922 [2009]; *see generally People v Brooks*, 31 NY3d 939, 941 [2018]). Defendant's related contention that first counsel and trial counsel should have challenged the admissibility of cell phone data contained in service provider records as violating defendant's right to confrontation is without merit

inasmuch as the records were not testimonial (*see People v Santiago*, 143 AD3d 545, 546 [1st Dept 2016], *lv denied* 28 NY3d 1127 [2016]; *see generally People v Pealer*, 20 NY3d 447, 453 [2013], *rearg denied* 24 NY3d 993 [2014], *cert denied* 571 US 846 [2013]).

Defendant further asserts that she was denied effective assistance of counsel because trial counsel opened the door to allow the People to present testimony on redirect examination of a police investigator that defendant had taken a polygraph test. We conclude, however, that trial counsel's conduct did not constitute " 'egregious and prejudicial' error such that defendant did not receive a fair trial" (*Benevento*, 91 NY2d at 713; *see People v Turley*, 130 AD3d 1574, 1575-1576 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015], *reconsideration denied* 26 NY3d 1093 [2015]). The testimony elicited on redirect examination of the police investigator was not inculpatory and, in any event, County Court provided the jury a curative instruction that polygraph evidence was not admissible and could not be considered as a basis for any inference—favorable or unfavorable—in relation to guilt, innocence, or credibility. Inasmuch as the jury is presumed to have followed the court's curative instruction, we conclude that "the curative instruction sufficiently alleviated any prejudice to defendant" (*Turley*, 130 AD3d at 1576).

Defendant further contends that trial counsel was ineffective for failing to object to remarks by the prosecutor on summation that purportedly shifted the burden of proof. That contention is without merit. We conclude upon our review of the record that "[t]he prosecutor's remarks . . . were within the broad bounds of rhetorical comment permissible during summations and did not shift the burden of proof" (*People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016] [internal quotation marks omitted]). Thus, trial counsel's failure to object to those remarks does not constitute ineffective assistance of counsel (*see People v Eckerd*, 161 AD3d 1508, 1509 [4th Dept 2018], *lv denied* 31 NY3d 1116 [2018]).

To the extent that first counsel and trial counsel erred in failing to obtain and provide *Rosario* material to the People, which ultimately resulted in the court granting the People's request for an adverse inference charge to the jury, we conclude that the error was not "sufficiently egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*Caban*, 5 NY3d at 152; *see People v Hurst*, 113 AD3d 1119, 1121 [4th Dept 2014], *lv denied* 22 NY3d 1199 [2014]).

Defendant further contends that trial counsel was ineffective in failing to pursue additional relief after it was determined that a complete transcript of the codefendant's recently-concluded trial, which included the testimony of the People's fire investigator witnesses, was unavailable. That contention lacks merit. Trial counsel had no basis to argue that the People committed a *Rosario* violation inasmuch as the People had no immediate access to the untranscribed portions of the fire investigators' prior testimony and therefore could not be held responsible for a failure to turn them over to defendant (*see People v Fishman*, 72 NY2d 884, 886 [1988]).

Moreover, even in the absence of a complete transcript of that prior testimony, the record establishes that trial counsel "effectively cross-examined the [fire investigators] and raised certain areas of possible doubt arising from their testimony" (*People v Flores*, 83 AD3d 1460, 1461 [4th Dept 2011], *affd* 19 NY3d 881 [2012]). Contrary to defendant's related contention in her pro se supplemental brief, the record further establishes that trial counsel effectively referenced and used nationally recognized standards of fire investigation published in the National Fire Protection Association 921 Guide for Fire and Explosion Investigations during cross-examination of the fire investigators and in presenting the testimony of defendant's own expert (*cf. People v Casey*, 133 AD3d 1236, 1238 [4th Dept 2015]). Defendant's "[s]peculation that a more vigorous cross-examination might have [undermined the credibility of the fire investigators] does not establish ineffectiveness of counsel" (*People v Adams*, 247 AD2d 819, 819 [4th Dept 1998], *lv denied* 91 NY2d 1004 [1998]; *see People v Bassett*, 55 AD3d 1434, 1438 [4th Dept 2008], *lv denied* 11 NY3d 922 [2009]).

Defendant contends in her main brief that the court should have granted her motion to withdraw her waiver of the *Huntley* hearing and held such a hearing. We reject that contention inasmuch as "[t]he record establishes that the waiver was made knowingly, voluntarily, and intelligently" (*People v Sinkler*, 112 AD3d 1359, 1361 [4th Dept 2013], *lv denied* 22 NY3d 1159 [2014]).

Defendant also contends in her main brief that she was deprived of her constitutional right to present a defense at trial when the court precluded her from challenging the voluntariness of her various statements on the ground that she did not sufficiently understand English. Even assuming, arguendo, that the court's preclusion ruling was in error (*see generally People v Jin Cheng Lin*, 26 NY3d 701, 718-719, 727-728 [2016]), we conclude that the error is harmless inasmuch as the evidence of guilt is overwhelming and "there is no reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). We note in particular that the parties fully litigated the issue of defendant's understanding of English during a pretrial hearing on defendant's request for an interpreter and the evidence presented therein—which presumably would also have been presented at trial if the court had permitted defendant to challenge the voluntariness of her statements on the ground that she did not sufficiently understand English—established that defendant was proficient in and understood English.

