SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JANUARY 3, 2014

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

1009

KA 10-01955

PRESENT: FAHEY, J.P., PERADOTTO, SCONIERS, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KHARYE JARVIS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Charles T. Maloy, J.), rendered October 28, 1992. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts).

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

Memorandum: Following a jury trial in 1991, defendant was convicted of two counts of murder in the second degree (Penal Law § 125.25 [1]), and we affirmed the judgment of conviction on direct appeal (*People v Jarvis*, 202 AD2d 1036, *lv denied* 83 NY2d 968). In 2012, defendant moved for a writ of error coram nobis in this Court, asserting that appellate counsel was ineffective in failing to raise an issue on direct appeal that would have resulted in reversal, i.e., failing to argue ineffective assistance of trial counsel. We granted the writ and vacated our prior order (*People v Jarvis*, 98 AD3d 1323, *lv denied* 20 NY3d 1012), and we now consider the appeal de novo. Defendant's sole contention is that he is entitled to a new trial because he was deprived of effective assistance of counsel. We agree.

The right to effective assistance of counsel is guaranteed by both the Federal and State Constitutions (US Const, 6th Amend; NY Const, art I, § 6). The constitutional requirement is met provided that 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 (*see People v Baldi*, 54 NY2d 137, 147). In reviewing claims of ineffective assistance of counsel, our concern is to avoid "confusing true ineffectiveness with mere losing tactics and according undue significance to retrospective analysis" (*id*. at 146). As long as there was a "reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, [the

representation] will not fall to the level of ineffective assistance" (*People v Benevento*, 91 NY2d 708, 712-713). It is " 'incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' " for counsel's alleged failures (*id*. at 712, quoting *People v Rivera*, 71 NY2d 705, 709; *see People v Roundtree*, 75 AD3d 1136, 1138, *lv denied* 15 NY3d 855). "[I]t is well settled that disagreement over trial strategy is not a basis for a determination of ineffective assistance of counsel" (*People v Dombrowski*, 94 AD3d 1416, 1417, *lv denied* 11 NY3d 924; *see People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852; *see generally Benevento*, 91 NY2d at 712-714). As the Court of Appeals recently observed, "[c]ounsel's performance must be evaluated to determine whether the tactics and strategies were consistent with . . . [t]he test [of] 'reasonable competence' " (*People v Oathout*, 21 NY3d 127, 128). While perfect representation is not required, "that test cannot be so weak as to deny a defendant adequate due process" (*id*. at 128-129).

In our view, defense counsel committed two serious errors that rendered his representation ineffective. The first error, which was sufficiently egregious by itself to deny defendant a fair trial, was defense counsel's inexplicable failure to object to testimony that he had successfully sought to preclude. Defense counsel obtained a ruling from County Court precluding the People, on their direct case, from questioning a certain prosecution witness about an alleged threat by defendant that he would shoot her if she "knew what happened" with respect to the murders herein. Nevertheless, defense counsel failed to object or move for a mistrial when the prosecutor, on the People's direct case, elicited that very testimony from the witness. We conclude that "defendant has demonstrated the absence of any strategic or other legitimate explanation for his attorney's" failure to object to the introduction of this prejudicial and previously precluded testimony (*People v Cleophus*, 81 AD3d 844, 846). Moreover, after defense counsel failed to object to the admission of that precluded testimony, the prosecutor continued to use that testimony to full advantage, arguing on summation that the threat to the prosecution witness "puts the [d]efendant [at the crime scene] just as easily as any person you saw in there" (*People v Webb*, 90 AD3d 1563, 1564-1565, *amended* 92 AD3d 1268). Defense counsel's error in failing to object to the testimony of the prosecution witness "simply cannot be construed as a misguided though reasonably plausible strategy decision" (*id*. at 1564; *see People v Jeannot*, 59 AD3d 737, 737, *lv denied* 12 NY3d 916; *People v Ofunniyin*, 114 AD2d 1045, 1046-1047), and " 'is sufficiently serious to have deprived defendant of a fair trial' " (*Webb*, 90 AD3d at 1564).

Compounding the above error was defense counsel's use of a flawed alibi defense. "[I]t is generally acknowledged that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt" (*Henry v Poole*, 409 F3d 48, 65, *cert denied* 547 US 1040 [internal quotation marks omitted]). " 'If the prosecution can establish the falsity of an alibi . . . , [a defendant's] case is as good as lost' " (*id*.). Here, the subject murders occurred at approximately 1:20 a.m. on Tuesday, June 4, 1991. Two alibi witnesses, defendant's girlfriend and her mother, testified

to defendant's whereabouts on the evening of June 3rd and the early morning hours of June 4th, but incorrectly identified the days of the week on which those dates fell. After the mother first incorrectly identified June 4th as a Friday on direct examination, defense counsel compounded her error by asking, "Ten minutes to two Friday morning? That would have been June 4th?," to which the mother responded, "Yes." On cross-examination, the mother testified that defendant was at her home on the evening of Friday, June 3rd, and that the following day was Saturday, June 4th. The prosecutor further emphasized the mother's mistake by asking her about other events that occurred on those days, including a television show that she watched on Friday night and a birthday party for her twin granddaughters held that Saturday. On rebuttal, the People called a witness who established that the subject television program did in fact air on Friday night and not Monday night. The cross-examination of defendant's girlfriend with respect to defendant's alibi also established the girlfriend's mistaken belief that June 3rd was a Friday and that June 4th was a Saturday. The court granted the People's request to take judicial notice of the fact that June 3, 1991 was a Monday and June 4, 1991 was a Tuesday, which further highlighted for the jury that defendant's alibi witnesses had given erroneous testimony. We note, too, that the People took full advantage of the poorly-presented alibi defense during summation, denigrating it as a "Hollywood charade."

Presenting an alibi defense for the wrong date or time has been found, by itself, to constitute ineffective assistance of counsel (*see People v Cabrera*, 234 AD2d 557, 558; *People v Long*, 81 AD2d 521, 521-522; *see also Henry*, 409 F3d at 65-66). We conclude that presenting an alibi defense for the wrong day of the week, as occurred here, similarly constitutes ineffective assistance of counsel inasmuch as offering patently erroneous alibi testimony cannot be construed as a plausible strategy (*see Webb*, 90 AD3d at 1564).

In light of the two serious errors of defense counsel, we reverse the judgment of conviction and grant a new trial.

All concur except VALENTINO and WHALEN, JJ., who dissent and vote to affirm in the following Memorandum: We respectfully dissent. We disagree with the majority's conclusion that defendant was deprived of effective assistance of counsel, and we therefore would affirm the judgment of conviction.

First, we cannot agree with the majority that defense counsel was ineffective for failing to object when the prosecutor elicited testimony from a certain prosecution witness that defendant threatened her, despite County Court's pretrial ruling precluding such testimony. In our view, defendant failed to meet his burden of establishing the absence of a strategic or other legitimate explanation for defense counsel's failure to object to that testimony (*see People v Benevento*, 91 NY2d 708, 712; *People v Rivera*, 71 NY2d 705, 709; *see also People v Baker*, 14 NY3d 266, 270-271; *People v Atkins*, 107 AD3d 1465, 1465, *lv denied* 21 NY3d 1040). For instance, defense counsel may have decided not to object in order to avoid focusing the jury's attention on the testimony of the witness (*see People v Taylor*, 1 NY3d 174, 177); he

may have sought to use the testimony of the witness to defendant's advantage by calling attention to her inability to recall the threat, rather than requesting that the court strike her testimony and give a curative instruction; or, he may have made a tactical decision to allow the prosecutor to elicit testimony concerning the threat on direct examination rather than on rebuttal, if defense counsel suspected that he might be forced to open the door to the testimony on cross-examination of the witness.

We further disagree with the majority's conclusion that defendant met his burden of establishing the absence of strategic or other legitimate explanations for defense counsel's decision to present an alibi defense through the testimony of defendant's girlfriend and mother (*see generally Benevento*, 91 NY2d at 712). We conclude that the cases relied upon by the majority—*People v Cabrera* (234 AD2d 557, 558) and *People v Long* (81 AD2d 521, 521-522)—do not compel reversal in the instant case. In those cases, the alibi witnesses testified to being with the respective defendants 18 to 24 hours after the time of the crimes therein. Consequently, in each case, the attorney for the defendant knew that such alibi testimony was not probative on the issue of defendant's innocence.

Here, defense counsel called three witnesses whose testimony on direct examination established an alibi for defendant for the time of the crime. On cross-examination, the prosecutor showed a single discrepancy in the alibi defense, i.e., that the television show that defendant was purportedly watching, according to the testimony of one of the three alibi witnesses, was not airing at the time that the witness specified. We note, however, that the remaining two alibi witnesses did not tie their testimony to the television show. Thus, in our view, the prosecutor did not conclusively establish that the alibi was false; rather, that was an issue for the jury to resolve. Given those circumstances, we cannot conclude that defense counsel's presentation of the alibi defense through the three alibi witnesses constitutes ineffective assistance of counsel (*see People v Johnson*, 30 AD3d 1042, 1043, *lv denied* 7 NY3d 790, *reconsideration denied* 7 NY3d 902; *People v Channer*, 222 AD2d 1023, 1023). Under the majority's analysis, defense counsel would have to be prescient to know that the prosecutor was going to cross-examine one of the witnesses with respect to the television show and then establish that the witness was incorrect about the time that it aired. We refuse to hold defense counsel to such a standard.

Defense counsel's otherwise impressive representation contradicts defendant's contention that he was denied effective assistance of counsel. Defense counsel thoroughly cross-examined the witnesses and presented a unified defense theory, with the result that the jury was compelled to deliberate for an extended period of time despite strong

evidence incriminating defendant.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1077

KA 12-00996

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. KOONS, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 18, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Steuben County Court for further proceedings in accordance with the following Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the second degree (Penal Law § 130.45 [1]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of attempted rape in the second degree (§§ 110.00, 130.30 [1]). In both appeals, defendant contends, inter alia, that County Court abused its discretion in failing to adjudicate him a youthful offender. Defendant, an apparently eligible youth (*see* CPL 720.10 [2]), pleaded guilty pursuant to a plea bargain that provided, among other things, that he would be sentenced to concurrent terms of probation if he successfully completed a period of interim probation, but would be sentenced to a term of incarceration in state prison with a term of postrelease supervision if he did not. Defendant was released on his own recognizance, subject to the terms of the interim probation. The court subsequently determined, after a hearing, that defendant had violated the terms of his interim probation and sentenced him to a term of incarceration in state prison, without determining whether defendant would be granted youthful offender status.

"Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). The Court of Appeals has

concluded that, by the use of the word "must," the legislature has made "a policy choice that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" (*People v Rudolph*, 21 NY3d 497, 501). "[W]e cannot deem the court's failure to rule on the . . . [issue] as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *see People v Ingram*, 18 NY3d 948, 949; *People v Chattley*, 89 AD3d 1557, 1558). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

All concur except WHALEN, J., who dissents and votes to affirm in the following Memorandum: I respectfully dissent and would affirm. I cannot agree with the majority that *People v Rudolph* (21 NY3d 497) requires this Court to remit this case to County Court for a youthful offender determination. Rather, I conclude that the sentencing court determined that defendant was not a youthful offender and did not abuse its discretion in doing so.

In *Rudolph*, the majority noted that CPL 720.20 (1) requires that "where a defendant is eligible to be treated as a youthful offender, the sentencing court 'must' determine whether he or she is to be so treated" (21 NY3d at 499). The majority held that the use of the word " 'must' " in the statute reflected "a policy choice that there be a youthful offender determination in every case where the defendant is eligible, even where the defendant fails to request it, or agrees to forgo it as part of a plea bargain" (*id.* at 501). Thus, the Court overruled its previous decision in *People v McGowen* (42 NY2d 905) (*see id.* at 499).

Here, when imposing the term of interim probation supervision, the court explicitly informed defendant that, if he violated the terms and conditions of the interim probation supervision, the court would sentence him as an adult and would not adjudicate him a youthful offender. After finding that defendant had violated the terms and conditions of his interim probation supervision, the court stated when sentencing defendant that defendant previously had been adjudicated a youthful offender on two occasions, but that his sentence of probation had been revoked in each instance. The court then determined that, based on that and other circumstances, "the promised sentence is appropriate here."

In my view, the court's statement at sentencing that the "promised sentence" was appropriate was sufficient to satisfy the mandate of the Court of Appeals in *Rudolph* that the sentencing court make a youthful offender determination on the record. The majority in *Rudolph* did not hold that the sentencing court must use the words "youthful offender" or invoke any other particular phrase but, rather, the majority held that "the court must make the decision in every case" (21 NY3d at 501). At sentencing, the court noted multiple factors that supported its decision to refuse to adjudicate defendant a youthful offender before stating that "the promised sentence is

appropriate here." I therefore conclude that defendant received that to which he was entitled under the interpretation of CPL 720.20 by the Court of Appeals in *Rudolph*, i.e., "consideration by the sentencing court of whether youthful offender treatment is appropriate or not" (*id.* at 503).

I otherwise conclude that the court properly determined that defendant violated the terms and conditions of his interim probation supervision and that defendant was afforded due process. Because I conclude that the court determined that defendant should not be adjudicated a youthful offender, I further address defendant's contention that the determination was an abuse of discretion. I reject that contention, and I would not exercise this Court's interest of justice jurisdiction to make that adjudication (*see People v Jones*, 107 AD3d 1589, 1590, *lv denied* 21 NY3d 1075; *People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961). I would therefore affirm the judgment.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1078

KA 12-00997

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHEYENNE J. KOONS, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

ROSEMARIE RICHARDS, SOUTH NEW BERLIN, FOR DEFENDANT-APPELLANT.

BROOKS T. BAKER, DISTRICT ATTORNEY, BATH (AMANDA M. CHAFEE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered February 18, 2011. The judgment convicted defendant, upon his plea of guilty, of attempted rape in the second degree.

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

Same Memorandum as in *People v Koons* ([appeal No. 1] ___ AD3d ___ [Jan. 3, 2014]).

All concur except WHALEN, J., who dissents and votes to affirm in accordance with the same dissenting Memorandum as in *People v Koons* ([appeal No. 1] ___ AD3d ___ [Jan. 3, 2014]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1086

CA 13-00579

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

MICHELLE PULVER, PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF FULTON DEPARTMENT OF PUBLIC WORKS AND
CITY OF FULTON, DEFENDANTS-APPELLANTS-RESPONDENTS.

GOLDBERG SEGALLA LLP, SYRACUSE (LISA M. ROBINSON OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KENNY & KENNY, PLLC, SYRACUSE (MICHAEL P. KENNY OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered October 31, 2012 in a personal injury action. The order denied the motion of defendants for summary judgment dismissing the complaint and the cross motion of plaintiff for partial summary judgment on liability.

It is hereby ORDERED that the order so appealed from is modified on the law by granting the motion and dismissing the complaint and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when she tripped and fell in a hole in the grassy area between the curb and the paved portion of the sidewalk. The hole was covered with a piece of plywood and was located adjacent to a catch basin that was part of the storm water drainage system owned and maintained by defendant City of Fulton (City). Defendants moved for summary judgment dismissing the complaint, and plaintiff cross-moved for partial summary judgment on liability. Supreme Court denied the motion and cross motion, determining that plaintiff failed to provide the City with the requisite prior written notice of the danger presented by the hole, but that there are issues of fact whether the City engaged in affirmative acts of negligence. This appeal and cross appeal ensued.

We conclude that the court erred in denying defendants' motion, and we therefore modify the order accordingly. Contrary to plaintiff's contention, the court properly determined that the City's prior written notice requirement applies inasmuch as the area where the accident occurred is part of the sidewalk (*see Castiglione v Village of Ellenville*, 291 AD2d 769, 770, *lv denied* 98 NY2d 604; *Hall v City of Syracuse*, 275 AD2d 1022, 1023; *see also Gallo v Town of*

Hempstead, 124 AD2d 700, 700). Because the City established in support of its motion that it did not receive prior written notice, the burden shifted to plaintiff to demonstrate the applicability of an exception to that requirement (*see Yarborough v City of New York*, 10 NY3d 726, 728). We agree with defendants that the court erred in determining that plaintiff met that burden by establishing that such an exception applies, i.e., that the City was affirmatively negligent (*see id.*). Although plaintiff submitted a preaccident "work order" to the City for the location in question, she failed to adduce any evidence that the City placed the plywood over the hole in which she fell. Further, the City established that, in response to the "work order," it dispatched an employee who testified that he inspected the area in question, found nothing wrong with it, and performed no work. Thus, plaintiff failed to raise an issue of fact "whether the City created a defective condition within the meaning of the exception" to defeat defendants' motion (*id.*).

We disagree with our dissenting colleague's interpretation of deposition testimony from a City Councilman with respect to which City department may have placed the plywood over the hole. In our view, a reading of the City Councilman's entire testimony on that subject and in context establishes that the City Councilman had no personal knowledge of any repair and was simply speculating about which City department, theoretically, would be responsible for such a repair. Indeed, the City Councilman characterized his testimony on the latter point as a "guess." Although the City Councilman submitted an errata sheet making certain corrections in his testimony with respect to the proper street address where the hole was located, we note that any factual discrepancy between his testimony and the corrections is irrelevant to our conclusion that he lacked personal knowledge of the repair and could offer only speculative testimony with respect to who placed the plywood over the hole.

Unlike our dissenting colleague, we cannot conclude that the deposition testimony of plaintiff's son aided plaintiff in raising an issue of fact whether the City placed plywood over the hole. Plaintiff's son admitted that he could not be sure whether the workers he saw at the intersection were employees of the City or Niagara Mohawk. Notably, he testified that he observed a worker engaged in repairing an overhead power line using a truck with a boom or lift to work at an elevated height. In any event, he further admitted that he could not "tell the difference" between the two types of workers. Given such testimony, a factual finding with respect to whom plaintiff's son observed at the intersection would necessarily be based on speculation (*see generally Bernstein v City of New York*, 69 NY2d 1020, 1021; *Fernandez v Allstate Ins. Co.*, 305 AD2d 1065, 1066).

In contrast to the above speculative testimony, the City produced a witness with personal knowledge, i.e., the City employee who responded to the "work order" prior to the accident and whose onsite inspection revealed that there was no defect or hole in front of plaintiff's property—the address on the face of the "work order." Both plaintiff and our dissenting colleague ignore that dispositive

testimony.

The dissent's theory, based on a lengthy chain of inferences concerning the City's alleged use of the plywood as a temporary measure until the weather improved in the spring, is unpersuasive. The City's wastewater and sanitary sewer collections systems supervisor testified that covering a hole with a piece of plywood is an "improper" practice, which he had never utilized or seen utilized. The City Commissioner of Public Works testified that the City's "standard practice" in making temporary repairs of catch basin defects was to use a steel plate and that it was not his Department's policy to use plywood.

Lastly, we consider our dissenting colleague's reliance on the deposition testimony of plaintiff's neighbors to be misplaced. In our view, neither neighbor's testimony raised an issue of fact whether the City placed the plywood over the hole. Contrary to the dissent's statement that someone observed a cone from the City Department of Public Works in the hole, we note that one neighbor simply stated that "a cone" was in the hole, and the other stated that it was the type of cone that "everyone uses." Neither neighbor testified that the cone belonged to the City or that a City employee placed the cone. In any event, plaintiff does not claim that placing a cone was an affirmative act of negligence.

All concur except WHALEN, J., who dissents in part and votes to affirm in the following Memorandum: I respectfully dissent in part because I cannot agree with the majority's conclusion that Supreme Court should have granted defendants' motion for summary judgment dismissing the complaint. Rather, I would affirm the order.

I agree with the majority that defendants met their initial burden of establishing that defendant City of Fulton (City) did not receive prior written notice of the danger presented by the hole, and that the burden therefore shifted to plaintiff to raise an issue of fact "whether the City created a defective condition within the meaning of the [affirmative act] exception" (*Yarborough v City of New York*, 10 NY3d 726, 728). I disagree with the majority's conclusion, however, that plaintiff failed to raise an issue of fact whether the City directed that the plywood be placed over the hole, thereby creating a defective condition. " 'When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination . . . and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact' " (*Esposito v Wright*, 28 AD3d 1142, 1143; *see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941).

Here, the City Councilman who placed the work order for the location in question testified at his deposition that he later observed the hole at that location covered with plywood. When asked if he knew who had placed the plywood over the hole, the City

Councilman stated that it would have been an employee of one of two City departments. In addition, the City Councilman's testimony that repairing the hole was delayed until the following spring because the surrounding intersection "was going to be redone," combined with the testimony of the City's commissioner of public works that he had never seen a hole like the one at issue repaired with a piece of plywood, permits the inference that the City placed the plywood over the hole as a temporary measure until the weather improved in the spring, and a permanent repair could be undertaken. Although the City Councilman subsequently called into question in an errata sheet appended to his deposition whether his testimony concerned the hole in which plaintiff was injured, or another hole across the street therefrom, I conclude that "[t]he conflict between [his] original deposition testimony . . . and the corrections he submitted in the errata sheet[] raise[] an issue of credibility which [can]not be resolved on the [instant] motion for summary judgment" (*Nye v Putnam Nursing & Rehabilitation Ctr.*, 62 AD3d 767, 768), particularly in light of the fact that the City Councilman's work order was never amended to reflect an address other than that for the location where plaintiff was injured.

Additionally, plaintiff's son testified at his deposition that "city workers" placed the plywood over the hole, although he conceded that it could have been employees of Niagara Mohawk, and according to the deposition testimony of plaintiff's neighbors, they saw a cone from the City's Department of Public Works "upside down inside" the hole and, later, a piece of plywood over the hole. Giving plaintiff the benefit of every reasonable favorable inference (*see Esposito*, 28 AD3d at 1143), I conclude that the above evidence raises an issue of fact whether the City directed that the plywood be placed over the hole (*see Yarborough*, 10 NY3d at 728; *Esposito*, 28 AD3d at 1143), thereby creating a defective condition by an act of affirmative negligence (*see Yarborough*, 10 NY3d at 728). I therefore would affirm the order.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1090

KA 09-02474

PRESENT: FAHEY, J.P., PERADOTTO, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAFARI LAMONT, DEFENDANT-APPELLANT.

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

JAFARI LAMONT, DEFENDANT-APPELLANT PRO SE.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ERIN TUBBS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered August 3, 2009. The judgment convicted defendant, upon a nonjury verdict, of attempted robbery in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of two counts of attempted robbery in the second degree (Penal Law §§ 110.00, 160.10 [1], [2] [b]), defendant contends that the evidence is legally insufficient to establish that he intended to steal property forcibly from another person, and that the verdict in that regard is against the weight of the evidence. We reject those contentions. The relevant facts are not in dispute. At approximately 6:30 a.m. on November 1, 2008, an employee of a Wendy's restaurant in Rochester was preparing food for the day when he heard the sound of knocking at the back door, which is not used by the general public. The restaurant was closed at the time. When the employee looked at the security camera, he observed two men outside "banging" on the back door. Both men wore masks and appeared to be brandishing handguns. The employee called 911, and a police officer was dispatched to the scene.

When the officer arrived at the back of the restaurant in a marked patrol vehicle, he observed two men hiding behind a stack of crates. As the officer began to exit his vehicle, the men emerged from behind the crates. One of the men, later identified as defendant, ran directly toward the officer with his gun pointed at the officer, while the other man ran in the opposite direction. Defendant

was wearing a black mask over his face, a black knit hat and black gloves. The officer pursued defendant and, with the assistance of the K-9 unit, found him hiding between two nearby buildings. Defendant had a backpack that contained clothing but no gun. The police later found a black BB gun in the grass behind the restaurant near the location where the men were hiding. The police also found a vehicle registered to defendant in a parking lot next to the restaurant, and they found a pellet gun inside the vehicle. Defendant's companion was never apprehended.

The indictment charged defendant with two counts of attempted robbery in the second degree and two counts of attempted burglary in the second degree. Both counts of attempted robbery alleged, inter alia, that defendant "attempted to forcibly steal property from an employee of the Wendy's restaurant." At trial, the parties stipulated to the introduction in evidence of the footage from the store security camera, which showed two masked men knocking at the back door and holding pistols. The parties further stipulated that defendant was the masked man who ran toward the responding officer and was later apprehended. The three employees of Wendy's who were working that morning testified that they did not know defendant. County Court convicted defendant of both attempted robbery counts and acquitted him of the attempted burglary counts.

Although defendant concedes that he and his companion "may have been up to no good with their masks and BB guns when they knocked on the door," he contends that the People failed to prove beyond a reasonable doubt that they intended to commit a robbery as opposed to some other crime, such as murder, kidnapping, rape or assault, and thus that the evidence is legally insufficient to support the conviction. We reject that contention. "Because intent is an invisible operation of the mind . . . , direct evidence is rarely available (in the absence of an admission) and is unnecessary where there is legally sufficient circumstantial evidence of intent," which may be inferred from defendant's conduct and the surrounding circumstances (*People v Rodriguez*, 17 NY3d 486, 489 [internal quotation marks omitted]). Here, it may reasonably be inferred from defendant's conduct and the surrounding circumstances that he intended to steal property forcibly from an employee of Wendy's.

Although defendant's mere entry into a store with a gun does not "unequivocally establish that he intended to commit a robbery" (*People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010), the evidence also established that none of the Wendy's employees knew defendant; the restaurant was not open to the public when defendant sought entry; defendant and his accomplice were armed with BB guns that appeared to be firearms; defendant and his accomplice wore masks and gloves; and defendant had a backpack into which stolen property could be put. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a " 'valid line of reasoning and permissible inferences [that] could lead a rational person' " to the conclusion reached by the trial court, i.e., that defendant was trying to gain entry into the restaurant with the intent to steal property forcibly from someone

inside (*People v Hines*, 97 NY2d 56, 62, *rearg denied* 97 NY2d 678). Furthermore, viewing the evidence in light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Although it is possible, as defendant contends, that he intended to commit a crime other than robbery, e.g., murder, kidnapping, rape or assault, we conclude that there is "not a reasonable possibility" that he intended to do so (*Bracey*, 41 NY2d at 303). Because the only weapons possessed by defendant and his accomplice were BB guns, it is not reasonable to infer that they intended to murder anyone inside the restaurant. Similarly, in the absence of evidence that defendant or his accomplice knew any of the Wendy's employees, it is not reasonable to infer that they intended to assault one or more of the employees. Indeed, "[i]n order to find that the defendant[] intended a personal assault . . . under these circumstances, the [trier of fact] would have to resort to sheer speculation" (*id.* at 302). Nor is it reasonable to infer that defendant intended to rape or kidnap someone in the restaurant. The only reasonable inference to be drawn is that defendant was attempting to gain entry to the restaurant so that he could rob someone.

Finally, we reject defendant's contention in his pro se supplemental brief that he was deprived of effective assistance of counsel because his trial attorney failed to object to the verdict as being repugnant. Even assuming, arguendo, that it was factually illogical for defendant to have committed attempted robbery in the second degree but not attempted burglary in the second degree, we conclude that it was not legally or theoretically impossible (*see People v Muhammad*, 17 NY3d 532, 545; *People v McFadden*, 90 AD3d 413, 414, *lv denied* 18 NY3d 995), inasmuch as the acquittal on the attempted burglary charges was not "conclusive as to a necessary element" of the attempted robbery charges (*People v Tucker*, 55 NY2d 1, 7). Where, as here, "there is a possible theory under which a split verdict could be legally permissible, it cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case" (*Muhammad*, 17 NY3d at 540).

All concur except FAHEY, J.P., and PERADOTTO, J., who dissent and vote to reverse the judgment in accordance with the following Memorandum: We respectfully dissent because, in our view, the evidence is legally insufficient to support defendant's conviction of attempted robbery in the second degree beyond a reasonable doubt (Penal Law §§ 100.00, 160.10 [1], [2] [b]). We would therefore reverse the judgment and dismiss the indictment.

It is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense" (*Jackson v Virginia*, 443 US 307, 316, *reh denied* 444 US 890). "An indispensable element of the crime of attempted robbery is an intent to forcibly

steal property" (*People v Mateo*, 13 AD3d 987, 988, *lv denied* 5 NY3d 883; *see* Penal Law § 160.00; *People v Pagan*, 81 AD3d 86, 91, *affd* 19 NY3d 91; *People v Miller*, 87 NY2d 211, 214). Thus, unlike, for example, an attempted burglary conviction (*see People v Mahboubian*, 74 NY2d 174, 193), "[a] conviction of [attempted] robbery cannot stand without proof of specific intent to steal" (*People v DeJesus*, 123 AD2d 563, 564, *lv denied* 69 NY2d 745; *see People v Morales*, 130 AD2d 366, 367-368). Further, "[t]he use [or threatened use] of force alone is not evidence of an intention to steal" (*People v Rivera*, 184 AD2d 288, 291, *appeal dismissed* 81 NY2d 758).

