SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

DECEMBER 31, 2015

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. JOSEPH D. VALENTINO

HON. GERALD J. WHALEN

HON. BRIAN F. DEJOSEPH, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

202/14

CA 13-01558

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

IN THE MATTER OF SIERRA CLUB, PEOPLE FOR A HEALTHY ENVIRONMENT, INC., COALITION TO PROTECT NEW YORK, JOHN MARVIN, THERESA FINNERAN, MICHAEL FINNERAN, VIRGINIA HAUFF AND JEAN WOSINSKI, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

VILLAGE OF PAINTED POST, PAINTED POST DEVELOPMENT, LLC, SWEPI, LP, RESPONDENTS-APPELLANTS, AND WELLSBORO AND CORNING RAILROAD, LLC, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (JOSEPH D. PICCIOTTI OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

RICHARD J. LIPPES & ASSOCIATES, BUFFALO (RICHARD J. LIPPES OF COUNSEL), AND RACHEL TREICHLER, HAMMONDSPORT, FOR PETITIONERS-RESPONDENTS.

JANE E. TSAMARDINOS, ALBANY, FOR NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS, AMICUS CURIAE.

JAMES BACON, NEW PALTZ, FOR COMMUNITY WATERSHEDS CLEAN WATER COALITION, INC., AMICUS CURIAE.

KATHERINE HUDSON, WATERSHED PROGRAM DIRECTOR, WHITE PLAINS, FOR RIVERKEEPER, INC. AND KATHERINE SINDING, NEW YORK CITY, FOR NATURAL RESOURCES DEFENSE COUNCIL, AMICI CURIAE.

Appeal from a judgment (denominated order) of the Supreme Court, Steuben County (Kenneth R. Fisher, J.), entered April 8, 2013 in a proceeding pursuant to CPLR article 78. The judgment, insofar as appealed from, denied in part the motion of respondents Village of Painted Post, Painted Post Development, LLC, and SWEPI, LP to dismiss the petition and granted petitioners summary judgment on the first cause of action. The judgment was reversed insofar as appealed from by memorandum and order of this Court entered March 28, 2014 (115 AD3d 1310), and petitioners on October 23, 2014 were granted leave to appeal to the Court of Appeals from the order of this Court (24 NY3d 908), and the Court of Appeals on November 19, 2015 reversed the order and remitted the case to this Court for consideration of issues raised but not determined on the appeal to this Court (___ NY3d ___ [Nov. 19,

2015]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking, inter alia, to annul certain determinations of respondent Village of Painted Post (Village), which permitted respondent Painted Post Development, LLC (PPD) to lease land to respondent Wellsboro and Corning Railroad, LLC (WCOR) for the construction and operation of a transloading facility (Lease Agreement) and permitted the Village to sell approximately one million gallons per day (gpd) of water from its water supply to respondent SWEPI, LP (SWEPI) (Water Agreement). The water was to be loaded onto trains at the transloading facility and transported to Pennsylvania via an existing rail line that traversed the entire Village.

Respondents filed motions in which they sought, inter alia, dismissal of the petition pursuant to CPLR 3211 and 3212. Petitioners opposed those motions but did not file a cross motion. Supreme Court granted respondents' motions in part, but denied respondents' motions insofar as they sought dismissal of the first cause of action, which alleged that the Village had failed to comply with the strict procedural requirements of New York State Environmental Quality Review Act ([SEQRA] ECL 8-0101 *et seq.*; 6 NYCRR 617.1 *et seq.*). Instead, the court searched the record, awarded petitioners summary judgment on that cause of action and issued an injunction enjoining any further water withdrawals from the Village's water supply pursuant to the Water Agreement. Respondents-appellants (hereafter, respondents) appealed.

When this matter was first before this Court, we determined that none of the petitioners had established standing to commence the proceeding, i.e., an " 'injury that [was] in some way different from that of the public at large' " (*Matter of Sierra Club v Village of Painted Post*, 115 AD3d 1310, 1312, quoting *Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774). We thus reversed the judgment insofar as it awarded summary judgment to petitioners on the first cause of action (*id.* at 1310). The Court of Appeals, finding that this appeal provided it with "the opportunity to elucidate and further address the 'special injury' requirement of standing," reversed the order of this Court and remitted the matter for consideration of issues raised but not determined on the appeal to this Court (*Matter of Sierra Club v Village of Painted Post*, ___ NY3d ___, ___ [Nov. 19, 2015], quoting *Society of Plastics Indus.*, 77 NY2d at 778). We now address those issues.

We reject respondents' contention that the first cause of action should have been dismissed on the grounds of laches or mootness. "Dismissal based upon laches is appropriate where the following

circumstances are present: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant" (*Matter of Miner v Town of Duanesburg Planning Bd.*, 98 AD3d 812, 813-814, *lv denied* 20 NY3d 853 [internal quotation marks omitted]). Although there may be triable issues of fact on the element of delay, we conclude that there is no evidence in the record that respondents would suffer any injury or prejudice in the event relief is accorded to petitioners.

On February 23, 2012, the Village Board (Board) issued resolutions authorizing the Lease Agreement and Water Agreement. Among other things, the Lease Agreement authorized WCOR, as the Lessor, to construct the transloading facility, at no expense to the Lessee, i.e., PPD. By the time petitioners commenced this proceeding on June 25, 2012, construction on the transloading facility was substantially completed. Petitioners, however, are not challenging the construction of the transloading facility but, rather, they are challenging the underlying project for which the facility was constructed (*cf. id.* at 814; *Matter of Paden v Planning Bd. of Town of Mamakating*, 270 AD2d 626, 626; *Matter of Caprari v Town of Colesville*, 199 AD2d 705, 706). Thus, the relief requested by petitioners has not been rendered moot, i.e., "impossible to grant or wholly untenable" (*Matter of E.W. Tompkins Co., Inc. v Board of Trustees of Clifton Park-Halfmoon Pub. Lib.*, 27 AD3d 1046, 1047-1048, *lv denied* 7 NY3d 704). Moreover, respondents failed to raise a triable issue of fact concerning whether they would suffer any injury or prejudice inasmuch as the nonappealing respondent, WCOR, was responsible for the construction of the transloading facility.

On the merits, we agree with petitioners that the Village's determination that the Water Agreement was a Type II action and not subject to SEQRA review was arbitrary and capricious. First, we reject respondents' contention that the withdrawal and sale of surplus water from a municipal water supply is not an "action" for SEQRA purposes (*see* 6 NYCRR 617.2 [b] [1]). Second, we conclude that the Water Agreement constitutes either a Type I or an Unlisted action.

Type I actions include any "project or action that would use ground or surface water in excess of [two million gpd]" (6 NYCRR 617.4 [b] [6] [ii]). Type II actions, i.e., those that are not subject to SEQRA review (*see* 6 NYCRR 617.5 [a]), include the "purchase or sale of furnishings, equipment or supplies, including surplus government property, other than the following: land, radioactive material, pesticides, herbicides, or other hazardous materials" (6 NYCRR 617.5 [c] [25]). Unlisted actions are defined as all actions not previously identified as either a Type I or Type II action (*see* 6 NYCRR 617.2 [ak]).

It is undisputed that the purchase or sale of one million gpd of water is not specifically defined as a Type I or Type II action (*see* 6

NYCRR 617.4, 617.5). Respondents thus contend that it is a Type II action because it involves the purchase and sale of surplus government "property" (6 NYCRR 617.5 [c] [25]). We reject that contention inasmuch as water constitutes a natural resource, not property (*see* ECL 8-0105 [6]; *see also* ECL 15-0505 [3]; *cf.* 6 NYCRR 617.5 [b] [25]).

Although the Water Agreement does not call for the use of "ground or surface water in excess of [two million gpd]" (6 NYCRR 617.4 [b] [6] [ii]) and thus is not a Type I action under that subsection, Type I actions also include "any Unlisted action[] that exceeds 25 percent of any threshold in this section, occurring wholly or partially within or substantially contiguous to any publicly owned or operated parkland, recreation area or designated open space" (6 NYCRR 617.4 [b] [10]). Where, as here, the Department of Environmental Conservation (DEC) has set a threshold clarifying that the use of a certain amount of a natural resource, e.g., land or water, constitutes a Type I action, it is reasonable to assume that the DEC has "implicitly determined that an annexation of less than [that threshold] is an '[U]nlisted action' " (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 517-518). We thus conclude therefrom that the Water Agreement is implicitly an Unlisted action. Inasmuch as there is also evidence in the record that the transloading facility may be substantially contiguous to a publicly owned park and the Water Agreement calls for the use of surface water in the amount of one million gpd, i.e., 50% of the threshold in section 617.4 (b) (6) (ii), the Water Agreement could also be deemed a Type I action under 6 NYCRR 617.4 (b) (10).

Consequently, SEQRA review was required for the Water Agreement. Although the Village conducted a SEQRA review of the Lease Agreement, segmentation, i.e., the division of environmental review for different sections or stages of a project (*see* 6 NYCRR 617.2 [ag]), is generally disfavored (*see Matter of Forman v Trustees of State Univ. of N.Y.*, 303 AD2d 1019, 1019). We thus conclude that the court properly determined, on the merits of the first cause of action, that all of respondent Village's resolutions should be annulled and that a consolidated SEQRA review of both agreements was required.

Respondents further contend that the Susquehanna River Basin Compact ([Compact] ECL 21-1301) and its regulations (21 NYCRR part 1806) preempt the Village from undertaking a SEQRA review and that the proceeding should be dismissed for failing to join the Susquehanna River Basin Commission (Commission) as a necessary party. Even assuming, arguendo, that we may address those contentions where, as here, there is no evidence in the record that respondents raised those contentions at any time before this appeal, we conclude that the contentions lack merit. The Compact does not preempt SEQRA review because nothing in SEQRA "conflicts with the Compact" (*Tarrant Regional Water Dist. v Herrmann*, ___ US ___, ___, 133 S Ct 2120, 2130 n 8). Moreover, the Commission recognized that its approval of the withdrawal of water from the Corning aquifer did not preempt state or local agency approval when it wrote that its approvals were "subject to any approval or authorization required by the Commission's (host) member state to utilize" the water. For the same reasons, we conclude

that the Commission is not a necessary party to the instant

proceeding (*see* CPLR 1001 [a]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

212

CAF 13-02243

PRESENT: SCUDDER, P.J., CENTRA, PERADOTTO, AND DEJOSEPH, JJ.

IN THE MATTER OF RICARDO SUAREZ AND LAURA SUAREZ, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

MELISSA WILLIAMS, RESPONDENT-APPELLANT, AND ERNESTO SUAREZ, RESPONDENT-RESPONDENT.

MELVIN & MELVIN, PLLC, SYRACUSE (CHRISTOPHER M. JUDGE OF COUNSEL), FOR RESPONDENT-APPELLANT.

LINDA M. CAMPBELL, SYRACUSE, FOR PETITIONERS-RESPONDENTS.

PATRICK J. HABER, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michelle Pirro Bailey, J.), entered March 26, 2013 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded petitioners Laura Suarez and Ricardo Suarez and respondent Ernesto Suarez joint legal custody of the subject child. The order was reversed by opinion and order of this Court entered March 20, 2015 (128 AD3d 20), and petitioners Ricardo Suarez and Laura Suarez on June 9, 2015 were granted leave to appeal to the Court of Appeals from the order of this Court (25 NY3d 1063), and the Court of Appeals on December 16, 2015 reversed the order and remitted the case to this Court for further proceedings in accordance with the opinion of the Court of Appeals (___ NY3d ___ [Dec. 16, 2015]).

Now, upon remittitur from the Court of Appeals,

It is hereby ORDERED that, upon remittitur from the Court of Appeals, the order so appealed from is unanimously affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, awarded joint legal custody of her child to petitioner grandparents and respondent father. We previously held that the grandparents failed to establish extraordinary circumstances to deprive the mother of custody of the child, but the Court of Appeals reversed our order and held that they had made such a showing (*Matter of Suarez v Williams*, 128 AD3d 20, *revd* ___ NY3d ___ [Dec. 16, 2015]). The Court remitted the matter to us to consider issues raised but not reached by us on the appeal. We now affirm.

Contrary to the mother's contention, Family Court's determination that it was in the child's best interests to remain in the primary physical custody of the grandparents is supported by a sound and substantial basis in the record, and we will not disturb it (*see Matter of Misty D.B. v David M.S.*, 38 AD3d 1317, 1317). We have considered the mother's remaining contentions and conclude that they lack merit.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

921

CA 15-00183

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

JESSE FLADD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

INSTALLED BUILDING PRODUCTS, LLC, ET AL.,
DEFENDANTS,
MORRELL BUILDERS, INC., AND S&J MORRELL, INC.,
DEFENDANTS-APPELLANTS.

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

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

Appeal from an order of the Supreme Court, Monroe County (William P. Polito, J.), entered August 13, 2014. The order denied in part the motion of defendants Morrell Builders, Inc. and S&J Morrell, Inc., for summary judgment, and granted in part plaintiff's cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying the cross motion in its entirety and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he allegedly sustained while he was installing spray foam insulation inside a garage under construction in a residential development owned by Morrell Builders, Inc. and S&J Morrell, Inc. (defendants). According to plaintiff, while standing on the third or fourth rung of a 10-foot A-frame ladder, he was struck in the upper rib cage area by a garage door that was suddenly opened by a coworker. The garage door was 16 feet wide and 7 feet high, and the floor of the garage was unfinished and consisted of "crush and run" gravel or pea stone. The ladder was placed on that surface by plaintiff's supervisor, and plaintiff contends that the surface was unstable and inappropriate for ladder footing. Plaintiff alleges that, when he was struck by the garage door, the ladder became more "wobbly" and he injured his back in attempting to steady the ladder in order to prevent himself from falling.

Defendants moved for summary judgment dismissing the complaint against them, and plaintiff cross-moved for partial summary judgment

on liability on the Labor Law § 240 (1) cause of action. Supreme Court denied defendants' motion except with respect to Labor Law § 200 and common-law negligence, which plaintiff did not oppose, and granted plaintiff's cross motion in part, determining that there was a violation of Labor Law § 240 (1) that was a proximate cause of the accident, but there was an issue of fact whether the accident was a proximate cause of plaintiff's alleged injuries. We conclude that the court properly denied those parts of defendants' motion with respect to Labor Law §§ 240 (1) and 241 (6), but we agree with defendants that the court should have denied plaintiff's cross motion in its entirety. We therefore modify the order accordingly.

Initially, we agree with plaintiff that "[t]he application of section 240 (1) does not hinge on whether the worker actually hit the ground" (*Striegel v Hillcrest Hgts. Dev. Corp.*, 100 NY2d 974, 978). "Rather, that section equally applies where the force of gravity requires the worker to act to prevent himself or herself from falling from an elevated worksite" (*Peters v Kissling Interests, Inc.*, 63 AD3d 1519, 1520, *lv denied* 13 NY3d 903). We likewise reject defendants' contention that they were entitled to summary judgment dismissing the Labor Law § 240 (1) cause of action on the ground that the accident involved the usual and ordinary dangers of a construction site and thus that section does not apply here (*see e.g. Riffo-Velozo v Village of Scarsdale*, 68 AD3d 839, 840-841; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 173; *see generally Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 491, *rearg denied* 87 NY2d 969).

Nevertheless, we agree with defendants' alternative contention that there are issues of fact with respect to how the accident occurred and whether the ladder was " 'placed and operated as to give proper protection' " to plaintiff pursuant to Labor Law § 240 (1) (*Avendano v Sazerac, Inc.*, 248 AD2d 340, 341), particularly in light of the various inconsistencies in the record as to how the accident occurred. Here, plaintiff testified at his deposition that the ladder was placed "about ten feet" from the garage door opening. Defendants submitted the affidavit of an engineering expert who concluded based on, inter alia, his personal examination and replication of the accident conditions that the accident could not have happened as plaintiff alleges. According to defendants' expert, inasmuch as the garage door was only 7 feet high, it could not have struck plaintiff when he was situated on a ladder a distance of 10 feet from the door opening. Defendants' expert also opined that "crush and run" gravel or pea stone is an appropriate and safe surface upon which to place a 10-foot A-frame ladder. We further note that plaintiff also testified at his deposition that, when he was on the ladder, his feet were approximately 8 to 10 feet off the ground and his head was in between rafters that were 16 feet high.

We reject defendants' further contention that the court erred in denying that part of their motion for summary judgment dismissing the Labor Law § 241 (6) cause of action. We note that, with the exception of 12 NYCRR 23-1.21, plaintiff has abandoned any reliance on the various provisions of the Industrial Code and the Code of Federal

Regulations cited in his bill of particulars by failing to address them either in the motion court or on appeal (*see Cardenas v One State St., LLC*, 68 AD3d 436, 438). Pursuant to 12 NYCRR 23-1.21 (b) (4) (ii), "[s]lippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings" and, pursuant to 12 NYCRR 23-1.21 (e) (3), "[s]tanding stepladders shall be used only on firm, level footings." In addition, 12 NYCRR 23-1.21 (b) (9) requires that ladders "shall not be placed in door openings unless the doors are securely fastened open, closed and locked or otherwise guarded against swinging." We agree with plaintiff that defendants failed to establish as a matter of law that those provisions of the regulation are not applicable to the facts of this case (*see Whalen v ExxonMobil Oil Corp.*, 50 AD3d 1553, 1554; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214; *Losurdo v Skyline Assoc., L.P.*, 24 AD3d 1235, 1237), and we further agree with plaintiff that there are issues of fact concerning how the accident happened and whether the regulation was violated (*see generally Buhr v Concord Sq. Homes Assoc., Inc.*, 126 AD3d 1533, 1534-1535).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

962

CA 15-00348

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

SCOTT WINTERMUTE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

VANDEMARK CHEMICAL, INC., DEFENDANT-APPELLANT.

RUPP, BAASE, PFALZGRAF, CUNNINGHAM & COPPOLA LLC, BUFFALO (MELISSA L. VINCTON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BISOGNO & MEYERSON, LLP, BROOKLYN (PATRICK BISOGNO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), entered May 9, 2014. The judgment awarded plaintiff money damages upon a jury verdict.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law without costs, the posttrial motion is granted, the verdict is set aside and a new trial is granted.