Defendant contends in her pro se supplemental brief that the court improperly admitted in evidence statements that the nontestifying codefendant made to a police investigator in violation of her Sixth Amendment right of confrontation. Even assuming, arguendo, that defendant preserved for our review her contention, which is based on the alleged violation of *Bruton v United States* (391 US 123 [1968]) and the purported improper admission of testimonial hearsay, we conclude that any error is harmless. "Trial errors resulting in violation of a criminal defendant's Sixth Amendment right

to confrontation 'are considered harmless when, in light of the totality of the evidence, there is no reasonable possibility that the error affected the jury's verdict' " (*People v Porco*, 17 NY3d 877, 878 [2011]; *see People v Astacio*, 105 AD3d 1394, 1396 [4th Dept 2013], *lv denied* 22 NY3d 1154 [2014]; *see generally Crimmins*, 36 NY2d at 237). Here, there was overwhelming direct and circumstantial evidence of defendant's guilt, including her own statements that linked her to the crimes and were largely cumulative of the codefendant's statements, and there is no reasonable possibility that the purported error affected the jury's verdict (*see Astacio*, 105 AD3d at 1396; *People v McNerney*, 6 AD3d 1107, 1108 [4th Dept 2004], *lv denied* 3 NY3d 678 [2004]; *cf. People v Johnson*, 27 NY3d 60, 73-74 [2016]; *see also People v Goodbread*, 127 AD3d 1106, 1107 [2d Dept 2015], *lv denied* 27 NY3d 965 [2016]).

Contrary to defendant's contention in her pro se supplemental brief, 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 a different verdict would have been unreasonable and thus that the verdict is not against the weight of the evidence (*see People v Robinson*, 174 AD3d 1490, 1492 [4th Dept 2019], *lv denied* 34 NY3d 953 [2019]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Defendant's contention in her main brief that the court erred in ordering her to pay restitution without a hearing is not preserved for our review inasmuch as defendant "did not request a hearing to determine the [proper amount of restitution] or otherwise challenge the amount of the restitution order during the sentencing proceeding" (*People v Horne*, 97 NY2d 404, 414 n 3 [2002]; *see People v Jones*, 108 AD3d 1206, 1207 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]). We nevertheless exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Moreover, even assuming, arguendo, that defendant's further challenge to the court's purported failure to direct restitution to an appropriate person or entity (*see* Penal Law § 60.27 [4] [b]) required preservation under these circumstances (*see People v Graves*, 163 AD3d 16, 25 [4th Dept 2018]), we likewise exercise our power to reach that unpreserved contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). As the People correctly concede, the record does not contain sufficient evidence to establish the amount of restitution imposed, nor does it establish the recipient of the restitution (*see* Penal Law § 60.27 [1], [2], [4] [b]). We therefore modify the judgment by vacating that part of the sentence ordering restitution, and we remit the matter to County Court for a hearing to determine restitution in compliance with Penal Law § 60.27.

Finally, contrary to defendant's contention in her main brief, the sentence imposing concurrent terms of incarceration is not unduly

harsh or severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

378
KA 19-00588
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VINCE M.F., DEFENDANT-APPELLANT.

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

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

Appeal from an adjudication of the Cayuga County Court (Thomas G. Leone, J.), rendered February 28, 2019. The adjudication revoked defendant’s sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant was adjudicated a youthful offender based upon his plea of guilty to sexual abuse in the first degree (Penal Law § 130.65 [3]). Defendant admitted to a first violation of probation when he was arrested for criminal possession of stolen property, and was restored to probation. Defendant then admitted to a second violation of probation for alcohol and marihuana use, and he now appeals from an adjudication that revoked his probation and sentenced him to an indeterminate term of 1⅓ to 4 years’ imprisonment. Contrary to defendant’s contention, the sentence is not unduly harsh or severe.

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

383

KA 17-01786

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEONARD WEATHER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Oneida County Court (Matthew J. Doran, A.J.), rendered June 16, 2017. The judgment convicted defendant upon a jury verdict of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we reject defendant's contention that the evidence is legally insufficient to support the conviction. At a joint trial, the People presented evidence that the two codefendants broke into the residence of the victim, stole cash and two cell phones, and physically assaulted the victim. The victim testified that, during the assault, the first codefendant told the second codefendant, "tell [defendant] to get the gun." The victim further testified that defendant arrived soon after carrying a revolver, which he handed to the first codefendant, who then shot the victim in his buttock. A witness for the defense testified that the victim showed him a gun immediately prior to the incident and, although the witness was not present for the altercation, the victim told the witness afterward that he had shot himself. "Confronted with the conflicting testimony of [the victim and the witness], the jury could rationally conclude—as this jury evidently did—that the victim's recollection was credible and accurate" (*People v Delamota*, 18 NY3d 107, 116 [2011]), and we therefore conclude that there is sufficient evidence to support the jury's inference that defendant possessed a loaded firearm. 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]).