Here, we conclude that the evidence is legally insufficient to establish beyond a reasonable doubt that defendant specifically intended to commit robbery as charged in the indictment, i.e., that he intended to "forcibly steal property from an employee of the Wendy's restaurant," as opposed to any number of other crimes or misdeeds (*see Mateo*, 13 AD3d at 988; *People v Sharpe*, 222 AD2d 534, 534; *People v Lopez*, 58 AD2d 516, 516). Unlike many attempted robbery cases, here there is no post-arrest admission by defendant or his unidentified companion that their acts were committed with a specific criminal purpose (*see People v Bracey*, 41 NY2d 296, 301, *rearg denied* 41 NY2d 1010*; cf. People v Montanez*, 57 AD3d 1366, 1367, *lv denied* 12 NY3d 857; *People v Stewart*, 174 AD2d 583, 584, *lv denied* 78 NY2d 1081). In some cases intent may be inferred from the act itself; however, "in many, if not most attempt cases, it will not be possible to look only at the act and its natural consequences to discover intent since by definition of a criminal attempt the ultimate consequences do not ensue" (*Bracey*, 41 NY2d at 301 [internal quotation marks omitted]). Here, the fact that defendant and his companion in this case knocked on the door of a closed restaurant while armed with handguns and wearing masks "does not unequivocally establish that [they] intended to commit a robbery" (*id.*). While it is quite unlikely that their intentions were innocent, defendant and his companion may have intended, for example, to kidnap, rape, assault, or menace an employee of the restaurant, or to gain entry to the restaurant to commit some other crime or mischief therein (*see id.*; *see generally Mateo*, 13 AD3d at 988; *Matter of Amar A.*, 172 AD2d 426, 426, *lv denied* 79 NY2d 751). "The act does not speak for itself, as it rarely will in the case of criminal attempt" (*Bracey*, 41 NY2d at 301).

Of course, "intent [may] also 'be inferred from the defendant's conduct and the surrounding circumstances' " (*id.*; *see People v Steinberg*, 79 NY2d 673, 682; *People v Durden*, 219 AD2d 605, 606, *lv denied* 87 NY2d 900). In *Bracey* (41 NY2d at 301), upon which the majority relies, the Court of Appeals noted that the fact that one of the defendants "entered a stationery store with a gun in his hand [did] not unequivocally establish that he intended to commit a robbery." The Court concluded, however, that the conduct of the defendants, coupled with the surrounding circumstances, was sufficient to establish their intent to commit robbery (*id.* at 301-302). Of critical importance in *Bracey* were the defendants' actions *before* one of the defendants entered the store brandishing a gun (*see id.* at 297-299, 302). Prior to that point in time, the defendants entered the

store together, cased the area, and purchased a token amount of candy (*id.* at 297). They then left the store, walked around the corner, came back toward the store, and again turned around and walked in the opposite direction (*id.*). Thereafter, they approached a car parked nearby and one of the defendants, who was holding a canvas shoulder bag, entered the car and handed the bag to the other defendant (*id.*). That defendant returned to the store with the bag, from which he later withdrew the gun (*id.* at 297-298). Under those circumstances, the Court concluded that "the jury could well find that the defendants, who acted together throughout, had reconnoitered the store and returned to rob it. In fact the only thing that could have made this intention plainer was an actual demand for money" (*id.* at 301).

Here, by contrast, the evidence established only that defendant and a companion knocked on the back door to Wendy's, and that they possessed what appeared to be handguns. There is no evidence of preparation or prior coordination on the part of defendant and his companion, no statements by defendant or his companion that evidence an intent to steal property, and no actions by either individual that specifically reflect a larcenous intent as opposed to general criminal intent (*see Mateo*, 13 AD3d at 988; *Amar A.*, 172 AD2d at 426). The fact that defendant fled upon the arrival of the police does not add anything to the proof relative to his specific intent. Although evidence of flight from the police may very well indicate guilt on the part of the fleeing suspect (*see generally People v Reynolds*, 269 AD2d 735, 736, *lv denied* 95 NY2d 838, *cert denied* 531 US 945), it does not tend to establish an intent to commit a specific crime. Further, when defendant was taken into custody, he was not found in possession of any items relevant to criminal intent; the police testified that his backpack contained clothing only. In our view, defendant's "robbery conviction may not rest on so deficient an evidentiary foundation" (*DeJesus*, 123 AD2d at 564; *cf. People v Bryant*, 36 AD3d 517, 518, *lv denied* 8 NY3d 944; *People v Wilson*, 10 AD3d 460, 461, *lv denied* 3 NY3d 743; *People v Tavares*, 235 AD2d 325, 326; *People v Harris*, 191 AD2d 643, 643-644, *lv denied* 81 NY2d 1014).

The majority concludes that "there is 'not a reasonable possibility' that [defendant] intended to" commit a crime other than robbery because, inter alia, there is no evidence that "defendant *or his accomplice* knew any of the Wendy's employees" (emphasis added). We note, however, that none of the three employees testified that they did not recognize defendant; they testified only that they did not know an individual by the name of Jafari Lamont. More significantly, because defendant's companion was wearing a mask at the time of the alleged robbery and was never apprehended or identified, we have no idea whether the companion knew one or more of the employees inside the restaurant that morning. Further, even if we concede (and we do not) that it is more probable than not that defendant and his companion were attempting to commit robbery, that is insufficient to sustain a criminal conviction (*see generally Jackson*, 443 US at 315-316).

In sum, we conclude that the evidence is legally insufficient to establish beyond a reasonable doubt that defendant intended to steal

property from an employee of Wendy's (*see Mateo*, 13 AD3d at 988*; People v D'Agostino*, 266 AD2d 227, 228, *lv denied* 94 NY2d 918; *Sharpe*, 222 AD2d at 534). Alternatively, we conclude that County Court's determination in this nonjury trial that the evidence presented by the People established defendant's larcenous intent is against the weight of the evidence (*see People v Farkas*, 96 AD3d 873, 874-875; *People v Farrell*, 61 AD3d 696, 697). We would therefore reverse the judgment, dismiss the indictment, and remit the matter to County Court for proceedings pursuant to CPL 470.45.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1124

CA 13-00207

PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, SCONIERS, AND WHALEN, JJ.

NANCY E. CLARK, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TIFFANY AQUINO, DEFENDANT-RESPONDENT.

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

MURA & STORM, PLLC, BUFFALO (KRIS E. LAWRENCE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 9, 2012 in a personal injury action. The order, among other things, granted the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the cross motion is denied and the complaint is reinstated.

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when the vehicle she was driving was struck by a vehicle operated by defendant. In her bill of particulars, plaintiff alleged that, as a result of the accident, she sustained a serious injury under the permanent consequential limitation of use, significant limitation of use, and 90/180-day categories set forth in Insurance Law § 5102 (d). We agree with plaintiff that Supreme Court erred in granting defendant's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a qualifying injury under any of those categories.

With respect to plaintiff's alleged preexisting condition, defendant failed to meet her initial burden by submitting persuasive evidence establishing that plaintiff's " 'alleged injuries sustained in the accident were preexisting' . . . or, if they were, that they were not exacerbated by the accident" (*Schreiber v Krehbiel*, 64 AD3d 1244, 1245; *see Pommells v Perez*, 4 NY3d 566, 580). Defendant's own expert physician concluded that plaintiff had sustained a cervical strain as a result of the accident and that she was "free of ongoing neck pain" prior to the accident, and the medical records support those conclusions (*see Fanti v McLaren*, 110 AD3d 1493, 1494; *Verkey v Hebard*, 99 AD3d 1205, 1206; *Ashquabe v McConnell*, 46 AD3d 1419, 1419).

Defendant also failed to establish that she is entitled to summary judgment on the ground that plaintiff ceased treatment for her injuries, thereby "interrupt[ing] the chain of causation between the accident and claimed injur[ies]" (*Pommells*, 4 NY3d at 572). Here, plaintiff provided a "reasonable explanation" for the "cessation of all treatment" (*id.* at 574). She was discharged from two different courses of physical therapy after her treatment providers noted that she had maximized her potential on those courses and recommended that she should continue with home exercises. Plaintiff was also discharged from a course of chiropractic treatment, which had provided her with only temporary relief. Plaintiff also established that further physical therapy would have been palliative and not beneficial absent periodic Botox injections, the risks of which were discussed with her, along with the lack of any guarantee of success (*see id.* at 576-577; *see Paz v Wydrzynski*, 41 AD3d 453, 453-454). "A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his [or her] injury" (*Pommells*, 4 NY3d at 577).

With respect to the category of permanent consequential limitation of use, we conclude that defendant failed to eliminate all issues of fact whether plaintiff's injuries are permanent (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, the record establishes that the symptoms of plaintiff's alleged permanent consequential limitation of use have been of lengthy duration and "that no change in her condition [is] expected" (*Hawkins v Foshee*, 245 AD2d 1091, 1091; *see Stearns v O'Brien*, 77 AD3d 1383, 1383-1384; *Thomas v Hulslander*, 233 AD2d 567, 567).

We further conclude that defendant failed to meet her initial burden of establishing that plaintiff did not sustain a significant limitation of use (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353). Specifically, defendant failed to refute the allegation in the bill of particulars that plaintiff suffers from cervical dystonia (*see Bowen v Dunn*, 306 AD2d 929, 929; *Aleksiejuk v Pell*, 300 AD2d 1066, 1066-1067). Furthermore, defendant's own submissions raise an issue of fact with respect to the category of significant limitation of use because they contain "an expert's designation of a numeric percentage" of plaintiff's significant restrictions in her range of motion in her cervical area (*Perl v Meher*, 18 NY3d 208, 217), and "recite the tests used to ascertain the degree of plaintiff's loss of range of motion" (*Weaver v Town of Penfield*, 68 AD3d 1782, 1785). The medical records submitted by defendant also "relate the range of motion losses to . . . objective findings of injur[ies]" caused by the accident (*id.*), including muscle spasms that were noted by medical providers (*see Harrity v Leone*, 93 AD3d 1204, 1206). Moreover, conflicting opinions of the parties' experts raise issues of fact with respect to significant limitation of use (*see Fonseca v Cronk*, 104 AD3d 1154, 1155), including whether a postaccident MRI reveals accident-related disc herniations (*see Durham v New York E. Travel*, 2 AD3d 1113, 1114-1115). It is undisputed that, at a minimum, plaintiff suffered a cervical sprain or strain in the accident, and that her medical records demonstrate that she continuously complained of chronic neck

and shoulder pain that restricted her activities (*see Hawkins*, 245 AD2d at 1091; *see generally Toure*, 98 NY2d at 352, 355).

Finally, there is an issue of fact with respect to the 90/180-day category inasmuch as plaintiff testified that she was unable to perform substantially all of her customary daily activities during the requisite time period (*see Hartley v White*, 63 AD3d 1689, 1690; *Cummings v Riedy*, 4 AD3d 811, 813; *Calucci v Baker*, 299 AD2d 897, 898), and her medical records during the requisite time period corroborate her testimony (*cf. Womack v Wilhelm*, 96 AD3d 1308, 1311).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1141

CAF 12-01862

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF HOLLY A. BRENNAN,
PETITIONER-RESPONDENT,

V ORDER

JAMES E. BRENNAN, III, RESPONDENT-RESPONDENT.

ELIZABETH A. SAMMONS, ESQ., ATTORNEY FOR THE
CHILD, APPELLANT.

ELIZABETH A. SAMMONS, WILLIAMSON, ATTORNEY FOR THE CHILD, APPELLANT
PRO SE.

Appeal from an order of the Family Court, Wayne County (Dennis M. Kehoe, J.), entered September 12, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, determined that petitioner shall have primary physical custody of the subject child.

Now, upon reading and filing the stipulations of discontinuance signed by the parties on October 19 and 21, 2013 and by the child and the attorney for the child on October 21 and December 20, 2013, respectively,

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

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1144

CA 13-00514

PRESENT: CENTRA, J.P., FAHEY, CARNI, SCONIERS, AND VALENTINO, JJ.

EVIE SHEPHERD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WHITESTAR DEVELOPMENT CORP., ONE NIAGARA, LLC, ONE NIAGARA CENTER INC., ALLIED WASTE SERVICES OF NORTH AMERICA, LLC, ALLIED WASTE SERVICES OF BUFFALO, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS.

WEBSTER SZANYI LLP, BUFFALO (CHARLES E. GRANEY OF COUNSEL), FOR DEFENDANTS-APPELLANTS ALLIED WASTE SERVICES OF NORTH AMERICA, LLC AND ALLIED WASTE SERVICES OF BUFFALO.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MAUREEN G. FATCHERIC OF COUNSEL), FOR DEFENDANTS-APPELLANTS ONE NIAGARA, LLC AND ONE NIAGARA CENTER INC.

MACKENZIE HUGHES, LLP, SYRACUSE (SAMANTHA L. MILLIER OF COUNSEL), FOR DEFENDANT-APPELLANT WHITESTAR DEVELOPMENT CORP.

THE CAREY FIRM, LLC, GRAND ISLAND (DALE J. BAUMAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered July 24, 2012. The order denied in part the motions of defendants Whitestar Development Corp., One Niagara, LLC, and One Niagara Center Inc. for summary judgment dismissing the complaint against them and denied the motion of Allied Waste Services of North America, LLC and Allied Waste Services of Buffalo for summary judgment dismissing the complaint against them in its entirety.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motions of defendants-appellants for summary judgment dismissing the complaint against them insofar as it asserts claims for negligent infliction of emotional distress in the second and third causes of action and as modified the order is affirmed without costs.

Memorandum: Plaintiff's brother (decedent) was employed by defendant Whitestar Development Corp. (Whitestar) as a custodian at the One Niagara building in Niagara Falls. Defendant One Niagara, LLC owned the property, Whitestar managed the property, and defendants

Allied Waste Services of North America, LLC and Allied Waste Services of Buffalo (collectively, Allied defendants) maintained a trash compactor/dumpster on the property. Decedent was last seen at work on July 4, 2010, and it was ultimately determined that he had been crushed to death after falling into the trash compactor provided by the Allied defendants. No body was recovered. Decedent was survived by plaintiff and six adult children.

Plaintiff subsequently commenced this action asserting, inter alia, the "depriv[ation] of . . . funeral and burial" rights. Defendants One Niagara, LLC and One Niagara Center Inc. (collectively, One Niagara defendants) and Whitestar moved for summary judgment dismissing the two causes of action against them, for their interference with plaintiff's right of sepulcher and infliction of emotional distress based on their negligent investigation and their negligence in allowing a dangerous condition to exist on their property. The Allied defendants moved for summary judgment dismissing the single cause of action asserted against them, for their interference with plaintiff's right of sepulcher and infliction of emotional distress based on their negligence with respect to their trash compactor. Supreme Court granted the motions of the One Niagara defendants and Whitestar only with respect to the cause of action for negligent investigation and denied the motion of the Allied defendants. We conclude that the court should have granted the motions insofar as plaintiff asserts separate claims for negligent infliction of emotional distress against defendants-appellants (hereafter, defendants) apart from the claims for loss of sepulcher, and we therefore modify the order accordingly.

Contrary to defendants' contentions, the court properly denied those parts of their motions with respect to the second and third causes of action insofar as they assert claims for loss of sepulcher. "It is well established that the common-law right of sepulcher gives the next of kin the absolute right to the immediate possession of a decedent's body for preservation and burial, and that damages will be awarded against any person who unlawfully interferes with that right or improperly deals with the decedent's body" (*Melfi v Mount Sinai Hosp.*, 64 AD3d 26, 31; *see Darcy v Presbyt. Hosp. in City of N.Y.*, 202 NY 259, 262-263, *rearg denied* 203 NY 547). "To establish a cause of action for interference with the right of sepulcher, plaintiff must establish that: (1) plaintiff is the decedent's next of kin; (2) plaintiff had a right to possession of the remains; (3) defendant interfered with plaintiff's right to immediate possession of the decedent's body; (4) the interference was unauthorized; (5) plaintiff was aware of the interference; and (6) the interference caused plaintiff mental anguish, which is generally presumed" (2 NY PJI2d 3:6 at 76-77 [2013]).

Here, in support of their motions for summary judgment, defendants had the burden of establishing that someone with a valid claim for loss of sepulcher had priority over plaintiff, decedent's sister. Indeed, we note in particular the distinction between standing and priority in this context. The issue in this case with respect to the claim for loss of sepulcher is one of priority, not one

of standing. Standing is defined as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right" (Black's Law Dictionary 1536 [9th ed 2009]), and there is no question that plaintiff has standing pursuant to Public Health Law § 4201 (2) (a) (v), along with decedent's surviving adult children (*see* § 4201 [2] [a] [iii]), to control the disposition of decedent's remains. The statute, however, also provides for priority, giving greater priority to surviving adult children than to surviving siblings to control the disposition of decedent's remains (*see id.*). Public Health Law § 4201 (2) (b), in turn, provides for the transfer of priority with respect to the disposition of decedent's remains in the event that "a person designated to control the disposition of a decedent's remains . . . is not reasonably available, [is] unwilling or [is] not competent to serve." Although it is undisputed that there are six surviving adult children of decedent, there is no indication in the record that the surviving children have sought to exercise their right to pursue a claim for loss of sepulcher relative to decedent's death and the disappearance of his body. At trial the burden of proof will be on plaintiff to establish that she has priority, but here the burden is on defendants in the context of their motions for summary judgment to establish that there is no possibility that plaintiff has a right to possession of decedent's remains, and they failed to meet it (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We further conclude, however, that plaintiff failed to state a claim for negligent infliction of emotional distress independent of the emotional distress recoverable under a claim for loss of sepulcher (*see Henderson v Kingsbrook Jewish Med. Ctr.*, 91 AD3d 720, 721), which as noted presumes the existence of mental anguish (*see* 2 NY PJI2d 3:6 at 76-77). Plaintiff failed to allege that she was " 'in imminent danger of physical harm at the time of [decedent's] accident,' and thus was . . . in the zone of danger" (*Maracle v Curcio* [appeal No. 1], 24 AD3d 1233, 1235, *lv denied* 7 NY3d 703). Nor did plaintiff allege that any conduct by defendants breached a duty to her that "unreasonably endanger[ed her] physical safety or cause[d her] to fear for . . . her physical safety" (*Passucci v Home Depot, Inc.*, 67 AD3d 1470, 1471 [internal quotation marks omitted]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1170

CA 12-01605

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

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

JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT;

OPINION AND ORDER

MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS.
(APPEAL NO. 1.)

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

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

Appeal from a decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered May 18, 2012. The decree dismissed the objections to the petition for probate and admitted to probate the last will and testament of Robyn R. Lewis, deceased, executed July 15, 1996.

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

Opinion by SCUDDER, P.J.:

I

Robyn R. Lewis (decedent) was married to James A. Simmons (ex-husband), and they divorced in 2007. The parties resided in Texas during the course of the marriage, but they purchased property in Clayton, New York. Pursuant to the divorce decree entered in the State of Texas, decedent was awarded, inter alia, the real property located in Clayton. Decedent relocated permanently to that residence, and she lived there until her death in March 2010. Following decedent's death, her parents applied for letters of administration, and amended letters of administration were issued in May 2010. Decedent's parents thereafter renounced their interest in the Clayton property so that it would pass to decedent's brother and half-brother.

In December 2010, petitioner, who is the father of the ex-husband, filed a petition to probate a will of decedent dated July 15, 1996 and executed in the State of Texas (1996 Will). Pursuant to the

1996 Will, decedent appointed the ex-husband, who at that time was still married to her, as executor of the will and beneficiary of all of her property. Also pursuant to the 1996 Will, in the event that the ex-husband predeceased decedent, petitioner was named as alternate executor and alternate beneficiary. In his petition to probate the 1996 Will, petitioner alleged that the testamentary disposition to the ex-husband, as well as his appointment as executor, were revoked by virtue of the divorce (*see generally* EPTL 5-1.4 [a] [1], [3]). Petitioner further alleged that he was the sole beneficiary of the 1996 Will, and asked Surrogate's Court to issue letters testamentary to him. At the time petitioner filed the petition to probate the 1996 Will, he filed an additional petition seeking, inter alia, revocation of the amended letters of administration issued to decedent's parents.

Decedent's parents, brother and half-brother (collectively, objectants) filed objections to probate. They contended that, inasmuch as decedent was a domiciliary of Texas at the time the 1996 Will was executed as well as at the time of her divorce, the nomination of petitioner as the alternate executor and alternate beneficiary failed under the Texas Probate Code. Pursuant to section 69 (b) of that Code, "[i]f, after making a will, the testator's marriage is dissolved . . . by divorce . . . , all provisions in the will, including all fiduciary appointments, shall be read as if the former spouse and *each relative of the former spouse who is not a relative of the testator* failed to survive the testator, unless the will expressly provides otherwise" (emphasis added). Objectants further contended that, because the divorce decree required the ex-husband to return any "paperwork associated with any items of the decree," his failure to return the 1996 Will to decedent wrongfully and fraudulently deprived decedent of the opportunity to access and evaluate the 1996 Will. As a result, objectants contended that petitioner was "estopped from claiming any benefit or nomination from the late offering" of the 1996 Will.

In supplemental objections, objectants contended that the 1996 Will was "revoked by the revocatory language and content of a Second and Lost Will" executed by decedent (Lost Will). Following a hearing, the Surrogate issued the decree in appeal No. 1, which dismissed all objections to the petition for probate and admitted the 1996 Will to probate. The Surrogate further issued the decree in appeal No. 2, which revoked the amended letters of administration to decedent's parents and issued letters testamentary to petitioner. We conclude that the decree in each appeal should be affirmed.

II

We note as a preliminary matter that our dissenting colleague would reverse primarily based on her conclusion that, because petitioner failed to account for all of the alleged copies of the 1996 Will, he failed to rebut the presumption that the 1996 Will was revoked by an act of destruction performed by decedent (*see* EPTL 3-4.1 [a] [2] [A]). Objectants have never contended, however, that the 1996 Will was revoked by destruction. Aside from challenges to the testamentary dispositions in the 1996 Will, the only other contention

raised by objectants is that the 1996 Will was revoked by the purported execution of the Lost Will (*see generally* EPTL 3-4.1 [a] [1] [A], [B]).

It is well settled that "[a]n issue may not be raised for the first time on appeal . . . where[, as here,] it 'could have been obviated or cured by factual showings or legal countersteps' in the trial court" (*Oram v Capone*, 206 AD2d 839, 840; *see Matter of Jared*, 225 AD2d 1049, 1049; *see generally Misicki v Caradonna*, 12 NY3d 511, 519; *Bingham v New York City Tr. Auth.*, 99 NY2d 355, 359). Moreover, appellate courts cannot and will not review an issue that has never been raised by the parties themselves. An exception to that rule is where a trial court or the Appellate Division determines, sua sponte, that it lacks subject matter jurisdiction (*see Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718). In this case, the dissent would decide this appeal on an issue objectants "never so much as hinted much less claimed before" the Surrogate or this Court (*Misicki*, 12 NY3d at 519 [emphasis omitted]).

> "For us now to decide this appeal on a distinct ground that we winkled out wholly on our own would pose an obvious problem of fair play. We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made. In sum, [petitioner] deserves an opportunity to refute the proposition on which the dissent would decide this appeal against him" (*id.*).

As the Court of Appeals recognized in *Misicki*, "[w]hile appellate judges surely do not sit as automatons . . . , they are not freelance lawyers either. Our system depends in large part on adversary presentation; our role in that system is best accomplished when [we] determine[] legal issues . . . that have first been considered by . . . the trial . . . court" (*id.* [internal quotation marks omitted]). "In our view, it would be fundamentally unfair to determine this issue sua sponte and conclude, as does our dissenting colleague, that [petitioner] failed to meet [his] initial burden" of rebutting the presumption that the 1996 Will was revoked by destruction (*Woods v Design Ctr., LLC*, 42 AD3d 876, 878; *see e.g. Hann v Black*, 96 AD3d 1503, 1503-1504; *CB Richard Ellis, Buffalo, LLC v D.R. Watson Holdings, LLC*, 60 AD3d 1409, 1410). Indeed, to decide this appeal on issues never raised by the objectants would "implicate due process concerns" (*McHale v Anthony*, 41 AD3d 265, 267).

The dissent attempts to avoid the rules of preservation by contending that, regardless of preservation, "it was petitioner's burden, as proponent of the 1996 Will, 'to make the proofs essential to its admission to probate' " (quoting *Matter of Schillinger*, 231 App Div 679, 680, *affd* 258 NY 186). While we agree that petitioner had the initial burden of proof, we recognize that "[t]he preservation of an issue for appellate review is completely distinct from the question whether [a party] has sustained his [or her] burden of proof" (*People*

v Duncan, 177 AD2d 187, 192, *lv denied* 79 NY2d 1048). We are mindful that *Duncan* involves an appeal from a judgment of conviction in a criminal case, but we conclude that the above principle is applicable to all appeals heard by this Court.

III

We now address those contentions raised by objectants on appeal. Although our dissenting colleague questions whether the ex-husband or his parents had possession of the 1996 Will, objectants contend that petitioner and his wife were the custodians of the 1996 Will and that they failed in their duty as custodians. It is well settled that one who accepts custody of an original will is "bound to return the instrument to its maker upon demand and[,] . . . after the death of the testator and upon notice of such death, . . . [is] bound to produce the will so that it might be probated" (*Scholen v Guaranty Trust Co.*, 288 NY 249, 253-254; *see generally* SCPA 2507 [3]). Here, as in *Scholen*, there is no evidence that petitioner or his wife "voluntarily assumed any greater obligation," and objectants "allege[] no facts which would permit the inference that from the bailment a broader duty ar[o]se[]" (*id.* at 254).

Even assuming, arguendo, that the ex-husband also could have been considered a custodian of the will, we conclude that neither the ex-husband nor his parents were under any legal obligation to return the 1996 Will to decedent at any time before her death inasmuch as it is undisputed that she never made a demand for its return (*see id.* at 253-254). Although decedent's divorce decree required the ex-husband to return financial paperwork and any paperwork "needed to effectuate [the] division [of property]," the 1996 Will was not a document needed to effectuate the division of any property. Moreover, petitioner and his wife were not parties to the divorce decree and thus were not subject to its provisions.

IV

Objectants further contend that the nomination of petitioner as alternate executor and alternate beneficiary must fail because such a nomination would fail under the law of Texas, and it would be inequitable to allow decedent's former father-in-law to be the sole beneficiary of her estate. It is undisputed that the 1996 Will was a valid will and that the law of Texas, if applicable, would invalidate any testamentary distributions to petitioner (*see* Texas Probate Code § 69 [b]). In New York, however, a divorce operates to revoke testamentary distributions to former spouses only (*see* EPTL 5-1.4 [a], [b]). As objectants concede, New York law governs resolution of this case inasmuch as the real property is situated in this state and decedent was a domiciliary of this state at the time of her death (*see* EPTL 3-5.1 [b] [1], [2]; *see generally Matter of Good*, 304 NY 110, 115; *Matter of Strauss*, 75 Misc 2d 454, 456). Pursuant to New York law, the testamentary distribution to the ex-husband and his appointment as executor are revoked, but all other provisions of the will remain valid (*see* EPTL 5-1.4 [a], [b]; *Matter of Coffed*, 59 AD2d 297, 300, *affd* 46 NY2d 514).

We reject the contention of objectants that we should ignore the clear and unambiguous wording of EPTL 5-1.4, as well as our own precedent, and decide this case on equitable principles. Indeed, we have previously held that the provisions of EPTL 5-1.4 apply only to former spouses, not to members of the former spouse's family (*see Coffed*, 59 AD2d at 300). Whereas *Coffed* involved a determination whether a former stepchild could inherit, and this case involves a former father-in-law, the statute does not permit us to distinguish between various members of the former spouse's family. If testamentary distributions to former stepchildren remain valid under the statute, we are constrained to conclude that testamentary distributions to other members of the former spouse's family also remain valid. We thus cannot rely on EPTL 5-1.4 to invalidate the testamentary distribution to petitioner; the clear and unambiguous language of the statute does not permit us to do so.