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained when he slipped and fell inside a building at defendant's chemical plant. Following a trial, the jury returned a verdict in favor of plaintiff, and Supreme Court denied defendant's posttrial motion seeking to set aside the verdict pursuant to CPLR 4404 (a). We agree with defendant that the court abused its discretion in refusing to allow defendant to present the testimony of a witness who interviewed plaintiff concerning the facts and circumstances of his fall (*see generally Kaplan v Sparks* [appeal No. 1], 221 AD2d 974, 974). That evidence was relevant to the critical issue whether plaintiff slipped on snow or ice inside of defendant's building, or whether plaintiff tracked the snow into the building on his boots. Moreover, inasmuch as plaintiff was in possession of the written report generated as a result of the interview well before trial, plaintiff demonstrated no prejudice from the untimely disclosure of this witness (*see O'Callaghan v Walsh*, 211 AD2d 531, 531-532). We thus conclude that the court erred in denying defendant's posttrial motion to set aside the verdict and for a new trial (*see* CPLR 4404 [a]).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

965.1

CA 15-00538

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF MYRON WRIGHT, CONSECUTIVE NO. 16906 FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT TO
MENTAL HYGIENE LAW § 10.09,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

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

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MICHAEL CONNOLLY OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

EMMETT J. CREAHAN, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (PATRICK T. CHAMBERLAIN OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered March 26, 2015 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, directed the discharge of petitioner from the custody of the Office of Mental Health.

It is hereby ORDERED that the order so appealed from is reversed on the law without costs, the motion is denied, and the matter is remitted to Supreme Court, Oneida County, for further proceedings on the petition in accordance with the following memorandum: Petitioner commenced this proceeding to challenge his continued confinement to a secure facility as a dangerous sex offender. Petitioner was convicted of numerous sex offenses, including a 1972 rape that occurred hours after he was placed on probation and a 1978 sex offense that occurred shortly after his release from prison. He was released again after his ensuing prison sentence and, although he remained in the community for approximately 10 years, he was sentenced to, inter alia, six years in prison upon his 2001 plea of guilty to attempted rape in the first degree (*see Matter of State of New York v Myron P.*, 86 AD3d 26, 28, *affd* 20 NY3d 206). After petitioner completed that prison term, respondents commenced a proceeding seeking to confine him pursuant to article 9 of the Mental Hygiene Law, and they then commenced an article 10 civil confinement proceeding. After a trial on the latter proceeding, Supreme Court, Albany County (McNamara, J.), found that petitioner was a dangerous sex offender in need of confinement and

committed him to a secure treatment facility (*see Myron P.*, 86 AD3d at 28).

In 2014, petitioner filed a petition pursuant to Mental Hygiene Law § 10.09 (f), seeking his release under a regimen of strict and intensive supervision and treatment. At the trial on the petition, respondents called Dr. Allison T. Prince, who opined that petitioner remained a dangerous sex offender requiring confinement. Dr. Prince based her opinion, inter alia, on her diagnosis that petitioner suffers from antisocial personality disorder, cannabis dependence in remission in a secure environment and paraphilia, otherwise specified, i.e., his arousal by and predisposition to engage in nonconsensual sex, in a highly formulaic and compulsive manner, following a well-defined cycle of offending. Dr. Prince testified regarding petitioner's history of offending, including his admission that he offended against 21 women, and his recent lack of progress in treatment. She also testified regarding the psychological tests given to petitioner, and developed a comprehensive profile of his sexual compulsions. Dr. Prince's evaluation of petitioner was also received in evidence.

At the conclusion of Dr. Prince's testimony, petitioner moved for a directed verdict pursuant to CPLR 4401, contending, inter alia, that respondents failed as a matter of law to meet their burden of establishing that he has serious difficulty controlling his conduct within the meaning of the Mental Hygiene Law. We agree with respondents that the court erred in granting the motion for a directed verdict. We therefore reverse the order, deny the motion and remit the matter to Supreme Court for further proceedings on the petition.

It is well settled that, "[i]n determining a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmoving party and resolve all issues of credibility in favor of the nonmoving party . . . , and may grant the motion only if there is no rational process by which the jury could find for the [nonmoving party] as against the moving" party (*Wolf v Persaud*, 130 AD3d 1523, 1524; *see generally State of New York v Farnsworth*, 107 AD3d 1444, 1445). In considering such a motion, "the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in [the] light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556; *see Shelters v City of Dunkirk Hous. Auth.*, 126 AD3d 1329, 1329).

Pursuant to the Mental Hygiene Law, a person is classified as a dangerous sex offender requiring confinement if that person "suffer[s] from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility" (§ 10.03 [e]). The statute defines a mental abnormality as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex

offense and that results in that person having serious difficulty in controlling such conduct" (§ 10.03 [i]).

Here, the court concluded that, as a matter of law, respondents failed to establish that petitioner has serious difficulty in controlling his predisposition to commit sexual offenses. Respondents' burden with respect to that issue was to submit "clear and convincing evidence that [petitioner] had 'serious difficulty in controlling' his sexual misconduct within the meaning of section 10.03 (i)" (*Matter of State of New York v Donald DD.*, 24 NY3d 174, 187). Although we agree with petitioner that the evidence establishing that he was diagnosed with antisocial personality disorder and paraphilia is, standing alone, insufficient to meet that burden (*see id.* at 189-191), we conclude that the evidence presented by respondents in this case was sufficient to withstand petitioner's motion for a directed verdict.

Respondents introduced evidence that petitioner had been diagnosed with three mental disorders, i.e., antisocial personality disorder, paraphilia otherwise specified, and cannabis dependence in sustained remission in a controlled environment. We agree with the dissent that, when asked which factors led her to the conclusion that petitioner had serious difficulty in controlling his sexual behavior, Dr. Prince listed only certain factors. We note, however, that respondents elicited significant additional information concerning petitioner's predispositions from Dr. Prince throughout the trial, and she testified that such information factored into her diagnosis and her opinion that petitioner had the requisite serious difficulty in controlling his sexual conduct. That evidence therefore leaves an issue for the trier of fact whether petitioner has serious difficulty in controlling his predisposition to commit sexual crimes. First, respondents established that petitioner engaged in sexual offenses against 21 women but was not prosecuted for all of those offenses, and petitioner had "voiced having . . . sexual arousal to nonconsensual activity." Petitioner told Dr. Prince that there was a 50-50 chance that he would reoffend, thus lending credence to Dr. Prince's opinion that he had serious difficulty in controlling his conduct.

More importantly, however, Dr. Prince indicated that petitioner follows "a script of behaviors with his offense cycle . . . that he would play out with each offense," and she wrote in her report that petitioner "presents with a pattern of highly repetitive, compulsive sexual behavior." Dr. Prince testified that petitioner's cycle begins with feelings of loneliness, anger, powerlessness and isolation, which lead to the start of his cycle of offending. His cycle then progresses through fixating on a particular woman, stalking her, fantasizing about nonconsensual sex with her, planning on how to approach her, and then physically touching her and engaging in sex with her without her consent, often with the use of weapons.

Furthermore, Dr. Prince testified that petitioner never completed a sexual offender treatment program, became stagnant in his current treatment program, and slept during recent group treatment sessions. Dr. Prince testified that petitioner's treatment had not progressed to

the point where he had a viable plan for coping with that cycle, and that petitioner was isolating himself as a method of coping with the stresses that he faced from, inter alia, these Mental Hygiene Law article 10 proceedings. She also opined that he needed to update his relapse prevention plan to account for his specific sexual offense cycle, but he had not done so. Dr. Prince testified that petitioner has "been repeatedly really encouraged to focus more intently on areas related to his cycle, and he just hasn't done that." In addition, although petitioner had previously submitted to two penile plethysmograph (PPG) tests earlier in the treatment process, they were inconclusive, and he refused to take a polygraph or another PPG test during his most recent phase of treatment.

Dr. Prince also relied on psychological testing of petitioner. She noted that he had undergone Static-99 tests on several occasions, and that his test scores of 7 in 2007 and 2008 supported her conclusions. In addition, she scored a VRS:SO test regarding petitioner, which indicated that he was in the high risk group for reoffending sexually. Consequently, we conclude that Dr. Prince created "[a] detailed psychological portrait of a sex offender [that] allow[ed her] to determine the level of control the offender has over his sexual conduct" (*Donald DD.*, 24 NY3d at 188). Indeed, when the Court of Appeals was confronted with a trial of an offender with a similar diagnosis and supporting facts, the Court concluded that there was overwhelming evidence on the issue of the offender's inability to control his conduct (*see Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455).

Dr. Prince also testified that petitioner indicated that he was becoming increasingly frustrated with the Mental Hygiene Law article 10 process, and his continued detention. When coupled with the evidence of petitioner's clear, well-defined cycle of offending that begins with becoming frustrated, the deficits in his recent treatment plan on that specific area, and his stagnating course of treatment, we conclude that Dr. Prince's opinion and the supporting evidence, " 'when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, [establish that petitioner is a] . . . dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment[, rather than a] *dangerous but typical recidivist convicted in an ordinary criminal case*' " (*Donald DD.*, 24 NY3d at 189, quoting *Kansas v Crane*, 534 US 407, 413). Thus, respondents submitted sufficient evidence that, if it is credited by the factfinder, would establish that petitioner has a condition, disease or disorder "that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [petitioner] having serious difficulty in controlling such conduct" (§ 10.03 [i]; *see generally Matter of State of New York v John S.*, 23 NY3d 326, 348-349, *rearg denied* 24 NY3d 933). Consequently, we conclude that, if the factfinder accepts that evidence, there is a "rational process by which the [factfinder] could find for [respondents] as against" petitioner (*Wolf*, 130 AD3d at 1524).

All concur except LINDLEY and DEJOSEPH, JJ., who dissent and vote to affirm in accordance with the following memorandum: We respectfully dissent because we disagree with the conclusion of the majority, quoting *Matter of State of New York v Donald DD.* (24 NY3d 174, 188), that respondents' expert created " '[a] detailed psychological portrait of [petitioner that] allow[ed her] to determine the level of control the [petitioner] has over his sexual conduct.' " We therefore vote to affirm.

In 2014, the Court of Appeals wrote that sufficient evidence of a serious difficulty controlling sex-offending conduct may not consist of such "meager material" as that a sex offender did not make efforts to avoid arrest and re-incarceration, but instead must include a "detailed psychological portrait of a sex offender [to] allow an expert to determine the level of control the offender has over his sexual conduct" (*id.*). Shortly thereafter, the First Department in *Matter of State of New York v Frank P*. (126 AD3d 150), relying on *Donald DD.*, held that the evidence on which the State experts relied was insufficient to establish by clear and convincing evidence that respondent has or will have serious difficulty controlling his behavior, where "respondent spent 33 consecutive years in prison and there is no evidence that he engaged in any inappropriate sexual behavior during that prolonged period to suggest that he had serious difficulty controlling his behavior in such an environment. Instead, [respondent] voluntarily attended anger management and sex offender treatment programs while in prison" (*id*. at 163).

Here, during respondents' direct examination of their expert, Dr. Allison T. Prince, she was specifically asked to provide her opinion on why petitioner has serious difficulty controlling his behavior. In response, she listed only four factors: (1) the chronic nature of the offenses, including the fact that they started at a young age; (2) the fact that he offended despite the likelihood of being caught; (3) his previous criminal sanctions, including incarceration; and (4) his history of offending in a secure environment.

In our view, those factors are insufficient to establish by clear and convincing evidence "that [petitioner] had 'serious difficulty in controlling' his sexual misconduct within the meaning of section 10.03 (i)" (*Donald DD.*, 24 NY3d at 187). With respect to the second and third factors, as we previously noted, the Court of Appeals made it clear that evidence of serious difficulty cannot consist of such "meager material" as a failure to make efforts to avoid arrest and re-incarceration (*id.* at 188). As for the fourth factor, although there is some evidence that petitioner "sexually acted out" while imprisoned in the mid-1980's, the record is also clear that from 2000 to the present petitioner has not had any instances of sexual misconduct and has not engaged in any "proxy" behaviors - behaviors that mimic aspects of a person's sexual offenses - while in a secure facility. The events contemplated by the fourth factor occurred approximately 30 years ago, well prior to the offenses that led to petitioner's current confinement. Those instances can hardly support the conclusion "that petitioner *currently* suffers from a 'mental abnormality' " (*Matter of Groves v State of New York*, 124 AD3d 1213, 1214 [emphasis added]).

As for the first factor, there is no dispute that petitioner has a lengthy criminal history of sex offenses dating back to the 1970's. These offenses, in Dr. Prince's view, followed a "script" or a pattern in which petitioner would form a relationship with a prostitute, stalk her, fantasize about the attack, plan the attack, and then complete the attack. Nevertheless, Dr. Prince did not provide a connection between the number of victims and the "serious difficulty" standard. In any event, while in *Donald DD*. there were certainly fewer victims and fewer crimes than here, in *Frank P.*, the respondent "was convicted of raping and sodomizing four women in their homes, and accused of raping seven more women" (*Frank P*., 126 AD3d at 151). On those facts, the First Department, relying heavily on *Donald DD*., determined that "the inferences that logically flow from [the] evidence [were] insufficient to support a determination, under the clear and convincing evidence standard, that respondent has or will have serious difficulty controlling his sexual behavior" (*id*. at 163). Simply put, as in *Frank P*., it is impossible to conclude on this record whether the number of victims means that petitioner had "difficulty in controlling his urges or simply decided to gratify them" (*Donald DD.*, 24 NY3d at 188).

Although the majority is correct that respondents "elicited significant additional information concerning petitioner's predispositions from Dr. Prince throughout the trial," we disagree with the majority's view that Dr. Prince "testified that such information factored into her . . . opinion that petitioner had the requisite serious difficulty in controlling his sexual conduct." The issue of "serious difficulty" was not the only issue at the hearing and therefore not the only issue discussed by Dr. Prince; she provided testimony on the "mental abnormality" question along with testimony on the issue of whether petitioner is currently a dangerous sex offender requiring confinement. In our view, it is entirely speculative to conclude that the additional information provided by Dr. Prince was intended to address the serious difficulty question, and she simply failed to provide the connection suggested by the majority.

Finally, we note our disagreement with the majority's view of the record and the testimony of Dr. Prince that petitioner never completed a sex offender treatment program and has become stagnant in his current programs. Dr. Prince testified that one of petitioner's treatment providers told her that petitioner had " 'maxed out' of the treatment opportunities at the facility, because he . . . engaged in . . . mostly all of the groups that they offer." Moreover, the record is clear that petitioner is currently in phase III of his treatment and has been recommended for the final phase of treatment and apparently could proceed to phase IV if he took a third PPG test and a polygraph. In the four-phase treatment program provided by Office of Mental Health (OMH) secure facilities, "[p]hase III . . . requires participants to meet goals that demonstrate the ability to utilize skills and insights acquired earlier in the program. Upon completing these goals and maintaining them for six months or longer, participants may enter phase IV, which addresses individualized discharge planning for the transition back to the community. As of October 2011, approximately 270 residents of [OMH secure facilities]

were participating in the OMH program; fewer than 30 had reached phase III and only one . . . was in phase IV" (*Matter of Charles A. v State of New York*, 101 AD3d 1535, 1537). In our view, petitioner's presence in phase III shows that he has made progress and has some level of understanding of his prior offenses and actions, and the so-called stagnancy of petitioner's treatment was not completely explained by Dr. Prince, who simply concluded that "[y]ou can still glean additional information from attending these [therapy] groups again."

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1127

CA 15-00771

PRESENT: SCUDDER, P.J., SMITH, CARNI, LINDLEY, AND VALENTINO, JJ.

DAVID SMALLEY AND JUDITH SMALLEY,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

HARLEY-DAVIDSON MOTOR COMPANY GROUP LLC,
AND STAN'S HARLEY-DAVIDSON, INC.,
DEFENDANTS-RESPONDENTS.

LADUCA LAW FIRM, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

QUARLES & BRADY LLP, MILWAUKEE, WISCONSIN (LARS E. GULBRANDSEN, OF THE WISCONSIN BAR, ADMITTED PRO HAC VICE, OF COUNSEL), AND HARTER SECREST & EMERY LLP, ROCHESTER, FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered July 28, 2014. The order, among other things, granted defendants' motion seeking an order confirming that certain prior evidentiary rulings made by the court constitute the law of the case.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of defendants' motion seeking to preclude the expert testimony and evidence of customer complaints to the extent such evidence is relevant to defendants' continuing duty to warn, and as modified the order is affirmed without costs in accordance with the following memorandum: In this products liability case, plaintiffs appeal from an order that, among other things, granted defendants' motion to preclude plaintiffs from introducing certain expert testimony of an electrical engineer and evidence of certain customer complaints at trial. Plaintiffs, who were injured when their motorcycle allegedly lost electrical power while they were riding it, sought to introduce the expert testimony to demonstrate that their motorcycle suffered from the same defect as motorcycles recalled by Harley-Davidson Motor Company Group LLC (defendant) in 2004. According to defendant's recall notice, the defect could cause the motorcycles to experience a loss of electrical power while being driven, known as a "quit while riding" event. Plaintiffs sought to introduce the evidence of customer complaints to demonstrate that defendant had notice of "quit while riding" events experienced by owners of motorcycles similar to plaintiffs' motorcycle prior to plaintiffs' accident, and thus that defendant had notice of the defect from which their motorcycle allegedly suffered.

At trial in 2013, Supreme Court granted in part defendants' motions in limine by precluding evidence of the customer complaints to the extent that such complaints did not relate to "quit while riding" events involving the same 1999 motorcycle model that was involved in plaintiffs' accident; precluding plaintiffs from presenting evidence relating to defendant's 2004 recall through the testimony of their accident reconstruction expert; and precluding plaintiffs from presenting certain expert testimony, including the testimony of their electrical engineer expert, on the ground that it was untimely disclosed. On appeal from the latter ruling, we held, inter alia, that the court erred in precluding the testimony of plaintiffs' electrical engineer expert on untimeliness grounds, and that the court instead should have adjourned the trial (*Smalley v Harley-Davidson Motor Co., Inc.*, 115 AD3d 1369, 1370).

Following a mistrial and our decision regarding the testimony of plaintiffs' electrical engineer expert, defendants moved for an order confirming, as "law of the case," the court's prior rulings granting in part defendants' motions in limine with respect to the evidence concerning defendant's 2004 recall, which plaintiffs sought to introduce through their electrical engineer expert, and the evidence of customer complaints. In the alternative, the motion sought an order granting defendants' motions in limine with respect to that evidence. The court granted the motion, precluding plaintiffs from introducing evidence of the recall through their expert, and precluding plaintiffs from introducing any customer complaints that do not relate to "quit while riding events" involving the exact same 1999 model of defendant's motorcycle that plaintiffs were riding at the time of their accident.

Even assuming, arguendo, that defendants are correct that the court was bound to adhere to its prior rulings by "law of the case," we note that "this Court is not bound by the doctrine of law of the case, and may make its own determinations" whether the evidence at issue is admissible (*Ramanathan v Aharon*, 109 AD3d 529, 531; *see generally Martin v City of Cohoes*, 37 NY2d 162, 165).