Defendant's contention that County Court should have severed his trial from that of the codefendants is not preserved for our review because defendant did not move for a severance (*see People v Evans*, 142 AD3d 1291, 1292 [4th Dept 2016], *lv denied* 28 NY3d 1144 [2017]; *see generally* CPL 470.05 [2]). In any event, the charges against defendant and the codefendants were properly joined inasmuch as they were based upon a common scheme or plan (*see* CPL 200.40 [1] [b]; *People v Wright*, 166 AD3d 1022, 1023-1024 [2d Dept 2018], *lv denied* 32 NY3d 1211 [2019]). Moreover, the evidence against defendant and the codefendants was "supplied by the same eyewitness . . . , and . . . defendant's defense was by no means 'antagonistic' to that of the codefendant[s]" (*Wright*, 166 AD3d at 1024, citing *People v Mahboubian*, 74 NY2d 174, 186 [1989]).

We further conclude that defendant has not established that he was denied effective assistance of counsel (*see generally People v Benevento*, 91 NY2d 708, 712-713 [1998]). Inasmuch as the charges against defendant and the codefendants were properly joined, "[a]ny motion to sever . . . the indictment would have had little or no chance of success, and thus counsel's failure to make such a . . . motion . . . does not indicate ineffectiveness of counsel" (*People v Lukens*, 107 AD3d 1406, 1409 [4th Dept 2013], *lv denied* 22 NY3d 957 [2013] [internal quotation marks omitted]; *see People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]), and defendant has not shown the absence of strategic or other legitimate explanations for defense counsel's failure to move for a discretionary severance (*see People v McGee*, 20 NY3d 513, 520-521 [2013]). Defendant's contention that the court failed to give a proper limiting instruction to the jury is also unpreserved for appellate review (*see* CPL 470.05 [2]; *People v Autry*, 75 NY2d 836, 838-839 [1990]) and, in any event, is without merit. Finally, the sentence is not unduly harsh or severe.

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

384

KA 19-00991

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANNON E. TERWILLIGER, 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 (Mark H. Fandrich, A.J.), rendered March 19, 2019. The judgment convicted defendant, upon her plea of guilty, of attempted burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Defendant's contention that County Court's *Molineux* ruling constituted an abuse of discretion is forfeited by her guilty plea (*see People v Sapp*, 147 AD3d 1532, 1534 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]). Contrary to defendant's further contention, she validly waived her right to appeal (*see generally People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *4 [2019]). Defendant's valid waiver of the right to appeal forecloses our review of her challenges to the court's denial of her request for a *Wade*/*Rodriguez* hearing (*see People v Rohadfox*, 175 AD3d 1813, 1814 [4th Dept 2019], *lv denied* 34 NY3d 1019 [2019]), and to the severity of her sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]).

Although defendant's contention that her guilty plea was not voluntarily, knowingly, and intelligently entered survives the waiver of the right to appeal (*see People v McKay*, 5 AD3d 1040, 1041 [4th Dept 2004], *lv denied* 2 NY3d 803 [2004]), that contention is unpreserved for our review because defendant failed to move to withdraw her guilty plea or to vacate the judgment of conviction (*see People v Jimenez*, 177 AD3d 1326, 1326 [4th Dept 2019], *lv denied* 34 NY3d 1078 [2019]; *People v Reddick*, 175 AD3d 1788, 1789 [4th Dept 2019], *lv denied* 34 NY3d 1162 [2020]), and "nothing on the face of the record calls into question the voluntariness of the plea or casts significant doubt upon defendant's guilt" (*People v Karlsen*, 147 AD3d

1466, 1468 [4th Dept 2017], *lv denied* 29 NY3d 1082 [2017]; *see generally People v Lopez*, 71 NY2d 662, 666 [1988]).

Defendant's further contention that she was denied effective assistance of counsel does not survive her plea of guilty or her waiver of the right to appeal because she "failed to demonstrate that 'the plea bargaining process was infected by [the] allegedly ineffective assistance or that [s]he entered the plea because of [her] attorney['s] allegedly poor performance' " (*People v Lugg*, 108 AD3d 1074, 1075 [4th Dept 2013]; *see People v Babagana*, 176 AD3d 1627, 1627 [4th Dept 2019], *lv denied* 34 NY3d 1075 [2019]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

386

CAF 18-02178

PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF JAMES M. MULLEN, JR.,
PETITIONER-APPELLANT,

V   ORDER

JACKIE ELAINE MULLEN, RESPONDENT-RESPONDENT.

IN THE MATTER OF JAMES M. MULLEN, JR.,
PETITIONER-APPELLANT,

V

JACKIE ELAINE MULLEN, RESPONDENT-RESPONDENT.

IN THE MATTER OF DARCIE L. MASSUCCI,
PETITIONER-RESPONDENT,

V

JAMES M. MULLEN, JR., RESPONDENT-APPELLANT,
AND JACKIE ELAINE MULLEN, RESPONDENT-RESPONDENT.