Contrary to the position of the dissent, such a result does not "circumvent the intent of the statute." Even if we could assume that the ex-husband might someday inherit or obtain the property from petitioner, we cannot decide petitioner's current legal rights to property based on our speculation of what he might do with that property in the future.

V

Finally, objectants contend that, although there is insufficient evidence to support admitting the Lost Will to probate (*see* SCPA 1407), there is sufficient evidence to establish that the Lost Will was duly executed, which thereby operates to revoke the 1996 Will. We reject that contention.

Pursuant to EPTL 3-4.1 (a) (1) (A) and (B), "[a] will or any part thereof may be revoked or altered by . . . [a]nother will[or] [a] writing of the testator clearly indicating an intention to effect such revocation or alteration, *executed with the formalities prescribed . . . for the execution and attestation of a will*" (emphasis added). The only evidence at the hearing concerning the Lost Will was the testimony of decedent's former neighbor, whom the Surrogate found to be "a highly credible witness." Insofar as relevant to the issues on this appeal, the neighbor testified that, during the late summer or early fall of 2007, decedent received a package that she showed to the neighbor. The neighbor opened the package, which contained a cover letter from "an attorney's office" and a legal document entitled "Last Will and Testament." According to the neighbor, decedent had been working with a divorce attorney in Texas and had been traveling back and forth to Texas to finalize her divorce.

The neighbor testified that, in addition to revoking all prior wills and naming decedent's mother as the executrix, the legal document instructed that decedent's property would be left to her brothers, with a small stipend to a niece and nephew. The legal document was signed by decedent, and "[t]here were two witnesses' signatures." The neighbor could not recall the names of the witnesses, but testified that the document stated that they had

witnessed decedent's signature to the document. There was a raised and embossed notary seal and a statement at the bottom of the third page indicating that the notary attested to the signing of the legal document. Although the neighbor retained the legal document for a period of time, she returned it to decedent before moving away from the area. It is undisputed that, despite a diligent search of decedent's residence, neither that document nor any other purported will was discovered.

Pursuant to EPTL 3-5.1 (c), a will disposing of real property situated in this state "is formally valid and admissible to probate in this state[] if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of . . . [t]his state; . . . [t]he jurisdiction in which the will was executed, at the time of execution; or . . . [t]he jurisdiction in which the testator was domiciled, either at the time of execution or of death." Objectants contend that the evidence at the hearing was sufficient to establish that the Lost Will was duly executed and attested pursuant to EPTL 3-2.1. We note, however, that the testimony at the hearing failed to establish whether the Lost Will was executed and attested in New York or Texas. We therefore must consider the execution requirements for wills under the laws of both states.

In order for a will to be duly executed and attested in New York, the testator must sign the document at the end; the testator must sign or acknowledge the signature in the presence of the attesting witnesses; the testator must declare to each of the attesting witnesses that the instrument is his or her will; and there must be two attesting witnesses who shall, within 30 days, attest the testator's signature and, at the request of the testator, sign their names and affix their residence addresses (*see* EPTL 3-2.1 [a] [1] - [4]). In order for a will to be duly executed in Texas, the will must be in writing, be signed by the testator, and be attested by two or more credible witnesses above the age of 14 who shall subscribe their names to the will in their own handwriting in the testator's presence (*see* Texas Probate Code § 59).

We are constrained to conclude that the evidence at the hearing is insufficient to establish that the Lost Will was duly executed and attested under the laws of either state. With respect to New York's EPTL 3-2.1, there was no testimony that the document was signed or acknowledged by decedent in the presence of the witnesses. Furthermore, there was no evidence that decedent declared to the witnesses that the document was her will. Finally, although the neighbor testified that decedent's signature appeared on the document, there was no evidence that the signature was at the end of the document. With respect to Texas Probate Code § 59, there was no evidence that the purported witnesses were over the age of 14 or that their signatures were in their own handwriting.

Although our dissenting colleague concludes that we may presume that the Lost Will was properly executed, we disagree with that conclusion. There is no dispute that, "*[i]f* an attorney-drafter supervises the execution of a will, there is a presumption of

regularity that the will was properly executed" (*Matter of Halpern*, 76 AD3d 429, 431, *affd* 16 NY3d 777 [emphasis added]). Here, however, our dissenting colleague has made an assumption that an attorney in either New York or Texas drafted the Lost Will and supervised its execution. That assumption is based on the neighbor's testimony that the document mailed to decedent in the fall of 2007 "was accompanied by a cover letter from a law office." Although our dissenting colleague cites *Matter of Derrick* (88 AD3d 877, 879) and *Matter of Moskoff* (41 AD3d 481, 482) for the proposition that we may infer the Lost Will was prepared by an attorney because it was accompanied by a cover letter from an attorney's office, neither case supports that proposition. In both cases, the disputed will was actually before the Surrogate, and it was an established and undisputed fact that an attorney drafted those wills and supervised their execution.

As the First Department stated in *Halpern*, although "a valid attestation clause raises a presumption of a will's validity, . . . it is nonetheless incumbent upon Surrogate's Court to examine all of the circumstances surrounding the execution of the document in order to ascertain its validity" (*id.* at 431). Here, we are unable to examine any of the circumstances surrounding the execution and attestation of the Lost Will because we do not have the document or a copy thereof, we do not know where it may have been executed, we do not know who drafted it or who may have witnessed its execution, and it was not on file with a government agency (*cf. Derrick*, 88 AD3d at 878; *Halpern*, 76 AD3d at 430-431; *Moskoff*, 41 AD3d at 482; *Matter of Coniglio*, 242 AD2d 901, 902). We therefore decline to make a presumption based on an assumption.

Objectants contend in the alternative that, even if the evidence presented at the hearing failed to establish the elements of due execution and attestation, thereby precluding the Lost Will from being admitted to probate, the evidence, including evidence of decedent's intent, was sufficient in equity to establish that the 1996 Will was revoked. We reject that contention and respectfully disagree with the dissent's conclusion to the contrary. "With few exceptions not here relevant, the exclusive mechanism for revocation of a testamentary instrument is contained in EPTL 3-4.1. That section wisely requires that a revocatory instrument be executed with the same formalities as those needed to make a valid will. A less stringent provision would open the door to the dual evils of fraud and perjury" (*Coffed*, 46 NY2d at 519). Thus, if a document is not duly executed and attested in accordance with EPTL 3-2.1, then it cannot operate to revoke, pursuant to EPTL 3-4.1, a prior, duly executed and attested will.

We agree with the dissent that, even if the evidence concerning a subsequent will is insufficient to permit the subsequent will to be admitted to probate pursuant to SCPA 1407, that evidence may nevertheless be sufficient to establish that an earlier will was revoked (*see Matter of Wear*, 131 App Div 875, 876; *Matter of Shinn*, 7 Misc 2d 623, 624-625; *Matter of Henesey*, 1 Misc 2d 864, 868-869; *but see Matter of Logasa*, 161 Misc 774, 775-776; *see generally Matter of Goldsticker*, 192 NY 35, 37). The evidence concerning a subsequent will must establish, however, that it was duly executed and attested

before the subsequent will may be used to establish revocation of a prior will (*see e.g. Wear*, 131 App Div at 876; *Shinn*, 7 Misc 2d at 624; *Matter of Walsh*, 5 Misc 2d 801, 802-803; *Henesey*, 1 Misc 2d at 866; *Logasa*, 161 Misc at 775-776). The subsequent wills in *Wear, Shinn, Walsh* and *Henesey* were duly executed and attested, but they were not admitted to probate based on the fact that they had been lost and were presumed revoked (*see Wear*, 131 App Div at 876-877; *Shinn*, 7 Misc 2d at 624-625; *Walsh*, 5 Misc 2d at 802; *Henesey*, 1 Misc 2d at 868; *see generally* SCPA 1407 [1]; *Matter of Staiger*, 243 NY 468, 471-472; *Matter of Kennedy*, 167 NY 163, 168). In contrast, where the evidence fails to establish that a purported subsequent will was duly executed and attested, Surrogates have held that the evidence is insufficient to establish that the earlier will was revoked (*see Goldsticker*, 192 NY at 37; *Matter of Katz*, 78 Misc 2d 790, 791; *Matter of Andrews*, 195 Misc 421, 430-431; *Logasa*, 161 Misc at 776; *Matter of Kiltz*, 125 Misc 475, 479-480). Here, inasmuch as the evidence concerning the Lost Will is insufficient to establish that it was duly executed and attested, we conclude that the evidence is insufficient to establish that the 1996 Will was revoked.

VI

With respect to the dissent's general considerations of equity and the power of the Surrogate to fashion equitable remedies, we note that, even if "[t]he equities in the instant case may appear to favor a different result, . . . a more significant consideration is that the formalities attendant upon the revocation of a will are necessary to prevent mistake, misapprehension and fraud" (*Coffed*, 59 AD2d at 300). Even if we may "surmise that [decedent] intended to change [her] will in accord with a natural desire to benefit [her relatives] exclusively[,] . . . it is not for the courts to circumvent the statutory requirements regarding the revocation of a will. Those provisions do not contemplate an implied revocation, but declare that revocation must be effected with the same formality with which a will is executed or by some act of mutilation or destruction" (*id.*).

VII

Accordingly, because objectants failed to establish that the 1996 Will was revoked, we conclude that the decree in each appeal should be affirmed.

All concur except PERADOTTO, J., who dissents and votes to reverse the decrees in accordance with the following Opinion: I respectfully dissent. In my view, the record clearly establishes that decedent intended to, and did in fact, revoke her will dated July 15, 1996, both by execution of a subsequent testamentary instrument and by the presumption of physical destruction arising from the absence of the will among her personal possessions at the time of her death. I therefore conclude that the decrees should be reversed, probate of the will should be denied, the letters testamentary issued to petitioner should be revoked, and the amended letters of administration issued to decedent's parents should be reinstated.

I

The facts of this case are largely undisputed. Decedent married James A. Simmons (ex-husband) in Texas in 1991. In July 1996, decedent executed a last will and testament (1996 Will), in which she left all of her property to her ex-husband and, in the event that he predeceased her, to her ex-husband's father, James Robert Simmons, the petitioner herein. Significantly, as noted in the Surrogate's decision, it is not clear from the record whether decedent executed four originals of the 1996 Will or one original and three copies. When decedent executed the 1996 Will, she and the ex-husband owned a home together in Texas and had modest savings. Decedent and the ex-husband thereafter purchased property in Clayton, New York (New York property) from decedent's mother and an uncle. The property had been in decedent's family for several generations.

About 10 years later, decedent petitioned for divorce. While the divorce was pending, she was hospitalized twice for grand mal seizures relating to alcohol abuse. Doctors told decedent that, if she continued to drink, she would be dead within six months. In April 2007, a Texas court granted decedent a divorce on the ground of insupportability, i.e., "that the marriage ha[d] become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation" (Texas Family Code § 6.001). The ex-husband was awarded the marital residence in Texas and all of its contents with the exception of decedent's personal effects, and decedent was awarded the New York property. Both parties were directed to "execute, sign and deliver to the other party *all property and/or paperwork* associated therewith for any items awarded to the other party . . . within ten days, including any deeds, releases, transfer of title, etc. as needed to effectuate this division" (emphasis added).

Decedent thereafter moved to the New York property and, on March 21, 2010, she died at age 43 from alcohol-related complications. At the time of her death, decedent's only significant asset was the New York property, which was valued at approximately $200,000. Despite a diligent and exhaustive search of the New York property, no will was found among decedent's personal effects. As a result, in April 2010, decedent's parents, Meredith M. Stewart and Ronald L. Lewis, applied for and received letters of administration in Surrogate's Court. They subsequently renounced their interest in the New York property in favor of decedent's brothers.

Approximately eight months after decedent died, the ex-husband learned of her death through an internet search. Shortly thereafter, petitioner filed the 1996 Will in Surrogate's Court and petitioned for probate of that will and issuance of letters testamentary. Petitioner alleged that, after the ex-husband learned of decedent's death, he advised petitioner that "*he had in his possession Decedent's original Last Will and Testament dated July 15, 1996*" (emphasis added). Petitioner alleged that, because decedent's testamentary disposition with respect to the ex-husband had been revoked by operation of law

upon their divorce (*see* EPTL 5-1.4 [a]), he was entitled to decedent's entire estate as the sole remaining beneficiary of the 1996 Will.

Decedent's parents and brothers (collectively, objectants) objected to probate of the 1996 Will, contending, inter alia, that petitioner should be estopped from offering the 1996 Will for probate because, despite the provisions in the divorce decree requiring the ex-husband to turn over decedent's personal effects and associated paperwork, he "wrongfully and fraudulently deprived the decedent of the offered will and the opportunity to access and evaluate the instrument in the context of her divorce."

The Surrogate denied petitioner's request for preliminary letters testamentary, but amended the parents' letters of administration to prohibit the distribution of estate assets. The Surrogate noted that if the 1996 Will had been "held by . . . [the] ex-husband, . . . [it] should have been returned to decedent." The Surrogate further questioned whether "equity prohibit[s] the ex-husband and/or his father from possibly secreting or obtaining the Will via questionable means and then 'resurrecting' it by . . . bringing the Will to New York?" Objectants subsequently filed supplemental objections, asserting that decedent executed a second will in 2007, thereby revoking the 1996 Will. At the hearing, objectants presented the testimony of decedent's former neighbor, who testified that she and decedent became very close in 2005 when decedent and the ex-husband were having marital difficulties. The ex-husband "occasionally berate[d] [decedent] in public" and, on one occasion, decedent appeared at the neighbor's home "covered in bruises." The neighbor testified that she helped decedent with her finances, which were "very bleak." Because decedent suffered from short-term memory loss, the neighbor helped decedent make lists of the things that she needed to do. According to the neighbor, after the divorce was finalized, decedent's top priority was the preparation of a new will. In the late summer or early fall of 2007, decedent gave the neighbor a large manila envelope, which had arrived via UPS. The envelope contained a cover letter from an attorney's office and a legal document entitled "Last Will and Testament." Decedent asked the neighbor to read the document, and they reviewed the terms together.

The neighbor testified that the first part of the document

> "revoked all previous wills and codicil[s]. This next part of it instructed to pay her debts. The next paragraph was the Executrix who was her mother, Meredith.
>
> "And then the final part of it was that the river house [the New York property] go to her brothers, . . . and that a small stipend be given to her niece and nephew, . . . maybe five hundred dollars apiece, two hundred dollars apiece, something like that . . . I was struck by that because [decedent] didn't have two dimes to rub together at the time, but she loved those children."

The will was signed by decedent and two witnesses, both of whom indicated that they had witnessed decedent sign the document, and there was a raised and embossed notary seal and a notary statement at the end of the document. At decedent's request, the neighbor stored the will in a file containing other papers belonging to decedent. In August 2009, the neighbor moved from the area and returned to decedent all of her papers, including the will. Finally, the neighbor testified that she was not aware of any contact between petitioner and decedent after the divorce. By contrast, decedent had a close relationship with her father and brothers, who regularly visited her at the New York property.

A tenant who lived with decedent at the New York property from August 2006 until January 2008 testified that he never met petitioner and never heard decedent talk about him, and that he was not aware of any contact between the two. He had met decedent's parents and brothers, however, and he testified that she "seemed to love them very much. It was a very caring family." Decedent's father and a tenant who lived with decedent from early 2008 until her death both testified that they searched the New York property after decedent's death, but did not find any will.

The main witness on behalf of petitioner was decedent's former mother-in-law (Mrs. Simmons), who testified that, on July 15, 1996, decedent gave her "the" original 1996 Will and "asked [her] to keep it in a safe place." Mrs. Simmons placed the will "in a dresser drawer and showed [decedent] where [she] put it, so that [decedent] could retrieve it at any time she wished." Thereafter, decedent never asked for the will and Mrs. Simmons never considered returning it to her. According to Mrs. Simmons, the will remained in her dresser until she learned of decedent's death in late November 2010. At that point, she "knew [she] had the Will and [she] said we have got to read the Will and see what it says." When she opened the will, she was "shocked" to learn that petitioner was named therein. Within a few days, the ex-husband "got on the phone . . . to try to locate a lawyer." Neither Mrs. Simmons nor the ex-husband notified decedent's family of the existence of the will.

The ex-husband testified that, in 1996, he and decedent executed mirror wills, i.e., he left all of his property to decedent and decedent left all of her property to him. At the same time, they each also executed a power of attorney and a health care proxy. According to the ex-husband, they had "four copies of [each of the] six different documents done all on the same day," and they planned to keep one set at their Texas home, another set at the New York property, another set at his parents' house, and the final set in a safe deposit box. The ex-husband testified that they had "four sets of everything at each house for a reason," i.e., "[w]e both traveled. We knew that one house could burn down." According to the ex-husband, it was not until "the day we dug them out or my mom discovered them after we found out [decedent] had died" that they learned that Mrs. Simmons had "the" original 1996 Will. Like Mrs. Simmons, the ex-husband testified that he was "shocked" that petitioner was decedent's alternate beneficiary. The ex-husband admitted, however, that, after

the divorce, he found "[o]ne of [the] four copies" of the 1996 Will "in some remaining paperwork" at the Texas property.

Finally, petitioner briefly testified that he was "not the Petitioner," and that he was "just along for the ride."

In its decree dated May 18, 2012, the Surrogate found that the neighbor "was a highly credible witness," and wrote that he "ha[d] no doubt that her testimony was accurate and that she saw what she described." The Surrogate concluded, however, that, "while the testimony of what [the neighbor] saw establishe[d] all the components required to be in [a] last will and testament, it cannot establish due execution as required under EPTL[] 3.2-1" because the neighbor did not witness the execution ceremony and the attesting witnesses were unknown. The Surrogate recognized that "the distribution pursuant to the will being offered for probate by the petitioner [wa]s drastically different than what an intestate distribution would be," and that "the fact that the will was drafted [10] years prior to the decedent's divorce raises suspicion in [objectants'] eyes as to whether the [1996 Will] truly reflect[ed] what the decedent would have wanted when she passed in 2010." The Surrogate concluded, however, that he was "bound by the existing body of law in New York," and that he could not "set aside a duly proven will just because the testamentary disposition therein is different than what would be expected." The Surrogate therefore dismissed the objections, revoked the amended letters of administration, and admitted the 1996 Will to probate.

Objectants appeal.

II

> "It is . . . clear that a paper once duly executed as a will, but which has been expressly revoked by the testator, or which is presumed to have been revoked by the happening of those facts which the law declares shall raise a presumption of revocation, ought not to be admitted to probate. The question of revocation touches the testamentary intent[,] and it is the duty of the [S]urrogate to investigate the question of testamentary intent and to hear all legal proof that may be germane to that question" (*Matter of Davis*, 45 Misc 554, 557, *affd* 105 App Div 221, *affd* 182 NY 468).

In this case, the only direct testimony of decedent's postdivorce intent, which was expressly credited by the Surrogate, establishes that decedent intended to revoke the 1996 Will and to prepare a new instrument devising the New York property, her only significant asset, to her blood relatives. The only question, therefore, is whether decedent in fact revoked the 1996 Will in accordance with her undisputed intent.

A will may be revoked by "[a]nother will" or by "[a]n act of

burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction performed by . . . [t]he testator" (EPTL 3-4.1 [a] [1] [A]; [2] [A] [i]). It is well established that, "[i]f a will, shown once to have existed and to have been in the testator's possession, cannot be found after the testator's death, the legal presumption is that the testator destroyed the will with the intention of revoking it" (*Matter of Demetriou*, 48 AD3d 463, 464; *see Matter of Staiger*, 243 NY 468, 472; *Matter of Kennedy*, 167 NY 163, 168-169; *Collyer v Collyer*, 110 NY 481, 486). The presumption of revocation by physical destruction is "strong" and "stands in the place of positive proof" that the testator in fact destroyed his or her will with revocatory intent (*Staiger*, 243 NY at 472; *see Matter of Sharp*, 134 Misc 405, 406, 407-408, *affd* 230 App Div 730; *Matter of Barnes*, 70 App Div 523, 525; *Matter of Huang*, 11 Misc 3d 325, 326). The burden of overcoming that presumption is borne by the petitioner, who must establish that the will was not revoked by the testator during the testator's lifetime (*see Demetriou*, 48 AD3d at 464; *Matter of Gray*, 143 AD2d 751, 751-752, *lv denied* 74 NY2d 607; *Barnes*, 70 App Div at 524-525; *Matter of Ascheim*, 75 Misc 434, 435).

Moreover, where multiple copies of a will are executed, "revocation of one is a revocation of all" (*Matter of Betts*, 200 Misc 633, 634-635; *see Crossman v Crossman*, 95 NY 145, 150; *Matter of Robinson*, 257 App Div 405, 406-407; *Matter of Hedin*, 181 Misc 730, 731). As the Court of Appeals has explained, "[w]here a will is executed in duplicates a revocation of one according to law *animo revocandi* is a revocation of both. As each contains the will of the testator, a revocation of either is a revocation of his [or her] will, and thus revokes both" (*Crossman*, 95 NY at 150; *see Matter of Konner*, 101 NYS2d 651, 652 ["The revocation of one of several counterparts of a will constitutes a revocation of the will"]). Thus, the proponent of a will executed in multiples must "produce or satisfactorily account" for each counterpart (*Matter of Rinder*, 196 Misc 657, 659; *see Robinson*, 257 App Div at 407; *Matter of Jacobstein*, 253 App Div 458, 461; *Matter of Sibley*, 8 Misc 2d 533, 534). Where one of the copies of the will is missing, the presumption is that "the testator destroyed such executed copy, *animo revocandi*, and thus revoked his [or her] entire will, *particularly when it is shown that the copy unaccounted for was in [the] deceased's possession*" (*Rinder*, 196 Misc at 659 [emphasis added]; *see Sibley*, 8 Misc 2d at 534; *Matter of Schofield*, 72 Misc 281, 285-286).

Here, the ex-husband testified with respect to the execution of the 1996 Will that he and decedent "had four copies of six different documents done all the same day, four of her will, four of [his] will," four power of attorney forms, and four health care proxies. He and decedent planned "to leave one set [of each of the six documents] at [the ex-husband's] parents' house, one set at [their] Texas house, one set at the New York house and one set in a safe deposit box." According to the ex-husband, "[t]hat was all planned out before we sat down that day and . . . *signed all those signatures*" (emphasis added). He and decedent "had four sets of everything" because, among other reasons, they both traveled frequently and "one house could burn

down."

Upon decedent's death, however, only one of the four copies of the 1996 Will was produced—the one possessed by petitioner, the sole remaining beneficiary under the will. Despite an exhaustive search, no will was found in decedent's New York home or among her personal effects. As the Surrogate noted in his decision, it is not clear from the record whether "decedent and [the ex-husband] left the attorney's office with four original instruments or one original and three copies." In my view, that factual uncertainty is fatal to the petition for probate of the 1996 Will. As this Court stated many decades ago,

> "[t]he authorities are uniform in holding that when it appears . . . that a will was executed in duplicate, one paper cannot be probated without producing the other or accounting for its non-production, the theory being that *[a] testator can destroy his [or her] will by destroying the one in his [or her] possession without repossessing and destroying its duplicate*" (*Robinson*, 257 App Div at 407 [emphasis added]; *see Jacobstein*, 253 App Div at 461; *Matter of Flanagan*, 38 NYS2d 696, 697-698; *Schofield*, 72 Misc at 285-286).

Based upon the trial testimony and common sense, it is far more likely that decedent executed four original instruments, and any doubts relative thereto should be resolved against petitioner as proponent of the 1996 Will. Mrs. Simmons testified that decedent was "very meticulous about records" and that she "kept records of everything," yet she claimed that, out of the four locations decedent and her ex-husband selected to store their wills—the Texas house, the New York property, the ex-husband's parents' house, and a safe deposit box—they decided to entrust Mrs. Simmons with the *only* original, which she placed in a dresser drawer.

Those circumstances are even more suspect in light of the differing accounts of how the 1996 Will ended up in petitioner's possession. The verified petition alleges that, at the time of decedent's death, *the ex-husband* "had in his possession [d]ecedent's original Last Will and Testament dated July 15, 1996." Objectants thereafter asserted that petitioner should be estopped from offering the 1996 Will for probate because the ex-husband withheld it in violation of the divorce decree. After the Surrogate issued a decision stating that if the 1996 Will had been "held by . . . [the] ex-husband, . . . [it] should have been returned to decedent," petitioner's counsel then advised the court that it was actually petitioner, not the ex-husband, who possessed decedent's original 1996 Will at the time of her death. According to counsel, she "was told . . . that[,] after [decedent] signed the will, . . . the original was delivered to [petitioner] for safekeeping because [decedent] and [the ex-]husband traveled a lot. And they put a copy in their house in Texas and a copy in their house in New York after they purchased the New York house and there it sat." Petitioner's counsel told the

Surrogate that she did not "know why the will was not found after [decedent] died in her home . . . *I don't know why* *even an original wasn't found after [decedent] died*. It was in her - - in the safe in her house with her abstract of title" (emphasis and additional emphasis added). At trial, petitioner adhered to his statement in the petition that the ex-husband possessed the original 1996 Will at the time of decedent's death. The ex-husband admitted that he possessed "[o]ne of four copies" of the 1996 Will, which he claimed he found after the parties' divorce among "some remaining paperwork" in the Texas house. He did not return the will to decedent, however, despite the directives in the divorce decree that he return to decedent any of her "personal effects" in his possession or in the Texas house, and that he "deliver to [decedent] all property and/or paperwork associated therewith for any items awarded to [her]."

Significantly, the ex-husband never produced his copy of the 1996 Will, and the Surrogate did not direct him to do so. In my view, that was error (*see Crossman*, 95 NY at 152 ["As soon as it is brought to the attention of the (S)urrogate that there are duplicates of a will presented to him (or her) for probate, it is proper that he (or she) should require both duplicates to be presented, not for the purpose of admitting both as separate instruments to probate, but that (the Surrogate) may be assured whether the will has been revoked, and whether each completely contains the will of the testator"]; *Matter of McChesney*, 118 Misc 545, 546 ["(I)t is undoubtedly the duty of the court to require the production of the missing duplicate in order that the court may inspect both duplicates so that it may be seen whether or not they are precisely alike and whether or not there has been any revocation"]). Where, as here, the only copies of the 1996 Will that petitioner produced or accounted for were in the exclusive custody and control of his wife and son, and petitioner failed to produce or account for the two remaining copies, at least one of which was in decedent's possession prior to her death, "we must apply the established presumption 'that a will proved to have had existence and not found at the death of [the] testator was destroyed *animo revocandi*' " (*Schofield*, 72 Misc at 286, quoting *Knapp v Knapp*, 10 NY 273, 278; *see Matter of McGuigan*, 10 Misc 2d 865, 866 ["The proponent's failure to explain the inability to produce both or all copies of a will executed in multiplicate one of which was shown to have been in the possession of decedent raises the presumption that the will was revoked by decedent"]). Here, as in *Schofield*,

> "it [was] established that [decedent] did not have possession of [all] examples or duplicates [of the will] . . . [T]he authentic or the example actually produced for probate was not in [her] custody in [her] lifetime, and *no presumption . . . is to be drawn from the passive conduct of the testator in respect of that example.* [She] may have been of the opinion that its destruction was not necessary to a revocation, or, as [petitioner was] named in the duplicate as [sole] legatee[], [s]he may not have desired [him] to know of the

> revocation. What [her] thoughts were we do not know and cannot consequently consider" (72 Misc at 285 [emphasis added]; *see Hedin*, 181 Misc at 731 ["Where it is shown, as here, that the decedent had possession of the counterparts and the proponent cannot satisfactorily explain the nonproduction of all such, the presumption of revocation by destruction is operative"]).

Accordingly, I conclude that probate of the 1996 Will should be denied (*see Matter of Funk*, 139 NYS2d 225, 228-229 ["Since proponent has wholly failed to explain or account for the non-production of the executed counterpart retained by testatrix, the court has no alternative other than to deny probate"]; *see also Robinson*, 257 App Div at 407-408; *Sibley*, 8 Misc 2d at 534-535; *Hedin*, 181 Misc at 731; *Matter of Branagan*, 180 Misc 209, 210-211; *McChesney*, 118 Misc at 546-547; *Schofield*, 72 Misc at 285-286).