On the merits, we conclude that the court erred in granting that part of defendants' motion seeking to preclude the testimony of plaintiffs' electrical engineer expert and the customer complaints to the extent that such evidence is relevant to defendants' continuing duty to warn. We therefore modify the order accordingly. "A manufacturer or retailer may . . . incur liability for failing to warn concerning dangers in the use of a product which come to his attention after manufacture or sale . . . through being made aware of later accidents involving dangers in the product of which warning should be given to users . . . Although a product [may] be reasonably safe when manufactured and sold and involve no then known risks of which warning need be given, risks thereafter revealed by user operation and brought to the attention of the manufacturer or vendor may impose upon one or both a duty to warn" (*Cover v Cohen*, 61 NY2d 261, 274-275). "What notice . . . will trigger [this] postdelivery duty to warn appears to be a function of the degree of danger which the problem involves and the number of instances reported . . . [Whether] a prima facie case on

that issue has been made will, of course, depend on the facts of each case" (*id*. at 275-276).

Defendant's recall was first issued in March 2004, prior to plaintiffs' accident on April 30, 2004. A determination that plaintiffs' motorcycle should have been included in the recall would be relevant to defendants' duty to warn plaintiffs of the defect that, plaintiffs allege, caused a "quit while riding" event in their motorcycle and thereby caused or contributed to their accident. Plaintiffs' expert, an electrical engineer, expects to testify in part that plaintiffs' motorcycle does not differ in any material respect from those included in the 2004 recall, despite the fact that plaintiffs' motorcycle did not have the same stator as the motorcycles affected by the recall. In our view, the expert's qualifications as an electrical engineer qualify him to opine whether the motorcycles "were the same in all significant respects" (*Bolm v Triumph Corp*., 71 AD2d 429, 438-439, *lv dismissed* 50 NY2d 801, 928), and the fact that the expert has done no testing goes to the weight to be given to his testimony, not its admissibility (*see e.g. Di Carlo v Ford Motor Co.*, 77 AD2d 643, 644).

In addition, to the extent that the evidence of customer complaints that plaintiffs seek to introduce concerns accidents prior to April 30, 2004 involving "quit while riding" events that "were, in their relevant details and circumstances, substantially similar to the subject accident" (*White v Timberjack*, 209 AD2d 968, 969), that evidence is also relevant to defendants' duty to warn. Thus, plaintiffs should be allowed the opportunity to demonstrate that the customer complaints they seek to introduce are admissible because they involve motorcycles sufficiently similar to theirs and accidents sufficiently similar to the subject accident, even if the motorcycles that are the subject of those complaints are not identical in model and year of manufacture to plaintiffs' motorcycle. Contrary to defendants' contention, those customer complaints are not impermissible hearsay. They are not being offered for the truth of the factual assertions therein, but, rather, they are being offered as evidence that the statements in those complaints were in fact made, and that defendants had notice of them (*see generally Stern v Waldbaum, Inc*., 234 AD2d 534, 535).

Plaintiffs further contend that we should address the admissibility of the document untimely disclosed by defendants, and determine "in the interest of judicial economy" that the document is inadmissible. Because the court granted plaintiffs' cross motion to preclude that document, plaintiffs are not aggrieved, and their contention concerning the admissibility of the document is not before us (*see generally* CPLR 5511). Finally, contrary to plaintiffs' contention, nothing in the record raises a "reasonable concern about the court's appearance of impartiality" (*R&R Capital LLC v Merritt*, 78 AD3d 533, 534, *lv dismissed* 17 NY3d 769), and we therefore see no reason to direct that the matter be reassigned to another Justice.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1144

CA 15-00464

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

MARCUS QUIROS, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

FIVE STAR IMPROVEMENTS, INC., DEFENDANT-APPELLANT.

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

FARACI LANGE, LLP, ROCHESTER (MATTHEW F. BELANGER OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment and order (one paper) of the Supreme Court, Monroe County (John J. Ark, J.), entered December 23, 2014. The judgment and order granted the motion of plaintiff for partial summary judgment and denied the cross motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this Labor Law action to recover damages for injuries he sustained while using a nail gun to install a new roof at a residential home. With respect to his Labor Law § 241 (6) cause of action, plaintiff alleged that, while using the nail gun, he was not provided with adequate eye protection pursuant to 12 NYCRR 23-1.8 (a). Plaintiff moved for partial summary judgment on the issue of liability under Labor Law § 241 (6), and defendant cross-moved for summary judgment dismissing the complaint. Supreme Court granted plaintiff's motion and denied defendant's cross motion. We conclude that the court erred in granting plaintiff's motion, and we therefore modify the judgment and order accordingly.

We reject defendant's contention that it was entitled to summary judgment pursuant to this Court's holding in *Herman v Lancaster Homes* (145 AD2d 926, 926, *lv denied* 74 NY2d 601). Unlike the circumstances in *Herman*, plaintiff herein was not manually hammering nails but, rather, was operating a pneumatic nail gun when a nail ricocheted and penetrated his right eye. In our view, "the dangers a nail gun present[s] to the eyes are more apparent tha[n] the dangers of manual hammering" (*Pina v Dora Homes, Inc.*, 2013 WL 359386, at *4 [ED NY, Jan. 29, 2013, No. 09-CV-1626 [FB] [JMA]) and the plaintiff's use of the nail gun clearly falls within the regulatory definition of

engaging "in any other operation which may endanger the eyes" (12 NYCRR 23-1.8 [a]). Contrary to defendant's further contention, based upon the record before us, we conclude that plaintiff established as a matter of law that the regulation applies, and that defendant failed to raise a triable issue of fact on that point (*cf. Guryev v Tomchinsky*, 87 AD3d 612, 613, *affd* 20 NY3d 194).

We agree with defendant, however, that the court erred in granting plaintiff's motion inasmuch as defendant raised triable issues of fact whether it had violated 12 NYCRR 23-1.8 (a) and whether plaintiff was comparatively negligent (*see Puckett v County of Erie*, 262 AD2d 964, 965; *McCune v Black Riv. Constructors*, 225 AD2d 1078, 1079). Specifically, there is a triable issue of fact whether defendant provided eye protection, or made such available, to plaintiff on the day of the accident and, if so, whether plaintiff was comparatively negligent in refusing to use the eye protection. Summary judgment to plaintiff is therefore inappropriate (*see Montenegro v P12, LLC*, 130 AD3d 695, 697). We note, in any event, that "[e]ven assuming, arguendo, that plaintiff[] established that defendant violated [12 NYCRR 23-1.8 (a)], any such violation 'does not establish negligence as a matter of law but is merely some evidence to be considered on the question of a defendant's negligence' " (*Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1404).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1190

CA 15-00389

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

JESSICA KELLER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CARLA LIBERATORE, M.D., CNY OBSTETRICS & GYNECOLOGY, P.C., DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

COTE & VANDYKE, LLP, SYRACUSE (JOSEPH S. COTE, III, OF COUNSEL), FOR PLAINTIFF-APPELLANT.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (DANIEL P. LARABY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 24, 2014. The order and judgment granted the motion of defendants Carla Liberatore, M.D. and CNY Obstetrics & Gynecology, P.C., for summary judgment and dismissed the complaint against those defendants.

It is hereby ORDERED that the order and judgment so appealed from is unanimously modified on the law by denying the motion in part and reinstating the complaint against defendants Carla Liberatore, M.D., and CNY Obstetrics & Gynecology, P.C., insofar as the first, second, and fourth causes of action assert a claim for medical malpractice or negligence with respect to perineal massage, and as modified the order and judgment is affirmed without costs.

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained as a result of the treatment rendered by Carla Liberatore, M.D., and CNY Obstetrics & Gynecology, P.C. (defendants), during the birth of plaintiff's child. Plaintiff appeals from an order and judgment granting defendants' motion for summary judgment dismissing the complaint against them. We agree with plaintiff that Supreme Court erred in granting the motion with respect to her claim that defendants were negligent in failing to perform a perineal massage, and we therefore modify the order and judgment accordingly.

We agree with plaintiff that defendants failed to meet their initial burden on the motion with respect to the perineal massage claim inasmuch as their own submissions raise a triable issue of fact whether such a procedure was performed (*see Chavis v Syracuse Community Health Ctr., Inc.*, 96 AD3d 1489, 1490). In any event,

plaintiff's submissions also raised an issue of fact with respect to that claim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562), and plaintiff's expert averred that failure to perform a perineal massage was a departure from the standard of care and a proximate cause of plaintiff's injury. Contrary to defendants' contention that plaintiff's expert opined only in general terms that a perineal massage can reduce the incidence of tears, viewing the evidence in the light most favorable to plaintiff (*see Esposito v Wright*, 28 AD3d 1142, 1143), we conclude that plaintiff's expert averred with sufficient reference to this specific case that failure to perform the massage contributed to the fourth-degree laceration sustained by plaintiff.

We reject plaintiff's contention that the court erred in granting the motion with respect to her claim that defendants were negligent in failing to repair the laceration properly. Rather, we conclude that defendants met their burden with respect to that claim and that plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562). The affidavit of plaintiff's expert submitted in opposition to the motion was conclusory with respect to that claim inasmuch as the expert failed to explain the accepted medical practice from which defendants deviated in repairing the laceration and never addressed the conclusion of defendants' expert, who opined that the problems plaintiff subsequently developed were merely complications with the healing process rather than a result of an improper repair (*see Oestreich v Present*, 50 AD3d 522, 523). The conclusions of plaintiff's expert that defendants failed to undertake proper examinations before performing the repair were speculative and unsupported by the record. The multiple examinations conducted by defendants are detailed in plaintiff's medical records, and we see no evidentiary basis for the conclusion that defendants did not fully or properly conduct them (*see generally Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544). Inasmuch as plaintiff has failed to raise an issue of fact whether the repair was improperly performed, we see no need to address plaintiff's further contention that the court erroneously resolved a factual dispute with respect to her claim that Liberatore committed malpractice by allegedly allowing a resident to perform the repair.

We reject plaintiff's contention that the court erred in dismissing those parts of the complaint premised on defendants' alleged failure to obtain her informed consent before administering the medication Pitocin to her. Contrary to plaintiff's contention, even in cases where the defendant fails to submit sufficient proof with respect to the other elements of an informed consent cause of action, the defendant may nevertheless establish entitlement to summary judgment by demonstrating that any lack of informed consent was not the proximate cause of the plaintiff's injury (*see Tsimbler v Fell*, 123 AD3d 1009, 1010-1011; *Amodio v Wolpert*, 52 AD3d 1078, 1080; *Mondo v Ellstein*, 302 AD2d 437, 438). Here, defendants met their initial burden inasmuch as the submission of their expert's affidavit and plaintiff's hospital records established that plaintiff was administered a conservative dosage of Pitocin that was well within standard levels and did not cause her injury (*see Gage v Dutkewych*, 3

AD3d 629, 630-631; *see also Tsimbler*, 123 AD3d at 1010-1011). In opposition, plaintiff failed to raise an issue of fact (*see generally Zuckerman*, 49 NY2d at 562). Plaintiff's expert opined in a speculative and conclusory manner that use of Pitocin is "associated with" fourth-degree perineal tears because of the "excessive expulsive forces" caused by that medication, but did not dispute or even address the opinion of defendants' expert that the amount of Pitocin administered to plaintiff was proper, nor did plaintiff's expert controvert the conclusion of defendants' expert that, based on the medical records in this case, plaintiff experienced a well-controlled delivery and that the dosage of Pitocin was not responsible for causing plaintiff's injury (*see Gage*, 3 AD3d at 631; *see also Tsimbler*, 123 AD3d at 1010-1011). The court therefore properly granted summary judgment dismissing the cause of action for lack of informed consent, as well as the causes of action for medical malpractice and negligence to the extent that they are premised on defendants' allegedly improper administration of Pitocin.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1214

CA 15-00228

PRESENT: SCUDDER, P.J., SMITH, CENTRA, WHALEN, AND DEJOSEPH, JJ.

MICHELLE DEERING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF TAMMY HUBER, DECEASED, PLAINTIFF-RESPONDENT, ET AL., PLAINTIFF,

V MEMORANDUM AND ORDER

LEEANN M. DEERING, DEFENDANT-RESPONDENT, WILLIAM J. MACKEY, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (ACTION NO. 1.)

LEEANN M. DEERING, PLAINTIFF-RESPONDENT,

V

WILLIAM J. MACKEY, DEFENDANT-APPELLANT, ET AL., DEFENDANT. (ACTION NO. 2.)

SLIWA & LANE, BUFFALO (MICHAEL T. COUTU OF COUNSEL), FOR DEFENDANT-APPELLANT.

THE BALLOW LAW FIRM, P.C., WILLIAMSVILLE (MICHAEL D. BRAISTED OF COUNSEL), FOR PLAINTIFF-RESPONDENT IN ACTION NO. 1.

WILLIAM MATTAR, P.C., WILLIAMSVILLE (MATTHEW J. KAISER OF COUNSEL), FOR DEFENDANT-RESPONDENT AND PLAINTIFF-RESPONDENT IN ACTION NO. 2.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 1, 2014 in a personal injury action. The order, inter alia, denied in part the motion of defendant William J. Mackey for summary judgment dismissing the complaints and cross claims against him.

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

Memorandum: These consolidated actions arise out of a motor vehicle accident that occurred at the intersection of Route 5 and Bayview Road in defendant Town of Hamburg. At the time of the accident, Leeann M. Deering (Deering), a defendant in action No. 1 and the plaintiff in action No. 2, was driving southbound on Bayview Road. That road was controlled by a yield sign at the intersection with

Route 5, but Deering failed to yield the right-of-way to William J. Mackey (defendant), a defendant in both actions, who was driving westbound on Route 5. Defendant's vehicle struck Deering's vehicle on its passenger side. A passenger in the Deering vehicle, whose estate is represented by plaintiff Michelle Deering in action No. 1, was killed in the collision, and Deering was injured.

Defendant moved for summary judgment dismissing the complaints and cross claims against him, and, alternatively, he sought partial summary judgment against Deering on the issues of negligence and proximate cause. Supreme Court, inter alia, granted the alternative relief sought in defendant's motion, and that part of the order is not at issue on appeal. Defendant appeals from the order insofar as it otherwise denied his motion, and we affirm.

There is no dispute that Deering was negligent in failing to yield the right-of-way or that defendant was entitled to anticipate that she would obey the traffic laws that required her to yield the right-of-way to him (*see Dorr v Farnham*, 57 AD3d 1404, 1405-1406; *Cooley v Urban*, 1 AD3d 900, 901). Nevertheless, in moving for summary judgment, defendant had the burden of establishing not only that Deering was negligent, but also that he was free of comparative fault (*see Espiritu v Shuttle Express Coach, Inc.*, 115 AD3d 787, 789; *Cooley*, 1 AD3d at 901). Defendant failed to meet that burden, inasmuch as his own submissions raised triable issues of fact whether he was negligent (*see Cocina v County of Erie*, 52 AD3d 1256, 1257). At his deposition, defendant testified that he saw the Deering vehicle at the intersection after he traveled over an elevated overpass on Route 5 that is approximately 300 yards from the intersection, but he looked away and did not see the Deering vehicle before or at the moment of impact. "[I]t is well settled that 'drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident,' " and defendant's admitted failure to see the Deering vehicle immediately prior to the accident raises an issue of fact whether he violated that duty (*Cupp v McGaffick*, 104 AD3d 1283, 1284; *see Deshaies v Prudential Rochester Realty*, 302 AD2d 999, 1000). Thus, even though defendant had the right-of-way as he approached Bayview Road, he "may nevertheless be found negligent if he . . . fail[ed] to use 'reasonable care when proceeding into the intersection' . . . A driver 'cannot blindly and wantonly enter an intersection' " (*Strasburg v Campbell*, 28 AD3d 1131, 1132).

Contrary to defendant's contention, we conclude that the opinion of his accident reconstruction expert was insufficient to establish as a matter of law that defendant had no opportunity to avoid the accident. The expert listed the documents and other material he considered in reaching his conclusion, but failed to draw any specific connection between the facts and his conclusion. Thus, his opinion "lacks an adequate factual foundation and is of no probative value" (*Costanzo v County of Chautauqua*, 108 AD3d 1133, 1134).

Finally, we conclude that defendant failed to establish that he is entitled to judgment as a matter of law based upon the emergency

doctrine (*see generally Guzek v B & L Wholesale Supply, Inc.*, 126 AD3d 1506, 1507; *Andrews v County of Cayuga*, 96 AD3d 1477, 1479).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1235

CAF 14-00250, CAF 14-00289

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

IN THE MATTER OF BURKE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

RICHARD H. AND TIFFANY H.,
RESPONDENTS-APPELLANTS.

IN THE MATTER OF SEAN H., DONNA H. AND
CHLOE H.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

RICHARD H. AND TIFFANY H.,
RESPONDENTS-APPELLANTS.

BERNADETTE HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT RICHARD H.

COLUCCI & GALLAHER, P.C., BUFFALO (REGINA A. DELVECCHIO OF COUNSEL), FOR RESPONDENT-APPELLANT TIFFANY H.

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).

Appeals from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered January 23, 2014 in proceedings pursuant to Family Court Act article 10 and Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondents with respect to Sean H., Donna H. and Chloe H.

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

Memorandum: In these consolidated appeals arising from proceedings pursuant to Social Services Law § 384-b and Family Court Act article 10, respondent mother and respondent father each appeal from an order that, inter alia, terminated their parental rights on the ground of permanent neglect with respect to their three older children and freed those children for adoption. We affirm.

Contrary to the mother’s contention, we conclude that petitioner

established by the requisite clear and convincing evidence that it fulfilled its duty to exercise diligent efforts to encourage and strengthen the parents' relationships with the subject children during the relevant time period (*see* Social Services Law § 384-b [7] [f]; *Matter of Sheila G.*, 61 NY2d 368, 373). Specifically, petitioner's caseworker facilitated the parents' supervised visitation with the children, referred the parents to parenting and domestic violence programs, arranged for preventative services, referred the parents to mental health counseling and encouraged them to attend such counseling, and conducted service plan reviews (*see Matter of Sapphire A.J. [Angelica J.]*, 122 AD3d 1296, 1297, *lv denied* 24 NY3d 916; *Matter of Jyashia RR. [John VV.]*, 92 AD3d 982, 983; *Matter of Laelani B.*, 59 AD3d 880, 881). Further, when the mother stopped attending mental health counseling, the caseworker suggested other facilities for the mother to attend and encouraged her to reapply for Medicaid to obtain coverage for the counseling, and when the father had trouble paying for his counseling sessions, the caseworker referred him to another, less expensive agency (*see Matter of Carter A. [Courtney QQ.]*., 121 AD3d 1217, 1218; *Matter of Aldin H.*, 39 AD3d 914, 915). The caseworker also encouraged the parents to comply with the stay-away orders of protection that had been put in place because of the volatile and violent nature of their relationship, and explained to the parents that continuing to violate the orders of protection would jeopardize their ability to have the children returned to their care (*see generally Carter A.*, 121 AD3d at 1219).