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

PAUL A. NORTON, CLINTON, FOR RESPONDENT-RESPONDENT.

MARK P. MALAK, CLINTON, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered October 31, 2018 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded primary physical custody of one of the subject children to petitioner-respondent Darcie L. Massucci.

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

Entered: April 24, 2020   Mark W. Bennett
Clerk of the Court

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

387
CAF 18-01918
PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF CURTIS FLAKES,
PETITIONER-RESPONDENT,

V ORDER

SCHUMON JONES, RESPONDENT-APPELLANT.

ELIZABETH CIAMBRONE, BUFFALO, FOR RESPONDENT-APPELLANT.

STEINER & BLOTNIK, BUFFALO (MICHAEL M. BLOTNIK OF COUNSEL), FOR PETITIONER-RESPONDENT.

JOSEPH J. SCINTA, JR., ORCHARD PARK, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered August 23, 2018 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall have joint custody of the subject child.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

401
KA 16-01474
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V — ORDER

JOHNNELL N. WEBB, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANET C. SOMES 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 (Thomas R. Morse, A.J.), rendered July 12, 2016. The judgment convicted defendant, upon his plea of guilty, of rape in the second degree.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

404

KA 16-01831

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TASHJ Y. SIMPSON, ALSO KNOWN AS TAHJ SIMPSON,
DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered December 21, 2015. The judgment convicted defendant upon a nonjury verdict of robbery 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 following a nonjury trial of robbery in the second degree (Penal Law § 160.10 [2]), defendant contends that Supreme Court abused its discretion in refusing to grant him youthful offender status. Preliminarily, we note that defendant asserts that the court properly made an initial determination that he is an eligible youth pursuant to subdivisions two and three of CPL 720.10 (*cf. People v Lofton*, 29 NY3d 1097, 1098 [2017]; *People v Middlebrooks*, 25 NY3d 516, 524-526 [2015]). Inasmuch as defendant does not challenge that determination on this appeal, we do not address it.

Contrary to defendant's contention, the court did not abuse its discretion in refusing to grant defendant youthful offender status (*see People v Lang*, 178 AD3d 1362, 1363 [4th Dept 2019], *lv denied* 34 NY3d 1160 [2020]; *see generally People v Minemier*, 29 NY3d 414, 421 [2017]). Additionally, having reviewed the applicable factors pertinent to a youthful offender determination (*see People v Keith B.J.*, 158 AD3d 1160, 1160 [4th Dept 2018]), we decline to exercise our interest of justice jurisdiction to grant him such status (*see People v Macon*, 169 AD3d 1439, 1440 [4th Dept 2019], *lv denied* 33 NY3d 978 [2019]; *People v Lewis*, 128 AD3d 1400, 1400-1401 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]; *see also People v Lindsey*, 166 AD3d 1565,

1566 [4th Dept 2018], *lv denied* 32 NY3d 1206 [2019]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

405

KA 16-01503

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

OLASUNKANMI S. ADEJUMO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 21, 2016. The judgment convicted defendant, upon a plea of guilty, of attempted criminal possession of a forged instrument 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 of attempted criminal possession of a forged instrument in the second degree (Penal Law §§ 110.00, 170.25) upon his plea of guilty to a superior court information. Defendant contends that his written waiver of indictment was invalid because it did not state the approximate time of the offense for which he waived indictment. Because defendant's contention is that the indictment waiver form omitted "non-elemental factual information," that contention is "forfeited by [his] guilty plea" inasmuch as defendant "lodges no claim that he lacked notice of the precise crime[] for which he waived prosecution by indictment" (*People v Thomas*, — NY3d —, —, 2019 NY Slip Op 08545, *8 [2019]; *see People v Ramirez*, 180 AD3d 1378, 1378 [4th Dept 2020]).

Defendant further contends that his plea was rendered involuntary by County Court's alleged failure to advise him of the potential deportation consequences of his plea. We agree with defendant that his contention survives his waiver of the right to appeal (*see People v Roman*, 160 AD3d 1492, 1492 [4th Dept 2018]) and conclude that, under the circumstances presented here, defendant was required to preserve the issue for our review and did so by moving to vacate the judgment of conviction pursuant to CPL 440.10 (*see generally People v Conceicao*, 26 NY3d 375, 381 [2015]; *People v Peque*, 22 NY3d 168, 182-183 [2013], *cert denied* 574 US 840 [2014]; *People v Johnson*, 128 AD3d

1539, 1539 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]). Nevertheless, we reject defendant's contention. Courts "are to be afforded considerable latitude in stating the requisite advice" during the plea colloquy, and the record reflects that the court sufficiently "assure[d] itself that . . . defendant [knew] of the possibility of deportation prior to entering [his] guilty plea" (*Peque*, 22 NY3d at 197; *see People v Dealmeida*, 124 AD3d 1405, 1406 [4th Dept 2015]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