I note that, although the majority attempts to cast this critical issue as one of preservation or lack thereof on the part of objectants, it was petitioner's burden, as proponent of the 1996 Will, "to make the proofs essential to its admission to probate" (*Matter of Schillinger*, 231 App Div 679, 680, *affd* 258 NY 186; *see Matter of Andriola*, 160 Misc 775, 778-790). Where, as here, the testimony of *petitioner's own witnesses* raised a question of fact whether the will produced for probate was *the* original will, or one of several wills unproduced and unaccounted for, petitioner failed to meet that burden (*see Jacobstein*, 253 App Div at 461 ["(I)f, as claimed here, the propounded instrument was executed in triplicate, the burden was cast upon the proponent to produce the face copy retained by the decedent more than twenty years ago, or—failing to do so—to account in such a manner for its (nonproduction) as to negative the inference of revocation"]). If the majority believes that it would be "fundamentally unfair" to decide this issue on appeal, as they assert, then we should remit the matter to Surrogate's Court to make a determination whether the 1996 Will was executed in multiples (*see Matter of Burtis*, 107 App Div 51, 52 ["(I)f upon appeal it appears that the disposition of the questions of fact raised by the evidence is not free from doubt and the (S)urrogate's decision is not entirely satisfactory, the questions of fact will be sent to a jury for determination"]; *see also Howland v Taylor*, 53 NY 627, 628; *Matter of Lawson*, 75 AD2d 20, 29-30). If the Surrogate so determines, then petitioner must produce or account for the three other copies of the 1996 Will before the offered copy may be admitted to probate (*see Crossman*, 95 NY at 152; *Robinson*, 257 App Div at 407).

III

Over and above the legal presumption that decedent destroyed the 1996 Will with the intention of revoking it (*see Staiger*, 243 NY at 472; *Collyer*, 110 NY at 486; *Demetriou*, 48 AD3d at 464), there is direct evidence in this case of decedent's revocatory intent and conduct. Decedent's neighbor, whom the Surrogate found to be "highly

credible," testified without contradiction that decedent intended to, and did in fact, revoke the 1996 Will by executing a new will devising her estate to her brothers (*see* EPTL 3-4.1 [a] [1] [A]). The neighbor testified that, after decedent's divorce was finalized, her highest priority was to execute a new will. To that end, in the late summer or early fall of 2007, decedent gave the neighbor a large manila envelope containing a cover letter from an attorney's office and a legal document entitled "Last Will and Testament." The document had been signed by decedent and two witnesses, both of whom indicated that decedent had signed the will in their presence, and contained a raised notary seal and a notary statement. Decedent asked the neighbor to read the will, and they reviewed the terms together. This later will "revoked all previous wills and codicil[s]," named decedent's mother as executrix of her estate, devised the New York property to her brothers, and left a small stipend to her niece and nephew. The Surrogate stated that he had "no doubt that [the neighbor's] testimony was accurate and that she saw what she described." Unfortunately, this later will could not be located after decedent's death, and the neighbor did not recall the names of the subscribing witnesses or the attorney who prepared the will (hereafter, Lost Will). The Surrogate thus concluded that, "while the testimony of what [the neighbor] saw establishes all of the components required to be in [a] last will and testament, it cannot establish due execution as required under EPTL[] 3.2-1."

It is not clear whether the Lost Will was executed in Texas or in New York, although the record suggests that it was executed in Texas. Under Texas law, "a will is valid if it is (1) in writing, (2) signed by the testator, and (3) attested by two or more credible witnesses above the age of fourteen years, who write their signatures in the testator's presence" (*Matter of Arrington*, 365 SW3d 463, 467 [Tex App, 1st Dist 2012]; *see* Texas Probate Code § 59). In order for a will to be duly executed in New York, the testator must sign the document at the end, sign or acknowledge his or her signature in the presence of at least two witnesses, and declare to each of the witnesses that the instrument is his or her will (*see* EPTL 3-2.1 [a] [1] - [3]). Further, the witnesses must, within 30 days, attest the testator's signature and, at the request of the testator, sign their names and affix their addresses (*see* EPTL 3-2.1 [a] [4]).

I agree with the Surrogate and the majority that the neighbor's testimony, by itself, is insufficient to establish due execution of the Lost Will under New York law. Although the neighbor testified that the instrument was signed by decedent and two witnesses, both of whom indicated that they had witnessed decedent sign the will, she did not testify that decedent declared that the instrument was her will or that decedent's signature appeared at the end of the instrument. It is well established, however, that, "[i]f an attorney-drafter supervises the execution of a will, there is a presumption of regularity that the will was properly executed" (*Matter of Halpern*, 76 AD3d 429, 431, *affd* 16 NY3d 777; *see Matter of Coniglio*, 242 AD2d 901, 902). Here, the neighbor testified that the Lost Will was accompanied by a cover letter from an attorney's office, that it was written in "legalese," and that it contained the signature of a notary

"attest[ing] to the signing of the Will" and a raised, embossed notary seal. She further testified that, during the period at issue, decedent periodically traveled back and forth to Texas to consult with an attorney in connection with her divorce. Based on those facts and the attendant circumstances, it may reasonably be inferred that the Lost Will was prepared by an attorney, thereby giving rise to the "presumption of proper execution" (*Matter of Derrick*, 88 AD3d 877, 879; *see Matter of Moskoff*, 41 AD3d 481, 482). Further, in my view, the neighbor's testimony was sufficient to establish the validity of the Lost Will under Texas law inasmuch as she testified that (1) the instrument was in writing, (2) it was signed by decedent, and (3) it was attested by two witnesses (*see* Texas Probate Code § 59; *Arrington*, 365 SW3d at 467). Although the majority correctly notes that we do not know whether the two witnesses were over the age of 14 (*see* Texas Probate Code § 59), "there is a presumption of regularity that the will was properly executed in all respects" based upon its preparation by an attorney (*Matter of Spinello*, 291 AD2d 406, 407).

Even assuming, arguendo, that objectants have not proven due execution of the Lost Will, I conclude that the neighbor's testimony is sufficient to establish decedent's revocation of the 1996 Will. SCPA 1407 provides that "[a] lost or destroyed will *may be admitted to probate* only if, [inter alia,] . . . [e]xecution of the will is proved in the manner required for the probate of an existing will" (emphasis added). Here, objectants do not seek to "admit[] to probate" the Lost Will (SCPA 1407). Rather, they seek to establish that decedent revoked the 1996 Will by execution of a subsequent testamentary instrument. We note that it is well settled that "[a] later instrument may effect a revocation of an earlier will although inoperative in other respects" (*Matter of Shinn*, 7 Misc 2d 623, 624; *see Matter of Goldsticker*, 192 NY 35, 37 ["It is doubtless true that under certain circumstances an instrument may be effective as a revocation of previous wills, and yet fail as a will itself"]; *see also Matter of Rokofsky*, 111 NYS2d 553, 557). As the Second Department reasoned in *Matter of Wear* (131 App Div 875, 876-877),

> "it is one thing to admit to probate a will disposing of a [person]'s estate where the will cannot be found, and quite another thing to merely establish that a second will, revoking a former will, has been duly made and executed and left in the possession of the decedent. In the one case we are assuming to dispose of property in a manner different from that prescribed by law in the absence of a will, while in the latter case we are merely permitting the property to descend in the manner which the law designates."

Here, in light of the uncontradicted testimony of decedent's intent to revoke the 1996 Will and her execution of a document effectuating that intent, I would hold that the Lost Will operated to revoke the 1996 Will. I would therefore deny probate of the 1996 Will and permit the estate to pass through intestacy (*see generally Matter of Hughson*, 97 Misc 2d 427, 429 ["(I)t is the court's obligation to .

. . carry out, within the realm of possibility, the intent of the deceased under the circumstances"]; *Matter of Neill*, 177 Misc 534, 536 ["In this type of case as in all other questions of construction the intention of the testator is paramount and supersedes all presumptions and general rules"]). As the majority notes, the overriding purpose of the statutory due execution requirements is "to prevent the probate of fraudulent instruments" (*Matter of Litwack*, 13 Misc 3d 1011, 1013; *see Matter of Kleefeld*, 55 NY2d 253, 259, *rearg denied* 56 NY2d 683, 805). Here, objectants do not seek to probate the Lost Will and there is no suggestion of fraud on their part or on the part of the neighbor, the only disinterested witness to testify at the hearing. I thus conclude that giving effect to the revocatory language of the Lost Will would not frustrate the "fraud-preventing purposes" of the statute (*Litwack*, 13 Misc 3d at 1013).

IV

Finally, I cannot agree with the majority that this Court is "constrained" to conclude as they do. It is well established that "[t]he Surrogate's Court is a court of equity" (*Matter of Dell*, 154 Misc 216, 219), with "the broadest possible equitable powers" in relation to the subject matter entrusted to its jurisdiction (*Matter of McCafferty*, 147 Misc 179, 201; *see* NY Const, art VI, § 12 [e]; *Matter of Stortecky v Mazzone*, 85 NY2d 518, 523-524; *Matter of Stuart*, 261 AD2d 550, 550; *Matter of Abraham L.*, 53 AD2d 669, 670; *Matter of Beall*, 184 Misc 881, 883-884). SCPA 201 provides that Surrogate's Court

> "shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and . . . to try and determine all questions, *legal or equitable*, arising between any or all of the parties to any action or proceeding . . . in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires" (SCPA 201 [3] [emphasis added]).

As one court wrote, "[m]ore comprehensive language could not have been found" (*Beall*, 184 Misc at 883-884) and, "[o]nce equity is invoked, the court's power is as broad as equity and justice require . . . [T]he court sitting in equity looks to the substance and to the merits of a transaction, rather than to its form" (*Norstar Bank v Morabito*, 201 AD2d 545, 546). "[A]s one cannot foresee the myriad of circumstances which might arise in the future, it is quite necessary that '[e]quity will administer such relief as the exigencies of the case demand' " (*Beall*, 184 Misc at 884, quoting *Bloomquist v Farson*, 222 NY 375, 380).

In this case, the equities overwhelmingly favor denying probate of the 1996 Will and permitting decedent's estate to pass through intestacy (*see* SCPA 201 [3]; *see generally Latham v Father Divine*, 299

NY 22, 27, *reargd denied* 299 NY 599 [“Nothing short of true and complete justice satisfies equity”]). As both parties acknowledge, decedent’s estate primarily consists of the New York property, which has been in her family for several generations. At the time that decedent executed the 1996 Will, she did not own the New York property. Decedent and the ex-husband thereafter purchased the New York property from decedent’s mother and, when the parties divorced in 2007, decedent was awarded the New York property as her sole and separate property.

After the divorce, there was little, if any, contact between decedent and her former in-laws. Decedent’s neighbor testified that she was not aware of any contact between decedent and petitioner after the divorce, and one of decedent’s tenants likewise testified that he never met petitioner, had never heard decedent talk about him, and was not aware of any communication between the two. By contrast, the neighbor testified that decedent was very close to her father and brothers, who were “frequent visitors” to the New York property. The tenant met decedent’s parents and brothers when he lived with her, and he testified that “[s]he seemed to love them very much. It was a very caring family.” Although Mrs. Simmons claimed that decedent and petitioner were “very close,” she admitted that the two had no contact after the divorce. Indeed, the ex-husband’s family did not learn of decedent’s passing until approximately eight months after her death, when the ex-husband “decided to Google [decedent’s] name and see if he - - what came up and her obituary came up.” Within a few days, the ex-husband’s family had retrieved the 1996 Will and had consulted estate attorneys in New York and Texas. They did not contact decedent’s family, however, to express their condolences or to advise them of the purported “discovery” of the 1996 Will.

In my view, the testimony of Mrs. Simmons and the ex-husband to the effect that they had forgotten that the 1996 Will left everything to the ex-husband or, in the event that he predeceased decedent, to petitioner, and that they were “shocked” to discover that petitioner was the sole beneficiary of decedent’s estate is simply incredible. Indeed, the ex-husband testified that he and decedent executed mirror wills in 1996, and he insisted at trial that it was decedent’s “choice” to select petitioner as the alternate beneficiary. It is thus disingenuous, at best, for him to claim that he was unaware of the contents of the 1996 Will. Rather, the record suggests that the ex-husband’s family was fully aware that they possessed an original and at least one copy of the 1996 Will and that, despite the divorce, decedent’s relocation to New York, and their knowledge that her health was failing, they made no effort to return the will to its rightful owner, but instead retained possession of the will and resurrected it as soon as they learned of her untimely demise.

It is troubling that it seems apparent from the record that the real party in interest here is the ex-husband, who is legally barred from taking under his former spouse’s will (*see* EPTL 5-1.4 [a]; *Matter of Cullen*, 174 Misc 2d 236, 237 [“The divorce of a testator and the former spouse, subsequent to a will’s execution, revokes any bequest to or appointment of the former spouse”]). It was the ex-husband who,

shortly after learning of decedent's death, attempted to find a lawyer and, indeed, counsel for petitioner acknowledged that the ex-husband brought the will to her office. Petitioner testified at trial that he was "not the [p]etitioner" and that he was "just along for the ride," suggesting that he is the petitioner in name only and that the true party in interest is the ex-husband. Thus, in my view, enforcing the predivorce testamentary disposition and appointment with respect to petitioner would circumvent the intent of the statute by permitting the ex-husband to obtain indirectly from petitioner through inter vivos gift, testamentary bequest, or intestacy (*see* EPTL 4-1.1 [a] [1], [3]), what he could not lawfully obtain directly (*see* EPTL 5-1.4 [a]; *see generally Riggs v Palmer*, 115 NY 506, 510 [" 'By an equitable construction, a case not within the letter of a statute is sometimes holden to be within the meaning, because it is within the mischief for which a remedy is provided' "]).

V

In sum, I conclude that objectants established that decedent intended to revoke the 1996 Will and that she did in fact revoke that will by operation of the presumption of revocation through destruction and by her subsequent execution of a new testamentary instrument (*see Matter of Williams*, 121 Misc 243, 246-247). I further conclude that admitting the 1996 Will to probate is manifestly unjust and inequitable under the unique circumstances of this case inasmuch as it would defeat the purpose and spirit of EPTL 5-1.4 and contravene decedent's clear and unequivocal intent to revoke the 1996 Will and to leave her limited estate to her own family.

Accordingly, I conclude that the objections should be sustained, probate of the 1996 Will should be denied, the letters testamentary issued to petitioner should be revoked, and the amended letters of administration issued to decedent's parents should be reinstated.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1171

CA 13-00497

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

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

JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT;

OPINION AND ORDER

MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS, OBJECTANTS-APPELLANTS.
(APPEAL NO. 2.)

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

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

Appeal from a decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered May 22, 2012. The decree revoked amended letters of administration issued to objectants Ronald L. Lewis and Meredith M. Stewart and issued letters testamentary to petitioner.

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

Same Opinion by SCUDDER, P.J., as in *Matter of Lewis* ([appeal No. 1] ___ AD3d ___ [Jan. 3, 2014]).

FAHEY, LINDLEY and VALENTINO, JJ., concur with SCUDDER, P.J.; PERADOTTO, J., dissents and votes to reverse in accordance with the same dissenting Opinion as in *Matter of Lewis* ([appeal No. 1] ___ AD3d ___ [Jan 3, 2014]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1172

CA 13-00498

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, LINDLEY, AND VALENTINO, JJ.

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

JAMES ROBERT SIMMONS, PETITIONER-RESPONDENT;

ORDER

MEREDITH M. STEWART, RONALD L. LEWIS, RONALD L. LEWIS, II, AND JONATHAN K. LEWIS,
OBJECTANTS-APPELLANTS.
(APPEAL NO. 3.)

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

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

Appeal from an amended decree of the Surrogate's Court, Jefferson County (Peter A. Schwerzmann, S.), entered June 4, 2012. The amended decree dismissed the objections to the petition for probate and admitted to probate the last will and testament of Robyn R. Lewis, deceased, executed July 15, 1996.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Kolasz v Levitt*, 63 AD2d 777, 779).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1219

KA 12-02217

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JACQUETTA B. SIMMONS, DEFENDANT-APPELLANT.

ANN M. NICHOLS, BUFFALO, FOR DEFENDANT-APPELLANT.

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered November 14, 2012. 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 modified as a matter of discretion in the interest of justice by reducing the sentence to a definite term of imprisonment of one year and as modified the judgment is affirmed and the matter is remitted to Genesee County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: On appeal from a judgment convicting her following a jury trial of assault in the second degree (Penal Law § 120.05 [12]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. "Viewing the evidence in a neutral light and weighing the probative value of the conflicting testimony and the conflicting inferences that could be drawn, while deferring to the jurors' ability to observe the witnesses and assess their credibility, aided by the video recording, we find that it was not contrary to the weight of the credible evidence for the jury to find that defendant" intentionally punched the victim (*People v Purvis*, 90 AD3d 1339, 1341, *lv denied* 18 NY3d 997; *see e.g. People v Woodring*, 48 AD3d 1273, 1275, *lv denied* 10 NY3d 846; *People v Gibbs*, 34 AD3d 1120, 1121-1122; *People v Thomas*, 24 AD3d 1242, 1243, *lv denied* 6 NY3d 819; *see generally People v Bleakley*, 69 NY2d 490, 495).

We agree with defendant, however, that the sentence is unduly harsh and severe under the circumstances of this case, and we therefore modify the judgment by reducing the sentence as a matter of discretion in the interest of justice to a definite term of imprisonment of one year (*see generally* CPL 470.15 [6] [b]).

We have reviewed defendant's remaining contention and conclude that it lacks merit.

All concur except SCONIERS, J., who dissents and votes to reverse in accordance with the following Memorandum: I respectfully dissent because, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), in my view the verdict convicting defendant of assault in the second degree (Penal Law § 120.05 [12]) is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). I would therefore reverse the judgment of conviction and dismiss the indictment. Where, as here, a different finding from that reached by the jury would not have been unreasonable, we must " 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony' " (*id*.), and then we must "decide[] whether the jury was justified in finding the defendant guilty beyond a reasonable doubt" (*Danielson*, 9 NY3d at 348; *see People v Lamar*, 83 AD3d 1546, 1546-1547). When considering all of the evidence in the record, including the surveillance video, I conclude that the credible evidence is more consistent with the testimony of the defense witnesses that defendant's arm was grabbed by someone who was behind her and that she accidently struck the victim when she aggressively pulled away from that person's grasp.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1223

KA 12-00718

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KRISTA M. GOLEY, DEFENDANT-APPELLANT.

KELIANN M. ARGY ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (KRISTYNA S. MILLS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered March 16, 2012. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree, criminal possession of a weapon in the fourth degree (two counts), endangering the welfare of a child (two counts), attempted assault in the second degree, perjury in the first degree and menacing in the second degree.

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

Memorandum: Defendant was convicted following a jury trial of, inter alia, manslaughter in the first degree (Penal Law § 125.20 [1]) for stabbing her boyfriend in the chest with a 12-inch steak knife and thereby causing his death. The jury acquitted defendant of murder in the second degree, as charged in the indictment. Defendant contends that the evidence is legally insufficient to support the manslaughter conviction and that the verdict with respect to that offense is against the weight of the evidence. Defendant failed to preserve for our review her contention concerning the legal sufficiency of the evidence by failing to renew her motion for a trial order of dismissal after presenting evidence (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678) and, in any event, we reject both of her contentions. With respect to the element of intent to cause serious physical injury, defendant admittedly caused the victim's death by stabbing him in the chest with a knife, and "the jury could infer from defendant's conduct that [s]he intended to cause [such] injury" (*People v Almonte*, 7 AD3d 324, 325, *lv denied* 3 NY3d 670, citing *People v Steinberg*, 79 NY2d 673, 685).

With respect to defendant's proffered justification defense, there is no dispute that the victim was unarmed when stabbed by defendant, and the evidence at trial established that he was not using

or attempting to use deadly physical force against her at the time. Although defendant told the police that the victim was about to strike her with a "hammer fist" when she stabbed him, we note that even a "crushing punch" is a "use of ordinary, not *deadly*, physical force" (*People v Bradley*, 297 AD2d 640, 641, *lv denied* 99 NY2d 556). We note that defendant conceded during her grand jury testimony, which was admitted in evidence at trial, that she told at least five fellow inmates in jail that the victim was so drunk on the night in question that he could barely stand but that she was nevertheless going to pursue a strategy of self-defense. Defendant also testified before the grand jury that, although she told the police that she stabbed the victim in self-defense, the victim essentially stabbed himself by pushing her hand toward his chest. That claim of an inadvertent stabbing was not included in the lengthy statement defendant gave to the police and was inconsistent with the trial testimony of the two witnesses who observed the incident. Thus, based upon our independent review of the evidence pursuant to CPL 470.15 (5), 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), we are satisfied that the jury's rejection of the justification defense was not contrary to the weight of the evidence (*see People v Romero*, 7 NY3d 633, 643-644).

We reject defendant's further contention that she was deprived of a fair trial by prosecutorial misconduct. Defendant failed to preserve for our review her contention that the prosecutor engaged in misconduct when, during the direct examination of a jailhouse informant, she asked the witness whether the witness notified a correction officer that defendant spoke to her about "the murder." The record establishes that County Court sustained defense counsel's objection to the prosecutor's use of the word "murder" and defense counsel did not seek further relief, such as a curative instruction or a mistrial (*see People v Tolbert*, 283 AD2d 930, 931, *lv denied* 96 NY2d 908; *see also People v McCovery*, 254 AD2d 751, 751, *lv denied* 92 NY2d 1051). We note in any event that the indictment charged defendant with murder, and it was the People's theory of the case that she intentionally killed the victim. Defendant also contends that the prosecutor engaged in misconduct by stating during her summation that defendant, in holding up a stool to ward off the victim, was "like a lion tamer." Defendant herself used that same language in describing her actions during her interview with the police, and we cannot conclude that it was improper for the prosecutor to describe defendant's actions in the same manner. We have reviewed defendant's remaining challenges to the alleged instances of prosecutorial misconduct and conclude that none has merit.

We reject defendant's contention that she was deprived of effective assistance of counsel at trial because, among other reasons, her attorney failed to pursue a psychiatric defense. The record establishes that defense counsel filed a motion seeking to require Jefferson County to pay for a psychological evaluation of defendant, and the court granted the motion. There is no indication in the record that the results of that evaluation supported a psychiatric defense or that defendant otherwise suffered from a mental disease or defect. To the extent that defendant relies on matters outside the

record on appeal in support of her contention, her remedy is by way of a CPL 440.10 motion (*see People v Cobb*, 72 AD3d 1565, 1567, *lv denied* 15 NY3d 803; *People v Shorter*, 305 AD2d 1070, 1071, *lv denied* 100 NY2d 566).

Although defendant also contends that defense counsel did not object to the court's increasing bail at arraignment on the indictment, the record establishes that defense counsel stated at the time that defendant was indigent and could not afford the bail as previously set, i.e., $50,000 cash or $100,000 bond. In any event, defense counsel was not required to make an objection that had little or no chance of success (*see People v Caban*, 5 NY3d 143, 152). Here, when bail was initially set in local court, defendant was charged with manslaughter in the second degree, and an increase in bail was justified by the fact that the indictment, unlike the felony complaint, charged defendant with murder in the second degree. We further conclude that defense counsel was not ineffective in failing to renew her motion for a trial order of dismissal, nor was defense counsel ineffective for failing to object to the alleged instances of prosecutorial misconduct. Because the evidence is legally sufficient to support the conviction, renewal of the motion for a trial order of dismissal had " 'little or no chance of success' " (*id.*; *see People v Galens*, 111 AD3d 1322, 1323) and, as noted, the prosecutor did not engage in misconduct.

In sum, "the evidence, the law and the circumstances of [this] case, viewed together and as of the time of representation, reveal that meaningful representation was provided" (*People v Satterfield*, 66 NY2d 796, 798-799; *see generally People v Baldi*, 54 NY2d 137, 147), particularly in light of the fact that defense counsel obtained an acquittal on the top count of the indictment, charging murder in the second degree.

Finally, contrary to defendant's contention, the police did not engage in "improper tactics," and thus defendant was not thereby deprived of due process.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1234

CAF 12-02085

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND VALENTINO, JJ.

IN THE MATTER OF MEGYN J.B., ON BEHALF OF
HEATHER M.-D., PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

CORY A.D., RESPONDENT-APPELLANT.

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

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

Appeal from an order of the Family Court, Monroe County (John J. Rivoli, J.H.O.), entered October 3, 2012 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from Heather M.-D.

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

Memorandum: In this family offense proceeding pursuant to article 8 of the Family Court Act, respondent appeals from a two-year order of protection issued against him on behalf of his 17-year-old daughter. The order was issued following a determination by Family Court that respondent committed the family offense of harassment in the second degree (*see* Family Ct Act § 832; Penal Law § 240.26 [1]). Respondent contends that the order must be vacated because petitioner, the child's mother and respondent's ex-wife, failed to prove by a preponderance of the evidence that he harassed his daughter. We reject that contention.

"A petitioner bears the burden of proving by a preponderance of the evidence that respondent committed a family offense" (*Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113). "A respondent's conduct forms the basis for a family offense predicated on harassment in the second degree when 'with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects another person to physical contact' " (*Matter of Anthony J. v David K.*, 70 AD3d 1220, 1221, quoting Penal Law § 240.26 [1]; *see* Family Ct Act § 812 [1]). "The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed unless clearly unsupported by the record" (*Matter of Medranda v Mondelli*, 74

AD3d 972, 972).

Here, respondent's daughter testified that he punched her in the face, grabbed her arms and shoved her onto a couch. At the time, petitioner had been awarded sole custody of the child and respondent's visitation was supervised. The incident took place in petitioner's residence, and respondent did not have permission from anyone to be there. Respondent testified that he grabbed his daughter in an attempt to take her cell phone from her as a form of punishment, but he denied punching her. Accepted as true, the daughter's testimony that respondent punched and grabbed her was sufficient to establish that he committed the family offense of harassment. Although, as respondent points out, the court did not explicitly find that all of the daughter's testimony was true, we note that the court likewise did not explicitly reject any of her testimony. The court's finding that "the testimony of both parties" established respondent's commission of the family offense is supported by the record.

Finally, respondent failed to preserve for our review his contention that he was justified in using physical force against his daughter. In any event, that contention lacks merit (*see generally* Penal Law § 35.10 [1]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1240

CA 13-00822

PRESENT: SCUDDER, P.J., CENTRA, LINDLEY, SCONIERS, AND VALENTINO, JJ.

DENISE F. MCKNIGHT, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

GARY COPPOLA, DEFENDANT-RESPONDENT.

THE LAW OFFICES OF JON LOUIS WILSON, LOCKPORT (JON LOUIS WILSON OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF DESTIN SANTACROSE, BUFFALO (DESTIN SANTACROSE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), entered February 20, 2013 in a personal injury action. The order granted the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries she allegedly sustained when she fell down the basement stairway at defendant's residence. The accident occurred when plaintiff walked down an unlit hallway, intending to open the door to the first floor bathroom, and instead opened the door to the basement. Plaintiff moved her hand along the wall inside the basement doorway in search of a light switch, took a step and fell down the stairs. She alleges that defendant was negligent in, inter alia, failing to maintain his property in a reasonably safe condition and failing to warn her of the danger posed by the basement door, which was next to the bathroom door and identical in appearance to it.

Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint. Ordinarily the issue whether a danger is open and obvious is for the trier of fact (*see Tagle v Jakob*, 97 NY2d 165, 169; *Sniatecki v Violet Realty, Inc.*, 98 AD3d 1316, 1319), and defendant's own submissions raise triable issues of fact whether the danger posed by the proximity and appearance of the bathroom and basement doors was open and obvious (*cf. Koval v Markley*, 93 AD3d 1171, 1171-1172; *see generally Quinlan v Cecchini*, 41 NY2d 686, 690; *Christianson v Breen*, 288 NY 435, 437-438; *Pollack v Klein*, 39 AD3d 730, 730-731). In addition, defendant did not meet his burden of establishing that he discharged his " 'broader duty' " to maintain

the property in a reasonably safe condition (*Juoniene v H.R.H. Constr. Corp.*, 6 AD3d 199, 201; *see generally Cohen v Shopwell, Inc.*, 309 AD2d 560, 561-562), or that plaintiff's conduct was the sole proximate cause of her fall (*see Sniatecki*, 98 AD3d at 1319; *Mooney v Petro, Inc.*, 51 AD3d 746, 747).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1249

KA 12-01364

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LEVAUGHN MCARTHUR, DEFENDANT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE (SHIRLEY A. GORMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered October 12, 2011. The judgment convicted defendant, upon a jury verdict, of burglary in the first degree (two counts), assault in the first degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of two counts of burglary in the first degree (Penal Law § 140.30 [2], [3]) and one count each of assault in the first degree (§ 120.10 [4]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Defendant contends that he was denied his right to be present at all material stages of the trial inasmuch as he was not present for a bench conference that occurred during his testimony (*see People v Antommarchi*, 80 NY2d 247, 250, *rearg denied* 81 NY2d 759). Even assuming, arguendo, that the bench conference " 'involved factual matters about which defendant might have [had] peculiar knowledge that would [have] be[en] useful in advancing [his] or countering the People's position' " (*People v Spotford*, 85 NY2d 593, 596, quoting *People v Dokes*, 79 NY2d 656, 660; *cf. People v Horne*, 97 NY2d 404, 416), we conclude that defendant voluntarily, knowingly and intelligently waived that right (*see People v Vargas*, 88 NY2d 363, 375-376; *see also People v Velasquez*, 1 NY3d 44, 49). Defendant's contention that County Court erred in modifying its *Sandoval* ruling during trial is not properly before us (*see* CPL 470.05 [2]), and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant further contends that the court erred in determining that his request for a missing witness charge was untimely because it

was made after both parties had rested, "rather than at the close of the People's proof, when defendant became 'aware that the witness[es] would not testify' " (*People v Williams*, 94 AD3d 1555, 1556; *see People v Lopez*, 96 AD3d 1621, 1622, *lv denied* 19 NY3d 998). Defendant's contention that the court failed to respond meaningfully to a jury note seeking clarification of the definition of intent is not preserved for our review (*see People v Santiago*, 101 AD3d 1715, 1717, *lv denied* 21 NY3d 946) and, in any event, it lacks merit because "the court's rereading of the [intent] instruction constituted a meaningful response" to the note (*id.*).

We further conclude that defendant's challenge to the legal sufficiency of the evidence supporting the conviction of burglary and assault is not preserved for our review (*see People v Gray*, 86 NY2d 10, 19), and in any event lacks merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that defendant's challenge to the legal sufficiency of the evidence supporting the conviction of criminal possession of a weapon in the third degree is preserved for our review (*cf. Gray*, 86 NY2d at 19), we conclude that defendant's challenge lacks merit (*see Bleakley*, 69 NY2d at 495). Viewing the evidence in light of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we also conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury" (*People v Witherspoon*, 66 AD3d 1456, 1457, *lv denied* 13 NY3d 942 [internal quotation marks omitted]), and we see no basis for disturbing the jury's resolution of those issues.

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). Defendant further contends that his right to present a defense was violated when the court precluded him from presenting hearsay evidence in which defendant's accomplice attempted to exonerate defendant. We reject that contention. "[A] defendant has a constitutional right to present a defense" (*People v Hayes*, 17 NY3d 46, 53), and a "defendant's constitutional right to due process requires admission of hearsay evidence when [the] declarant has become unavailable to testify and 'the hearsay testimony is material, exculpatory and has sufficient indicia of reliability' " (*People v Burns*, 6 NY3d 793, 795, quoting *People v Robinson*, 89 NY2d 648, 650 [emphasis omitted]). Here, there is no dispute that the accomplice was unavailable to testify (*see People v Stultz*, 2 NY3d 277, 286, *rearg denied* 3 NY3d 702), and we agree with the parties that our analysis turns on the issue whether the accomplice's statements were declarations against penal interest, and thus admissible as an exception to the hearsay rule (*see People v Shabazz*, 22 NY3d 896, 898). The hearsay evidence at issue consists of statements made by the accomplice during his plea colloquy and in a letter in which he took "full responsibility for what occurred." We agree with the People that the court properly concluded that those statements were

unreliable, and thus did not err in refusing to admit them in evidence (*cf. id.*; *People v McFarland*, 108 AD3d 1121, 1122-1123). The court expressly noted that, during the plea colloquy, the accomplice sought to alter his account of the incident out of a desire to avoid entering the prison system as a "snitch," and the court outlined the accomplice's contradictory statements during the plea colloquy. The accomplice initially stated that defendant entered the home in which the assault occurred only to "get" the accomplice, thus implying that defendant had entered the home after the accomplice was there. The court then advised the accomplice that untruthful testimony during the plea colloquy could result in the accomplice receiving a sentence greater than that promised to him during plea negotiations, and noted that the People had witnesses "who were there" at the subject home and "saw what happened." When the plea colloquy resumed, the accomplice changed his account, stating that defendant had entered the home with the accomplice. That change leads us to conclude that the court properly found the accomplice's testimony at the plea colloquy to be unreliable. Even assuming, arguendo, that the letter is contrary to the accomplice's penal interest, we further conclude that the court properly found that the statements therein were also unreliable. We note that the letter was signed one week after the accomplice's plea colloquy, and that the accomplice attempted to establish therein that defendant had no knowledge of the accomplice's plans when the accomplice took him to the home. We further note that the Court of Appeals has recently reiterated that there are four components to the declaration against penal interest exception to the hearsay rule: "(1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability" (*Shabazz*, 22 NY3d at 898). Jerome Prince, Richardson on Evidence sets forth a fifth component, i.e., that the declarant "had no probable motive to misrepresent the facts" (Jerome Prince, Richardson on Evidence § 8-403 [Farrell 11th Ed 2008]). To the extent that component should be part of our calculus here, we conclude that it weights our determination even more heavily in the People's favor. Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except CARNI, J., who dissents and votes to reverse and grant a new trial in accordance with the following Memorandum: I respectfully dissent and would reverse the judgment and grant a new trial. I agree with defendant that County Court erred in failing to admit in evidence the transcript of the plea colloquy of defendant's accomplice and a letter written by that accomplice, both of which contained statements exonerating defendant for the crimes herein. Inasmuch as those items are exculpatory, they "are subject to a more lenient standard, and will be found 'sufficient if [the supportive evidence] establish[es] a reasonable possibility that the statement[s therein] might be true' " (*People v Deacon*, 96 AD3d 965, 968, *appeal dismissed* 20 NY3d 1046, quoting *People v Settles*, 46 NY2d 154, 169-170). In my view, the accomplice's declarations against his penal interest were supported by evidence establishing a reasonable

possibility that they might be true, and the court therefore erred in refusing to admit them in evidence (*see People v McFarland*, 108 AD3d 1121, 1122). Further, the exclusion of those statements infringed on defendant's weighty interest in presenting exculpatory evidence, thus depriving him of a fair trial (*see Chambers v Mississippi*, 410 US 284, 302-303; *People v Oxley*, 64 AD3d 1078, 1084, *lv denied* 13 NY3d 941). Because the evidence of third-party culpability was improperly excluded, I conclude that defendant is entitled to a new trial (*see Oxley*, 64 AD3d at 1084).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1263

CA 13-00867

PRESENT: SMITH, J.P., FAHEY, CARNI, VALENTINO, AND WHALEN, JJ.

BAUMANN REALTORS, INC., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FIRST COLUMBIA CENTURY-30, LLC AND HEALTHNOW NEW YORK, INC., DEFENDANTS-RESPONDENTS.

BLAIR & ROACH, LLP, TONAWANDA (DAVID L. ROACH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEWNDOWSKI & ASSOCIATES, WEST SENECA (ASHLEY J. LITWIN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 12, 2013. The order granted the motion of defendants to dismiss the complaint.

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

Memorandum: Plaintiff commenced this action alleging that defendant First Columbia Century-30, LLC (Columbia) breached a broker commission agreement with plaintiff, that defendant HealthNow New York, Inc. (HealthNow) tortiously interfered with that agreement and that, as a result of such breach and tortious interference, plaintiff sustained damages as a third-party beneficiary of a lease. Defendants moved to dismiss the complaint pursuant to CPLR 3211 (a) (1), and Supreme Court granted the motion. We reverse.

Pursuant to a 2001 broker commission agreement, Columbia recognized plaintiff as "the exclusive leasing agent" for HealthNow and agreed to pay plaintiff a commission "for the initial term of the lease" and an additional commission if HealthNow "renew[ed] or extend[ed] the term of the lease." Thereafter, in 2001, HealthNow and Columbia entered into a 10-year lease with an option to renew for two five-year terms "upon all of the [same] terms and conditions" if HealthNow provided notice of renewal a year "prior to expiration of the then current term." In 2011, HealthNow, using its own broker, entered into a new lease with Columbia that contained different terms and conditions and purportedly superseded the 2001 lease.

"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" (*Ramos v Hughes*, 109 AD3d 1121, 1122 [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]" (*Wells Fargo Bank, N.A. v Zahran*, 100 AD3d 1549, 1550, *lv denied* 20 NY3d 861 [internal quotation marks omitted]).

Contrary to the court's conclusion, the documentary evidence does not conclusively establish as a matter of law that the 2011 lease was a new lease, as opposed to a renewal or extension of the 2001 lease. We conclude that plaintiffs are entitled to discovery on the issue whether the 2011 lease was a renewal or extension of the 2001 lease (*see Ernie Otto Corp. v Inland Southeast Thompson Monticello, LLC*, 91 AD3d 1155, 1157, *lv denied* 19 NY3d 802; *cf. Stern v Satra Corp.*, 539 F2d 1305, 1310).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1274

CA 12-00128

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

SUSAN GATELY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES GATELY, DEFENDANT-APPELLANT.

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

DAMON MOREY LLP, BUFFALO (MICHAEL J. WILLETT OF COUNSEL), AND J. ADAMS & ASSOCIATES, PLLC, WILLIAMSVILLE, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Erie County (John F. O'Donnell, J.), dated March 25, 2011 in a divorce action. The amended judgment, among other things, distributed marital assets and ordered defendant to pay plaintiff maintenance.

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

Memorandum: In this divorce action, defendant appeals from an amended judgment that, inter alia, distributed marital assets and ordered him to pay maintenance to plaintiff. We reject defendant's contention that Supreme Court abused its discretion in awarding maintenance to plaintiff. " 'As a general rule, the amount and duration of maintenance are matters committed to the sound discretion of the trial court' " (*Frost v Frost*, 49 AD3d 1150, 1150-1151). There is no abuse of discretion here, given that the record establishes that the court appropriately considered plaintiff's "reasonable needs and predivorce standard of living in the context of the other enumerated statutory factors" set forth in Domestic Relations Law § 236 (B) (6) (a) (*Hartog v Hartog*, 85 NY2d 36, 52).

We reject defendant's further contention that the court erred in determining that certain investment accounts, stock options, deferred compensation benefits, and parcels of real property were marital property subject to equitable distribution. "It is well established that [e]quitable distribution presents issues of fact to be resolved by the trial court, and its judgment should be upheld absent an abuse of discretion" (*Swett v Swett*, 89 AD3d 1560, 1561 [internal quotation marks omitted]). "Marital property is broadly defined as 'all property acquired by either or both spouses during the marriage' " (*Price v Price*, 69 NY2d 8, 11, quoting Domestic Relations Law § 236 [B] [1] [c]). The term " 'marital property' . . . should be construed

broadly in order to give effect to the 'economic partnership' concept of the marriage relationship recognized in the statute" (*id.* at 15). A party asserting a separate property claim must " 'trace the source of the funds . . . with sufficient particularity to rebut the presumption that they were marital property' " (*Bailey v Bailey*, 48 AD3d 1123, 1124; *see Swett*, 89 AD3d at 1561-1562; *Bennett v Bennett*, 13 AD3d 1080, 1082, *lv denied* 6 NY3d 708). "[S]eparate property which is commingled with marital property or is subsequently titled in the joint names of the spouses is presumed to be marital property" (*Chiotti v Chiotti*, 12 AD3d 995, 996; *see Richter v Richter*, 77 AD3d 1470, 1471; *DiNardo v DiNardo*, 144 AD2d 906, 906). The party seeking a finding of separate property has the burden of rebutting that presumption (*see Frost*, 49 AD3d at 1151; *Haas v Haas*, 265 AD2d 887, 888), and we conclude that defendant failed to meet that burden with respect to the assets in question.

The court also properly required defendant to maintain a policy of life insurance to secure his child support and maintenance obligations (*see* Domestic Relations Law § 236 [B] [8] [a]). Finally, we decline to grant plaintiff's request that defendant be required to pay the printing costs for her separately filed appendix (*cf. Wittig v Wittig*, 258 AD2d 883, 884-885).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1276

CA 13-00539

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

AFFINITY ELMWOOD GATEWAY PROPERTIES LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AJC PROPERTIES LLC, ET AL., DEFENDANTS,
EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN
GATHERS, ANGELINE C. GENOVESE, SANDRA GIRAGE
AND LORENZ M. WUSTNER, DEFENDANTS-APPELLANTS.

ARTHUR J. GIACALONE, APPELLANT.
(APPEAL NO. 1.)

ARTHUR J. GIACALONE, EAST AURORA, APPELLANT PRO SE, AND FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered February 21, 2013. The order, inter alia, sua sponte precluded nonparty Arthur J. Giacalone, Esq., from communicating with nonparty Kaleida Health concerning the subject matter of this litigation and denied the cross motion of defendants-appellants for sanctions.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the second ordering paragraph and as modified the order is affirmed without costs in accordance with the following Memorandum: Plaintiff commenced this action to extinguish a restrictive covenant in a deed. In appeal No. 1, defendants-appellants (hereafter, defendants), and their attorney, nonparty Arthur J. Giacalone, Esq. (collectively, appellants), appeal from those parts of an order that, sua sponte, precluded Giacalone from communicating with nonparty Kaleida Health (Kaleida) pursuant to CPLR 3103 concerning the subject matter of this litigation, and also denied defendants' cross motion for sanctions. In appeal No. 2, defendants appeal from an order denying their cross motion for recusal.

In appeal No. 1, we agree with appellants that Supreme Court abused its discretion in precluding Giacalone from communicating with Kaleida pursuant to CPLR 3103. Plaintiff sought, inter alia, to enjoin Giacalone from communicating with Kaleida on the ground that

Giacalone had violated the New York Rules of Professional Conduct (22 NYCRR 1200.0 *et seq*.), and the order to show cause bringing on the motion contained a temporary restraining order (TRO) enjoining Giacalone from engaging in certain conduct. By the order in appeal No. 1, the court, inter alia, denied that part of plaintiff's motion based on the alleged violation of the Rules of Professional Conduct and vacated the TRO, but the court also sua sponte granted the relief with respect to Kaleida pursuant to CPLR 3103. In pertinent part, that statute permits the court to issue "a protective order denying, limiting, conditioning or regulating the use of any disclosure device" (CPLR 3103 [a]). Here, however, there was no evidence establishing that Giacalone had misused the discovery process. Indeed, the documents submitted in support of plaintiff's order to show cause do not mention the discovery process, nor do they contain any evidence establishing that the conduct complained of was related to any information obtained in that process. Thus, inasmuch as "plaintiff failed to show that there was anything unreasonable or improper about defendants' demands" or the use of discovery materials by defendants and Giacalone (*Response Personnel, Inc. v Aschenbrenner*, 77 AD3d 518, 519), and there was no indication that "the disclosure process [was] used to harass or unduly burden a party" or a witness (*Barouh Eaton Allen Corp. v International Bus. Machs. Corp*., 76 AD2d 873, 874; *see Seaman v Wyckoff Hgts. Med. Ctr., Inc*., 25 AD3d 598, 599, *lv dismissed* 7 NY3d 864), the court abused its discretion in precluding Giacalone from communicating with Kaleida (*cf. Jones v Maples*, 257 AD2d 53, 56-57). We therefore modify the order by vacating the ordering paragraph in which that relief was granted. In light of our determination, we do not consider appellants' further contentions concerning preclusion.

Also by the order in appeal No. 1, the court vacated the TRO, and thus any issue raised by appellants concerning "the validity of the grant of [the TRO] . . . is for all intents and purposes rendered moot" (*Stubbart v County of Monroe*, 58 AD2d 25, 29, *lv denied* 42 NY2d 808; *see generally Welch Foods, Inc. v Wilson*, 262 AD2d 949, 950-951). Contrary to appellants' contention, the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715).

Contrary to appellants' further contention, the court did not improvidently exercise its discretion in denying that part of their cross motion that sought the imposition of sanctions (*see generally* 22 NYCRR 130-1.1 [a]).

Finally, contrary to defendants' contention in appeal No. 2, the court did not abuse its discretion in denying their recusal motion. "Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal . . . [and a] court's decision in this respect may not be overturned unless it was an abuse of discretion" (*People v Moreno*, 70 NY2d 403, 405-406; *see Curto v Zittel's Dairy Farm*, 106 AD3d 1482, 1482-1483). Here, defendants' "claim of bias is not supported by the record and is thus insufficient to require recusal. There is no evidence that any alleged bias had result[ed] in an opinion on the merits [of this case] on some basis other than what the [J]udge learned from [his] participation in the

case" (*Matter of McLaughlin v McLaughlin*, 104 AD3d 1315, 1316 [internal quotation marks omitted]; *see United States v Grinnell Corp.*, 384 US 563, 583; *Matter of Petkovsek v Snyder*, 251 AD2d 1086, 1086-1087).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1277

CA 13-00540

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

AFFINITY ELMWOOD GATEWAY PROPERTIES LLC,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

AJC PROPERTIES LLC, ET AL., DEFENDANTS,
EVELYN BENCINICH, SUSAN M. DAVIS, STEVEN
GATHERS, ANGELINE C. GENOVESE, SANDRA GIRAGE
AND LORENZ M. WUSTNER, DEFENDANTS-APPELLANTS.
(APPEAL NO. 2.)

ARTHUR J. GIACALONE, EAST AURORA, FOR DEFENDANTS-APPELLANTS.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (BRENDAN H. LITTLE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John A. Michalek, J.), entered March 8, 2013. The order, as relevant to this appeal, denied the cross motion of defendants-appellants for recusal.

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

Same Memorandum as in *Affinity Elmwood Gateway Props. LLC v AJC Props.* ([appeal No. 1] ___ AD3d ____ [Jan. 3, 2014]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1280

CA 12-01968

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

BARBARA GRASSO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT MCCOY, DEFENDANT-RESPONDENT.

BARBARA GRASSO, PLAINTIFF-APPELLANT PRO SE.

FRYE & CARBONE LLC, UTICA (RICHARD A. FRYE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered September 18, 2012. The order, inter alia, granted the motion of defendant to strike the amended complaint.

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

Memorandum: Plaintiff commenced this action seeking, inter alia, imposition of a constructive trust on real property owned by defendant. Supreme Court erred in granting defendant's motion to strike the amended complaint pursuant to CPLR 3126 based upon plaintiff's failure to respond to discovery demands. The affirmation submitted by defendant's attorney in support of the motion failed to demonstrate that he "ha[d] conferred with counsel for [plaintiff] in a good faith effort to resolve the issues raised by the motion" (Uniform Rule for Trial Cts [22 NYCRR] § 202.7 [a] [2]; *see Kane v Shapiro, Rosenbaum, Liebschutz, & Nelson, L.L.P.*, 57 AD3d 1513, 1513-1514). The conclusory assertions in the affirmation do not refer to any specific efforts or communications with plaintiff's attorney "that would evince a diligent effort by [defendant] to resolve the discovery dispute" (*Mironer v City of New York*, 79 AD3d 1106, 1108; *see 241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 472), nor do those assertions support defendant's contention that he is excused from complying with the rule because "any effort to resolve the present dispute non-judicially would have been 'futile' " (*Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334; *see Yargeau v Lasertron*, 74 AD3d 1805, 1806).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1283

CA 13-00955

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, LINDLEY, AND SCONIERS, JJ.

BRIAN RAULS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DIRECTV, INC., DEFENDANT-RESPONDENT.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (HARRY J. FORREST OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LEMERY GREISLER LLC, SARATOGA SPRINGS (ROBERT A. LIPPMAN OF COUNSEL), AND WALSH, ROBERTS & GRACE, BUFFALO, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Shirley Troutman, J.), entered September 17, 2012 in a personal injury action. The order denied the motion of plaintiff for partial summary judgment on liability under Labor Law § 240 (1) and granted the cross motion of defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of defendant's cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) claims and reinstating those claims, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law action seeking damages for injuries he sustained when he slipped and fell while stepping back onto a ladder from the roof of a residence after installing a satellite dish thereon. Plaintiff moved for partial summary judgment on liability under Labor Law § 240 (1), and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court denied plaintiff's motion, granted defendant's cross motion in its entirety, and dismissed the complaint. We note at the outset that plaintiff has abandoned any contention with respect to the propriety of the court's dismissal of his Labor Law § 200 claim (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984). We agree with plaintiff, however, that the court erred in granting those parts of defendant's cross motion with respect to the Labor Law §§ 240 (1) and 241 (6) claims, and we therefore modify the order accordingly.

Plaintiff established as a matter of law that defendant is a "contractor" within the meaning of Labor Law §§ 240 (1) and 241 (6), i.e., that it " 'had the power to enforce safety standards and choose responsible subcontractors' " (*Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 1428), and defendant failed to raise an

issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Indeed, it is well established that an entity's "right to exercise control over the work denotes its status as a contractor, regardless of whether it actually exercised that right" (*Milanese v Kellerman*, 41 AD3d 1058, 1061; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500; *Mergenhagen v Dish Network Serv. L.L.C.*, 64 AD3d 1170, 1171-1172). Thus, the Labor Law "holds owners and general contractors absolutely liable for any breach of the statute even if the job was performed by an independent contractor over which [they] exercised no supervision or control" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [internal quotation marks omitted]). Here, plaintiff submitted evidence establishing that defendant had the contractual authority to control the work at issue (*see Mergenhagen*, 64 AD3d at 1171-1172; *Mulcaire*, 45 AD3d at 1428). Among other things, the contract between defendant and plaintiff's employer required the latter to comply with defendant's policies and procedures, provide training in accordance with specifications provided by defendant, and utilize materials approved by defendant. Further, the contract incorporated by reference a manual prepared by defendant that provided, inter alia, detailed instructions for the installation of defendant's satellite equipment, including instructions concerning safety issues. We thus conclude that, because defendant "had the authority to choose the part[y] who did the work, and directly entered into [a] contract[] with th[at party], it had the authority to exercise control over the work, even if it did not actually do so" (*Williams v Dover Home Improvement*, 276 AD2d 626, 626; *see Johnson v Ebidenergy, Inc.*, 60 AD3d 1419).

Contrary to plaintiff's further contention, we conclude that the court properly denied his motion for partial summary judgment on liability under Labor Law § 240 (1) inasmuch as he did not establish as a matter of law that "the absence of or defect in a safety device was [a] proximate cause of his . . . injuries" (*Tronolone v Praxair, Inc.*, 22 AD3d 1031, 1033 [internal quotation marks omitted]; *see generally Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442; *Arigo v Spencer*, 39 AD3d 1143, 1144-1145). We further conclude in any event that defendant's submissions raise an issue of fact whether the sole proximate cause of the accident was plaintiff's decision to step onto a steep, slippery roof in violation of specific safety instructions (*see John v Klewin Bldg. Co., Inc.*, 94 AD3d 1502, 1503-1504; *Tronolone*, 22 AD3d at 1033).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1286

KA 12-01414

PRESENT: SCUDDER, P.J., CENTRA, CARNI, LINDLEY, AND SCONIERS, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

JESSE F. JOHNSTON, DEFENDANT-RESPONDENT.

JASON L. COOK, DISTRICT ATTORNEY, PENN YAN, FOR APPELLANT.

MICHAEL A. JONES, JR., VICTOR, FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Yates County Court (W. Patrick Falvey, J.), dated June 4, 2012. The order granted that part of the omnibus motion of defendant seeking to suppress certain evidence.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, that part of defendant's omnibus motion seeking to suppress evidence is denied, and the matter is remitted to Yates County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to suppress evidence, i.e., a weapon and oral statements made by defendant to an investigator employed by the Sheriff's Department. We previously determined that County Court erred in suppressing the weapon and defendant's statements, but we held the case, reserved decision and remitted the matter to County Court to consider other possible grounds for granting that part of defendant's motion seeking to suppress his statements (*People v Johnston*, 103 AD3d 1202, *lv denied* 21 NY3d 912). Upon remittal, the court rejected the other grounds advanced by defendant with respect to suppression of his statements. Inasmuch as defendant has no appeal as of right from an intermediate order denying a suppression motion (*see* CPL 450.10; *see also People v Merz*, 20 AD2d 918), we do not address the propriety of the court's determination upon remittal that the other grounds advanced by defendant did not warrant suppression of his statements. Thus, in accordance with our prior decision in which we determined that the court erred in suppressing the weapon and the statements, we deny that part of defendant's omnibus motion seeking to suppress evidence.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1290

KA 12-00848

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH M. BOWMAN, DEFENDANT-APPELLANT.

KELIANN M. ARGY-ELNISKI, ORCHARD PARK, FOR DEFENDANT-APPELLANT.

CINDY F. INTSCHERT, DISTRICT ATTORNEY, WATERTOWN (PATRICIA L. DZIUBA OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered May 7, 2012. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and endangering the welfare of a child.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of predatory sexual assault against a child (Penal Law § 130.96) and endangering the welfare of a child (§ 260.10 [1]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence both because he made only a general motion for a trial order of dismissal and because he failed to renew his motion after presenting evidence (*see People v Roman*, 85 AD3d 1630, 1630, *lv denied* 17 NY3d 821; *see also People v Hall*, 106 AD3d 1513, 1514, *lv denied* ___ NY3d ___ [Oct 07, 2013]). In any event, we conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Furthermore, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). "Although a different result would not have been unreasonable, the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801).

Defendant's contention that he was denied a fair trial based on the prosecutor's improper comments during summation and by an instruction that County Court gave while charging the jury is not preserved for our review inasmuch as defendant failed to object to

those instances of alleged misconduct or to the jury instruction (*see* CPL 470.05 [2]). We decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *see also People v Benton*, 106 AD3d 1451, 1451-1452, *lv denied* 21 NY3d 1040; *People v Nunez*, 51 AD3d 1398, 1400, *lv denied* 11 NY3d 792). Finally, we reject defendant's contention that he was denied effective assistance of counsel inasmuch as "the evidence, the law, and the circumstances of [this] . . . case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1293

KA 10-02082

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN F. BRITTON, DEFENDANT-APPELLANT.

LEANNE LAPP, PUBLIC DEFENDER, CANANDAIGUA, THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (ROBERT C. JEFFRIES OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered October 6, 2010. The judgment convicted defendant, upon his plea of guilty, of attempted kidnapping in the second degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, attempted kidnapping in the second degree (Penal Law §§ 110.00, 135.20). Defendant's contention that he was unlawfully arrested in his home without an arrest warrant in violation of *Payton v New York* (445 US 573) is unpreserved for our review inasmuch as he failed to raise it before County Court (*see People v Smith*, 55 NY2d 888, 890; *People v Long*, 195 AD2d 610, 610, *lv denied* 82 NY2d 756; *People v Sneed*, 191 AD2d 969, 969-970), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We reject defendant's contention that the search of his apartment was unlawful because the police lacked a search warrant or valid consent to search, and thus that the court erred in refusing to suppress the rifle obtained by the police during the search of this apartment. The People met their burden of establishing that the police reasonably believed that defendant's wife, the complainant, had the requisite authority to consent to the search of the apartment (*see People v Gonzalez*, 88 NY2d 289, 295; *People v Littleton*, 62 AD3d 1267, 1269, *lv denied* 12 NY3d 926). The evidence at the suppression hearing established that police officers responded to a report of a domestic dispute possibly involving a gun at defendant's apartment. As the police approached the door of the apartment, they heard a male yelling and a female crying. After defendant was removed from the apartment,

the complainant permitted the police to enter the apartment and informed them that she lived there. The complainant then told the police that defendant had threatened her with a gun and directed the officers to the location of the rifle. The rifle was located in a closet inside the doorway to the apartment. The complainant consented to the seizure of the rifle and, indeed, asked the police to remove it for her safety. Thus, "the record establishes that the searching officer[s] relied in good faith on the apparent authority of [the complainant] to consent to the search, and the circumstances reasonably indicated that [she] had the requisite authority to consent to the search" (*People v Fontaine*, 27 AD3d 1144, 1145, *lv denied* 6 NY3d 847; *see People v Smith*, 101 AD3d 1794, 1795, *lv denied* 20 NY3d 1104; *see generally People v Scott*, 31 AD3d 1165, 1165-1166, *lv denied* 7 NY3d 851).