Contrary to the mother's further contention, we conclude that the court properly determined that she failed to plan for the future of the children, although able to do so (*see Sapphire A.J.*, 122 AD3d at 1297). The evidence established that the mother stopped attending mental health counseling and failed to complete such counseling in the manner recommended by petitioner (*see Jyashia RR.*, 92 AD3d at 983; *Matter of Kyle K.*, 49 AD3d 1333, 1335, *lv denied* 10 NY3d 715). To the extent that there was a discrepancy between the mother's service plan and the testimony of petitioner's caseworkers on the issue whether the mother had previously attended an approved facility for counseling, we note that the court was entitled to credit the testimony of petitioner's caseworkers that the mother failed to complete counseling at such a facility, particularly in light of the mother's "failure to testify at the fact-finding hearing" (*Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1855, quoting *Matter of Nassau Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79). Further, although the mother participated in some of the services offered by petitioner, petitioner established that she "did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren]'s safe return" (*Matter of Giovanni K.*, 62 AD3d 1242, 1243, *lv denied* 12 NY3d 715; *see Matter of Sophia M.G.K. [Tracy G.K.]*, 132 AD3d 1377, 1378; *Matter of Kyla E. [Stephanie F.]*, 126 AD3d 1385, 1386, *lv denied* 25 NY3d 910). Indeed, although the mother expressed a strong desire to end her relationship with the father when initially interviewed by petitioner's expert psychologist and was warned by one of petitioner's caseworkers that violating the orders of protection would be detrimental to her interests, the evidence established that the mother repeatedly violated the orders of

protection to stay away from the father, the parents conceived another child while the neglect proceedings were ongoing with respect to the older children, and the parents were again living together at the time of the fact-finding hearing (*see Carter A.*, 121 AD3d at 1219; *Matter of Jayden J. [Johanna K.]*, 100 AD3d 1207, 1209, *lv denied* 20 NY3d 860). To the extent that the mother challenges the testimony of petitioner's psychologist, we reiterate that "it is well settled that the court's 'determination regarding the credibility of witnesses is entitled to great weight on appeal, and will not be disturbed if supported by the record' " (*Matter of Burke H. [Tiffany H.]*, 117 AD3d 1568, 1568; *see Matter of Burke H. [Richard H.]*, 117 AD3d 1455, 1456). We conclude on this record that "the court properly credited the psychologist's report and opinion, which were based upon numerous visits with the mother and an extensive review of documentation" (*Burke H. [Tiffany H.]*, 117 AD3d at 1569).

We reject the parents' contentions that petitioner failed to meet its burden of establishing by a preponderance of the evidence that termination of their parental rights is in the best interests of the three subject children (*see Matter of Yasiel P. [Lisuan P.]*, 79 AD3d 1744, 1746, *lv denied* 16 NY3d 710). The record establishes that the parents failed to complete their service plans and made inadequate efforts to visit the subject children despite being able to do so (*see id.*). We reject the mother's further contention that termination of the parents' parental rights is not in the best interests of the subject children because it will result in separation from their younger sibling. "Although separation of siblings is not desirable, it is sometimes necessary to serve their best interests" (*Matter of S. Children*, 210 AD2d 175, 176, *lv denied* 85 NY2d 807; *see Matter of Malik M.*, 40 NY2d 840, 841; *Matter of Joshua E.R. [Yolaine R.]*, 123 AD3d 723, 726; *Matter of Alpacheta C.*, 41 AD3d 285, 286, *lv denied* 9 NY3d 812). Here, although the record establishes that the subject children were bonded with the younger child, we note that the subject children had already been living in foster care prior to the younger child's birth and have continued to do so thereafter. Indeed, the evidence established that the subject children's foster parent was an appropriate preadoptive resource who had bonded with the subject children, provided them with a structured environment, and integrated them into his large, supportive family. The court's determination "that it was in the [subject] children's best interests to be adopted by the foster parent[] with whom they had lived for most of their lives rather than to be returned to the [parents] is entitled to great deference" (*Sophia M.G.K.*, 132 AD3d at 1378; *see Matter of Elijah D. [Allison D.]*, 74 AD3d 1846, 1847), and we see no reason to disturb that determination.

The father failed to preserve for our review his contention that the court abused its discretion in not imposing a suspended judgment (*see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1315, *lv denied* 25 NY3d 909; *Matter of Atreyu G. [Jana M.]*, 91 AD3d 1342, 1343, *lv denied* 19 NY3d 801). In any event, a suspended judgment was not warranted under the circumstances inasmuch as "any 'progress made by [the father] in the months preceding the dispositional determination was not sufficient to warrant any further prolongation of the

[subject] child[ren]'s unsettled familial status' " (*Matter of Donovan W.*, 56 AD3d 1279, 1279, *lv denied* 11 NY3d 716).

Finally, on the mother's prior appeal, we determined that the court's finding of derivative neglect with respect to the younger child was supported by a preponderance of the evidence (*Burke H. [Tiffany H.]*, 117 AD3d at 1568; *see Burke H. [Richard H.]*, 117 AD3d at 1455). That determination is the law of the case, which forecloses the mother's challenge to that finding in the instant appeal (*see Matter of Jeremy H. [Logann K.]*, 100 AD3d 518, 518-519; *see generally Matter of Yamilette M.G. [Marlene M.]*, 118 AD3d 698, 699, *lv denied* 24 NY3d 906).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1245

CA 14-00431

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

IN THE MATTER OF ROOSEVELT COBB,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL SHEAHAN, SUPERINTENDENT, FIVE POINTS
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

ROOSEVELT COBB, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered December 26, 2013 in a proceeding pursuant to CPLR article 78. The judgment denied and dismissed the petition.

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

Memorandum: In this proceeding pursuant to CPLR article 78, petitioner appeals from a judgment dismissing his petition challenging his sentence as calculated by the Department of Corrections and Community Supervision (DOCCS). Contrary to petitioner's contention, we conclude that DOCCS correctly computed his sentence and, thus, Supreme Court properly dismissed the petition (*see generally Matter of Williams v Annucci*, 131 AD3d 1329, 1330-1331). To the extent that petitioner contends that he was denied the benefit of his plea bargain, his remedy is to seek relief by way of a motion pursuant to CPL article 440 (*see Matter of Cristostomo v Fischer*, 93 AD3d 976, 977).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1249

KA 13-01609

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LAWRENCE P. FRUMUSA, ALSO KNOWN AS JOHN DOE,
DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered September 30, 2011. The judgment convicted defendant, upon a jury verdict, of grand larceny in the second 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 grand larceny in the second degree (Penal Law § 155.40 [1]). Defendant contends that he was deprived of a fair trial because County Court improperly admitted as *Molineux* evidence a civil contempt order (hereafter, contempt order) finding that certain companies owned solely by defendant (hereafter, defendant's businesses) had failed to obey the terms of an earlier order. We reject that contention. The earlier order directed defendant's businesses to turn over all monies they had received as a result of defendant diverting credit card proceeds from Webster Hospitality Development LLC (WHD), a company in which defendant held majority ownership and which was in receivership, to undisclosed bank accounts maintained for defendant's businesses. Contrary to defendant's contention, the contempt order does not constitute a finding that defendant stole the money; rather, it demonstrates that defendant's businesses failed to abide by the earlier order to return money to WHD and to provide certain documentation to the receiver. We thus conclude that the contempt order was properly admitted as relevant evidence of defendant's intent to deprive WHD of the money by "withhold[ing] it or caus[ing] it to be withheld from [WHD] permanently" (§ 155.00 [3]; *see People v Molineux*, 168 NY 264, 293). Moreover, we note that "[l]arcenous intent . . . 'is rarely susceptible of proof by direct evidence, and must usually be inferred from the circumstances surrounding the defendant's actions' " (*People*

v Brown, 107 AD3d 1145, 1146, *lv denied* 22 NY3d 1039). Here, the contempt order had significant probative value inasmuch as it showed that defendant's conduct did not merely constitute poor financial management but, rather, that defendant, through his businesses, intended to deprive WHD of the diverted money permanently. The court therefore properly concluded that "the probative value of the evidence outweighed its prejudicial effect" (*People v Smith*, 129 AD3d 1549, 1549, *lv denied* 26 NY3d 971).

We reject defendant's contention that the court improperly limited his cross-examination of a witness with the minority ownership of WHD. "It is well settled that [t]he scope of cross-examination is within the sound discretion of the trial court" (*People v Bryant*, 73 AD3d 1442, 1443 [internal quotation marks omitted], *lv denied* 15 NY3d 850). Here, "the record establishes that defendant was given wide latitude in cross-examining the witness in question, and the court limited the cross-examination in merely a single instance that could not have affected the outcome of the trial" (*id.*). Contrary to defendant's further contention, we conclude that he received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Finally, we reject defendant's contention that the court abused its discretion in denying his request for an adjournment of sentencing to permit his newly-retained counsel additional time to prepare. "It is well established that '[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court' " (*People v LaCroce*, 83 AD3d 1388, 1388, *lv denied* 17 NY3d 807, quoting *People v Diggins*, 11 NY3d 518, 524), and " '[t]he court's exercise of discretion in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Aikey*, 94 AD3d 1485, 1486, *lv denied* 19 NY3d 956). Defendant made no such showing here.

All concur except CENTRA and LINDLEY, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent and conclude that County Court erred in admitting in evidence a contempt order issued by a Supreme Court Justice. We would therefore reverse the judgment of conviction and grant a new trial. Defendant was the majority owner of Webster Hospitality Development LLC (WHD), a company that developed and operated a hotel. The minority owner of WHD filed a civil suit against defendant in Supreme Court, resulting in the court appointing a temporary receiver to manage WHD. Defendant was charged with grand larceny in the second degree (Penal Law § 155.40 [1]) based on the allegation that he stole in excess of $50,000 from WHD between December 1, 2008 and June 15, 2009, while it was in receivership. Specifically, the People alleged that defendant directed American Express credit card proceeds into a bank account that defendant had opened for WHD at PNC Bank, an account of which the receiver had no knowledge. Once the funds were in that account, defendant transferred the funds to the accounts of other companies owned solely by defendant (hereafter, defendant's businesses), also at PNC Bank.

By order issued on July 27, 2009, which was after the time period set forth in the indictment herein, Supreme Court ordered defendant's businesses to turn over all monies deposited into WHD's account at PNC Bank. By notice of motion dated August 20, 2009, WHD moved for an order of contempt for the failure of defendant's businesses to comply with that order. Defendant's businesses did not submit any papers in opposition to the motion, and did not appear on the return date thereof. Supreme Court granted the motion and issued a final order adjudging defendant's businesses in contempt (hereafter, contempt order). The contempt order provided that defendant's businesses "are adjudged to be in contempt of Court in having willfully and deliberately failed to obey the terms of the Order in that they have *converted* $249,196.28 of WHD's monies and refused to comply with the express directions in the Order to pay over to WHD all monies received by each of them, or paid on their behalf, from a WHD account . . . [;] and it is further determined that [the conduct of defendant's businesses] *was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of WHD*" (emphasis added).

The People's *Molineux* notice sought to introduce in evidence the contempt order, arguing that it demonstrated defendant's intent to steal. The People argued that they were not introducing the order "to suggest that just because a judge found . . . defendant's [businesses] . . . in contempt of Court, that they should convict [defendant]." Over defendant's objection, the court granted the People's application. The contempt order was admitted in evidence at trial, and witnesses testified that defendant and his businesses failed to comply with the contempt order and had not turned over any funds that were transferred into the PNC Bank accounts. The court gave the jury no limiting instruction with respect to that evidence.

It is well settled that "evidence of a defendant's prior bad acts may be admitted to prove the crime charged when the evidence tends to establish," inter alia, intent (*People v Denson*, 26 NY3d 179, ___; *see People v Molineux*, 168 NY 264, 293). We conclude that the contempt order did not constitute *Molineux* evidence. The contempt order and related testimony involved defendant's conduct, through his businesses, that occurred after the crime he was charged with. In certain circumstances, bad acts or crimes that are committed after the crime charged are admissible (*see People v Ingram*, 71 NY2d 474, 479-480). The evidence here, however, was not "[p]roof of defendant's conviction of a subsequent *unrelated* crime" (*People v Holmes*, 112 AD2d 739, 739, *lv denied* 66 NY2d 920 [emphasis added]; *see Ingram*, 71 NY2d at 479-480). Rather, it was evidence involving conduct of defendant, through his businesses, that was related to the *same* crime with which defendant was charged. Indeed, the contempt order arose from an order directing defendant's businesses to turn over the very funds that the People accused defendant of stealing. Moreover, the contempt order was issued in an uncontested civil proceeding, where the lesser burden of proof of clear and convincing evidence applied (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29).

In any event, even if the contempt order constituted *Molineux*

evidence, we conclude that the court abused its discretion in admitting it in evidence because its probative value did not outweigh its prejudicial effect (*see People v Drake*, 94 AD3d 1506, 1508, *lv denied* 20 NY3d 1010). Inasmuch as the contempt order stated that defendant, through his businesses, "converted" the funds at issue to the detriment of the rights and remedies of WHD, the jury had before it a document that essentially constituted, in the context of the other evidence presented at trial, a judicial finding of defendant's larcenous intent. The prejudicial effect on the charge herein against defendant was nothing other than obvious and extreme. In addition, as noted above, the court did not give any limiting instruction to the jury to minimize any prejudicial effect (*cf. People v Graham*, 117 AD3d 1584, 1584-1585, *lv denied* 23 NY3d 1037).

Moreover, the prosecutor concluded his summation by drawing the jury's attention to the contempt order, and the prosecutor urged the jurors to convict inasmuch as a Supreme Court Justice "had tried [to hold him responsible] by trying to fine him and that didn't work." He further stated that Supreme Court had "issued order after order after order trying to hold him in contempt. Now you can issue that decision. You can hold him responsible for this, and you can find him guilty of Grand Larceny in the Second Degree." Thus, the prosecutor sought to have the jury use the contempt order for the very purpose which he had earlier said was not the purpose of the *Molineux* application, i.e., "to suggest that just because a judge found . . . defendant's [businesses] . . . in contempt of Court, that they should convict him." In our view, defendant was denied a fair trial by cumulative effect of the admission in evidence of the contempt order, the testimony regarding that contempt order, and the prosecutor's references to the contempt order on summation.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1262

CA 15-00023

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

CHANDRA M. HEWITT, AN INFANT, BY HER PARENT AND NATURAL GUARDIAN, DONALD E. HEWITT, AND DONALD E. HEWITT, INDIVIDUALLY, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

LIVERPOOL CENTRAL SCHOOL DISTRICT, LIVERPOOL CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION, NATARE CORPORATION, PATTERSON-STEVENS AQUATECH, INC., PATTERSON-STEVENS, INC., DODGE CHAMBERLIN LUZINE WEBER ASSOCIATES ARCHITECTS, LLP, BBL CONSTRUCTION SERVICES, LLC, FORMERLY KNOWN AS BARRY, BETTE & LED DUKE, INC., BETTE & CRING, LLC, FORMERLY KNOWN AS BARRY, BETTE & LED DUKE, INC., DEFENDANTS-RESPONDENTS, KLEPPER, HAHN & HYATT, ENGINEERS AND LANDSCAPE ARCHITECT, P.C., DEFENDANT-APPELLANT, ET AL., DEFENDANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANT-APPELLANT.

GREENE & REID, PLLC, SYRACUSE (JAMES T. SNYDER OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (DONALD S. DIBENEDETTO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS LIVERPOOL CENTRAL SCHOOL DISTRICT AND LIVERPOOL CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION.

PHELAN, PHELAN & DANEK, LLP, ALBANY (TIMOTHY P. TRIPP OF COUNSEL), FOR DEFENDANT-RESPONDENT BBL CONSTRUCTION SERVICES, LLC, FORMERLY KNOWN AS BARRY, BETTE & LED DUKE, INC.

NAPIERSKI, VANDENBURGH, NAPIERSKI & O'CONNOR, LLP, ALBANY (SHAWN T. NASH OF COUNSEL), FOR DEFENDANT-RESPONDENT BETTE & CRING, LLC, FORMERLY KNOWN AS BARRY, BETTE & LED DUKE, INC.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 21, 2014. The order denied the motions of defendant Klepper, Hahn & Hyatt, Engineers and Landscape Architect, P.C., for summary judgment dismissing plaintiff's complaint and any cross claims against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motions of defendant-appellant are granted, and the complaint and the cross claims of defendants Liverpool Central School District, Liverpool Central School District Board of Education, Natare Corporation, and Bette & Cring, LLC, formerly known as Barry, Bette & Led Duke, Inc., against it are dismissed.

Memorandum: Plaintiff Chandra M. Hewitt, by her father, and plaintiff father, individually, commenced this action seeking damages for injuries sustained by Chandra when she lacerated her wrist on strips of metal in the water collection and filtration system of a swimming pool owned and operated by defendants Liverpool Central School District and the Liverpool Central School District Board of Education (collectively, School District defendants). Plaintiffs alleged that the injuries were caused by, inter alia, the negligent design, manufacture and installation of the water collection and filtration system, and that defendant Klepper, Hahn & Hyatt, Engineers and Landscape Architect, P.C. (KHH) was liable for damages because the School District defendants had hired KHH to provide structural and mechanical engineering services during a renovation of the swimming pool. After some discovery, KHH moved for summary judgment dismissing the complaint against it pursuant to CPLR 3212 (b) and (i), and KHH moved separately pursuant to those subdivisions for summary judgment dismissing "any and all current or prospective cross claims" against it. We note that KHH did not name any specific cross claimants in that motion, but the moving papers of KHH included the answers with cross claims against it from the School District defendants, defendant Natare Corporation (Natare), and defendant Bette & Cring, LLC, formerly known as Barry, Bette & Led Duke, Inc. (Bette & Cring). Supreme Court denied KHH's motions pursuant to CPLR 3212 (f), without prejudice to renew pursuant to CPLR 3212 (b) and (i) following additional discovery. We reverse.