406

KA 18-00871

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES FENTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Yates County Court (Jason L. Cook, J.), rendered February 15, 2018. The judgment convicted defendant upon a jury verdict of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed on each count to a determinate term of 2½ years of imprisonment and three years of postrelease supervision, and as modified the judgment is affirmed and the matter is remitted to Yates County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]), defendant contends, inter alia, that his sentence is unduly harsh and severe. We agree. The evidence at trial established that defendant and his son sold $50 worth of cocaine to a police informant. At the time, defendant was 56 years old and his criminal record consisted of two misdemeanor convictions, both of which were for violating the Vehicle and Traffic Law. Defendant was not a known drug dealer and was not targeted by the police. Defendant's son, who had arranged the drug sale with the informant, pleaded guilty and was sentenced to probation. Having contested the charges at trial, defendant was sentenced to concurrent determinate terms of imprisonment of 7½ years, to be followed by a period of postrelease supervision. In light of the nonviolent nature of the crimes, defendant's age, and his minimal criminal history, we modify the judgment as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]) by reducing the

sentence on each count to a determinate term of imprisonment of 2½ years plus three years of postrelease supervision, with the sentences remaining concurrent.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

414
CA 19-02057
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

DEEPIKA REDDY, PLAINTIFF-APPELLANT,

V ORDER

GILLES R.R. ABITBOL, DEFENDANT-RESPONDENT.

DEEPIKA REDDY, PLAINTIFF-APPELLANT PRO SE.

GILLES R.R. ABITBOL, DEFENDANT-RESPONDENT PRO SE.

Appeal from an order of the Supreme Court, Onondaga County (Gregory R. Gilbert, J.), entered June 24, 2019. The order denied the motion of plaintiff to, inter alia, vacate an order dated December 7, 2018.

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: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

415
CA 16-02217
PRESENT: SMITH, J.P., CARNI, LINDLEY, CURRAN, AND DEJOSEPH, JJ.

NORA ALMONTASER, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF SELLAH
ALMONTASER, DECEASED, CLAIMANT-APPELLANT,

V ORDER

ROSWELL PARK CANCER INSTITUTE CORPORATION,
DOING BUSINESS AS ROSWELL PARK CANCER INSTITUTE,
DEFENDANT-RESPONDENT.
(CLAIM NO. 123266.)

PAUL WILLIAM BELTZ, P.C., BUFFALO (PHILIPP L. RIMMLER OF COUNSEL), FOR CLAIMANT-APPELLANT.

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

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered July 25, 2016. The order granted defendant's motion to compel claimant to produce less restrictive HIPPA compliant authorizations and a supplemental bill of particulars.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

432
KAH 18-02417
PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CURTIS MIDDLEBROOKS, PETITIONER-APPELLANT,

V ORDER

PAUL M. GONYEA, SUPERINTENDENT, MOHAWK
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered October 25, 2018 in a habeas corpus proceeding. The judgment, insofar as appealed from, denied the petition.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

433
CA 19-01198
PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

THEODORE NALBONE AND JENNIFER NALBONE,
PLAINTIFFS-RESPONDENTS,

V ORDER

VANDERBILT PROPERTIES, INC.,
ET AL., DEFENDANTS.

VANDERBILT PROPERTIES, INC., THIRD-PARTY
PLAINTIFF,

V

CMC CONCRETE, LLC, THIRD-PARTY DEFENDANT,
AND UNITED MATERIALS, THIRD-PARTY
DEFENDANT-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR THIRD-PARTY DEFENDANT-APPELLANT.

VIOLA, CUMMINGS & LINDSAY, LLP, NIAGARA FALLS (MICHAEL J. SKONEY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark A. Montour, J.), entered June 4, 2019. The order granted the motion of plaintiffs for leave to amend the summons and complaint to assert a direct cause of action against third-party defendant United Materials.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

437

CA 19-00505

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

IN THE MATTER OF THE APPLICATION OF
TERRY L.M., PETITIONER-APPELLANT,
FOR THE APPOINTMENT OF A GUARDIAN OF THE
PERSON OR PROPERTY OF MARY L.M.,
RESPONDENT-RESPONDENT. ORDER

CENTER FOR ELDER LAW & JUSTICE, RESPONDENT.
(APPEAL NO. 1.)

MATTHEW ALBERT, BUFFALO, FOR PETITIONER-APPELLANT.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (BRADLEY LOLIGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered March 14, 2019. The order, inter alia, authorized the sale of certain real property.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

438
CA 19-00506
PRESENT: CENTRA, J.P., NEMOYER, TROUTMAN, WINSLOW, AND BANNISTER, JJ.

IN THE MATTER OF THE APPLICATION OF
TERRY L.M., PETITIONER-APPELLANT,
FOR THE APPOINTMENT OF A GUARDIAN OF THE
PERSON OR PROPERTY OF MARY L.M.,
RESPONDENT-RESPONDENT. ORDER

CENTER FOR ELDER LAW & JUSTICE, RESPONDENT.
(APPEAL NO. 2.)

MATTHEW ALBERT, BUFFALO, FOR PETITIONER-APPELLANT.