Finally, defendant further contends that the court erred in refusing to suppress the rifle seized from his apartment as the result of an arrest that was made without probable cause. Although defendant moved to suppress the rifle on that ground, he abandoned it by expressly limiting the scope of the suppression hearing to the legality of the search of his apartment and the seizure of the rifle and, furthermore, by failing to seek a ruling on that part of his omnibus motion (*see generally People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954; *People v Adger*, 83 AD3d 1590, 1591, *lv denied* 17 NY3d 857; *People v Nix*, 78 AD3d 1698, 1698-1699, *lv denied* 16 NY3d 799, *cert denied* ___ US ___, 132 S Ct 157; *People v Bigelow*, 68 AD3d 1127, 1128, *lv denied* 14 NY3d 797).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1294

KA 09-00385

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

KEON S. ANDERSON, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (GEOFFREY KAEUPER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered July 1, 2008. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and robbery in the first degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [3]) and two counts of robbery in the first degree (§ 160.15 [4]). Contrary to defendant's contention, we conclude that County Court did not abuse its discretion in denying his motion seeking to sever the November 22, 2007 robbery count, i.e., count three, from the December 3, 2007 felony murder and robbery counts, i.e., counts one and two (*see generally People v Owens*, 51 AD3d 1369, 1370-1371, *lv denied* 11 NY3d 740; *People v Dozier*, 32 AD3d 1346, 1346, *lv dismissed* 8 NY3d 880). The December 3, 2007 felony murder and robbery counts were joinable pursuant to CPL 200.20 (2) (a), while the two robbery counts involving different criminal transactions were joinable pursuant to CPL 200.20 (2) (c). The November 22, 2007 robbery count and the December 3, 2007 felony murder and robbery counts were therefore joinable under the "chain of joinder" rule (CPL 200.20 [2] [d]). Defendant failed to meet his burden of submitting sufficient evidence of prejudice from the joinder to establish good cause to sever (*see People v Sharp*, 104 AD3d 1325, 1325-1326, *lv denied* 21 NY3d 1009; *People v Ogborn*, 57 AD3d 1430, 1430, *lv denied* 12 NY3d 786; *see also* CPL 200.20 [3]).

We reject defendant's further contention that defense counsel was ineffective in failing to seek to remove a prospective juror during voir dire. While at the outset of voir dire the prospective juror made statements that raised concerns regarding his impartiality, upon

further questioning he clarified his position by giving an unequivocal and credible assurance under oath that he would be able to render an impartial verdict if chosen to serve (*see People v Garrow*, 75 AD3d 849, 852; *People v Molano*, 70 AD3d 1172, 1174, *lv denied* 15 NY3d 776). Moreover, we note that defense counsel, in not objecting to the juror being seated, may well have had sound tactical reasons for not seeking to remove him from the jury panel, and defendant has no legal basis for challenging that "exercise of professional judgment[]" by defense counsel (*People v Colon*, 90 NY2d 824, 826; *see People v Sprowal*, 84 NY2d 113, 119). Viewing the evidence in light of the elements of the December 3, 2007 felony murder and robbery counts as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence with respect to those counts (*see generally People v Bleakley*, 69 NY2d 490, 495). Finally, the sentence is not unduly harsh or severe.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1295

KA 12-01692

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ADRIAN DIXON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (VINCENT F. GUGINO OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (MICHAEL D. SMITH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered January 12, 2012. The judgment convicted defendant, after a nonjury trial, 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 following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to support the conviction despite the fact that no witness observed defendant in possession of the weapon (*see People v Mateo*, 13 AD3d 987, 988, *lv denied* 5 NY3d 883). Viewing the evidence in the light of the elements of the crime in this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review his contention that his waiver of the right to a jury trial is invalid on the ground that the record does not establish that he signed the written waiver in open court (*see People v Moran*, 87 AD3d 1312, 1312, *lv denied* 19 NY3d 976; *People v Brunson*, 307 AD2d 323, 324, *lv denied* 100 NY2d 641). In any event, that contention lacks merit inasmuch as the record of the waiver colloquy, which took place in open court, establishes that defendant discussed the waiver with defense counsel, stated that he understood the nature and consequences of the waiver, and acknowledged that he had signed the waiver form (*see People v Badden*, 13 AD3d 463, 463, *lv denied* 4 NY3d 796; *Brunson*, 307 AD2d at 324). Defendant's

further contention that his waiver of the right to a jury trial is invalid on the ground that the written waiver bears an incorrect date is also unpreserved for our review (*see* CPL 470.05 [2]) and, in any event, does not warrant reversal. This Court "must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties . . . , and the error here exemplifies such a technicality" (*People v Cepeda*, 29 AD3d 491, 492, *lv denied* 7 NY3d 810 [internal quotation marks omitted]).

Finally, we reject defendant's contention that County Court erred in failing to rule on that part of his pretrial motion seeking dismissal of the indictment on the ground that the grand jury proceedings were defective. The record establishes that the court in fact denied that part of defendant's motion (*cf. People v Jones*, 103 AD3d 1215, 1217, *lv dismissed* 21 NY3d 944; *People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1299

CA 13-01043

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

ISKALO ELECTRIC TOWER LLC AND DOWNTOWN CBD INVESTORS LLC, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STANTEC CONSULTING SERVICES, INC., DEFENDANT-APPELLANT.

HARTER SECREST & EMERY LLP, ROCHESTER (F. PAUL GREENE OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE GARAS LAW FIRM, LLP, BUFFALO (JOHN C. GARAS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered March 12, 2013. The order granted the motion of plaintiffs for an order determining, inter alia, that they had complied with a conditional order entered May 17, 2012 and denied the cross motion of defendant for an order staying determination of plaintiffs' motion pending the deposition of a certain person.

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

Memorandum: Plaintiffs, limited liability companies managed by Iskalo Development Corp. (Iskalo), commenced this action seeking damages for defendant's alleged breach of two commercial leases. Defendant interposed an answer asserting six counterclaims and served a notice demanding the production of documents in 49 categories. Plaintiffs produced approximately 1,100 pages in response. Defendant deemed that response insufficient and sent plaintiffs' attorney a letter dated December 16, 2011 demanding production of documents in 11 additional categories, and further production of documents in nine of the categories of its initial notice to produce. Defendant subsequently moved to compel production of the requested documents. Plaintiffs did not oppose the motion, and instead produced approximately 1,700 additional pages of documents. By order entered May 17, 2012, Supreme Court conditionally dismissed the complaint unless plaintiffs "produce[d] for discovery and inspection the documents and information sought in [defendant]'s motion within thirty (30) days of service." Defendant thereafter deposed a former Iskalo employee, who allegedly testified to the existence of documents that had not yet been produced, but which were responsive to defendant's discovery requests. Plaintiffs located those and other documents, and

produced thousands of additional pages of documents in July and September 2012. Defendant sent a letter to plaintiffs' attorney stating that, by the self-executing terms of the conditional order of dismissal, the complaint was dismissed for plaintiffs' failure to comply with the discovery mandates set forth in the conditional order, whereupon plaintiffs moved for an order determining, inter alia, that they had complied with the conditional order. Defendant cross-moved for an order staying determination of plaintiffs' motion pending the deposition of Iskalo's executive vice-president. The court granted plaintiffs' motion, finding that "[p]laintiffs made diligent efforts to comply with the Court's Order entered May 17, 2012," and denied defendant's cross motion. We affirm.

" 'It is well settled that the court is vested with broad discretion to control discovery and that the court's determination of discovery issues should be disturbed only upon a showing of clear abuse of discretion' " (*Eaton v Hungerford*, 79 AD3d 1627, 1628). The court has the power to grant a conditional order that imposes a sanction upon a party unless that party submits to a discovery request by a certain date (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79; *Legarreta v Neal*, 108 AD3d 1067, 1068; *see also* CPLR 3126). Generally, a "conditional order [of dismissal is] self-executing and [a party]'s 'failure to produce [the requested] items on or before the date certain' render[s] it 'absolute' " (*Wilson v Galicia Contr. & Restoration Corp.*, 10 NY3d 827, 830; *see Gibbs*, 16 NY3d at 78; *Burton v Matteliano*, 98 AD3d 1248, 1250). "Nevertheless, a conditional order, like any other, must be sufficiently specific to be enforceable" (*Trabanco v City of New York*, 81 AD3d 490, 492). Here, the court's conditional order did not give a specific, concrete directive, but rather ordered plaintiffs to disclose "the documents and information sought in [defendant]'s motion." We decline to disturb the court's discretionary determination that the thousands of pages of documents produced by plaintiffs prior to the deadline sufficiently satisfied the numerous categories sought by defendant in its discovery requests (*see generally Eaton*, 79 AD3d at 1628). Finally, we note that, if further depositions yield new facts that would change the court's determination in the order appealed from, defendant may seek relief pursuant to CPLR 2221.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1319

CAF 12-02281

PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

IN THE MATTER OF DWAYNE CROSS,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

DANIELLE M. CASWELL, RESPONDENT-APPELLANT.

IN THE MATTER OF DANIELLE M. CASWELL,
PETITIONER-APPELLANT,

V

DWAYNE CROSS, RESPONDENT-RESPONDENT.

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

STEVEN R. FORTNAM, ATTORNEY FOR THE CHILD, WESTMORELAND.

Appeal from an order of the Family Court, Oneida County (James R. Griffith, J.), entered November 9, 2012 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded the parties joint custody of their daughter with primary physical residence to petitioner-respondent, Dwayne Cross.

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

Memorandum: In this proceeding pursuant to article 6 of the Family Court Act, respondent-petitioner mother appeals from an order that, inter alia, awarded the parties joint custody of their daughter with primary physical residence to petitioner-respondent father. The mother contends that Family Court's determination is not in the child's best interests and that we should award her sole custody with reasonable visitation to the father. We affirm. In making a custody determination, "the court must consider all factors that could impact the best interests of the child . . . , including the existing custody arrangement, the current home environment, the financial status of the parties, the ability of [the parties] to provide for the child's emotional and intellectual development and the wishes of the child . . . No one factor is determinative because the court must review the totality of the circumstances" (*Matter of Marino v Marino*, 90 AD3d 1694, 1695; *see Eschbach v Eschbach*, 56 NY2d 167, 172-174).

Here, although there are several factors that militate in favor of awarding custody to the mother, we conclude that the court's determination that it is in the best interests of the child to award primary physical custody to the father is supported by a sound and substantial basis in the record (*see Matter of Weekley v Weekley*, 109 AD3d 1177, 1178; *Matter of Crudele v Wells* [appeal No. 2], 99 AD3d 1227, 1228). We note at the outset that we afford "great deference" to the determination of the hearing court (*Matter of Goossen v Goossen*, 72 AD3d 1591, 1591), with its "superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625). As the court found, the father can provide a more stable home environment for the child than the mother. He owns a four-bedroom home and is gainfully employed, while the mother is unemployed and has resided in at least four different apartments since separating from the father. One of the mother's apartments had a problem with mice and her current residence has only one bedroom. In addition, the father has custody of the parties' other child, and there is a preference for keeping siblings together (*see Eschbach*, 56 NY2d at 173). Furthermore, it is undisputed that, while the child was residing with the mother after the parties separated, the mother ran out of money and food on several occasions and had to ask the father for assistance, and the mother had her furniture repossessed while this proceeding was pending.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1320

CA 13-01061

PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

CHERYL GUGA, INDIVIDUALLY,
AND AS PARENT AND NATURAL GUARDIAN OF MEGAN
CHAPIN, CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

WATERTOWN BOARD OF EDUCATION, WATERTOWN CITY
SCHOOL DISTRICT, WATERTOWN HIGH SCHOOL AND
CASE MIDDLE SCHOOL, RESPONDENTS-APPELLANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (MOLLY M. RYAN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CARLISLE CARROTHERS & CLOUSH, P.C., OGDENSBURG (REBECCA A. SIMSER OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Jefferson County (James P. McClusky, J.), entered September 5, 2012. The order granted the application of claimant for leave to serve a late notice of claim.

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

Memorandum: Respondents appeal from an order granting claimant's application for leave to serve a late notice of claim. We conclude that Supreme Court properly granted the application. "It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the [respondents] acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the [respondents] in maintaining a defense on the merits" (*Le Mieux v Alden High Sch.*, 1 AD3d 995, 996). Here, according to the notice of claim, respondents assumed the affirmative duty of ensuring that claimant's daughter (daughter) would be placed on a school bus after school and transported home in order to avoid a potential confrontation with two students who had threatened claimant's older child (*see Wenger v Goodell*, 220 AD2d 937, 938). Respondents then breached that duty by failing to instruct the daughter to take the bus home or even to make her aware of the potential danger, as a result of which the daughter walked home and was assaulted by the two students off school property. Claimant established a reasonable excuse for the delay, i.e., she was unaware of the serious nature of her daughter's

injury and its permanency during the 90-day period and submitted medical records demonstrating the progressive and worsening nature of the injury (*see Matter of Greene v Rochester Hous. Auth.*, 273 AD2d 895, 895). We note that "the [daughter's] infancy . . . weighs in favor of allowing service of a late notice of claim," and the six-month period between the assault and claimant's application "is a comparatively short period of delay" (*Reed v City of Lackawanna*, 221 AD2d 967, 968). We conclude that respondents had "actual or constructive notice of the essential facts constituting the claim" (*Matter of Kliment v City of Syracuse*, 294 AD2d 944, 945), inasmuch as it is undisputed that respondents had actual knowledge of the assault and the daughter's immediate injuries.

We further conclude that late service will not substantially prejudice respondents in maintaining a defense on the merits, inasmuch as they investigated the incident by questioning students and faculty "within days of its occurrence" (*Reed*, 221 AD2d at 968). Moreover, respondents have already established their defense by asserting that they never assumed an affirmative duty. Finally, we note that, although respondents submitted affidavits in opposition to claimant's application in which the employees involved denied making the assurances set forth in the notice of claim, the affidavits merely present a factual dispute for trial and do not render the claim patently meritless (*see generally Matter of Catherine G. v County of Essex*, 3 NY3d 175, 179).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1322

CA 13-01038

PRESENT: SMITH, J.P., FAHEY, LINDLEY, VALENTINO, AND WHALEN, JJ.

MICHAEL J. DIFABIO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

JAMES M. JORDAN, DEFENDANT-APPELLANT.

COUCH, WHITE, LLP, ALBANY (JOEL M. HOWARD, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered March 19, 2013. The order, among other things, denied the motion of defendant for summary judgment dismissing the amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion in part and dismissing the second cause of action and as modified the order is affirmed without costs.

Memorandum: In this action seeking damages for defamation and tortious interference with contractual relations, defendant appeals from an order denying his motion for summary judgment dismissing the amended complaint. Contrary to defendant's contention, Supreme Court properly denied that part of his motion seeking summary judgment on the first cause of action, for defamation. In this action involving a public figure, defendant's burden in support of the motion with respect to the defamation cause of action "is not . . . to prove as a matter of law that [he] did not publish with actual malice, but [instead is] to point to deficiencies in the record that will prevent plaintiff from proving that fact by clear and convincing evidence" (*Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 354; *see Humane League of Phila., Inc. v Berman & Co.*, 108 AD3d 417, 418). A defendant seeking summary judgment dismissing a defamation cause of action bears the initial "burden of demonstrating that plaintiff could not show by clear and convincing evidence that he made the challenged statements with actual malice" (*Farber v Jefferys*, 103 AD3d 514, 515, *lv denied* 21 NY3d 858). Here, defendant failed to meet that burden and, in any event, plaintiff raised a triable issue of fact whether defendant acted with actual malice, " 'that is, with knowledge that it was false or with reckless disregard of whether it was false or not' " (*Freeman v Johnston*, 84 NY2d 52, 56, *cert denied* 513 US 1016, quoting *New York*

Times Co. v Sullivan, 376 US 254, 280).

We agree with defendant, however, that the court erred in denying his motion with respect to the second cause of action, for tortious interference with contract. We therefore modify the order accordingly. Indeed, plaintiff concedes that he cannot establish that defendant's conduct caused a breach of plaintiff's employment contract, as required to make out a prima facie case of tortious interference with an existing contract (*see generally Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 620-621), as pleaded in the complaint. We reject plaintiff's contention that the court properly denied the motion with respect to the second cause of action because he raised a triable issue of fact with respect to an unpleaded "claim of tortious interference with economic relations" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190-191). In general, "[a] court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (*Mezger v Wyndham Homes, Inc.*, 81 AD3d 795, 796; *see Ostrov v Rozbruch*, 91 AD3d 147, 154). In any event, even assuming, arguendo, that a court may deny a defendant's summary judgment motion based upon an unpleaded claim or cause of action where there is no surprise to the moving party and the evidence submitted in opposition to the motion raises a triable issue as to such a claim (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:11), we conclude that plaintiff failed to raise a triable issue of fact with respect to that unpleaded claim.

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

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1328

KA 12-01722

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERICK W. BARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 2, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the fourth degree (Penal Law § 220.09 [1]), defendant contends that County Court erred in denying his motion to suppress certain items of physical evidence. We reject that contention. The record supports the court's determination that the rental period of the hotel room in which the items were found had expired prior to the search by the police, and we thus conclude that "defendant lost his reasonable expectation of privacy in the hotel room and its contents, and the general manager of the hotel had the authority to consent to the search" (*People v D'Antuono*, 306 AD2d 890, 890, *lv denied* 100 NY2d 593, *reconsideration denied* 100 NY2d 641, *cert denied* 541 US 994, *reh denied* 541 US 1083; *see People v Kozba*, 66 AD3d 1387, 1388, *lv denied* 13 NY3d 939; *People v Rodriguez*, 104 AD2d 832, 833-834; *see generally People v Prochilo*, 41 NY2d 759, 761). The court also properly determined that defendant abandoned any reasonable or legitimate expectation of privacy in a backpack that was located in the hotel room, by virtue of both his flight (*see People v Gonzalez*, 25 AD3d 620, 621, *lv denied* 6 NY3d 833), and his disavowal of ownership of that backpack (*see People v DuPree*, 43 AD3d 1314, 1315). Finally, the sentence is not unduly harsh or severe.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1329

KA 12-00684

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH J. PUGLIESE, DEFENDANT-APPELLANT.

JOHN HERBOWY, ROME, FOR DEFENDANT-APPELLANT.

JEFFREY S. CARPENTER, DISTRICT ATTORNEY, HERKIMER (JACQUELYN M. ASNOE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Herkimer County Court (Patrick L. Kirk, J.), rendered November 10, 2011. The judgment convicted defendant, upon his plea of guilty, of assault in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the amount of restitution to $5,915.07 and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the third degree (Penal Law § 120.00) and ordering him to pay restitution in the amount of $7,115.07, defendant contends that County Court erred in failing to consider his ability to pay restitution. Defendant failed to preserve that contention for our review inasmuch as he "did not request a hearing on that issue or otherwise object to the amount of restitution ordered on that basis" (*People v Naumowicz*, 76 AD3d 747, 748; *see People v Willis*, 105 AD3d 1397, 1397, *lv denied* ___ NY3d ___ [Oct. 7, 2013]; *People v Dillon*, 90 AD3d 1468, 1468-1469, *lv denied* 19 NY3d 1025). In any event, the record establishes that the court considered defendant's ability to pay restitution pursuant to Penal Law § 65.10 (2) (g) (*see Dillon*, 90 AD3d at 1469; *Matter of Jessie GG.*, 190 AD2d 916, 917). The court inquired at the restitution hearing about defendant's employment status and whether he had any dependents, and the presentence report reviewed by the court detailed defendant's educational background and employment income (*see Dillon*, 90 AD3d at 1469).

Defendant next contends that the People failed to meet their burden of establishing the amount of restitution by a preponderance of the evidence (*see People v Tzitzikalakis*, 8 NY3d 217, 221). Specifically, defendant contends that the court erred in directing him to make restitution for the business income and the value of the sick leave that the victim allegedly lost as a result of the assault. Contrary to the contention of defendant, we conclude that the People

established the value of the sick leave through the victim's testimony at the restitution hearing and supporting documentation from the victim's employer and physician (*see People v Wilson*, 108 AD3d 1011, 1013; *People v LaVilla*, 87 AD3d 1369, 1370). We agree with defendant, however, that the People failed to establish the amount of income, if any, the victim lost from his auction business as a result of the assault (*see People v Wilson*, 59 AD3d 807, 808-809). The documentation in the record does not substantiate the victim's claimed loss of income and, indeed, the victim acknowledged that any lost income from his business during the period of time at issue was purely speculative (*see id.*). We therefore modify the judgment by reducing the amount of restitution to $5,915.07.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1330

KA 12-01876

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DESTINY BELLAUS, DEFENDANT-APPELLANT.

WAGNER & HART, LLP, OLEAN (JANINE C. FODOR OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cattaraugus County Court (Larry M. Himelein, J.), rendered July 9, 2012. The judgment convicted defendant, upon her plea of guilty, of assault in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Cattaraugus County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting her upon her plea of guilty of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in failing to adjudicate her a youthful offender. "Upon conviction of an eligible youth, the court must order a [presentence] investigation of the defendant. After receipt of a written report of the investigation and at the time of pronouncing sentence the court must determine whether or not the eligible youth is a youthful offender" (CPL 720.20 [1]). Here, at the time of sentencing, the court failed to determine whether defendant, an apparently eligible youth, is a youthful offender. "[W]e cannot deem the court's failure to rule on the . . . [issue] as a denial thereof" (*People v Spratley*, 96 AD3d 1420, 1421, *following remittal* 103 AD3d 1211, *lv denied* 21 NY3d 1020; *see also People v Koons*, ___ AD3d ___ [Dec. 27, 2013]). We therefore hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*People v Rudolph*, 21 NY3d 497, 503).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1333

KA 12-01723

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERICK W. BARKER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered April 2, 2012. The judgment convicted defendant, upon his plea of guilty, of strangulation in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of strangulation in the second degree (Penal Law § 121.12). Defendant's contention that County Court erred in refusing to make the presentence report (PSR) available to him before sentencing is without merit inasmuch as defendant did not request the PSR before sentencing (*see generally* CPL 390.50 [2] [a]). Defendant's contention that the court erred in refusing to make the PSR available to him in connection with this appeal is likewise without merit. Indeed, the submissions before us reflect that defendant received and reviewed the PSR in a timely fashion in connection with this appeal. Finally, the sentence is not unduly harsh or severe.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1335

KA 12-00239

PRESENT: SCUDDER, P.J., FAHEY, PERADOTTO, CARNI, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

RONALD D. ROSSBOROUGH, DEFENDANT-APPELLANT.

MULDOON & GETZ, ROCHESTER (CHRISTINE SEPPELER OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Wyoming County Court (Michael F. Griffith, J.), rendered January 11, 2011. The judgment convicted defendant, upon his plea of guilty, of grand larceny 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 grand larceny in the third degree (Penal Law § 155.35). Defendant's valid waiver of the right to appeal encompasses his contention that County Court erred in sentencing him in absentia (*see generally People v Jackson*, 26 AD3d 781, 781, *lv denied* 6 NY3d 849). In any event, defendant's contention lacks merit. The record establishes that defendant waived his right to be present at sentencing, having specifically requested at the plea proceeding that he be permitted to waive his personal appearance at sentencing (*see People v Condon*, 10 AD3d 811, 812-813, *lv denied* 4 NY3d 742).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1343

KA 10-00384

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

CHAZERAE M. BURNICE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JANE I. YOON OF COUNSEL), FOR DEFENDANT-APPELLANT.

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Patricia D. Marks, J.), rendered September 14, 2009. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the motion seeking to suppress showup identification testimony with respect to defendant is granted and the matter is remitted to Monroe County Court for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him, upon a guilty plea, of assault in the second degree (Penal Law § 120.05 [2]), defendant contends that County Court erred in refusing to suppress showup identification testimony with respect to him. We agree. "Showup identifications are disfavored, since they are suggestive by their very nature" (*People v Ortiz*, 90 NY2d 533, 537; *see People v Johnson*, 81 NY2d 828, 831). Here, the showup identification procedure was conducted in the parking lot of a police station, approximately 90 minutes after the occurrence of the crime, while defendant was handcuffed and while uniformed police officers and ambulance personnel were in the parking lot. The totality of the circumstances of this showup identification procedure presses judicial tolerance beyond its limits (*cf. People v Duuvon*, 77 NY2d 541, 545; *People v Hunt*, 277 AD2d 911, 911-912), and we conclude under the facts and circumstances of this case that the showup identification procedure was infirm (*cf. Duuvon*, 77 NY2d at 544).

Inasmuch as the witness who identified defendant at the showup identification procedure did not testify at the *Wade* hearing, the People did not establish that such witness had an independent basis for his in-court identification of defendant (*see People v Hill*, 53 AD3d 1151, 1151). We thus conclude that defendant is entitled to a new *Wade* hearing on that issue (*see id.* at 1151-1152; *see generally*

People v Burts, 78 NY2d 20, 22-23). We therefore reverse the judgment and, because the motion was made by defendant and his codefendant, we grant only that part of the motion with respect to defendant and remit the matter to County Court for further proceedings, including a new *Wade* hearing on the issue whether the witness has an independent basis for his in-court identification of defendant, if the People are so advised. In light of our determination, we do not address defendant's remaining contention.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1347

KA 11-01083

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEREK WILLIAMS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, 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 June 9, 2010. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree and robbery in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following Memorandum: On appeal from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [3]) and robbery in the second degree (§ 160.10 [2] [a]), defendant contends, inter alia, that Supreme Court failed to fulfill its "core responsibility" under CPL 310.30 in responding to a jury note (*People v Kisoon*, 8 NY3d 129, 134; *see generally People v O'Rama*, 78 NY2d 270, 276-279).

The law on this issue is well settled. CPL 310.30 (1) provides that, when a deliberating jury sends a note requesting further instruction or information, "the court must direct that the jury be returned to the courtroom and, after notice to both the [P]eople and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper." In *O'Rama* (78 NY2d at 277-278), the Court of Appeals provided more detailed instructions for the handling of jury notes, and the Court subsequently indicated that a trial court's failure to fulfill its "core responsibilities under CPL 310.30," such as giving notice to defense counsel and the People of the contents of a jury note, requires reversal even in the absence of preservation (*People v Tabb*, 13 NY3d 852, 853). We have previously stated, however, that "the core requirements of CPL 310.30 are triggered only by a 'substantive juror inquiry' (*O'Rama*, 78 NY2d at 280)[, and] that a request by the jury for a readback of the entire testimony of a witness is not a substantive inquiry" (*People v Kahley*, 105 AD3d 1322,

1325).

Here, the record contains Court Exhibit 5, a note from the jury seeking a readback of the entire testimony of a witness, but the transcript of the proceedings do not indicate that the court responded to that request. The People contend that the court clerk's notes establish that the court responded to the jury's request in defendant's presence, and thus that there was no *O'Rama* violation. Those notes were not included in the stipulated record on appeal, however, and we thus cannot determine from the record whether defendant and his attorney were notified of the contents of the jury note at issue. We therefore hold the case, reserve decision and remit the matter to Supreme Court for a reconstruction hearing on that issue (*see Kahley*, 105 AD2d at 1324-1325; *see generally People v Cruz*, 42 AD3d 901, 901; *People v Russo*, 283 AD2d 910, 910-911, *lv dismissed* 96 NY2d 867).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1348

KA 09-00285

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD S. SAMUELS, JR., DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (AMANDA L. DREHER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered January 13, 2009. 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 [2]), defendant contends that Supreme Court erred in denying his request to charge assault in the third degree as a lesser included offense (*see generally People v Glover*, 57 NY2d 61, 63). Viewing the evidence in the light most favorable to defendant, as we must (*see People v Burnett*, 100 AD3d 1561, 1562), we reject that contention (*see generally People v Freeman*, 46 AD3d 1375, 1376, *lv denied* 10 NY3d 840; *People v Saunders*, 292 AD2d 780, 780, *lv denied* 98 NY2d 681).