We conclude with respect to both motions that KHH met its initial burden pursuant to CPLR 3212 (b) by submitting evidence establishing that it was not involved in the design, manufacture or installation of the water collection and filtration system, and thus that the work KHH performed on the project "did not cause or contribute to the happening of the accident" (*Simon v Granite Bldg. 2, LLC*, 114 AD3d 749, 755; *see Davies v Ferentini*, 79 AD3d 528, 528-529). In opposition to the motions, plaintiff, the School District defendants, Natare, and Bette & Cring, failed to raise triable issues of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). We agree with KHH that the court erred in denying the motions pursuant to CPLR 3212 (f). "Although a motion for summary judgment may be opposed on the ground 'that facts essential to justify opposition may exist but cannot be stated' (CPLR 3212 [f]), 'the opposing party must make an evidentiary showing supporting [that] conclusion' " (*Preferred Capital v PBK, Inc.*, 309 AD2d 1168, 1169); "[m]ere speculation . . . is not sufficient to raise an issue of fact" (*Newman v Regent Contr. Corp.*, 31 AD3d 1133, 1135 [internal quotation marks omitted]). Here, the record establishes that KHH disclosed its project files to plaintiffs,

and plaintiffs had the opportunity to depose a KHH employee about the project. The contention of plaintiffs and the cross claimants that further discovery may result in the disclosure of evidence that KHH was involved in the design, manufacture or installation of the water collection and filtration system is merely speculative (*see State Farm Fire & Cas. Co. v Ricci*, 96 AD3d 1571, 1574; *see generally Kirbis v LPCiminelli, Inc.*, 90 AD3d 1581, 1582-1583; *WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617).

In light of our determination, we do not address KHH's contention that it was entitled to summary judgment pursuant to CPLR 3212 (i).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1271

KA 14-01061

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWAYNE HANDLEY, DEFENDANT-APPELLANT.

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

DWAYNE HANDLEY, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. VIOLANTE, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered April 8, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation previously imposed upon his conviction of attempted criminal possession of a weapon in the second degree (Penal Law §§ 110.00, 265.03 [3]) and sentencing him to a determinate term of imprisonment of seven years plus three years of postrelease supervision. We reject defendant's contention that the sentence is unduly harsh and severe. Although defendant was sentenced to the maximum sentence permitted by law and has a minimal criminal history, he repeatedly fired a gun at another person, and one of the errant bullets went through the window of a nearby home. Moreover, shortly after being placed on probation, defendant essentially ignored all of the terms and conditions of probation and then absconded for the next year and a half. Under the circumstances, we perceive no basis upon which to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *see generally People v Leggett*, 101 AD3d 1694, 1695, *lv denied* 20 NY3d 1101).

Defendant's contentions in his pro se supplemental brief that his plea was involuntarily entered and that he was deprived of effective assistance of counsel at the time of the plea are not properly before us. The only notice of appeal in the record is from the judgment entered upon sentencing for the violation of probation, and there is

no notice of appeal from the underlying judgment of conviction (*see People v Postula*, 50 AD3d 1581, 1581, *lv denied* 10 NY3d 938; *People v Parente*, 4 AD3d 793, 793-794).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1276

KA 14-01686

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL LAYOU, DEFENDANT-APPELLANT.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, NEW YORK CITY (ROSS E. WEINGARTEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an amended judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 14, 2014. The amended judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from an amended judgment convicting him, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [12]). On a prior appeal, we concluded that defendant was deprived of effective assistance of counsel by the attorney assigned to represent him at a suppression hearing, inasmuch as counsel, inter alia, " 'never supplied the hearing court with any legal rationale for granting suppression' " (*People v Layou*, 114 AD3d 1195, 1198, quoting *People v Clermont*, 22 NY3d 931, 933). We therefore remitted the matter to County Court for " 'further proceedings on the suppression application, to include legal argument by counsel for both parties and, if defendant so elects, reopening of the hearing' " (*id.*, quoting *Clermont*, 22 NY3d at 934).

Upon remittal, the court reopened the suppression hearing and heard testimony from four defense witnesses, including defendant, none of whom had testified at the first suppression hearing. Following the hearing, both sides submitted memoranda of law in support of their positions. The court again denied the motion. Defendant now contends that the court erred in denying his motion to suppress physical evidence because, among other reasons, the testimony of the arresting officer was not credible. More specifically, defendant contends that, contrary to the officer's testimony at the hearing, defendant's vehicle was not illegally parked when the officer made his initial

approach, and that the approach was therefore unlawful inasmuch as it was not "undertaken for an objective, credible reason" (*People v Ocasio*, 85 NY2d 982, 984). We reject that contention.

It is well settled that great deference should be given to the determination of the suppression court, which had the opportunity to observe the demeanor of the witnesses and to assess their credibility, and its factual findings should not be disturbed unless clearly erroneous (*see People v Prochilo*, 41 NY2d 759, 761; *People v Pitsley*, 185 AD2d 645, 645, *lv denied* 81 NY2d 792). Here, the arresting officer testified that he approached defendant's vehicle because it was parked in a municipal lot directly in front of a "No Parking" sign. Contrary to defendant's contention, there is nothing about the officer's testimony in that regard that is "unbelievable as a matter of law, manifestly untrue, physically impossible, contrary to experience, or self-contradictory" (*People v James*, 19 AD3d 617, 618, *lv denied* 5 NY3d 829). In fact, the officer's testimony was corroborated by that of defendant's former attorney, who testified at the suppression hearing that, when he went to the parking lot in question approximately 15 months after defendant's arrest, he observed a "No Parking" sign "underneath some snow and ice and other materials", with its metal pole having been bent flat to the ground. Even assuming, arguendo, that the sign was in that condition when the officer approached defendant's parked vehicle, we note that, as the officer testified, no parking was allowed in the lot. Moreover, it is immaterial whether other people regularly parked illegally in the lot, as defendant's remaining witnesses testified. We thus conclude that the court properly rejected defendant's contention that the officer lacked an objective, credible reason to approach the vehicle, and properly denied his motion to suppress contraband recovered from the vehicle and defendant's person.

Finally, we reject defendant's remaining contention that the indictment should be dismissed based on our prior finding that he was deprived of effective assistance of counsel at the first suppression hearing.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1279

KA 11-00451

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

EDWARD J. GIBSON, JR., DEFENDANT-APPELLANT.

CHARLES T. NOCE, CONFLICT DEFENDER, ROCHESTER (KIMBERLY J. CZAPRANSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (David D. Egan, J.), rendered October 29, 2009. The judgment convicted defendant, upon a jury verdict, of sexual abuse in the first degree (two counts), assault in the third degree and criminal contempt in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the facts by reversing that part convicting defendant of assault in the third degree under count seven of the indictment and dismissing that count, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of two counts of sexual abuse in the first degree (Penal Law § 130.65 [1]) and one count each of assault in the third degree (§ 120.00 [1]) and criminal contempt in the first degree (§ 215.51 [b] [v]), defendant contends, inter alia, that he was deprived of a fair trial by prosecutorial misconduct during summation. Defendant failed to preserve the alleged instances of misconduct for our review, inasmuch as defense counsel did not object to certain instances (*see People v Paul*, 78 AD3d 1684, 1684-1685, *lv denied* 16 NY3d 834), made "only unspecified, general objections" to others (*People v Romero*, 7 NY3d 911, 912), and failed to take any further actions such as requesting a curative instruction or moving for a mistrial when his objections were sustained (*see People v Medina*, 53 NY2d 951, 953). We nevertheless exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Despite this Court's repeated admonitions to prosecutors not to engage in misconduct during summation, the prosecutor improperly referred to facts not in evidence when he insinuated that the victim regretted that she did not get out of defendant's vehicle (*see People v Ashwal*, 39 NY2d 105, 109-110). The prosecutor also improperly

appealed to the jury's sympathy and bolstered the victim's credibility, and did so repeatedly, by commenting on how difficult it was for her to recount her ordeal, first to the police, then before the grand jury, and finally in her trial testimony (*see People v Fisher*, 18 NY3d 964, 966). In addition, the prosecutor improperly suggested that the jury experiment on themselves to see how quickly bite marks fade (*see People v Brown*, 196 AD2d 878, 878-879, *lv denied* 82 NY2d 891; *see also People v Legister*, 75 NY2d 832, 832-833). Nevertheless, "[a]lthough we do not condone the prosecutor's conduct, it cannot be said here that it 'caused such substantial prejudice to the defendant that he has been denied due process of law' " (*People v Glen*, 283 AD2d 987, 987, *lv denied* 96 NY2d 918, quoting *People v Mott*, 94 AD2d 415, 419). We admonish the prosecutor, however, "and remind him that prosecutors have 'special responsibilities . . . to safeguard the integrity of criminal proceedings and fairness in the criminal process' " (*People v Huntsman*, 96 AD3d 1387, 1388, *lv denied* 20 NY3d 1099, quoting *People v Santorelli*, 95 NY2d 412, 421).

We reject defendant's contention that the evidence is legally insufficient to support his conviction of two counts of sexual abuse in the first degree. Contrary to defendant's contention, we conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to establish that he subjected the victim to sexual contact by forcible compulsion (*see People v Brown*, 39 AD3d 886, 888, *lv denied* 9 NY3d 873). Viewing the evidence in light of the elements of that crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict on those counts is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant also contends that the evidence is legally insufficient to support his conviction of assault in the third degree and that the verdict is against the weight of the evidence with respect to that crime inasmuch as the People failed to prove that he caused physical injury to the victim. Defendant failed to preserve his legal sufficiency contention for our review because his motion for a trial order of dismissal with respect to that count "was not specifically directed at the ground advanced on appeal" (*People v Vassar*, 30 AD3d 1051, 1052, *lv denied* 7 NY3d 796; *see People v Gray*, 86 NY2d 10, 19). "However, we necessarily review the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence" (*People v Caston*, 60 AD3d 1147, 1148-1149; *see Danielson*, 9 NY3d at 349; *People v Heatley*, 116 AD3d 23, 27, *appeal dismissed* 25 NY3d 933), and we agree with defendant that the verdict is against the weight of the evidence with respect to that crime. We conclude, upon our independent review of the evidence, that the People failed to prove beyond a reasonable doubt that the victim sustained a physical injury (*see generally Danielson*, 9 NY3d at 349). The indictment alleged that defendant caused physical injury to the victim "by striking her in the face." Although the victim testified that defendant struck her in the face, and photographs of the victim showed swelling and discoloration of the left side of her face, the victim did not testify that she suffered

substantial pain from that injury or that she sought medical attention for it (*see People v Boley*, 106 AD3d 753, 753-754; *cf. People v Spratley*, 96 AD3d 1420, 1421). We therefore modify the judgment accordingly.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1284

CA 14-01035

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

IN THE MATTER OF JANET M. IZZO AND JENNIFER M. BEARD, AS COADMINISTRATORS OF THE ESTATE OF LAURA HULING, DECEASED, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF HEALTH, NIRAV R. SHAH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT, KENDRICK SEARS, CHAIR, STATE BOARD OF PROFESSIONAL MEDICAL CONDUCT, OFFICE OF PROFESSIONAL MEDICAL CONDUCT AND KEITH SERVIS, EXECUTIVE DIRECTOR OF OFFICE OF PROFESSIONAL MEDICAL CONDUCT, RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (VICTOR PALADINO OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

JANET M. IZZO, SYRACUSE, PETITIONER-RESPONDENT PRO SE AND FOR JENNIFER M. BEARD, PETITIONER-RESPONDENT.

Appeal, by permission of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order and judgment of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered May 29, 2014 in a proceeding pursuant to CPLR article 78. The order and judgment, among other things, directed respondents to serve detailed affidavits with their answer and to provide certain documents for in camera review.

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

Memorandum: In this CPLR article 78 proceeding, respondents contend that Supreme Court erred in directing them to supplement their verified answer by providing affidavits and submitting documents for in camera review to describe in greater detail the investigation undertaken by respondent Office of Professional Medical Conduct (OPMC) with respect to the medical misconduct complaint filed by petitioners' decedent. We agree. Pursuant to Public Health Law § 230 (10) (a) (v), OPMC's investigative records are confidential and not subject to disclosure, subject to certain exceptions not applicable to this case, where, as here, the OPMC investigation does not proceed past the

interview stage (*see Kirby v Kenmore Mercy Hosp.*, 122 AD3d 1284, 1285; *Hunold v Community Gen. Hosp. of Greater Syracuse*, 61 AD3d 1331, 1332-1333).

We further agree with respondents that the petition must be dismissed. A patient complaining of professional misconduct has no standing to challenge the determination of a disciplinary body not to pursue disciplinary action (*see Matter of Davis v New York State Dept. of Educ.*, 96 AD3d 1261, 1262), and petitioners therefore have no standing to challenge OPMC's determination not to bring medical misconduct charges pursuant to Education Law § 6510. In any event, we further conclude that the determination of a disciplinary body such as OPMC that no misconduct occurred in a particular case "is a discretionary one for which review in a proceeding in the nature of mandamus is unavailable" (*Matter of Frooks v Adams*, 214 AD2d 615, 615; *see Davis*, 96 AD3d at 1262-1263; *see also Matter of Wade v Suffolk County Med. Socy.*, 88 AD2d 602, 602).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1290

CA 15-00908

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

J.N.K. MACHINE CORPORATION, PLAINTIFF,

V MEMORANDUM AND ORDER

TBW, LTD., WOOLSCHLAGER, INC., AND BERNARD C. WOOLSCHLAGER, DEFENDANTS.

TBW, LTD., WOOLSCHLAGER, INC., AND BERNARD C. WOOLSCHLAGER, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

PAMELA LODESTRO, AS EXECUTOR OF THE ESTATE OF G. MARV SCHUVER, THIRD-PARTY DEFENDANT, AND BART SCHUVER, THIRD-PARTY DEFENDANT-RESPONDENT.

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

FESSENDEN, LAUMER & DEANGELO, JAMESTOWN (CHARLES S. DEANGELO OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County (Deborah A. Chimes, J.), entered September 16, 2014. The order granted the motion of third-party defendant Bart Schuver to dismiss the third-party complaint against him.

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

Memorandum: In this breach of contract action, defendants-third-party plaintiffs (defendants) appeal from an order that granted the motion of third-party defendant Bart Schuver to dismiss the third-party complaint against him. We affirm. In a prior appeal, we affirmed an order denying defendants' motion seeking leave to amend their answer to include additional allegations in their counterclaim, concluding that the proposed amendment "improperly sought relief that was inconsistent with this Court's decision in the prior appeal" (*J.N.K. Mach. Corp. v TBW, Ltd.*, 98 AD3d 1259, 1260). Inasmuch as the allegations and relief sought in the third-party complaint are substantially the same as the allegations and relief sought in defendants' proposed amended answer, we agree with Schuver that the third-party complaint also improperly seeks relief inconsistent with this Court's decision in the prior appeal. In any event, because the

allegations in the third-party complaint allege that Schuver was acting as an agent for plaintiff, a disclosed principal, and there is no clear and explicit evidence of any intention by Schuver to " 'superadd his personal liability for, or to, that of [plaintiff]' " (*Salzman Sign Co. v Beck*, 10 NY2d 63, 67; *see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4-6; *Jones v Archibald*, 45 AD2d 532, 534), the third-party complaint also was properly dismissed for failure to state a cause of action against Schuver (*see* CPLR 3211 [a] [7]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1292

CA 15-00184

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

ENGASSER CONSTRUCTION CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DRYDEN MUTUAL INSURANCE COMPANY,
DEFENDANT-APPELLANT.

BARCLAY DAMON, LLP, ROCHESTER (ANTHONY J. PIAZZA OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN & KELLY, LLP, BUFFALO (ANDREW D. MERRICK OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John A. Michalek, J.), entered September 22, 2014. The judgment granted the motion of plaintiff for summary judgment, denied the cross motion of defendant for summary judgment and declared that defendant owes a defense and indemnification to plaintiff in the underlying action.

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

Memorandum: Plaintiff hired a contractor to install ice blocks on the roof of its commercial building, and an employee of the contractor fell from the roof while installing the ice blocks. The employee and his spouse commenced an action against plaintiff, alleging common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). At the time of the accident, the contractor was insured under a general liability policy issued by defendant, and an endorsement to that policy named plaintiff as an additional insured. The additional insured endorsement states that the insured provision of the general liability coverage "is amended to include as an *insured* the [plaintiff] BUT only with respect to . . . its liability for activities of the *named insured* or activities performed by [the plaintiff] on behalf of the *named insured*." Pursuant to that endorsement, plaintiff sought a defense and indemnification in the underlying action, and defendant disclaimed coverage. Plaintiff thereafter commenced the instant action seeking a declaration that defendant had an obligation to defend and indemnify it in the underlying action, and in its answer, defendant sought, inter alia, a declaration that it had no such obligation.

Supreme Court properly granted plaintiff's motion for summary judgment, denied defendant's cross motion for summary judgment, and granted judgment declaring, inter alia, that defendant owes a defense and indemnification to plaintiff in the underlying action. "Insurance contracts must be interpreted according to common speech and consistent with the reasonable expectations of the average insured" (*Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122). Plaintiff reasonably expected coverage under the endorsement, inasmuch as it was subject to liability for the activities of the named insured, i.e., the injured worker's employer, under the Labor Law (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375; *Chapel v Mitchell*, 84 NY2d 345, 347-348). Thus, pursuant to the additional insured endorsement, plaintiff was entitled to coverage "with respect to . . . its liability for activities of the *named insured*," and the court properly declared that plaintiff is entitled to a defense and indemnification under the policy (*see Burlington Ins. Co. v NYC Tr. Auth.*, 132 AD3d 127, 138).

Entered: December 23, 2015

Frances E. Cafarell
Clerk of the Court

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

1293

KA 09-01271

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD GIBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.) rendered March 17, 2009. The appeal was held by this Court by order entered November 14, 2014, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (122 AD3d 1331). The proceedings were held and completed.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (§ 125.20). We previously held the cases, reserved decision, and remitted the matters to Supreme Court to determine whether to adjudicate defendant a youthful offender in both matters (*People v Gibson*, 122 AD3d 1331, 1332; *People v Gibson*, 122 AD3d 1332). Upon remittal, the court declined to adjudicate defendant a youthful offender, and we now affirm.