CENTER FOR ELDER LAW & JUSTICE, BUFFALO (BRADLEY LOLIGER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a supplemental order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered March 15, 2019. The supplemental order, inter alia, authorized the sale of certain real property.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

454
KA 19-00164
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. SWEM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZUIBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered September 7, 2018. The judgment convicted defendant upon a jury verdict of murder in the second degree, assault in the first degree, assault in the second degree, criminal possession of a weapon in the third degree and tampering with physical evidence (two counts).

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon a jury verdict of, inter alia, murder in the second degree (Penal Law § 125.25 [1]) and assault in the second degree (§ 120.05 [1]). In appeal No. 2, defendant appeals from a resentence on one count. We dismiss the appeal from the resentence in appeal No. 2 inasmuch as defendant raises no contentions with respect thereto (*see People v Griffin*, 151 AD3d 1824, 1825 [4th Dept 2017], *lv denied* 30 NY3d 949 [2017]).

Contrary to defendant's contentions in appeal No. 1, we conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

We nevertheless agree with defendant and conclude that County Court erred in denying defendant's request for a circumstantial evidence instruction. The victim was stabbed five times at a crowded

house party where there were multiple ongoing fights, and the evidence established that the victim was involved in physical altercations with at least two other partygoers. One of the wounds was almost five inches deep, meaning that the blade of the knife must have been at least five inches long. None of the witnesses who observed defendant fighting with the victim observed anything in defendant's hand during the altercation, and no blood was discovered in the room in which defendant and the victim engaged in their altercation. All of the evidence at trial required the jury to infer that defendant was the perpetrator who had the knife and that he used that knife to stab the victim. We thus conclude that a circumstantial evidence instruction was warranted (*see People v Sanchez*, 61 NY2d 1022, 1023 [1984]; *People v Jones*, 105 AD3d 1059, 1060 [2d Dept 2013], *lv denied* 21 NY3d 1016 [2013]; *People v Lynch*, 309 AD2d 878, 878 [2d Dept 2003], *lv denied* 2 NY3d 742 [2004]; *cf. People v Lewis*, 300 AD2d 827, 828-829 [3d Dept 2002], *lv denied* 99 NY2d 630 [2003]; *People v Lawrence*, 186 AD2d 1016, 1016-1017 [4th Dept 1992], *lv denied* 81 NY2d 790 [1993]). Contrary to the People's contention, this is not "the exceptional case where the failure to give the circumstantial evidence charge was harmless error" (*People v Brian*, 84 NY2d 887, 889 [1994]; *see People v James*, 147 AD3d 1211, 1214 [3d Dept 2017], *lv denied* 29 NY3d 1128 [2017]; *cf. Jones*, 105 AD3d at 1060). We thus conclude that the judgment must be reversed and a new trial must be granted on counts one through six of the indictment. In light of our determination, we do not address defendant's remaining contentions.

Entered: April 24, 2020 Mark W. Bennett
Clerk of the Court

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

455
KA 19-01240
PRESENT: PERADOTTO, J.P., LINDLEY, NEMOYER, TROUTMAN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER M. SWEM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

CAITLIN M. CONNELLY, BUFFALO, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZUIBA OF COUNSEL), FOR RESPONDENT.

Appeal from a resentence of the Jefferson County Court (Kim H. Martusewicz, J.), rendered November 19, 2018. Defendant was resentenced upon his conviction of criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal is unanimously dismissed.

Same Memorandum as in *People v Swem* ([appeal No. 1] — AD3d — [Apr. 24, 2020] [4th Dept 2020]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

480

CAF 19-00425

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

IN THE MATTER OF JACIEON M. AND NYLANI R.

MONROE COUNTY DEPARTMENT OF HUMAN SERVICES,
PETITIONER-RESPONDENT;

ORDER

INDIA M., RESPONDENT,
AND MARKEEF R., RESPONDENT-APPELLANT.

PAUL B. WATKINS, FAIRPORT, FOR RESPONDENT-APPELLANT.

JOHN P. BRINGEWATT, COUNTY ATTORNEY, ROCHESTER (CAROL L. EISENMAN OF COUNSEL), FOR PETITIONER-RESPONDENT.

ALISON C. BATES, VICTOR, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Monroe County (Caroline E. Morrison, A.J.), entered February 13, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudged that respondent Markeef R. neglected the subject children.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

504
CAF 18-01947
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF LAURA B. RESKA, FORMERLY KNOWN AS LAURA B. KLINE, FORMERLY KNOWN AS LAURA B. AUSTIN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL P. BROWNE, RESPONDENT-RESPONDENT.

IN THE MATTER OF MICHAEL P. BROWNE, PETITIONER-RESPONDENT,

V

LAURA B. RESKA, RESPONDENT-APPELLANT.

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

VERA A. VENKOVA, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Tracey A. Kassman, R.), entered August 10, 2018 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded respondent-petitioner Michael P. Browne sole custody of the subject child.