Contrary to defendant's further contention, "the police had reasonable suspicion to stop and detain him for a showup identification procedure based on the totality of the circumstances, including 'a radio transmission providing a general description of the perpetrator[] of [the] crime[,] . . . the . . . proximity of the defendant to the site of the crime, the brief period of time between the crime and the discovery of the defendant near the location of the crime, and the [officer's] observation of the defendant, who matched the radio-transmitted description' " (*People v Casillas*, 289 AD2d 1063, 1064, *lv denied* 97 NY2d 752; *see People v Bolden*, 109 AD3d 1170, 1172; *People v Knight*, 94 AD3d 1527, 1529, *lv denied* 19 NY3d 998). Also contrary to defendant's contention, he was not under arrest at the time that he was handcuffed and transported in a police vehicle to the nearby crime scene for a showup identification procedure (*see*

People v Galloway, 40 AD3d 240, 240-241, *lv denied* 9 NY3d 844; *see also People v McCoy*, 46 AD3d 1348, 1349, *lv denied* 10 NY3d 813). Finally, we conclude that "[t]he police had probable cause to arrest defendant after the victim [and a security officer] identified him during the showup identification procedure" (*People v Dumbleton*, 67 AD3d 1451, 1452, *lv denied* 14 NY3d 770).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1350

CAF 12-01236

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF MICHELE COWELL,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ROBERT PEMBROCK, SR., RESPONDENT-RESPONDENT.

ELIZABETH CIAMBRONE, BUFFALO, FOR PETITIONER-APPELLANT.

VENZON LAW FIRM PC, BUFFALO (CATHARINE M. VENZON OF COUNSEL), FOR RESPONDENT-RESPONDENT.

DOMINIC PAUL CANDINO, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 14, 2012 in a proceeding pursuant to Family Court Act article 6. The order, among other things, dismissed the petition seeking to modify a prior order that awarded custody of the subject child to respondent.

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

Memorandum: Petitioner mother appeals from an order that, inter alia, dismissed her petition seeking modification of a prior order that awarded custody of the subject child to respondent father. Contrary to the mother's contention, Family Court properly dismissed the petition following a hearing. In seeking a change in the established custody arrangement, the mother was required to show " 'a change in circumstances [that] reflects a real need for change to ensure the best interest[s] of the child' " (*Matter of Moore v Moore*, 78 AD3d 1630, 1630, *lv denied* 16 NY3d 704), and the record supports the court's conclusion that the mother failed to make that showing (*see Matter of Horn v Horn*, 74 AD3d 1848, 1848, *lv denied* 15 NY3d 710).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1360

CA 13-00891

PRESENT: SMITH, J.P., FAHEY, LINDLEY, SCONIERS, AND WHALEN, JJ.

SYLVIA WILSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

100 CARLSON PARK, LLC AND CARLSON PARK ASSOCIATES, DEFENDANTS-APPELLANTS.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP, ALBANY (CHRISTOPHER J. MARTIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered July 31, 2012. The order denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Defendants contend that Supreme Court erred in denying their motion for summary judgment dismissing the complaint in this premises liability action arising from plaintiff's fall on a set of exterior stairs. We reject that contention. With respect to constructive notice, we conclude that there is an issue of fact whether the defect on the subject stairs was visible and apparent, and defendants failed to meet their initial burden of establishing that the defect did not "exist for a sufficient length of time prior to the accident to permit defendant[s'] employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837; *see Rogers v Niagara Falls Bridge Commn.*, 79 AD3d 1637, 1638; *Kimpland v Camillus Mall Assoc., L.P.*, 37 AD3d 1128, 1129). In addition, defendants failed to establish that the subject defect was " 'trivial as a matter of law' " (*Werner v Kaleida Health*, 96 AD3d 1569, 1570). "Whether a particular [defect] constitutes a dangerous or defective condition depends on the peculiar facts and circumstances of each case, including the width, depth, elevation, irregularity, and appearance of the defect as well as the time, place, and circumstances of the injury" (*Tesak v Marine Midland Bank*, 254 AD2d 717, 717-718, citing *Trincere v County of Suffolk*, 90 NY2d 976, 977-978). We further conclude that plaintiff's deposition testimony concerning what caused her to fall was sufficient to create an issue of fact on causation (*see Lane v Texas Roadhouse Holdings, LLC*, 96 AD3d 1364, 1364-1365). Finally, with respect to whether the artificial lighting

in the area where plaintiff fell was adequate, we conclude that defendants failed to meet their initial burden of establishing their entitlement to judgment as a matter of law on that issue (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1363

KA 09-02637

PRESENT: SCUDDER, P.J., CENTRA, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DANNY HURST, DEFENDANT-APPELLANT.

SCHWARTZ & PONTERIO, PLLC, NEW YORK CITY (MATTHEW F. SCHWARTZ 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 December 1, 2009. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second degree, grand larceny in the third degree (two counts) and falsifying business records in the first degree (three counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of grand larceny in the second degree (Penal Law § 155.40 [1]), two counts of grand larceny in the third degree (former § 155.35), and three counts of falsifying business records in the first degree (§ 175.10). Defendant's contention that the People failed to instruct the grand jury on the defense of a claim of right for the larceny counts is not preserved for our review (*see* § 155.15 [1]; *People v West*, 4 AD3d 791, 792-793; *see also People v Fisher*, 101 AD3d 1786, 1786-1787, *lv denied* 20 NY3d 1098). Defendant's contention that he was deprived of his constitutional right to present evidence and to confront witnesses against him when County Court precluded certain documents from evidence and limited cross-examination of a witness is likewise not preserved for our review (*see People v Angelo*, 88 NY2d 217, 222; *People v Bryant*, 93 AD3d 1344, 1344-1345; *People v Bernardez*, 63 AD3d 1174, 1175, *lv denied* 13 NY3d 794). 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]).

Defendant also failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction with respect to the counts of falsifying business records in the first degree inasmuch as his motion for a trial order of dismissal was not "specifically directed" at the alleged error now asserted on appeal

(*People v Gray*, 86 NY2d 10, 19 [internal quotation marks omitted]). In any event, that contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Defendant further contends that the evidence is legally insufficient to support the conviction with respect to the counts of grand larceny in the second and third degrees because he received the payments associated with those counts under a claim of right. We reject that contention. That defense applies where "the property was appropriated under a claim of right made in good faith" (Penal Law § 155.15 [1]). The People had the burden of disproving that defense beyond a reasonable doubt (*see People v Zona*, 14 NY3d 488, 492-493; *People v Chesler*, 50 NY2d 203, 210), and we conclude that they met that burden here. Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes of grand larceny in the second and third degrees as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), 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 on various errors made by defense counsel. We conclude that defendant failed to meet his burden of demonstrating the absence of a strategic or other legitimate explanation for many of defense counsel's alleged errors (*see People v Benevento*, 91 NY2d 708, 712). In addition, defendant was "not denied effective assistance of . . . counsel merely because counsel [failed to] make a motion or argument that ha[d] little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). To the extent that defense counsel committed errors, they were not "sufficiently egregious and prejudicial as to comprise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152). Viewing the evidence, the law, and the circumstances of this case in totality and at the time of representation, we conclude that defendant received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we reject defendant's contention that the court erred in failing to conduct a probing inquiry of a juror whom defense counsel reported to the court as appearing to be asleep during the jury charge. "[I]t is well established that [a] juror who has not heard all the evidence is grossly unqualified to render a verdict" (*People v Jean-Philippe*, 101 AD3d 1582, 1582 [internal quotation marks omitted]). Thus, a juror who has fallen asleep and missed part of the trial should be dismissed (*see id.* at 1582-1583). Here, defense counsel reported to the court that a juror "had [her] eyes closed and head over," and he was "concerned that she didn't hear all of the instructions." The court, however, indicated that it had "watched her carefully, she did close her eyes, she was not sleeping." Inasmuch as "the court had the benefit of its own observations, further inquiry was not required" (*People v Lennon*, 37 AD3d 853, 854, *lv denied* 9 NY3d 846; *see People v Booker*, 49 AD3d 658, 660, *lv denied* 10 NY3d 859;

People v Phillips, 34 AD3d 1231, 1231, *lv denied* 8 NY3d 848).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1365

KA 12-00568

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT POPE, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered November 29, 2011. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree (two counts) and robbery in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts each of robbery in the first degree (Penal Law § 160.15 [4]) and robbery in the second degree (§ 160.10 [1]). County Court properly denied that part of defendant's motion seeking suppression of items of physical evidence seized from the house where police officers located defendant on the day of the robbery. The evidence at the suppression hearing established that defendant was no more than a casual visitor having "relatively tenuous ties" to the house (*People v Ortiz*, 83 NY2d 840, 842; *see People v Sommerville*, 6 AD3d 1232, 1232, *lv denied* 3 NY3d 648). Defendant thus lacked standing to seek suppression of items seized therefrom (*see People v Ramirez-Portoreal*, 88 NY2d 99, 108; *People v Rodriguez*, 69 NY2d 159, 162). To the extent that defendant contends that the items of physical evidence should have been suppressed as the fruit of a *Payton* violation, we conclude that the court properly determined that there was no such violation inasmuch as defendant was arrested outside the house (*see People v Roe*, 73 NY2d 1004, 1006; *People v Moskal*, 262 AD2d 986, 987). Finally, the sentence is not unduly harsh or severe.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1366

KA 11-00931

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRENCE L. NICHOLS, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (NICOLE M. FANTIGROSSI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered April 28, 2011. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). We reject defendant's contention that County Court erred in refusing to suppress a gun discovered by probation officers and a police officer during the search of defendant's residence, as well as defendant's subsequent statement to the police, on the ground that neither he nor his wife validly consented to the search of the house where they resided. Rather, we conclude that the testimony at the suppression hearing established that defendant, who was on probation, and his wife both consented to the search (*see People v Caldwell*, 221 AD2d 972, 972, *lv denied* 87 NY2d 920).

Specifically, defendant contends that the search was coerced with respect to him because he had been placed in custody. That contention lacks merit. Although defendant was placed in custody shortly after the arrival of the probation officers and the police at his home, a probation officer testified that defendant gave his consent to search the house before being placed in custody. In any event, we note that a defendant may consent to a search even after he is placed in custody (*see People v May*, 100 AD3d 1411, 1412, *lv denied* 20 NY3d 1063). Here, the suppression hearing testimony established that defendant's

consent to search was obtained " 'without the use of any threats or other coercive techniques' " (*People v Shaw*, 8 AD3d 1106, 1107, *lv denied* 3 NY3d 681).

Even assuming, arguendo, that defendant's consent to search was not valid, we conclude that the court properly determined that defendant's wife validly consented to the search (*see Caldwell*, 221 AD2d at 972). Indeed, the record establishes that defendant's wife was aware of the right to refuse to consent to the search (*see id.*), inasmuch as she informed the police officer that she would not have allowed the search had she thought that there were anything illegal in the house. Finally, to the extent that defendant contends that the court erred in crediting the testimony of the prosecution witnesses over that of his wife, we reject that contention. " '[I]t is well settled that [t]he suppression court's credibility determinations and choice between conflicting inferences to be drawn from the proof are granted deference and will not be disturbed unless unsupported by the record' " (*May*, 100 AD3d at 1412).

In light of our determination, we reject defendant's further contention that his statement to the police must be suppressed as fruit of the poisonous tree (*see generally People v Sims*, 106 AD3d 1473, 1474, *appeal dismissed* ___ NY3d ___ [Nov. 26, 2013]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1369

KA 12-00682

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

LAWRENCE HAWKINS, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. SMALL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 9, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and criminal possession of a weapon in the third degree (§ 265.02 [1]). Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621), is legally sufficient to disprove his defense of temporary and lawful possession of the weapon (*see People v Bailey*, 111 AD3d 1310, 1311; *People v Lucas*, 94 AD3d 1441, 1441, *lv denied* 19 NY3d 964). After disarming his son, who was drunk and wielding a revolver at a family gathering, defendant locked the weapon in a garage. Defendant's own testimony, however, established that he soon thereafter retrieved the weapon during the course of a volatile argument with his son, shot his son, and then fled from the scene and destroyed the weapon rather than wait and turn it over to the authorities. "Such conduct is 'utterly at odds with [defendant's] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor' " (*Bailey*, 111 AD3d at 1311; *see People v Banks*, 76 NY2d 799, 801; *People v Gonzalez*, 262 AD2d 1061, 1062, *lv denied* 93 NY2d 1018). Although defendant maintained that he shot his son in self-defense, we note that "[i]t is well settled that justification is not a defense to a weapon possession count" (*People v Hancock*, 43 AD3d 1380, 1380, *lv denied* 9 NY3d 1034). Furthermore, viewing the evidence

in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see People v Hicks*, 110 AD3d 1488, 1488-1489; *Gonzalez*, 262 AD2d at 1061-1062; *see generally People v Bleakley*, 69 NY2d 490, 495).

We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to testimony that defendant shot his son in the back (*see generally People v Santiago*, 101 AD3d 1715, 1716-1717, *lv denied* 21 NY3d 946). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see People v Martinez*, 73 AD3d 1432, 1433, *lv denied* 15 NY3d 807; *see generally People v Baldi*, 54 NY2d 137, 147).

Defendant further contends that he was denied his right to be present at all material stages of the trial because the record does not establish that he was present for three sidebar conferences during voir dire. We reject that contention. " '[A] sidebar interview that concerns a juror's background, bias or hostility, or ability to weigh the evidence objectively is a material stage of trial at which a defendant has a right to be present . . . , and a waiver by defendant [of that right] will not be inferred from a silent record' " (*People v Cohen*, 302 AD2d 904, 905; *see* CPL 260.20; *People v Antommarchi*, 80 NY2d 247, 250, *rearg denied* 81 NY2d 759). "There is[, however,] a presumption of regularity that attaches to judicial proceedings, and that presumption may be overcome only by substantial evidence to the contrary" (*People v Chacon*, 11 AD3d 906, 907, *lv denied* 3 NY3d 755; *see People v Foster*, 1 NY3d 44, 48). Here, County Court explained to the prospective jurors that the parties would be present in the jury room for any sidebar conferences during voir dire, and the record establishes that defendant was present at the beginning of jury selection, during the first and third sidebar conferences, and at the end of jury selection. We conclude with respect to the second sidebar conference that defendant failed to overcome the presumption of regularity with substantial evidence of his absence.

Finally, we agree with the People that defendant failed to provide a sufficient record to enable us to review the adequacy of the grand jury instructions (*see People v Kinchen*, 60 NY2d 772, 773-774; *People v Dixon*, 37 AD3d 1124, 1124, *lv denied* 10 NY3d 764), and that defendant's challenge to the sufficiency of the evidence before the grand jury is foreclosed by his conviction based upon legally sufficient evidence (*see People v Edgeston*, 90 AD3d 1535, 1535-1536, *lv denied* 19 NY3d 973; *see also* CPL 210.30 [6]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1370

CA 13-01053

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

JAY W. HANES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT N. NARRACCI, DEFENDANT-APPELLANT.

JOSEPH D. CALDWELL, NEW HARTFORD, FOR DEFENDANT-APPELLANT.

THE GOLDEN LAW FIRM, UTICA (LAWRENCE W. GOLDEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Herkimer County (Erin P. Gall, J.), entered December 31, 2012 in a personal injury action. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell down the exterior stairway of a building owned by defendant. Supreme Court properly denied defendant's motion seeking summary judgment dismissing the complaint. Defendant submitted evidence that, during the winter months, a gap between the roof and the gutter caused icicles to form and drip onto the stairway, resulting in the formation of black ice thereon. We reject defendant's contention that he was entitled to judgment as a matter of law based upon plaintiff's testimony at his deposition that he was "guessing it was black ice" that caused his fall (*see Godfrey v Town of Hurley*, 68 AD3d 1527, 1527-1528; *Belles v United Church of Warsaw*, 66 AD3d 1470, 1471). Although plaintiff testified that he did not see or otherwise sense that there was black ice on the stairway before he fell, we conclude that defendant's own submissions raised a triable issue of fact with respect to proximate cause (*see Belles*, 66 AD3d at 1471). Contrary to his further contention, defendant failed to establish as a matter of law the merit of his alternative theory that the accident was caused by snow tracked onto the stairway in the treads of plaintiff's boots (*see Higgins v Pope*, 37 AD3d 1086, 1087). Inasmuch as defendant failed to meet his burden on the motion, there is no need to consider the sufficiency of plaintiff's opposing papers (*see Gafter v Buffalo Med. Group, P.C.*, 85 AD3d 1605, 1606).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1371

CA 13-00093

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

IN THE MATTER OF DAVID FRAZIER,
PETITIONER-APPELLANT,

V ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered August 21, 2012 in a proceeding pursuant to CPLR article 78. The judgment, among other things, denied the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Robles v Evans*, 100 AD3d 1455, 1455).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1377

CA 13-00386

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

CHRISTINA J. TONE AND STEVEN TONE,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

SONG MOUNTAIN SKI CENTER AND SOUTH SLOPE DEVELOPMENT CORP. AND THEIR AGENTS, SERVANTS AND EMPLOYEES, AND PETER HARRIS, INDIVIDUALLY AND DOING BUSINESS AS SONG MOUNTAIN SKI CENTER, AND INDIVIDUALLY AS A MEMBER, OFFICER, SHAREHOLDER AND DIRECTOR OF SOUTH SLOPE DEVELOPMENT CORP., AND SONG MOUNTAIN SKI CENTER,
DEFENDANTS-RESPONDENTS.

WILLIAMS & RUDDEROW, PLLC, SYRACUSE (MICHELLE E. RUDDEROW OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

ROEMER WALLENS GOLD & MINEAUX LLP, ALBANY (MATTHEW J. KELLY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered November 2, 2012 in a personal injury action. The order granted the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying defendants' motion in part and reinstating the complaint insofar as it asserts claims for negligent operation of the chairlift and a derivative cause of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries Christina J. Tone (plaintiff) sustained while using a triple chairlift at defendant Song Mountain Ski Center, which is owned and operated by defendant South Slope Development Corp. Defendants moved for summary judgment dismissing the complaint, contending that plaintiff assumed the risk of injury when she "willingly engaged in the recreational activity of downhill skiing." We agree with plaintiffs that Supreme Court erred in granting the motion with respect to the claim for negligent operation of the chairlift, and we therefore modify the order accordingly.

"As a general rule, a voluntary participant in an athletic activity is deemed to have consented to the risk of injuries that are

known, apparent or reasonably foreseeable consequences of the participation in such events . . . [P]articipants will not be deemed to have assumed the risks of reckless or intentional conduct . . . or concealed or unreasonably increased risks . . . It is beyond debate that there is inherent risk of injury to participants in downhill skiing . . . Moreover, there is undoubtedly some risk of injury inherent in entering, riding and exiting from a chairlift at a ski resort. However, . . . the latter is not of such magnitude as to eliminate all duty of care and thereby insulate the owner from claims of negligent supervision and training of the lift operator or negligent maintenance and operation of the lift itself since such negligence may unduly enhance the level of the risk assumed" (*Morgan v Ski Roundtop*, 290 AD2d 618, 620 [internal quotation marks omitted]; *see* General Obligations Law § 18-101; *Miller v Holiday Val., Inc.*, 85 AD3d 1706, 1707; *see generally Morgan v State of New York*, 90 NY2d 471, 485).

Contrary to plaintiffs' contentions, defendants met their burden on the motion of establishing as a matter of law that the triple chairlift was designed and maintained properly and that it met all industry standards. Furthermore, defendants established as a matter of law that they were not negligent in their supervision and training of the chairlift operators. Plaintiffs failed to raise a triable issue of fact with respect to those claims (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562).

We conclude, however, that defendants' own submissions raised triable issues of fact whether they were negligent in their operation of the chairlift, thereby unduly enhancing the risk to plaintiff (*see Miller*, 85 AD3d at 1708; *Morgan*, 290 AD2d at 620). Defendants submitted evidence that plaintiff, an experienced skier, was riding the triple chairlift with her then-eight-year-old son and another passenger. Upon reaching the sign directing passengers to prepare to unload, plaintiff noticed that her skis were entangled with her son's skis. Defendants did not slow or stop the chairlift, and plaintiff was unable to unload from the chairlift before it passed the unloading area. Plaintiff was injured when she either jumped or was thrown from the chairlift before it reached the safety gate that would have stopped the chairlift.

Our decision in *Miller* is instructive. In that case, the plaintiff's skis were entangled with her son's snowboard. Upon approaching the unloading area, the plaintiff and her son "frantically attempt[ed] to untangle [the] plaintiff's skis," and the plaintiff's son "yelled to her that he was unable to do so" (*id.* at 1708). We concluded that such evidence, combined with an expert's opinion that "the top lift attendant had sufficient time in which to observe plaintiff's distress and . . . to slow or stop the lift," was enough to raise "triable issues of fact whether the alleged failure to operate the lift in a safe manner was a proximate cause of the accident" (*id.*).

Although there is no evidence that the actions of plaintiff herein signaled her distress to a chairlift operator upon approaching

the unloading area, defendants submitted evidence that top chairlift operators are required to monitor every approach to the unloading area to ensure that skiers are unloading safely. According to defendants' submissions, the top chairlift operators are able to see three to four approaching chairs at any given time, and are able to see to the tower where plaintiff first noticed that her skis were entangled. Once the emergency stop is activated, the chairlift is able to stop within 10 to 12 feet. Based on that evidence, we conclude that there is a triable issue of fact whether defendants were negligent in operating the chairlift.

Even if we were to assume that defendants met their initial burden on their motion with respect to the claim for negligent operation of the chairlift, we conclude that plaintiffs raised triable issues of fact by submitting defendants' training materials. Those materials state that the primary duty of a chairlift operator is to monitor the passengers as they prepare to unload and to anticipate problems. Where it "appears" that a passenger coming up the chairlift is experiencing a problem, the chairlift operators should try to stop or slow the chairlift to a very slow speed. Inasmuch as plaintiff began experiencing her problem some distance away from the unloading area, we conclude that there are issues of fact whether the top chairlift operator had sufficient time to observe plaintiff's problem, to anticipate the danger to plaintiff in attempting to unload from the chairlift with entangled skis and to slow or stop the chairlift in sufficient time to enable plaintiff to unload safely. Stated differently, there is a "rational view of the evidence that could lead a fact finder to conclude that the danger could or should have been prevented or lessened" by defendants, and thus defendants were not entitled to summary judgment dismissing the claim for negligent operation of the chairlift (*Covel v Mt. Mansfield Co.*, 237 AD2d 791, 792; *see Miller*, 85 AD3d at 1708; *Morgan*, 290 AD2d at 620).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1382

CA 13-01072

PRESENT: SCUDDER, P.J., CENTRA, CARNI, SCONIERS, AND WHALEN, JJ.

JONATHAN L. HABERL AND MARIA HABERL,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

VERIZON NEW YORK, INC., DEFENDANT-RESPONDENT,
AND GLOBAL INDUSTRIAL SERVICES, INC.,
DEFENDANT-APPELLANT,

VERIZON NEW YORK, INC., THIRD-PARTY PLAINTIFF,

V

ONE COMMUNICATIONS CORPORATION,
THIRD-PARTY DEFENDANT.

PETRONE & PETRONE, P.C., WILLIAMSVILLE (JAMES H. COSGRIFF, III, OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered December 11, 2012 in a personal injury action. The order denied the motion of defendant Global Industrial Services, Inc. for summary judgment dismissing the complaint and all cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint and all cross claims against defendant Global Industrial Services, Inc. are dismissed.

Memorandum: Plaintiffs commenced this action to recover damages for injuries allegedly sustained by Jonathan L. Haberl (plaintiff) when he slipped and fell on a wet floor at premises owned by defendant-third-party plaintiff Verizon New York, Inc. (Verizon), and maintained by defendant Global Industrial Services, Inc. (Global). We conclude that Supreme Court erred in denying Global's motion for summary judgment seeking dismissal of the complaint and all cross claims against it.

Global contends that it is entitled to summary judgment because it did not owe plaintiff a duty of care, and we agree. It is well

settled that, "[b]ecause a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138). Here, Global established as a matter of law that it did not owe any duty to plaintiff, and plaintiffs failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). Although Global had entered into a contract with Verizon to provide cleaning and snow removal services at the premises, as a general rule "a contractual obligation, standing alone, will . . . not give rise to tort liability in favor of a third party," i.e., a person who is not a party to the contract (*Espinal*, 98 NY2d at 138; *see Church v Callanan Indus.*, 99 NY2d 104, 111). Plaintiffs contend that an exception to that general rule applies here, i.e., "where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm' " (*Espinal*, 98 NY2d at 140), thereby "creat[ing] an unreasonable risk of harm to others, or increas[ing] that risk" (*Church*, 99 NY2d at 111). We reject that contention because the instrument of harm doctrine does not apply to the facts of this case (*see generally id.* at 111-112; *Cooper v Time Warner Entertainment-Advance/Newhouse Partnership*, 16 AD3d 1037, 1038-1039). Finally, we agree with Global that Verizon is not entitled to contractual indemnification inasmuch as Global established as a matter of law that it was not negligent in performing its duties pursuant to the contract, and Verizon failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562; *cf. Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1188).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1383

KA 11-01733

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RACHAEL DURODOYE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (PATRICK J. MARTHAGE OF COUNSEL), FOR DEFENDANT-APPELLANT.

RACHAEL DURODOYE, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered September 8, 2010. The judgment convicted defendant, upon her plea of guilty, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of robbery in the second degree (Penal Law § 160.10 [1]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived her right to appeal (*see People v Lopez*, 6 NY3d 248, 256). We reject defendant's contention that County Court should have explained that certain issues survive a waiver of the right to appeal, inasmuch as " '[n]o particular litany is required for an effective waiver of the right to appeal' " (*People v Fisher*, 94 AD3d 1435, 1435, *lv denied* 19 NY3d 973; *see People v Moissett*, 76 NY2d 909, 910-911). We reject defendant's further contention that the court was required to discuss the waiver at sentencing (*see generally Moissett*, 76 NY2d at 912; *People v Pieper*, 104 AD3d 1225, 1225). Defendant's contention that the guilty plea was not knowingly, voluntarily, and intelligently entered survives the waiver of the right to appeal but is not preserved for our review because she failed to move to withdraw the plea or to set aside the judgment of conviction (*see People v Busch*, 60 AD3d 1393, 1394, *lv denied* 12 NY3d 913). This case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of the sentence (*see People v Hidalgo*, 91 NY2d 733, 737).

Defendant contends in her pro se supplemental brief that she was denied effective assistance of counsel because defense counsel was subsequently convicted of a charge that adversely reflected on his honesty, trustworthiness, or fitness as an attorney. Defendant's contention does not survive the guilty plea or the waiver of the right to appeal inasmuch as " 'defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of [defense counsel's] allegedly poor performance' " (*Fisher*, 94 AD3d at 1435-1436). Indeed, we note that defendant does not point to anything in defense counsel's performance to show that she allegedly received less than meaningful representation.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1385

KA 12-00207

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERENCE HAMPTON, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT B. HALLBORG, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 5, 2012. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence to a determinate term of imprisonment of 15 years and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the first degree (Penal Law § 160.15 [4]). He was sentenced, as a second felony offender, to a determinate term of incarceration of 24 years to be followed by a five-year period of postrelease supervision. We reject defendant's contention that Supreme Court erred in failing to rule on his pretrial request for substitution of counsel. "Although the court should have expressly denied defendant's motion on the record, we conclude that the record is sufficient to establish conclusively that the motion was implicitly denied" (*People v Watkins*, 77 AD3d 1403, 1404, *lv denied* 15 NY3d 956). Moreover, we conclude that the court adequately "inquir[ed] into the nature of the disagreement [and] its potential for resolution" (*People v Hobart*, 286 AD2d 916, 916, *lv denied* 97 NY2d 683 [internal quotation marks omitted]). That disagreement primarily arose from defense counsel's refusal to make a motion to dismiss the indictment pursuant to CPL 30.30, which in fact was frivolous. The court in any event allowed defendant to make the CPL 30.30 motion on a pro se basis, and denied the motion. The court properly declined to inquire into the remaining grounds for defendant's request for substitution of counsel because his assertions "failed to suggest a serious possibility of good cause for substitution" (*Watkins*, 77 AD3d at 1404 [internal quotation marks omitted]). "[I]nasmuch as defendant did not

subsequently express dissatisfaction with defense counsel or renew his request for new counsel," we conclude that defendant thereafter abandoned any further request for substitution of counsel (*People v Bennett*, 94 AD3d 1570, 1571, *lv denied* 19 NY3d 994, *reconsideration denied* 19 NY3d 1101).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to the issue of identification (*see generally People v Bleakley*, 69 NY2d 490, 495). "The jury's resolution of credibility and identification issues is entitled to great weight . . . , and it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Mobley*, 49 AD3d 1343, 1345, *lv denied* 11 NY3d 791 [internal quotation marks omitted]). Finally, we agree with defendant that the sentence is unduly harsh and severe, particularly inasmuch as defendant had no prior history of violent crime and is relatively young. We therefore modify the judgment as a matter of discretion in the interest of justice by reducing the sentence imposed to a determinate term of imprisonment of 15 years, to be followed by the five-year period of postrelease supervision previously imposed.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1386

KA 10-01797

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

FABRICE LOWE, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered June 8, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence of imprisonment to a determinate term of five years and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him following a jury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. The police found a loaded firearm inside a vehicle in which defendant was a backseat passenger. The firearm was located on the floor toward the rear of the driver's seat, directly in front of where defendant was seated. County Court properly instructed the jurors that the statutory presumption of possession set forth in Penal Law § 265.15 (3) applies and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not contrary to the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see generally id.*).