Initially, we note that "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" and the determination to deny him youthful offender status (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076, citing *People v Maracle*, 19 NY3d 925, 928; *see People v Anderson*, 90 AD3d 1475, 1476, *lv denied* 18 NY3d 991). Thus, defendant's waiver of the right to appeal does not encompass his challenge to the severity of the sentence and the denial of youthful offender status (*see People v Avellino*, 119 AD3d 1449, 1449-1450; *Anderson*, 90 AD3d at 1476). Contrary to defendant's contention in

these appeals following remittal, however, we conclude that the sentence in each appeal is not unduly harsh or severe, and we further conclude that the court did not abuse its discretion in declining to adjudicate him a youthful offender (*see People v Guppy*, 92 AD3d 1243, 1243, *lv denied* 19 NY3d 961). Furthermore, we decline to exercise our interest of justice jurisdiction to adjudicate defendant a youthful offender (*cf. People v Shrubsall*, 167 AD2d 929, 930-931). The record establishes that two separate violent incidents were involved, one in which defendant aided a codefendant who stabbed the victim and inflicted serious injuries, and the other in which defendant killed a different young man with whom he had been feuding for months. In the latter incident, defendant took the handgun away from another participant in the crime who was refusing to shoot the victim and shot the victim himself.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1294

KA 09-01300

PRESENT: SCUDDER, P.J., SMITH, PERADOTTO, AND CARNI, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GERALD GIBSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.) rendered March 17, 2009. The appeal was held by this Court by order entered November 14, 2014, decision was reserved and the matter was remitted to Supreme Court, Erie County, for further proceedings (122 AD3d 1332). The proceedings were held and completed.

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

Same memorandum as in *People v Gibson* ([appeal No. 1] ___ AD3d ___ [Dec. 31, 2015]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1296

KA 14-00611

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JON H. BUSH, JR., DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (SUSAN C. MINISTERO OF COUNSEL), 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 13, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted burglary 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 of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]). Contrary to defendant's contention, he knowingly, voluntarily and intelligently waived his right to appeal, and his valid waiver forecloses his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255; *see generally People v Lococo*, 92 NY2d 825, 827; *People v Hidalgo*, 91 NY2d 733, 737). County Court advised defendant at the time of the waiver of the potential maximum term of incarceration, and thus the waiver encompasses defendant's present challenge to the sentence (*see Lococo*, 92 NY2d at 827).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1298

KA 15-00273

PRESENT: SMITH, J.P., PERADOTTO, LINDLEY, AND WHALEN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER K. KENNARD, DEFENDANT-APPELLANT.

LAW OFFICES OF JOSEPH D. WALDORF, P.C., ROCHESTER (JOSEPH D. WALDORF OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered February 5, 2015. The judgment convicted defendant, after a nonjury trial, of rape in the second degree (six counts), rape in the third degree (two counts) and endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress defendant's statements is granted, and a new trial is granted.

Memorandum: On appeal from a judgment convicting her following a nonjury trial of, inter alia, six counts of rape in the second degree (Penal Law § 130.30 [1]), defendant contends that County Court erred in failing to suppress statements she made to the police after she invoked her right to counsel. We agree. We therefore grant that part of defendant's omnibus motion seeking to suppress any statements she made to the police after her invocation of the right to counsel, and we grant a new trial.

On March 15, 2013, defendant was interviewed at the Irondequoit Police Department by two investigators, who had recently been informed by a 16-year-old boy that defendant, a teacher's aide at the boy's school, had engaged him in a sexual relationship for the previous two years. During the custodial interview, which was recorded on video, defendant waived her *Miranda* rights and repeatedly denied having sex with the boy. After answering questions for approximately an hour and ten minutes, defendant said, "I think I need to talk to an attorney." In response, the first investigator stated, "Would you like to talk to one? If you think that, that's fine. That's up to you." Defendant replied, "I need to," before going on to state that she would never have bad feelings toward the boy and genuinely cared about him. The

questioning then ceased, and the first investigator allowed defendant to go outside with the second investigator and a female Child Protective Services worker to smoke a cigarette.

While defendant was smoking in the parking garage, the second investigator engaged her in a lengthy conversation. Unbeknownst to defendant, the conversation was being digitally recorded by the second investigator. During the conversation, defendant made numerous admissions, all but confessing that she had engaged in sexual activity with the boy. She was thereafter arrested and charged with multiple counts of rape in the second degree, among other charges. Following indictment, defendant moved to suppress the statements she made to the second investigator in the parking garage, contending that they were obtained in violation of her right to counsel. At the ensuing *Huntley* hearing, the two investigators testified, and the recording of the interview was admitted into evidence. Defendant did not testify or call any witnesses. The court denied defendant's motion, ruling that she had not unequivocally invoked her right to counsel.

It is well settled that "a suspect in custody who unequivocally requests the assistance of counsel may not be questioned further in the absence of an attorney" (*People v Harris*, 93 AD3d 58, 66, *affd* 20 NY3d 912; *see People v Grice*, 100 NY2d 318, 320-321; *People v Glover*, 87 NY2d 838, 839). "Whether a particular request [for counsel] is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request[,] including the defendant's demeanor [and] manner of expression[,] and the particular words found to have been used by the defendant" (*People v Barber*, 124 AD3d 1312, 1313 [internal quotation marks omitted], *lv dismissed* 26 NY3d 965; *see People v Mitchell*, 2 NY3d 272, 276).

Here, we conclude that, although defendant's statement "I think I need to talk to an attorney" may not, standing alone, constitute an unequivocal invocation of the right to counsel (*see People v Twillie*, 28 AD3d 1236, 1237, *lv denied* 7 NY3d 795; *People v Davis*, 193 AD2d 1142, 1142), her subsequent statement "I need to"—made in reply to the first investigator stating "Would you like to talk to one? If you think that, that's fine. That's up to you"—removed any ambiguity and made clear that defendant was requesting the assistance of counsel (*see generally People v Porter*, 9 NY3d 966, 967; *Barber*, 124 AD3d at 1313; *Harris*, 93 AD3d at 69).

We disagree with the hearing court that it is unclear exactly what defendant said to the first investigator after he told her that she could talk to an attorney if she so desired. In our view, defendant can be heard to clearly say, "I need to." In any event, even assuming, arguendo, that defendant instead said, "I'll need to," as the People suggest, we conclude that defendant's request for counsel was no less unequivocal, and that the court therefore should have suppressed the statements defendant made to the second investigator in the parking garage. We further conclude that the court's error in denying the suppression motion is not harmless because there is a "reasonable possibility that the error might have

contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237; *see People v Huntsman*, 96 AD3d 1390, 1392; *see generally People v Douglas*, 4 NY3d 777, 779).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1300

KA 14-00889

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUAR PRATCHER, 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 (NICHOLAS T. TEXIDO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered May 14, 2014. The judgment convicted defendant, upon a nonjury verdict, of murder in the second degree, burglary in the first degree (two counts) and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him after a bench trial of, inter alia, murder in the second degree (Penal Law § 125.25 [3] [felony murder]). The conviction arises from a home invasion burglary during which the 96-year-old victim sustained, among other injuries, a subdural hematoma and so many broken facial bones that his skull remained distorted when he died approximately five months later.

We reject defendant's contention that the testimony of the two accomplices was insufficiently corroborated. The Criminal Procedure Law provides that a defendant "may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense" (CPL 60.22 [1]). Corroborating evidence is sufficient if it " 'tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the [factfinder] that the accomplice is telling the truth' " (*People v Reome*, 15 NY3d 188, 192, quoting *People v Dixon*, 231 NY 111, 116; *see People v Mohamed*, 94 AD3d 1462, 1463, *lv denied* 19 NY3d 999, *reconsideration denied* 20 NY3d 934). Therefore, contrary to defendant's contention, the statute "need not be read . . . to require that all corroboration that depends to any degree on the accomplice's testimony be ignored . . . There can be corroborative evidence that, read with the accomplice's testimony,

makes it more likely that the defendant committed the offense, and thus tends to connect him to it" (*Reome*, 15 NY3d at 194). Therefore, "some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant" (*id.*; *see People v Lipford*, 129 AD3d 1528, 1529), or if it " 'harmonized' " with the accomplices' testimony (*People v McRae*, 15 NY3d 761, 762, *rearg denied* 15 NY3d 902; *see People v Highsmith*, 124 AD3d 1363, 1364, *lv denied* 25 NY3d 1202).

Here, there was evidence from several sources corroborating the testimony of the accomplices. The testimony of the accomplices established the way in which the crime was committed, including that they and defendant used cell phones throughout the incident. In addition, one of the accomplices testified that, after the incident, defendant said that "the old man wouldn't shut up . . . so he had to hit him[, and] when he hit him, he felt his jaw getting soft." The accomplices also testified that they heard a gunshot as they fled the scene of the burglary, and defendant told one of them that he accidentally had shot himself in the leg while hopping a fence.

In support of that testimony, the People introduced corroborating evidence from several sources tending to show that the accomplices were telling the truth and that defendant was one of the perpetrators. First, there is overwhelming evidence establishing that the crime occurred in the manner in which the accomplices testified. The security system at the victim's home recorded the events that took place outside the home, and that video recording depicts the perpetrators making cell phone calls, exchanging a handgun, and entering the home through a window at night, then carrying away items of personal property when they later left the home. There is also overwhelming medical evidence establishing that the victim was savagely beaten during the incident. That evidence "may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant" (*Reome*, 15 NY3d at 194).

Moreover, there is also sufficient corroborating evidence tending to connect defendant with the commission of the crime. First and foremost, the People introduced evidence that defendant was treated two days after the incident herein for a gunshot wound to his leg, that he told the medical providers and a police officer that he sustained the wound two days earlier, i.e., on the day of the incident herein, and that the officer was unable to find any evidence corroborating defendant's version of how defendant had sustained the wound. In addition, although the video recording by itself is not clear enough to establish that defendant was one of the perpetrators, it is sufficiently clear to demonstrate that the accomplices are telling the truth about the events that occurred outside the home, including that a person who is consistent with defendant's height and build participated in the crime along with the accomplices. In addition, the People introduced in evidence cell phone records, call logs, and supporting testimony demonstrating where the subject cell phones were used, and that evidence establishes that cell phone calls were made as the accomplices testified. The People also introduced

expert medical testimony establishing that the victim sustained numerous facial fractures of his orbital, sinus, and jaw bones, which is consistent with defendant's statement that he felt the victim's "jaw getting soft." Based on all the evidence, we conclude that the testimony of the accomplices was sufficiently corroborated inasmuch as the evidence " 'tend[ed] to connect the defendant with the commission of the crime in such a way as [could] reasonably satisfy the [factfinder] that the accomplice[s] [were] telling the truth' " (*id.* at 192; *see* CPL 60.22 [1]; *People v Robinson*, 111 AD3d 1358, 1358, *lv denied* 22 NY3d 1141).

Defendant further contends that the evidence is not legally sufficient to establish that the injuries that the victim sustained during the commission of the crimes were the cause of his death approximately five months later. Although defendant moved for a trial order of dismissal, he did not contend in that motion that the victim's death was not the foreseeable result of the injuries the victim sustained during the commission of the crimes, and thus failed to preserve his legal sufficiency contention for our review (*see People v Gray*, 86 NY2d 10, 19; *see also People v Ingram*, 67 NY2d 897, 899). In any event, it has long been the rule in New York that " '[i]f a person inflicts a wound . . . in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible' " (*People v Kane*, 213 NY 260, 274). Thus, "[f]or criminal liability to attach, a defendant's actions must have been an actual contributory cause of death, in the sense that they 'forged a link in the chain of causes which actually brought about the death' " (*Matter of Anthony M.*, 63 NY2d 270, 280). Additionally, the "defendant's acts need not be the sole cause of death; where the necessary causative link is established, other causes, such as a victim's preexisting condition, will not relieve the defendant of responsibility for homicide . . . By the same token, death need not follow on the heels of injury" (*id.* at 280).

Here, the evidence established that defendant repeatedly struck the 96-year-old victim in the face and head, thereby fracturing the victim's orbit, sinuses, and jaw in numerous places and causing a subdural hematoma, and that many of those injuries had not healed at the time of his death approximately five months later. Thus, we conclude that "the ultimate harm, i.e., death, was a 'reasonably foreseeable result of [that] conduct' " (*People v Cox*, 21 AD3d 1361, 1362-1363, *lv denied* 6 NY3d 753). Although defendant's expert testified that the victim died of his advancing Alzheimer's-type dementia, the Medical Examiner testified that the injuries that the victim sustained in this attack were the cause of his death. Thus, the court "was presented with conflicting expert testimony regarding the cause of death, and the record supports its decision to credit the

People's expert testimony" (*People v Fields*, 16 AD3d 142, 142, *lv denied* 4 NY3d 886; *see generally People v Miller*, 91 NY2d 372, 380). Consequently, we conclude that, although other possible causes of the victim's death were not eliminated, the medical evidence, viewed in the light most favorable to the prosecution, is legally sufficient to establish that defendant's acts "were at least a contributing cause of" the victim's death (*Anthony M.*, 63 NY2d at 281). We further conclude that, with respect to all of the charges, 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. Viewing the evidence in light of the elements of the crimes in this bench 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).

Finally, the sentence is not unduly harsh or severe.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1303

KA 11-00637

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS P. ACOSTA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 15, 2011. The judgment convicted defendant, upon a jury verdict, of attempted criminal sexual act in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]), defendant contends that the evidence is legally insufficient to establish the element of forcible compulsion beyond a reasonable doubt. Defendant failed to preserve that contention for our review by a motion for a trial order of dismissal specifically directed at that alleged insufficiency, and he also failed to renew his motion after presenting evidence (*see People v Bowman*, 113 AD3d 1100, 1100, *lv denied* 24 NY3d 1082). In any event, we conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to support defendant's conviction (*see generally People v Danielson*, 9 NY3d 342, 349). Moreover, viewing the evidence in light of the elements of the crime as charged to the jury (*see id.*), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Although an acquittal would not have been unreasonable, where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, [we] must give [g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831 [internal quotation marks omitted]; *see Bleakley*, 69 NY2d at 495). The jury credited the victim's testimony concerning defendant's use of physical force in his attempt to have her perform oral sex on him, and we perceive no basis

in the record to disregard the jury's credibility determination in that regard.

Defendant's contention that the prosecutor committed misconduct is unpreserved inasmuch as Supreme Court sustained defense counsel's objections to the prosecutor's questions at issue and gave the jury a curative instruction which, in the absence of further objection or a request for a mistrial, "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944). Defendant's further contention that the court's *Sandoval* ruling constitutes an abuse of discretion is similarly unpreserved (*see People v Riley*, 117 AD3d 1495, 1495-1496, *lv denied* 24 NY3d 1088). 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]).

Contrary to defendant's contention, we conclude that the court properly instructed the jury with respect to the element of forcible compulsion for criminal sexual act in the first degree, "even though it did not repeat the definition of th[at] term[,] which it had provided to the jury during its earlier charge" with respect to rape in the first degree (*People v Howard*, 214 AD2d 418, 418, *lv denied* 86 NY2d 843).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1304

KA 11-01536

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEITH JACKSON, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (WILLIAM G. PIXLEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (John L. DeMarco, J.), rendered June 1, 2011. The judgment convicted defendant, after a nonjury trial, of criminal possession of a weapon in the second degree, criminal possession of a weapon in the third degree, criminal possession of a weapon in the fourth degree and unlawful possession of marihuana.

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]), criminal possession of a weapon in the third degree (§ 265.02 [1]), criminal possession of a weapon in the fourth degree (§ 265.01 [4]), and unlawful possession of marihuana (§ 221.05). The conviction resulted from the seizure, inter alia, of weapons and marihuana during the execution of a search warrant. Defendant and another man were present in the apartment when the warrant was executed.

Defendant contends that the verdict is against the weight of the evidence inasmuch as County Court failed to accord appropriate weight to the evidence that, when the police arrived at the apartment to execute the warrant, the other man was selling drugs while defendant was merely watching television. We reject that contention. Viewing the evidence in light of the elements of the crimes 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). The People presented credible evidence that defendant " 'had dominion and control over the area where the contraband was found' " (*People v Shoga*, 89 AD3d 1225, 1227, *lv denied* 18 NY3d 886). The fact that the other man also had access

to the apartment did "not preclude a finding of constructive possession by defendant because possession may be joint" (*People v Archie*, 78 AD3d 1560, 1561, *lv denied* 16 NY3d 856). Thus, based on the weight of the credible evidence at trial, we conclude that the court was justified in finding defendant guilty beyond a reasonable doubt (*see Danielson*, 9 NY3d at 349).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1314

CA 15-00177

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

COMPTROLLER OF STATE OF NEW YORK, AS TRUSTEE
FOR THE NEW YORK STATE COMMON RETIREMENT FUND,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LEVEL ACRES LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C., ALBANY (FRANCIS J. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PEKAREK LAW GROUP, P.C., WELLSVILLE (EDWARD PEKAREK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered August 6, 2014. The order denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this foreclosure action after Level Acres LLC (defendant) defaulted on a consolidated note and mortgage (note and mortgage). In appeal No. 1, plaintiff contends that Supreme Court erred in determining that the assignment of the note and mortgage to plaintiff was invalid, and therefore erred in denying his motion for summary judgment on the complaint. We agree. Although the assignment was executed on May 20, 2010, i.e., before the May 21, 2010 effective date of the note and mortgage, the assignment states that it was to be effective "as of the 28th day of May, 2010," i.e., after the effective date of the note and mortgage. "[W]here parties to an agreement expressly provide that a written contract be entered into 'as of' a[specific] date [other] than that on which it was executed, the agreement is effective . . . 'as of' the [specific] date and the parties are bound thereby accordingly" (*Colello v Colello*, 9 AD3d 855, 857 [internal quotation marks omitted]; *see Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 480). We therefore conclude that the assignment was valid.

We further conclude that plaintiff met his burden of establishing his entitlement to judgment as a matter of law by establishing that he

was the assignee of the note and mortgage when the action was commenced (*see First Franklin Fin. Corp. v Norton*, 132 AD3d 1423, 1423-1424), and by submitting the note and mortgage, along with evidence of defendant's default (*see HSBC Bank USA, N.A. v Prime, LLC*, 125 AD3d 1307, 1308). Defendant failed to raise a triable issue of fact in opposition (*see generally Zuckerman v City of New York*, 42 NY2d 557, 562). We note that, because the assignment was effective over three years before the foreclosure action was commenced, the court erred in relying on, e.g., *Wells Fargo Bank, N.A. v Marchione* (69 AD3d 204).

Finally, in light of our determination in appeal No. 1, we dismiss the appeal from the order in appeal No. 2 as moot.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1315

CA 15-00178

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

COMPTROLLER OF STATE OF NEW YORK, AS TRUSTEE
FOR THE NEW YORK STATE COMMON RETIREMENT FUND,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LEVEL ACRES LLC, DEFENDANT-RESPONDENT,
ET AL., DEFENDANTS.
(APPEAL NO. 2.)