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

Memorandum: Petitioner-respondent mother appeals from an order that, inter alia, modified a prior order of custody and visitation by awarding respondent-petitioner father sole custody of the subject child. We affirm for reasons stated in the "decision and order" at Family Court. We write only to address two additional points. First, the contention of the mother and the Attorney for the Child (AFC) "that the court violated [the mother's] constitutional rights is not preserved for our review" (*Matter of Brandon v King*, 137 AD3d 1727, 1729 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]; *see generally* CPLR 4017; *Matter of Lydia K.*, 112 AD2d 306, 307 [2d Dept 1985], *affd* 67 NY2d 681 [1986]), and we decline to address it in the interest of justice (*see Matter of Jeffrey T. v Julie B.*, 35 AD3d 1222, 1222 [4th Dept 2006]; *cf. Brandon*, 137 AD3d at 1729; *Matter of Beebe v Beebe*, 298 AD2d 843, 843-844 [4th Dept 2002]; *see generally Matter of Tamara Liz H.*, 300 AD2d 202, 203 [1st Dept 2002]). Second, to the extent

that the mother preserved her further contention, joined by the AFC, that the court erred in considering the mother's toxicology test results in its determination that her visitation should be supervised, we conclude that the contention lacks merit. Furthermore, we conclude that the court's determination to impose supervised visitation is supported by the requisite "sound and substantial basis in the record" (*Matter of Vasquez v Barfield*, 81 AD3d 1398, 1398 [4th Dept 2011] [internal quotation marks omitted]; *see Matter of Keen v Stephens*, 114 AD3d 1029, 1031 [3d Dept 2014]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

506
CAF 18-02324
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF MICHAEL S.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

CHARLE S., RESPONDENT-APPELLANT.

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

REBECCA HOFFMAN, BUFFALO, FOR PETITIONER-RESPONDENT.

JOHN L. TRIGILIO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered June 9, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights with respect to the subject child.

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

Memorandum: Respondent mother appeals from an order by which Family Court, inter alia, revoked a suspended judgment entered upon her admission that she had permanently neglected the subject child and terminated her parental rights with respect to that child. We affirm. There is a sound and substantial basis in the record to support the court's determination that the mother failed to comply with the terms of the suspended judgment and that the child's interests were best served by terminating the mother's parental rights (*see Matter of Zander L. [Athena L.]*, 162 AD3d 1671, 1672 [4th Dept 2018], *lv denied* 32 NY3d 907 [2018]; *Matter of Frederick MM.*, 23 AD3d 951, 953 [3d Dept 2005]; *see generally Matter of Amanda M. [George M.]*, 140 AD3d 1677, 1678 [4th Dept 2016]). Contrary to the mother's contention, "the fact that [she] may not have understood the reasoning for or agreed with the terms and conditions in the suspended judgment did not render such provisions anything less than compulsory" (*Matter of Michael HH. [Michael II.]*, 124 AD3d 944, 945 [3d Dept 2015]), and her constitutional challenges to the terms of the suspended judgment are unpreserved for appellate review (*see Matter of Jessica J.*, 44 AD3d 1132, 1133 [3d Dept 2007]; *Matter of Dutchess County Dept. of Social Servs. v Judy M.*, 227 AD2d 478, 479 [2d Dept 1996]). Finally, any error in excluding certain photographs was harmless because the photographs depicted a residence that the mother herself acknowledged was not an appropriate home (*see generally Matter of Neveah G.*

[Jahkeya A.], 156 AD3d 1340, 1341 [4th Dept 2017], *lv denied* 31 NY3d 907 [2018]).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

507
CAF 19-01086
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF JALYCE S., RIANA R., AND
SYNCERE R.

ONEIDA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

JEFFREY S.-B., RESPONDENT-APPELLANT.

MICHAEL JOHNSON, UTICA, FOR RESPONDENT-APPELLANT.

DEANA D. GATTARI, ROME, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered May 8, 2019 in a proceeding pursuant to Family Court Act article 10. The order, among other things, determined that respondent willfully and without just cause violated an order of disposition and sentenced him to 30 days in jail.

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

Memorandum: In this Family Court Act article 10 proceeding, respondent father appeals from an order determining that he willfully and without just cause violated an order of disposition in the underlying neglect proceeding by failing to engage in the required counseling services. We affirm.

Although the father does not dispute that he violated the order of disposition by failing to complete the required counseling, he contends that the violation was not willful because, during the relevant time period, he was intermittently incarcerated or on a waiting list for counseling services. Contrary to the father's contention, petitioner established by a preponderance of the evidence that the father willfully violated the order of disposition (*see Matter of Amariese L. [Tiffany N.]*, 137 AD3d 1750, 1751 [4th Dept 2016], *lv denied* 27 NY3d 910 [2016]; *Matter of Dashaun G. [Diana B.]*, 117 AD3d 1526, 1528 [4th Dept 2014], *lv dismissed* 24 NY3d 951 [2014]; *Matter of Aimee J.*, 34 AD3d 1350, 1350-1351 [4th Dept 2006]). Although the father's incarceration may have contributed to initial delays in completing counseling, we note that he was incarcerated as a result of his various violations of the order of disposition, including his alleged acts of domestic violence against the mother.