We reject defendant's further contention that the court abused its discretion in refusing to grant him youthful offender status (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961; *People v Potter*, 13 AD3d 1191, 1191, *lv denied* 4 NY3d 889), and we decline to exercise our interest of justice jurisdiction to adjudicate defendant

a youthful offender (*see Guppy*, 92 AD3d at 1243). We agree with defendant, however, that his sentence, a determinate term of imprisonment of 10 years plus five years of postrelease supervision, is unduly harsh and severe. Defendant has no prior criminal record and, in fact, this was his first arrest. In addition, "it is undisputed that defendant did not threaten anyone with the weapon or use it in a violent manner" (*People v Atchison*, 111 AD3d 1319, 1320). Under the circumstances, we exercise our discretion to modify the judgment in the interest of justice by reducing the sentence imposed to a determinate term of imprisonment of five years (*see generally* CPL 470.15 [6] [b]), to be followed by the five-year period of postrelease supervision imposed by the court.

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

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1389

KA 12-01729

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

SCOTT E. HODGINS, DEFENDANT-APPELLANT.

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

LAWRENCE FRIEDMAN, DISTRICT ATTORNEY, BATAVIA (WILLIAM G. ZICKL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Genesee County Court (Robert C. Noonan, J.), rendered May 3, 2012. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony, criminal possession of a weapon in the fourth degree and obstructing governmental administration in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of, inter alia, felony driving while intoxicated (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [i]). Pursuant to the plea agreement, County Court agreed to release defendant under supervision and to adjourn sentencing in order to afford defendant an opportunity to undergo a drug treatment program. If defendant successfully completed the program, the court would permit defendant to withdraw his plea and substitute therefor a plea of guilty to misdemeanor driving while intoxicated. If, however, defendant failed to complete the program successfully or otherwise violated the terms and conditions of his release, the court would sentence defendant to a term of incarceration. After defendant was unsuccessfully discharged from drug treatment, the court sentenced defendant to an indeterminate term of incarceration. Defendant failed to preserve for our review his contention that the court abused its discretion in determining that he had violated the terms of his release inasmuch as he did not request a hearing on that issue, nor did he move to withdraw his plea or to vacate the judgment of conviction (*see People v Malaj*, 69 AD3d 487, 487-488, *lv denied* 15 NY3d 776; *People v Saucier*, 69 AD3d 1125, 1125-1126). Contrary to the further contention of defendant, the court did not "reject" the plea agreement. Rather, the court properly sentenced defendant to a term of incarceration when defendant failed to abide by the conditions of his plea and supervised release and, indeed, acknowledged that he had

been unsuccessfully discharged from a residential drug treatment placement (*see People v Valencia*, 3 NY3d 714, 715; *Malaj*, 69 AD3d at 488; *People v Casey R.B.*, 35 AD3d 1200, 1201, *lv denied* 8 NY3d 920).

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

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1390

KA 10-00799

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EARL FAISON, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (MARIA MALDONADO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (William D. Walsh, J.), rendered February 10, 2010. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of two counts of criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]; [3]). Defendant made only a general motion for a trial order of dismissal and thus failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that defendant's contention lacks merit. According to the testimony of two eyewitnesses, they were standing outside a house when a vehicle driven by defendant slowed as it passed by them on the street. Defendant rolled the window down, looked around, and then drove off. Moments later, defendant made a U-turn and, as the vehicle passed by the eyewitnesses a second time, his codefendant shot multiple rounds from the passenger side of the vehicle. Thus, we conclude that there is a valid line of reasoning and permissible inferences to enable the jury to find that defendant shared his codefendant's intent and jointly possessed the weapon (*see People v Velasquez*, 44 AD3d 412, 412, *lv denied* 9 NY3d 1040; *see generally People v Bleakley*, 69 NY2d 490, 495). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that the in-court identification of

him by a prosecution witness was tainted by unduly suggestive circumstances, i.e., the fact that County Court asked him to stand during the in-court identification. Even assuming, arguendo, that defendant's contention has merit, we conclude that any error is harmless (*see generally People v Aquino*, 191 AD2d 574, 574, *lv denied* 81 NY2d 1069).

We reject defendant's contention that he was denied effective assistance of counsel. "There 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, quoting *People v Stultz*, 2 NY3d 277, 287). Contrary to defendant's contention, testimony regarding the location in which the police found the only projectile recovered from the scene would have been admissible over defense counsel's objection "as background material that completed the narrative of the episode" (*People v Strong*, 234 AD2d 990, 990, *lv denied* 89 NY2d 1016). Also contrary to defendant's contention, expert testimony concerning the reliability of eyewitness identifications would have been inappropriate in this case because defendant was a person known to one of the eyewitnesses (*see People v Abney*, 13 NY3d 251, 268-269; *see also People v LeGrand*, 8 NY3d 449, 459). We conclude that the record, viewed as a whole, demonstrates that defense counsel provided meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the court at sentencing erroneously considered crimes of which he was not convicted, and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see generally People v Hirsh*, 106 AD3d 1546, 1548). Finally, we conclude that the sentence is not unduly harsh or severe.

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1391

CAF 12-01012

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF HANNAH L., CALEB L., ALANNA L., NINA L., JULIEN L., DEVIN L. AND NATHANIEL L.

---------- MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

DWAYNE L., RESPONDENT-APPELLANT.

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

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 18, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated respondent's seven children to be neglected by him.

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 parents appeal, respectively, from orders adjudicating their seven children to be neglected by them. Contrary to the parents' contentions, Family Court's finding of neglect is supported by the requisite preponderance of the evidence (*see* Family Ct Act § 1046 [b] [i]). The "child[ren]'s out-of-court statements may form the basis for a finding of neglect as long as they are sufficiently corroborated by other evidence tending to support their reliability" (*Matter of Nicholas L.*, 50 AD3d 1141, 1142; *see* § 1046 [a] [vi]). We agree with the parents that neither the repetition by each child of his or her own account nor the strong inference drawn against the parents for failing to testify can establish corroboration where it otherwise does not exist (*see Matter of Iyonte G. [Charles J.R.]*, 82 AD3d 765, 767). In this case, however, the out-of-court statements of the three oldest children adequately cross-corroborated one another (*see Matter of Nicole V.*, 71 NY2d 112, 124), and established that the parents engaged in acts of domestic violence in the presence of the children (*see Matter of Lindsey BB. [Ruth BB.]*, 70 AD3d 1205, 1207). The evidence further established that the parents routinely allowed the oldest child, then 10 years old, to supervise

and discipline his six younger siblings in the parents' absence (*see Matter of Shayna R.*, 57 AD3d 262, 262-263; *see also Matter of Donell S. [Donell S.]*, 72 AD3d 1611, 1612, *lv denied* 15 NY3d 705; *Matter of Alan B.*, 267 AD2d 306, 307). The record also supports the court's finding that the parents coerced the children into not being truthful with the persons investigating the allegations against the parents.

We reject the parents' further contention that petitioner failed to establish a causal connection between their conduct and any impairment or risk of impairment to the children (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 369). Viewed as a whole, "the evidence shows that [the oldest girl] suffers from extreme distress, the source of which is her home environment" (*Matter of Maria A.*, 118 AD2d 641, 642; *see Matter of Theresa CC.*, 178 AD2d 687, 689), and that the physical, mental or emotional condition of all of the children was in imminent danger of becoming impaired due to the parents' " 'pattern of inattention to the child[ren]'s need for a safe environment' " (*Alan B.*, 267 AD2d at 307).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1392

CAF 12-02269

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF JADA G. AND JONATHAN G.

WYOMING COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARCELLA G., RESPONDENT-APPELLANT,
AND JONATHAN C., RESPONDENT.

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

WENDY S. SISSON, GENESEO, FOR PETITIONER-RESPONDENT.

LINDA M. JONES, ATTORNEY FOR THE CHILDREN, BATAVIA.

Appeal from an order of the Family Court, Wyoming County (Michael F. Griffith, J.), entered November 28, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents.

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

Memorandum: On appeal from an order terminating her parental rights on the ground of permanent neglect and transferring guardianship and custody of the children to petitioner, respondent mother contends that she was denied effective assistance of counsel. We reject that contention. It is well settled that "[a] parent alleging ineffective assistance of counsel has the burden of demonstrating both that he or she was denied meaningful representation and that the deficient representation resulted in actual prejudice" (*Matter of Michael C.*, 82 AD3d 1651, 1652, *lv denied* 17 NY3d 704). Here, the mother's attorney provided meaningful representation at the hearing on the petition alleging that she violated the terms of the suspended judgment and at the dispositional hearing, and the mother's contention otherwise "is impermissibly based on speculation, i.e., that favorable evidence could and should have been offered on [her] behalf" (*Matter of Devonte M.T. [Leroy T.]*, 79 AD3d 1818, 1819). Contrary to the mother's contention, reversal is not required based upon her attorney's alleged conflict of interest with a witness called by petitioner. The testimony was of a trivial nature, and in any event the record reflects that the mother upon an inquiry by the court indicated that she understood the relationship between the witness and her attorney and was not concerned about her attorney questioning the

witness (*see generally People v Wallace*, 60 AD3d 1268, 1271, *lv denied* 12 NY3d 922). Finally, although the mother asks this Court to remit the matter to Family Court to establish a schedule of therapeutic "winding down" of the parent/child relationships, we note that courts are without authority to order posttermination contact where, as here, parental rights have been terminated (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422, 437-438).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1393

CAF 12-01659

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF KELSEY R.K. AND MOLLY T.K.

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

JOHN J.K., JR. AND SHEILA K., RESPONDENTS-APPELLANTS.

THE ABBATOY LAW FIRM, PLLC, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR RESPONDENT-APPELLANT JOHN J.K., JR.

LEAH K. BOURNE, ROCHESTER, FOR RESPONDENT-APPELLANT SHEILA K.

KRISTOPHER STEVENS, WATERTOWN, FOR PETITIONER-RESPONDENT.

LISA A. PROVEN, ATTORNEY FOR THE CHILDREN, WATERTOWN.

Appeals from an order of the Family Court, Jefferson County (Richard V. Hunt, J.), entered August 17, 2012 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights with respect to the subject children.

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

Memorandum: Respondent father and respondent mother appeal from an order terminating their parental rights pursuant to Social Services Law § 384-b on the ground of permanent neglect. We affirm. Petitioner met its burden of proving "by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between [the parents] and the child[ren]" (*Matter of Ja-Nathan F.*, 309 AD2d 1152, 1152; *see* § 384-b [7] [a]). Among other things, petitioner provided the parents with the opportunity to obtain appropriate housing, provided supervised visitation with the children, and provided the parents with counseling (*see generally* § 384-b [7] [f] [1] - [4]; *Matter of Star Leslie W.*, 63 NY2d 136, 142). Contrary to the parents' further contention, the evidence at the hearing establishes that, despite petitioner's diligent efforts to reunite them with the children, the parents chose to obtain different housing and then denied petitioner access to their home after one visit; the visits with the children did not go well and were stressful for the children; and the parents failed to make progress in counseling due to their refusal to acknowledge the sexual abuse inflicted on the

children and to take responsibility for their failure to protect the children. Thus, petitioner established that the parents "failed to address successfully the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return" (*Ja-Nathan F.*, 309 AD2d at 1152; *see Matter of Jesus JJ.*, 232 AD2d 752, 754-755, *lv denied* 89 NY2d 809).

The father's contention that Family Court improperly limited his cross-examination of a witness is not preserved for our review (*see generally Matter of Clime v Clime*, 85 AD3d 1671, 1672). In any event, the court did not abuse its discretion in simply restating petitioner's position following an overly broad question posed by the father's attorney that would have merely elicited repetitive testimony (*see generally Matter of Heather J.*, 244 AD2d 762, 763-764). Finally, we reject the mother's contention that she was denied effective assistance of counsel. It is axiomatic that, "because the potential consequences are so drastic, the Family Court Act 'affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings' " (*Matter of James R.*, 238 AD2d 962, 963; *see Matter of Sarah A.*, 60 AD3d 1293, 1294-1295). The mother contends that her attorney was ineffective in failing to object to the qualification of certain witnesses as experts and in failing to call as a witness her new counselor, whom she did not start seeing until after the diligent efforts period. There is no denial of effective assistance of counsel, however, arising from a failure to make a motion or argument that has little or no chance of success (*see People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1396

CAF 12-01047

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

IN THE MATTER OF HANNAH L., CALEB L., ALANNA L., NINA L., JULIEN L., DEVIN L. AND NATHANIEL L.

---------- MEMORANDUM AND ORDER

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

AMANDA L., RESPONDENT-APPELLANT.

EVELYNE A. O'SULLIVAN, EAST AMHERST, FOR RESPONDENT-APPELLANT.

JOSEPH T. JARZEMBEK, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered May 18, 2012 in a proceeding pursuant to Family Court Act article 10. The order, among other things, adjudicated respondent's seven children to be neglected by her.

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

Same Memorandum as in *Matter of Hannah L. (Dwayne L.)* (___ AD3d ___ [Jan. 3, 2014]).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1397

CA 13-00896

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

EILEEN MALAY, PLAINTIFF-APPELLANT,

V ORDER

CITY OF SYRACUSE, GARY W. MIGUEL, DANIEL BELGRADER, MICHAEL YAREMA AND STEVE LYNCH, DEFENDANTS-RESPONDENTS.

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

MARY ANNE DOHERTY, CORPORATION COUNSEL, SYRACUSE (JAMES MCGINTY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered November 29, 2012. The order granted the motion of defendants for dismissal of plaintiff's complaint.

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

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1400

CA 13-00881

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, LINDLEY, AND VALENTINO, JJ.

TRA-LIN CORPORATION, DOING BUSINESS AS SAMSON FUEL AND TRUCKING, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EMPIRE BEEF CO., INC., DEFENDANT, STEVEN H. LEVINE AND LORI LEVINE, DEFENDANTS-APPELLANTS.

CULLEY, MARKS, TANENBAUM & PEZZULO LLP, ROCHESTER (AMY L. DIFRANCO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

MANGIONE & ASSOCIATES, P.C., ROCHESTER (RANDALL D. HILDERBRANDT OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered August 16, 2012. The order denied the motion of defendants Steven H. Levine and Lori Levine seeking, inter alia, to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the amended complaint is dismissed against defendants Steven H. Levine and Lori Levine.

Memorandum: Plaintiff commenced this action asserting causes of action for, inter alia, breach of contract and fraud against defendant Empire Beef Co., Inc. (Empire) and a single cause of action for fraud against Steven H. Levine and Lori Levine (defendants), after Empire rescinded payment for fuel deliveries made by plaintiff to Empire. Supreme Court erred in denying defendants' motion seeking, inter alia, to dismiss the amended complaint against them pursuant to CPLR 3211 (a) (7), for failure to state a cause of action. Even affording the cause of action for fraud against defendants a liberal construction and accepting the facts alleged as true (*see Leon v Martinez*, 84 NY2d 83, 87-88), we conclude that plaintiff alleges therein only that defendants, as corporate officers, knew of or participated in Empire's decision to induce plaintiff to enter into a contract that Empire did not intend to honor, and "such allegations do not state a cause of action [for] fraud" (*Makuch v New York Cent. Mut. Fire Ins. Co.*, 12 AD3d 1110, 1111). The alleged fraudulent representation was directly related to and contained within a specific provision of the contract, and "[i]t is well settled that a cause of action to recover damages for fraud may not be maintained when the only fraud charged relates to

a breach of contract" (*Alamo Contract Bldrs. v CTF Hotel Co.*, 242 AD2d 643, 644).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

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

1401

CA 13-00960

PRESENT: PERADOTTO, J.P., CARNI, LINDLEY, AND VALENTINO, JJ.

DEBORAH TOMUSHUNAS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

DESIGNCRETE OF AMERICA, LLC AND ROBERT G. BYRNES, INDIVDUALLY AND IN HIS CAPACITY AS OWNER AND PRESIDENT OF DESIGNCRETE OF AMERICA, LLC, DEFENDANTS-RESPONDENTS.

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

KIRWAN LAW FIRM, P.C., EAST SYRACUSE (TERRY J. KIRWAN, JR., OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 7, 2012. The order, inter alia, granted the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action against her former employer and its principal, alleging causes of action for assault, intentional infliction of emotional distress and prima facie tort. Supreme Court properly granted defendants' motion seeking summary judgment dismissing the complaint on the ground that the action is barred as the result of plaintiff's receipt of workers' compensation benefits. As plaintiff concedes, before commencing this action, she received $40,000 in workers' compensation benefits for missing work due to illnesses and injuries resulting from the same misconduct by her employer as alleged in the complaint. "[B]y accepting an award of workers' compensation benefits, plaintiff forfeited the right to maintain an action at law on the theory of intentional tort" (*Mylroie v GAF Corp.*, 55 NY2d 893, 894; *see Cunningham v State of New York*, 60 NY2d 248, 251-252; *Martin v Casagrande*, 159 AD2d 26, 29-30, *lv dismissed* 76 NY2d 1018). Contrary to plaintiff's contention, it is of no consequence that the award of benefits resulted from the settlement of her claim (*see generally Hynes v Start El.*, 2 AD3d 178, 181).

Entered: January 3, 2014

Frances E. Cafarell
Clerk of the Court

MOTION NO. (862/13) CA 12-02161. –– IN THE MATTER OF WOODSIDE MANOR NURSINGHOME, AVON NURSING HOME, THE BRIGHTONIAN, CONESUS LAKE NURSING HOME, ELM MANOR NURSING HOME, HORNELL NURSING HOME, HURLBUT NURSING HOME, NEWARK MANOR NURSING HOME, PENFIELD PLACE, SENECA NURSING AND REHABILITATION CENTER, SHOREWOODS NURSING HOME AND WEDGEWOOD NURSING HOME, PETITIONERS-RESPONDENTS, V NIRAV R. SHAH, M.D., COMMISSIONER OF HEALTH, STATE OF NEW YORK, ROBERT L. MEGNA, DIRECTOR OF BUDGET, STATE OF NEW YORK, OR THEIR SUCCESSORS, RESPONDENTS-APPELLANTS. -- Motion for reargument of the appeal be and the same hereby is granted and, upon reargument, the memorandum and order entered October 4, 2013 (110 AD3d 1439) is vacated and the following memorandum and order is substituted therefor: " Petitioners are 12 residential health care facilities, as defined in Public Health Law § 2801 (3), that participate in the Medicaid program (*see* 42 USC § 1396 *et seq*.). Pursuant to the Medicaid program, such facilities are entitled to reimbursement for services that are provided to eligible Medicaid recipients (*see* § 1396a *et seq*.). Each state participating in the program is required to adopt a method for reimbursing such facilities (*see* § 1396a [a] [13] [A]), as well as a procedure for providing facilities such as petitioners with administrative review of the payment rates (*see* 42 CFR 447.253 [e]). New York's method of determining the rates of payment and the administrative review procedure are found in Public Health Law article 28 and 10 NYCRR part 86. Administrative challenges to rate determinations, also known as "rate appeals" (10 NYCRR 86-2.13 [b]), are governed in particular by Public Health Law § 2808 and 10 NYCRR 86-2.13 and 86-2.14.

Between the years 2000 and 2009, petitioners collectively filed 95

rate appeals with the New York State Department of Health (DOH). At the time the appeals were filed, 10 NYCRR 86-2.14 (b) mandated that the Commissioner of Health (Commissioner) act upon such appeals "within one year of the end of the 120-day period" within which facilities were obligated to file the rate appeal (*see* 10 NYCRR 86-2.13 [a]).

In 2010, the legislature enacted Public Health Law § 2808 (17) (b), which initially provided that, "for the state fiscal year beginning April [1, 2010] and ending March [31, 2011], the [C]ommissioner shall not be required to revise certified rates of payment established pursuant to [article 28] for rate periods prior to April [1, 2011], based on consideration of rate appeals filed by residential health care facilities . . . in excess of an aggregate annual amount of [80] million dollars for such state fiscal year" (§ 2808 former [17] [b]; *see* L 2010, ch 109, § 1, part B, § 30). In determining which rate appeals would be subject to the moratorium and which rate appeals would be processed pursuant to the statutory cap, the Commissioner was to prioritize the appeals and, in doing so, was to consider "which facilities . . . [were] facing significant financial hardship" (§ 2808 [17] [b]).

In 2011, section 2808 (17) (b) was amended to expand the time period of the rate appeal moratorium through March 31, 2015 and to reduce the rate appeal cap to 50 million dollars for the fiscal year April 1, 2011 through March 31, 2012 (*see* L 2011, ch 59, § 1, part H, § 98). In addition, section 2808 (17) (c) was added, which provided that "for periods on and after April [1, 2011] the [C]ommissioner shall promulgate regulations . . . establishing priorities and time frames for processing rate appeals, including rate appeals filed prior to April [1, 2011] . . . ; provided, however, that such regulations shall not be inconsistent with the provisions of [subdivision (17)] (b)" (*see* L 2011, ch 59, § 1, part H, § 98).

Respondents failed to act on any of the 95 rate appeals filed by petitioners between 2000 and 2009. By letters dated September 13, 2011, each petitioner demanded that the DOH "immediately resolve the [applicable] administrative rate appeals." When no response was given and no action was taken, petitioners commenced this CPLR article 78 mandamus proceeding seeking, inter alia, to compel respondents "to immediately address and resolve [p]etitioners' outstanding Medicaid rate appeals." Respondents moved to dismiss the petition, contending that petitioners had failed to exhaust their administrative remedies and that the proceeding was barred by the statute of limitations. Respondents also contended that petitioners' rate appeals were subject to the moratorium established by Public Health Law § 2808 (17) (b) and thus that petitioners were required to await an administrative determination of their rate appeals before seeking judicial intervention.

Supreme Court denied respondents' motion and granted the petition in part by remitting the matter to the DOH "to complete resolution of the [rate] appeals in accordance with the laws in effect at the time of filing." The court concluded that section 2808 (17) (b) and (c) did not apply retroactively to rate appeals filed before the moratorium was enacted and thus that petitioners could properly seek mandamus to compel compliance with the mandated laws requiring reviews of rate appeals within a certain period of time. The court also concluded that the proceeding was not barred by the statute of limitations.

On appeal, respondents contend that, because section 2808 (17) (b) and (c) apply to petitioners' rate appeals, petitioners do not have a clear legal right to compel respondents to process their rate appeals. They therefore contend that mandamus does not lie and that petitioners must exhaust their administrative remedies before seeking judicial intervention.

We note that respondents have not pursued in their brief the issue raised in their motion papers that the petition should be dismissed pursuant to the statute of limitations. We therefore deem that issue abandoned (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with respondents that section 2808 (17) (b) and (c) apply retroactively to petitioners' rate appeals. The seminal case on whether statutes are to be applied retroactively is *Majewski v Broadalbin-Perth Cent. School Dist.* (91 NY2d 577, 584), which provides, in relevant part, that "[i]t is a fundamental canon of statutory construction that retroactive operation is not favored by courts and statutes will not be given such construction unless the language expressly or by necessary implication requires it" (*see generally* McKinney's Cons Laws of NY, Book 1, Statutes § 51 [b]). We conclude that the language of the statute requires that it be applied retroactively. Public Health Law § 2808 (17) (b) states that, for the period from April 1, 2010 through March 31, 2015, "the [C]ommissioner shall not be required to revise certified rates of payment . . . for rate periods prior to April [1, 2015], based on consideration of rate appeals filed by residential health care facilities" in excess of the monetary cap. While there is no explicit statement that the moratorium and cap shall apply to rate appeals filed before April 1, 2010, the statute specifically states that no revisions are required for any period before April 1, 2015 where the revision would emanate from a rate appeal filed by a residential health care facility. In our view, the necessary implication of that language is that the statute applies to any rate appeal seeking a revision for any period before April 1, 2015, including any revisions resulting from rate appeals filed before the statute took effect.

Moreover, subdivision (17) (c), which was added in 2011, specifically states that the Commissioner is required to promulgate regulations establishing priorities and time frames "for processing rate appeals,

including rate appeals filed prior to April [1, 2011] . . . ; provided, however, that such regulations shall not be inconsistent with the provisions of [subdivision (17)] (b)." Even if we were to conclude that subdivision (17) (c) does not explicitly state that the statute applies to rate appeals filed before the moratorium and cap took effect, the necessary implication is that the moratorium and cap apply to all pending rate appeals inasmuch as there would be no need to prioritize the handling of those appeals unless they were encompassed by the moratorium and cap.

Even assuming, arguendo, that the language of the statute is ambiguous, "we [would] turn to legislative history to steer our analysis" (*Majewski*, 91 NY2d at 584). As noted, subdivision (17) (b) was initially enacted to provide the moratorium and cap for a one-year period: April 1, 2010 through March 31, 2011. The legislation was part of a larger bill that was deemed "necessary to provide enhanced fiscal management and generate savings for the 2010-11 State fiscal year" (Governor's Approval Mem, Bill Jacket, L 2010, ch 109 at 4). The intent of the entire legislation was to "maintain continuity in State services and financial management in the absence of an enacted 2010-11 Budget" and "to ensure the fiscal stability of the State" (Senate Introducer Mem in Support, Bill Jacket, L 2010, ch 109 at 8-9). Specifically, part B of the legislation, which included the moratorium and cap contained in Public Health Law § 2808 (17) (b), was deemed "necessary to achieve $270 million in savings in the 2010-11 State Fiscal Year" (*id.* at 8). In enacting the time-period extension and adding subdivision (17) (c), the Governor stated that "[t]he bill is necessary to enact the 2011-2012 State budget" (Governor's Approval Mem, Bill Jacket, L 2011, ch 59 at 8).

In our view, the intent of the 2010 and 2011 legislation was to decrease costs in order to maintain the financial stability of the State. If the statute were to apply only to rate appeals filed after the

moratorium and cap were imposed, then the goal of the statute would not have been accomplished. There were approximately 7,500 rate appeals pending as of January 2012. Had the Commissioner been required to make revisions and payments on all of the rate appeals pending at the time of the moratorium, there would have been little, if any, savings. As unfair as it may appear to be to all those who had appeals pending for years, we conclude that the statute was intended to apply retroactively to all rate appeals, "including rate appeals filed prior to April [1, 2011]" (Public Health Law § 2808 [17] [c]).

Inasmuch as the moratorium applies retroactively to petitioners' rate appeals, petitioners do not have a clear legal right to relief, and their petition must be denied (*see e.g. Matter of Urban Strategies v Novello*, 297 AD2d 745, 746; *Matter of Jay Alexander Manor v Novello*, 285 AD2d 951, 953, *lv denied* 97 NY2d 610; *see generally Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757). We therefore modify the judgment by denying the petition in its entirety and dismissing the proceeding.

As a separate and distinct ground for relief, petitioners contend that state and federal law required respondents to provide prompt administrative review of rate appeals (*see* Public Health Law § 2808 [17] [a]; 42 CFR 447.253 [e]). In our view, the determination whether something has occurred "within a reasonable period" (Public Health Law § 2808 [17] [a]) or "prompt[ly]" involves a discretionary determination (42 CFR 447.253 [e]). Petitioners have failed to establish "a clear legal right to the relief demanded and . . . a corresponding nondiscretionary duty on the part of the [judge] to grant th[e requested] relief" (*Scherbyn,* 77 NY2d at 757; *see Matter of Harper v Angiolillo*, 89 NY2d 761, 765).

We further agree with respondents that petitioners' reliance on 42 CFR

447.45 (d) is misplaced. That regulation provides that Medicaid agencies must pay “claims” from practitioners within 12 months of the date of the receipt of the claim. Here, we are not concerned with the payment of claims for services provided; we are dealing with revisions to the rates established for those claims. ”

and the motion insofar as it seeks, in the alternative, leave to appeal to the Court of Appeals is denied. PRESENT: SCUDDER, P.J., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ. (Filed Jan. 3, 2014.)