MCNAMEE, LOCHNER, TITUS & WILLIAMS, P.C., ALBANY (FRANCIS J. SMITH OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PEKAREK LAW GROUP, P.C., WELLSVILLE (EDWARD PEKAREK OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Allegany County (Thomas P. Brown, A.J.), entered November 6, 2014. The order denied the motion of plaintiff for summary judgment.

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

Same memorandum as in *Comptroller of State of New York v Level Acres LLC* ([appeal No. 1] ___ AD3d ___ [Dec. 31, 2015]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1321

KA 11-00709

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT FOWLER, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE, PLLC, CANANDAIGUA (MARK C. DAVISON OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered March 9, 2010. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree, criminal sexual act in the first degree and robbery in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of, inter alia, kidnapping in the second degree (Penal Law § 135.20), defendant contends that the waiver of the right to appeal is not valid and challenges the severity of the sentence. We agree with defendant that his waiver of the right to appeal does not encompass his challenge to the severity of the sentence because "no mention was made on the record during the course of the allocution concerning the waiver of defendant's right to appeal his conviction that he was also waiving his right to appeal the harshness of his sentence" (*People v Pimentel*, 108 AD3d 861, 862, *lv denied* 21 NY3d 1076, citing *People v Maracle*, 19 NY3d 925, 928). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1332

CA 15-00906

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

FAYE JOHANSON, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF ADAM MURR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COUNTY OF ERIE AND ERIE COUNTY SHERIFF'S DEPARTMENT, DEFENDANTS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (SHAWN P. HENNESSY OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Christopher J. Burns, J.), entered September 12, 2014. The order granted plaintiff's motion for leave to serve an amended complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for, inter alia, the wrongful death and conscious pain and suffering of Adam Murr (decedent). Decedent committed suicide while he was in custody at the Erie County Holding Center (Holding Center). Plaintiff alleged, inter alia, that defendants were negligent in failing to assess and screen inmates to determine the level of supervision and intervention necessary to prevent suicides at the Holding Center, and in failing to provide decedent with adequate supervision.

After the expiration of the statute of limitations applicable to an action against a sheriff (*see* CPLR 215 [1]), plaintiff moved for leave to amend the complaint to add Timothy Howard in his official capacity as Sheriff of Erie County (Sheriff) as a defendant. Supreme Court erred in granting the motion, inasmuch as plaintiff failed to establish that her claims against the Sheriff relate back to her claims against defendants (*see generally* CPLR 203 [b]; *Buran v Coupal*, 87 NY2d 173, 177-178). In order for the relation back doctrine to apply, a plaintiff must establish that "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant[s], and by reason of that relationship can be charged with such notice of the institution

of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (*Buran*, 87 NY2d at 178 [internal quotation marks omitted]).

Defendants correctly concede that the first prong of the relation back test is satisfied, and we conclude that the third prong is satisfied as well (*see id.* at 181-182; *Kirk v University OB-GYN Assoc., Inc.*, 104 AD3d 1192, 1193-1194). We agree with defendants, however, that plaintiff did not satisfy the second prong, i.e., unity of interest. "In [the] context [of this case], unity of interest means that the interest of the parties in the [subject matter] is such that they stand or fall together and that judgment against one will similarly affect the other . . . Although the parties might share a multitude of commonalities, . . . the unity of interest test will not be satisfied unless the parties share precisely the same jural relationship in the action at hand . . . Indeed, unless the original defendant[s] and new [defendant] are vicariously liable for the acts of the other[,] . . . there is no unity of interest between them" (*Zehnick v Meadowbrook II Assoc.*, 20 AD3d 793, 796-797, *lv dismissed in part and denied in part* 5 NY3d 873 [internal quotation marks omitted]).

Here, defendant County of Erie (County) is not united in interest with the Sheriff inasmuch as the County cannot be held vicariously liable for the alleged negligent acts of the Sheriff or his deputies (*see Villar v County of Erie*, 126 AD3d 1295, 1296-1297; *Mosey v County of Erie*, 117 AD3d 1381, 1385). Nor is defendant Erie County Sheriff's Department (Sheriff's Department) united in interest with the Sheriff for purposes of the relation back doctrine. The Sheriff is not vicariously liable for the alleged negligent acts of the deputies employed at the Holding Center (*see Villar v Howard*, 126 AD3d 1297, 1299; *see generally Barr v County of Albany*, 50 NY2d 247, 257). In addition, the Sheriff's Department does not have a legal identity separate from the County (*see Santiamagro v County of Orange*, 226 AD2d 359, 359), and thus an "action against the Sheriff's Department is, in effect, an action against the County itself" (*Maio v Kralik*, 70 AD3d 1, 10). Given that the Sheriff and the County are not united in interest, it follows that the Sheriff and the Sheriff's Department are not united in interest, and the court therefore erred in granting plaintiff's motion for leave to amend the complaint to add the Sheriff as a party.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1337

CA 14-01184

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, AND DEJOSEPH, JJ.

JEROME S. DENNIS, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CLARKE E. MASSEY, NIAGARA FRONTIER TRANSPORTATION AUTHORITY, NFTA METRO BUS, AND NFT METRO SYSTEM, INC., ALSO KNOWN AS NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 1.)

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered March 25, 2014. The judgment was entered in favor of defendants as against plaintiff and awarded defendants costs and disbursements.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he allegedly sustained in a motor vehicle accident. He appeals from a judgment dismissing the complaint upon a jury verdict finding that he did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as the result of the accident.

Contrary to plaintiff's contention, Supreme Court properly denied his motions for a directed verdict, for judgment notwithstanding the verdict, and to set aside the verdict as against the weight of the evidence. With respect to plaintiff's first two contentions, "[g]iven the conflicting testimony of plaintiff['s] experts and defendants' expert[] both on the issues of serious injury and causation, we conclude that this is not an instance in which plaintiff[is] 'entitled to judgment as a matter of law' " (*Pawlaczyk v Jones*, 26 AD3d 822, 823, *lv denied* 7 NY3d 701, quoting CPLR 4404 [a]; *see Regdos v City of Buffalo*, 132 AD3d 1343, 1343), because it cannot be said that there is "simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented

at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499). To the contrary, "there is a rational process by which the jury could have found that defendant[s'] negligence was not a substantial factor in causing plaintiff's alleged injuries" (*Bennice v Randall*, 71 AD3d 1454, 1455).

The court also properly denied plaintiff's motion to set aside the verdict as against the weight of the evidence. Plaintiff failed to establish that the evidence so preponderated in his favor that the verdict "could not have been reached on any fair interpretation of the evidence" (*Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [internal quotation marks omitted]; *see Schley v Steffans*, 79 AD3d 1753, 1754; *Cummings v Jiayan Gu*, 42 AD3d 920, 922). Although plaintiff presented evidence that he sustained a serious injury with respect to his neck and lumbar spine, we note that "the conflicting medical expert testimony 'raised issues of credibility for the jury to determine' " (*Campo v Neary*, 52 AD3d 1194, 1198; *see generally Tallarico v Kolli*, 122 AD3d 1409, 1410; *Barton v Youmans*, 24 AD3d 1192, 1192). Furthermore, plaintiff presented only his testimony on the issue whether he sustained a serious injury within the meaning of the 90/180-day category (*see* Insurance Law § 5102 [d]), and "plaintiff's credibility was also an issue for the jury" (*Salisbury v Christian*, 68 AD3d 1664, 1665). "[A] plaintiff may of course be impeached by his or her own testimony" (*id.*) and, based on the factors negatively impacting plaintiff's credibility, we conclude that the verdict was not contrary to the weight of the evidence.

Contrary to plaintiff's final contention, the court properly denied his motion to set aside the verdict and for a new trial in the interest of justice where, as here, "there is no evidence that substantial justice has not been done" (*Danieu v 109 S. Union St., LLC*, 56 AD3d 1292, 1293, *lv denied* 12 NY3d 710 [internal quotation marks omitted]). In his motion to set aside the verdict and on appeal, he contends that he was deprived of a fair trial by statements made by defendants' attorney during summations, and by the court's failure to give a PJI 2:305 instruction to the jury. Even assuming, arguendo, that plaintiff preserved for our review his contention with respect to the statements of defendants' attorney on summation, we conclude that the majority of the statements were proper, and any impropriety that may have occurred was not so prejudicial as to deprive plaintiff of a fair trial (*see Guthrie v Overmyer*, 19 AD3d 1169, 1171; *cf. Huff v Rodriguez*, 64 AD3d 1221, 1223-1224). In addition, the court "properly rejected the plaintiff[s] request to charge the jury that the defendants were liable for any subsequent aggravation of the injuries due to subsequent medical treatment, or even subsequent medical malpractice (*see* PJI3d 2:305 [2004 Supp]), since there was no factual basis for such a charge" (*Tatlici v APA Truck Leasing Corp.*, 8 AD3d 656, 656-657).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1338

CA 14-01185

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, AND DEJOSEPH, JJ.

JEROME S. DENNIS, PLAINTIFF-APPELLANT,

V ORDER

CLARKE E. MASSEY, NIAGARA FRONTIER TRANSPORTATION AUTHORITY, NFTA METRO BUS, AND NFT METRO SYSTEM, INC., ALSO KNOWN AS NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC., DEFENDANTS-RESPONDENTS.
(APPEAL NO. 2.)

GELBER & O'CONNELL, LLC, AMHERST (TIMOTHY G. O'CONNELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

DAVID J. STATE, GENERAL COUNSEL, BUFFALO (VICKY-MARIE J. BRUNETTE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Patrick H. NeMoyer, J.), entered May 8, 2014. The order denied plaintiff's motion to, inter alia, set aside the verdict.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435; *see also* CPLR 5501 [a] [1], [2]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1340

CA 15-00297

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

MARY DELUCA, INDIVIDUALLY, AND AS
CLASS REPRESENTATIVE, ET AL.,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TONAWANDA COKE CORPORATION, ESTATE OF
J.D. CRANE, DECEASED,
MARK KAMHOLZ, DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.
(APPEAL NO. 1.)

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILENTZ, GOLDMAN & SPITZER, P.A., NEW YORK CITY (ALFRED M. ANTHONY OF COUNSEL), COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO, GORDON & GORDON, SPRINGFIELD, NEW JERSEY, AND HOBBIE, CORRIGAN & BERTUCIO, P.C., EATONTOWN, NEW JERSEY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 7, 2015. The order, inter alia, denied the motion of defendants-appellants to dismiss plaintiffs' class allegations.

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

Memorandum: Mary DeLuca (plaintiff) commenced this action, individually and on behalf of purported classes of personal injury plaintiffs seeking damages caused by defendants' negligent release of chemicals into the atmosphere. In appeal No. 1, Tonawanda Coke Corporation, the Estate of J.D. Crane, deceased, and Mark Kamholz (defendants) appeal from an order that, inter alia, denied their motion to dismiss the class allegations and granted plaintiff's cross motion for an extension of time in which to seek class certification. In appeal No. 2, defendants appeal from an order that, inter alia, granted in part plaintiff's motion for class certification and certified two classes of plaintiffs, one seeking damages for alleged loss in property values, and the other seeking damages for alleged loss of quality of life.

Contrary to defendants' contention in appeal No. 1, we conclude that Supreme Court did not abuse its discretion in granting

plaintiff's cross motion for an extension of time in which to seek class certification. "While class certification is an issue that should be determined promptly (*see* CPLR 902), a trial court has discretion to extend the deadline upon good cause shown" (*Rodriguez v Metropolitan Cable Communications*, 79 AD3d 841, 842; *see* CPLR 2004). Here, plaintiff made a showing of good cause by submitting evidence that further discovery was needed and that plaintiff had agreed to defendants' request to delay discovery until a criminal proceeding against defendants was complete (*see Chavarria v Crest Hollow Country Club at Woodbury, Inc.*, 109 AD3d 634, 634; *Rodriguez*, 79 AD3d at 842; *see generally Galdamez v Biordi Constr. Corp.*, 50 AD3d 357, 358). Furthermore, plaintiff established that she "had a good-faith belief that a motion for class action certification made at the close of discovery would be deemed timely" (*Argento v Wal-Mart Stores, Inc.*, 66 AD3d 930, 933).

In appeal No. 2, defendants contend that class certification was not appropriate because common questions of law or fact do not predominate over questions affecting only individual members. We reject that contention. "[A] class action may be maintained in New York only after the five prerequisites set forth in CPLR 901 (a) have been met, i.e., the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual members, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy" (*Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229, *lv dismissed in part and denied in part* 10 NY3d 910). A plaintiff seeking class certification has the "burden of establishing the prerequisites of CPLR 901 (a) and thus establish[ing] . . . entitlement to class certification" (*Freeman v Great Lakes Energy Partners, L.L.C.*, 12 AD3d 1170, 1171; *see East2West Constr. Co., LLC v First Republic Corp. of Am.*, 115 AD3d 1206, 1208; *Rife*, 48 AD3d at 1229).

Contrary to defendants' contention, plaintiff established that there are common questions of law or fact whether defendants negligently discharged chemicals into the atmosphere and whether such negligent conduct caused decreases in property values or quality of life in the affected area (*see Olden v LaFarge Corp.*, 383 F3d 495, 508-509, *cert denied* 545 US 1152; *Mejdrech v Met-Coil Sys. Corp.*, 319 F3d 910, 911-912; *see generally Freeman*, 12 AD3d at 1171). Although the individual class members may have sustained differing amounts of damages, it is well settled that " 'the amount of damages suffered by each class member typically varies from individual to individual, but that fact will not prevent the suit from going forward as a class action if the important legal or factual issues involving liability are common to the class' " (*Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399; *see generally City of New York v Maul*, 14 NY3d 499, 514).

We also reject defendants' contention that plaintiff failed to meet the typicality requirement of CPLR 901 (a) (3). Plaintiff established that the claims of the class representative arose " 'out of the same course of conduct and are based on the same theories as the other class members' " (*Freeman*, 12 AD3d at 1171). Contrary to defendants' contention, because "the typicality requirement relates to the nature of the claims and the underlying transaction, not the amount or measure of damages, [the fact that the class representative's] damages may differ from those of other members of the class is not a proper basis to deny class certification" (*Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22; *see Borden*, 24 NY3d at 399).

Contrary to defendants' further contention, the court provided adequate descriptions of the certified classes (*see* CPLR 903; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 137), and determining who is a member of each class would not require "individualized examination of each person[ ]" (*Mitchell v Barrios-Paoli*, 253 AD2d 281, 291).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1341

CA 15-00298

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

MARY DELUCA, INDIVIDUALLY, AND AS CLASS REPRESENTATIVE, ET AL., PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

TONAWANDA COKE CORPORATION, ESTATE OF J.D. CRANE, DECEASED, MARK KAMHOLZ, DEFENDANTS-APPELLANTS, ET AL., DEFENDANTS. (APPEAL NO. 2.)

HODGSON RUSS LLP, BUFFALO (HUGH M. RUSS, III, OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WILENTZ, GOLDMAN & SPITZER, P.A., NEW YORK CITY (ALFRED M. ANTHONY OF COUNSEL), COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO, GORDON & GORDON, SPRINGFIELD, NEW JERSEY, AND HOBBIE, CORRIGAN & BERTUCIO, P.C., EATONTOWN, NEW JERSEY, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Paula L. Feroleto, J.), entered January 7, 2015. The order, inter alia, granted in part the motion of plaintiffs for class certification.

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

Same memorandum as in *DeLuca v Tonawanda Coke Corp.* ([appeal No. 1] ___ AD3d ___ [Dec. 31, 2015]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1342

CA 15-00460

PRESENT: SCUDDER, P.J., SMITH, VALENTINO, WHALEN, AND DEJOSEPH, JJ.

ALEX C. MILLER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KIRK HOWARD, ET AL., DEFENDANTS,
AMORE'S USED CARS & REPAIRS, INC.,
DEFENDANT-APPELLANT,
AND COUNTY OF CATTARAUGUS,
DEFENDANT-RESPONDENT.

FRANCIS M. LETRO, BUFFALO (RONALD J. WRIGHT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (WILLIAM K. KENNEDY OF COUNSEL), FOR DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeals from an order and judgment (one paper) of the Supreme Court, Cattaraugus County (Paula L. Feroleto, J.), entered May 20, 2014. The order and judgment granted the motion of defendant County of Cattaraugus for summary judgment and dismissed the complaint and all cross claims against it.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was a passenger in a motor vehicle operated by Kirk Howard (defendant). Plaintiff alleged in the complaint, inter alia, that defendant County of Cattaraugus (County) was negligent in maintaining the county road where the accident occurred and that defendant Amore's Used Cars & Repairs, Inc. (Amore's) was negligent in repairing defendant's vehicle. Amore's asserted a cross claim against all defendants for contribution and indemnification. Supreme Court granted the County's motion for summary judgment dismissing the complaint and all cross claims against it. Plaintiff and Amore's appeal, and we affirm.

At the outset, we reject Amore's contention that the court was required to deny the County's motion based on its failure to submit Amore's answer with its initial moving papers. Amore's answer was submitted by the County in its reply papers, was before the court when

it decided the motion, and is part of the record on appeal (*see Dale v Gentry*, 66 AD3d 1469, 1469).

Although we agree with plaintiff "that there may be a triable issue of fact whether [the County] was negligent in allowing the [markings] on the road to become faded . . . , we further conclude that [the County] met its initial burden on the motion by establishing as a matter of law that any such negligence was not a proximate cause of the accident and plaintiff failed to raise a triable issue of fact with respect thereto" (*Endieveri v County of Oneida*, 35 AD3d 1268, 1269). "The only reasonable inference to be drawn from the facts established by [the County] is that the accident would have occurred regardless of the condition of the [road markings]" (*id.*). In opposition to the motion, plaintiff's expert did not address the speed at which defendant was driving when he entered the curve, defendant's admitted intoxicated and fatigued state, his failure to notice earlier traffic signs informing motorists of the curve's presence and, most importantly, how the "faded lines caused or contributed to [the] accident" (*Taylor v County of Onondaga*, 139 AD2d 906, 906, *lv denied* 72 NY2d 807; *see Ether v State of New York*, 235 AD2d 685, 686-687). Indeed, defendant testified that, prior to the accident, he "was looking forward at the road and . . . noticed the yellow lines and the[n] [the] crash happened." "Because there is no evidence in the record that the faded . . . [road markings] were a causative factor, a jury making that finding would impermissibly have to resort to speculation or conjecture" (*Endieveri*, 35 AD3d at 1269).