Further, the father’s own testimony demonstrated his lack of effort to re-engage in counseling services during the period of time between his brief incarceration in April 2018 and the filing of the motion by petitioner at the end of August 2018. Thus, we conclude that the record supports Family Court’s determination that petitioner met its burden of establishing by a preponderance of the evidence that the father willfully violated the terms of the order of disposition (*see generally* Family Ct Act § 1072 [b]; *Amariese L.*, 137 AD3d at 1751).

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

508
CA 19-01268
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF KEION PIERRE,
PETITIONER-APPELLANT,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL),
FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered May 24, 2019 in a CPLR article 78 proceeding. The judgment dismissed the petition.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

514
CA 19-00520
PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND CURRAN, JJ.

BRIAN S. RACHUNA, PLAINTIFF-APPELLANT,

V ORDER

SHAN HUANG AND LIFEN LI, DEFENDANTS-RESPONDENTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (THOMAS P. KOTRYS OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTOPHER G. FLOREALE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered January 7, 2019. The order denied the cross motion of plaintiff for leave to amend the summons and complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 20, 2020,

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

534

CA 19-01568

PRESENT: CENTRA, J.P., NEMOYER, CURRAN, AND WINSLOW, JJ.

MICHAEL J. CARLSON, SR., INDIVIDUALLY AND
AS ADMINISTRATOR OF THE ESTATE OF CLAUDIA
D'AGOSTINO CARLSON, DECEASED, AND AS ASSIGNEE
OF WILLIAM PORTER, PLAINTIFF-APPELLANT,

V ORDER

AMERICAN INTERNATIONAL GROUP, INC., AIG
DOMESTIC CLAIMS, INC., AMERICAN ALTERNATIVE
INSURANCE CO., NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, AND DHL EXPRESS
(USA), INC., FORMERLY KNOWN AS DHL WORLDWIDE
EXPRESS, INC., DEFENDANTS-RESPONDENTS.

BROWN CHIARI LLP, BUFFALO (TIMOTHY M. HUDSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (KEVIN D. SZCZEPANSKI OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AMERICAN INTERNATIONAL GROUP, INC., AIG DOMESTIC CLAIMS, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.

RUBIN, FIORELLA, FRIEDMAN & MERCANTE, LLP, NEW YORK CITY (PAUL KOVNER OF COUNSEL), FOR DEFENDANT-RESPONDENT AMERICAN ALTERNATIVE INSURANCE CO.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, NEW YORK CITY (PATRICK J. LAWLESS OF COUNSEL), FOR DEFENDANT-RESPONDENT DHL EXPRESS (USA), INC., FORMERLY KNOWN AS DHL WORLDWIDE EXPRESS, INC.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered February 6, 2019. The order granted the motions of defendants to dismiss the complaint.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

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

536
CA 19-00874
PRESENT: CENTRA, J.P., PERADOTTO, NEMOYER, CURRAN, AND WINSLOW, JJ.

RICHARD TIMMONS, CLAIMANT-APPELLANT,

V ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 131501.)

RICHARD TIMMONS, CLAIMANT-APPELLANT PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (OWEN DEMUTH OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered November 27, 2018. The order granted the motion of defendant to dismiss the claim and dismissed the claim.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court

548

CA 19-00900

PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

DAWN M. MILLER AND JASON R. MILLER,
PLAINTIFFS-APPELLANTS,

V   ORDER

CITY OF BUFFALO, CITY OF BUFFALO DEPARTMENT OF PUBLIC WORKS, CITY OF BUFFALO DIVISION OF PARKS AND RECREATION AND DOMINIC HASEK YOUTH HOCKEY LEAGUE, INC., DOING BUSINESS AS HASEK'S HEROES,
DEFENDANTS-RESPONDENTS.

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

GOLDBERG SEGALLA LLP, BUFFALO (MICHAEL E. APPELBAUM OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered March 5, 2019. The order granted the motion of defendants for summary judgment and dismissed the complaint.

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

Entered: April 24, 2020   Mark W. Bennett
Clerk of the Court

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

559
TP 19-02228
PRESENT: SMITH, J.P., TROUTMAN, WINSLOW, BANNISTER, AND DEJOSEPH, JJ.

IN THE MATTER OF NURI OZDEN, M.D., PETITIONER,

V   ORDER

SUNY UPSTATE MEDICAL UNIVERSITY AND MANTOSH
DEWAN, M.D., RESPONDENTS.

BOUSQUET HOLSTEIN, PLLC, SYRACUSE (LAWRENCE M. ORDWAY, JR., OF
COUNSEL), FOR PETITIONER.

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, Onondaga County [Anthony J. Paris, J.], entered October 25, 2019) to review a determination of respondents. The determination adopted a written recommendation by a Fair Hearing panel dated October 31, 2018 which upheld a decision of the Medical Executive Committee dated June 27, 2018 that, among other things, suspended petitioner for 29 days.

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

Entered: April 24, 2020

Mark W. Bennett
Clerk of the Court