Contrary to plaintiff's further contention, plaintiff is precluded from asserting a theory of liability based on the County's negligent design and construction of the road because he failed to include that theory of liability in his notice of claim, and we note that "a late notice of claim asserting such [a] theor[y] would in any event be time-barred" (*Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 1201; *see Crew v Town of Beekman*, 105 AD3d 799, 800-801).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1344

KA 11-01476

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LARON ROBINSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 23, 2011. The appeal was held by this Court by order entered November 14, 2014, decision was reserved and the matter was remitted to Onondaga County Court for further proceedings (122 AD3d 1282). The proceedings were held and completed.

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

Memorandum: We previously held this case, reserved decision, and remitted the matter to County Court to determine whether the police had probable cause to believe that defendant had committed a traffic infraction (*People v Robinson*, 122 AD3d 1282, 1283-1284). Upon remittal, the court denied defendant's request for suppression, and we now affirm.

This prosecution arises from an incident in which a captain in the Onondaga County Sheriff's Office, who was a lieutenant at the time of the incident, was observing an area for possible drug activity, and observed defendant park his vehicle in that area. The captain saw defendant leave that vehicle, reenter it shortly thereafter, and then pick up and drink from a can, which the captain concluded was a beer can based on its distinctive size and color. The officer who stopped defendant's vehicle testified that he did so based on, inter alia, the fact that he heard the captain broadcast that he observed defendant drinking from a can of beer. After defendant was stopped, a search revealed a loaded handgun, cocaine, a bag of bullets and an open can of beer. Defendant pleaded guilty to attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [5] [ii]) and, on appeal, he challenges only the propriety of the stop of the vehicle.

It is well settled that a law enforcement officer may stop a vehicle where, inter alia, the officer has "probable cause to believe that the driver . . . has committed a traffic violation" (*People v Robinson*, 97 NY2d 341, 349). "Probable cause requires, not proof beyond a reasonable doubt or evidence sufficient to warrant a conviction . . . , but merely information which would lead a reasonable person who possesses the same expertise as the officer to conclude, under the circumstances, that a crime is being or was committed" (*People v McRay*, 51 NY2d 594, 602; *see People v Guthrie*, 25 NY3d 130, 133, *rearg denied* 25 NY3d 1191). It is also well settled that the credibility determinations of the suppression court " 'are entitled to great deference on appeal and will not be disturbed unless clearly unsupported by the record' " (*People v Spann*, 82 AD3d 1013, 1014; *see generally People v Prochilo*, 41 NY2d 759, 761).

Here, the court credited the captain's testimony, and properly concluded that the police had probable cause to stop the vehicle based on defendant's violation of Vehicle and Traffic Law § 1227 (1), which prohibits the "drinking of alcoholic beverages, or the possession of an open container containing an alcoholic beverage, in a motor vehicle located upon the public highways or right-of-way public highway." Finally, although the officer who stopped defendant's vehicle did not personally observe defendant drink from the beer can, he was acting upon information provided by the captain who made that observation, and an "officer is deemed to act with probable cause when acting at the direction of another law enforcement officer who has the requisite probable cause" (*People v Maldonado*, 86 NY2d 631, 635).

All concur except WHALEN, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. In my view, the evidence at the suppression hearing does not support County Court's conclusion that the police had probable cause to believe that defendant violated Vehicle and Traffic Law § 1227 (1). The stop of defendant's vehicle therefore violated the constitutional protections against unreasonable seizures (US Const Fourth Amend; NY Const, art I, § 12), and the evidence obtained as the result of that stop should have been suppressed.

The determination of probable cause hinges upon the testimony of the police captain (then a lieutenant) who first observed defendant and, based upon his observations, directed other officers to stop defendant's vehicle. Under the fellow officer rule, the officer who stopped defendant's vehicle was "entitled to act on the strength of a radio bulletin . . . from a fellow officer . . . and to assume its reliability" (*People v Lypka*, 36 NY2d 210, 213; *see People v Rosario*, 78 NY2d 583, 588, *cert denied* 502 US 1109), and an "officer is deemed to act with probable cause when acting at the direction of another law enforcement officer who has the requisite probable cause" (*People v Maldonado*, 86 NY2d 631, 635). Where, as here, a stop based upon a Vehicle and Traffic Law violation "is challenged by a motion to suppress, the prosecution bears the burden of establishing that the officer imparting the information had probable cause to act" (*People v Ketcham*, 93 NY2d 416, 420; *see People v Ramirez-Portoreal*, 88 NY2d 99, 113-114).

The People failed to meet that burden. Vehicle and Traffic Law § 1227 (1) prohibits the consumption or possession of an open container containing an alcoholic beverage in a motor vehicle on a public highway. The evidence at the suppression hearing failed to establish, however, that the police had probable cause to believe either that defendant consumed or possessed an open container or that the container contained an alcoholic beverage. At the suppression hearing, the captain testified that he observed defendant get into the driver's seat of a vehicle, and he "saw the driver pick up a red can that appeared to be a forty-ounce beer can . . . , but [he] couldn't tell . . . whether it was or it wasn't." The captain's only explanation for his belief that the preposterously large red can contained beer was that beer comes in red 40-ounce cans. In addition, the captain's only testimony concerning whether the can was open and whether he saw defendant drink from it was confusing at best. The captain was asked whether he "believed at the time that [he] saw the driver pick up an open can of alcohol and drink from it," and he responded that he "thought that it was a good possibility that's what it was, yeah." The most reasonable interpretation of the captain's response is that he "thought it was a good possibility" that the can contained alcohol, i.e., "that's what it was." In any event, considering the sum of the captain's testimony concerning his observations, I conclude that defendant's behavior was "susceptible of innocent as well as culpable interpretation," and thus did not amount to probable cause to believe that defendant was violating Vehicle and Traffic Law § 1227 (1) (*People v De Bour*, 40 NY2d 210, 216).

I agree with the majority that "[p]robable cause does not require proof to a mathematical certainty, or proof beyond a reasonable doubt" (*People v Mercado*, 68 NY2d 874, 877, *cert denied* 479 US 1095). It does require, however, that based upon the facts before the captain, it was "at least more probable than not" that defendant was violating the open container law (*People v Carrasquillo*, 54 NY2d 248, 254). The facts as recounted by the captain do not meet that standard, and I cannot agree with the majority that his unsubstantiated subjective belief that he observed a beer can warranted the intrusion into defendant's liberty of movement. Indeed, the reasoning of the majority would support the conclusion that an officer's observation of a clear glass bottle is sufficient to establish probable cause when combined with the officer's subjective belief that the bottle contained vodka or gin, because vodka and gin are sold in clear glass bottles. "The basic purpose of the constitutional protections against unlawful searches and seizures is to safeguard the privacy and security of each and every person against all arbitrary intrusions by government" (*De Bour*, 40 NY2d at 217). Forcibly stopping a vehicle because the driver possessed a large red can strikes me as an arbitrary intrusion.

Finally, I note that the subsequent observation of an open beer can by the officer who stopped the vehicle cannot be considered in the probable cause determination, inasmuch as "[t]he police may not justify a stop by . . . subsequently acquired [probable cause] resulting from the stop" (*id.* at 215-216; *see People v Bordeaux*, 182 AD2d 1095, 1097, *appeal dismissed* 80 NY2d 915). The People,

therefore, failed to meet their burden of showing the legality of the police conduct in the first instance (*see People v Berrios*, 28 NY2d 361, 367), and defendant's suppression motion should have been granted (*see People v Lazcano*, 66 AD3d 1474, 1475, *lv denied* 13 NY3d 940).

I would therefore reverse the judgment, vacate the guilty plea, grant that part of defendant's omnibus motion seeking to suppress physical evidence, and dismiss the indictment (*see People v Washburn*, 309 AD2d 1270, 1271).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1349

KA 13-01615

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

REGINALD BOYKINS, DEFENDANT-APPELLANT.

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

VALERIE G. GARDNER, DISTRICT ATTORNEY, PENN YAN (DAVID MASHEWSKE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Yates County Court (W. Patrick Falvey, J.), rendered June 10, 2013. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), and criminal sale of a controlled substance in the third degree (§ 220.39 [1]). Defendant contends that County Court deprived him of his constitutional right to a fair trial by failing to excuse a prospective juror who did not unequivocally assure the court of her impartiality. " 'By failing to raise that challenge in the trial court . . . , defendant failed to preserve it for our review' " (*People v Irvin*, 111 AD3d 1294, 1295, *lv denied* 24 NY3d 1044, *reconsideration denied* 26 NY3d 930). "In any event, 'even if defendant had challenged [that] prospective juror[] . . . and his challenge[] had merit, [it] nevertheless would not be properly before us because he failed to exhaust his peremptory challenges prior to the completion of jury selection' " (*id.*). We reject defendant's related contention that he was denied effective assistance of counsel based on defense counsel's alleged failure to challenge the prospective juror inasmuch as defendant has "failed to show the absence of a strategic explanation" for defense counsel's decision not to challenge that juror (*id.* at 1296 [internal quotation marks omitted]). The record does not support defendant's further contention that he was denied his right to a jury trial by 12 jurors. Defendant asserts that there were less than 12 jurors present during the trial on a certain day, but the trial minutes establish that the

Court Clerk stated that "[a]ll Jurors [were] accounted for."

We reject defendant's further contention that reversal is required based upon a *Rosario* violation. " 'Reversal based upon a *Rosario* violation is necessary only when a defendant demonstrates that he has been substantially prejudiced' " (*People v Walters*, 124 AD3d 1321, 1323, *lv denied* 25 NY3d 1209), and defendant has not made such a showing here (*see id*.).

By making only a general motion for a trial order of dismissal, defendant failed to preserve for our review his contention that the evidence is not legally sufficient to support his conviction (*see People v Gray*, 86 NY2d 10, 19). In any event, we conclude that the conviction is supported by legally sufficient evidence (*see People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we further conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495).

Defendant failed to preserve for our review his contention that, in sentencing him, the court "penalized him for exercising his right to a jury trial" (*People v Campbell*, 118 AD3d 1464, 1466, *lv denied* 24 NY3d 959, *reconsideration denied* 24 NY3d 1218). "In any event, [t]he mere fact that a sentence imposed after trial is greater than that offered in connection with plea negotiations is not proof that defendant was punished for asserting his right to a trial" (*id.* [internal quotation marks omitted]).

Contrary to defendant's contention, the sentence is not unduly harsh or severe. "The court properly exercised its discretion when it adjudicated defendant a persistent felony offender and sentenced him accordingly" (*People v Mason*, 277 AD2d 170, 170, *lv denied* 96 NY2d 785). We have examined defendant's remaining contention and conclude that it lacks merit.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1352

KA 15-00249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAYLOR D. CARBONARO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 27, 2015. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree, vehicular manslaughter in the second degree, driving while intoxicated, a misdemeanor (two counts) and reckless driving.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed and the matter is remitted to Monroe County Court for proceedings pursuant to CPL 460.50 (5).

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of manslaughter in the second degree (Penal Law § 125.15 [1]), vehicular manslaughter in the second degree (§ 125.12 [1]), reckless driving (Vehicle and Traffic Law § 1212), and two counts of driving while intoxicated (§ 1192 [2], [3]). The charges arose from an automobile accident that resulted in the death of defendant's girlfriend (decedent). The accident occurred when a vehicle occupied by defendant and decedent veered off the road at a high speed and struck a utility pole and then a tree. The primary issue at trial was whether defendant was operating the vehicle at the time of the accident. The jury rendered a guilty verdict on all counts of the indictment, evidently resolving that factual issue against defendant.

Defendant failed to preserve for our review his contention that the trial evidence is legally insufficient to establish that he was operating the vehicle at the time of the accident. Although defendant moved at the close of the People's case for a trial order of dismissal on the ground that the People failed to prove that element of the crimes charged, he did not renew the motion after the defense rested (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678; *People v Nichols*, 89 AD3d 1503, 1504). In any event, we conclude that the

contention is without merit. The evidence established that defendant admitted three separate times to the police that he was driving the vehicle and that, during the ambulance ride to the hospital, he told a paramedic that he "screwed up," he was sorry, and he had never done "this before." Defendant also admitted that he was driving to an ex-girlfriend who visited him in the hospital while he was recovering from the injuries he sustained in the accident. The ex-girlfriend testified, "He told me that he went to the bar with [decedent] and before leaving the bar they got in an argument and he told me he remembers driving like speeding because he was angry." She further testified that, several months later, defendant called her and said that he had good news, i.e., that his statements to the police were "getting tossed out," and that, if the charges were dismissed, he would use "this as a second chance to start school."

Further, the evidence established that the vehicle was registered to defendant, and that decedent did not even have a driver's license. According to decedent's father, with whom she and defendant lived, decedent to his knowledge never had driven the vehicle. In addition, an acquaintance of the couple who was at the bar drinking with them before the accident testified that he saw defendant leave the bar with keys in his hand and say, "I'm going home." That witness also testified that decedent followed defendant down the street, presumably to the vehicle. Yet another witness testified that, when he saw the vehicle in question speeding down the road moments before the accident, the driver was "slouching" down in the driver's seat and leaning on the center console. Decedent was only four feet, nine inches tall, seven inches shorter than defendant, making it unlikely that she could have been so positioned while operating the vehicle.

We also note that defendant's expert witness agreed with the People's expert that the driver was ejected almost immediately after the vehicle struck the tree, and that the passenger was in the vehicle for a longer period of time after the collision, thus subjecting the passenger to more injuries. Defendant sustained only a fractured leg and a cut to his head, while decedent suffered many more injuries of greater severity. It is undisputed that decedent's blood was found on the front passenger's seat, and none of defendant's blood was found anywhere in the vehicle. Decedent's body was found lying next to the stopped vehicle, directly outside the driver's door, as if she had fallen out, while defendant was found some 20 to 30 feet away from the vehicle, trapped under a trailer. Finally, defendant had a compression injury to his left leg that appeared to have been caused by his leg striking the window crank on the driver's door, and the Medical Examiner testified to a reasonable degree of medical certainty that such injury was caused by the window crank.

To be sure, defendant attempted at trial to explain or controvert the above evidence, and there is other evidence suggesting that decedent may have been operating the vehicle. In determining whether the evidence is legally sufficient, however, we must view the evidence in the light most favorable to the People (*see People v Cabey*, 85 NY2d 417, 420; *People v Contes*, 60 NY2d 620, 621), and afford them the benefit of every favorable inference (*see People v Bleakley*, 69 NY2d

490, 495). Applying that standard of review, we conclude that the evidence is more than sufficient to establish that defendant was operating the vehicle at the time of the accident.

Moreover, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Defendant's contention is based largely on his assertion that the medical evidence conclusively establishes that decedent was operating the vehicle. According to defendant, the injuries sustained by decedent could have come only from her head striking the steering wheel, which was bent toward the front windshield. We reject that assertion. Although that medical evidence is probative, it is not conclusive. As the People's expert testified, decedent's injuries could have occurred by her head striking the center console or some other part of the vehicle's interior other than the steering wheel.

Moreover, defendant's expert agreed that decedent emerged from the vehicle through the driver's door, which opened upon impact, and it is therefore possible that her head or face came into contact with the steering wheel after the vehicle's initial impact with the utility pole. As noted above, both experts agreed that the driver was ejected from the vehicle almost immediately upon impact with the tree. Because the air bag in the steering wheel deployed immediately, then quickly deflated, and the driver's body was pushed sharply to the left, and not forward, it is entirely possible, as the People's expert opined, that the driver's head never struck the steering wheel. In sum, we conclude that, 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 People v Kalinowski*, 118 AD3d 1434, 1436, *lv denied* 23 NY3d 1064; *People v Hennings*, 55 AD3d 1393, 1393, *lv denied* 12 NY3d 758).

Defendant next contends that his *Miranda* rights were violated and that County Court therefore erred in refusing to suppress statements he made to a sheriff's deputy at the accident scene and at the hospital, subsequent statements he made to an investigator, as well as the results of a blood test conducted at the hospital showing that he was intoxicated. We conclude that the court properly refused to suppress that evidence. The first statement defendant sought to suppress was his admission to the deputy at the accident scene that he had "too much to drink" and that he had been driving the vehicle. The deputy's questioning of defendant at that time, however, was "merely investigatory and did not constitute custodial interrogation to which *Miranda* is applicable" (*People v Saunders*, 174 AD2d 700, 701; *see People v Williams*, 81 AD3d 993, 993, *lv denied* 16 NY3d 901; *People v Palmiere*, 124 AD2d 1016, 1016).

We further conclude that defendant was not in custody when he was questioned by the same deputy in the hospital trauma bay, where defendant again admitted that he was driving, and that such admission therefore was not obtained in violation of defendant's *Miranda* rights (*see People v Rounds*, 124 AD3d 1351, 1352, *lv denied* 25 NY3d 1077;

People v Gore, 117 AD3d 845, 846, *lv denied* 24 NY3d 1084). "In determining whether a defendant was in custody for *Miranda* purposes, '[t]he test is not what the defendant thought, but rather what a reasonable [person], innocent of any crime, would have thought had he been in the defendant's position' " (*People v Kelley*, 91 AD3d 1318, 1318, *lv denied* 19 NY3d 963, quoting *People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851). Here, defendant was not restrained in any way by the police while at the hospital, and the questioning by the deputy was investigatory and not accusatory in nature (*see People v Drouin*, 115 AD3d 1153, 1155-1156, *lv denied* 23 NY3d 1019; *People v O'Hanlon*, 5 AD3d 1012, 1012, *lv denied* 3 NY3d 645; *People v Ripic*, 182 AD2d 226, 231-232, *appeal dismissed* 81 NY2d 776).

Inasmuch as it is common knowledge that the police prepare reports with respect to motor vehicle accidents even where no criminal conduct is suspected, we conclude that a reasonable, innocent person in defendant's position at the hospital would not have felt that he or she was in custody when asked questions about the accident by the deputy (*see generally People v Borukhova*, 89 AD3d 194, 212-213, *lv denied* 18 NY3d 881, *reconsideration denied* 18 NY3d 955). Instead, a reasonable, innocent person would have thought that the deputy was "still in the process of gathering information about the [accident] prior to taking any action" (*People v Dillhunt*, 41 AD3d 216, 217, *lv denied* 10 NY3d 764; *see People v Taylor*, 57 AD3d 327, 328, *lv denied* 12 NY3d 860). Although defendant was in custody when he was subsequently interviewed by the investigator, he knowingly and voluntarily waived his *Miranda* rights before speaking to the investigator (*see People v Allen*, 104 AD3d 1170, 1171, *lv denied* 21 NY3d 1001; *People v Hernandez*, 67 AD3d 820, 820-821, *lv denied* 13 NY3d 939).

Defendant nevertheless contends that all of his statements to the police should have been suppressed because, owing to his injuries and the pain medication he was given at the hospital, he was incapable of making voluntary statements. Similarly, defendant contends that he was unable to voluntarily waive his *Miranda* rights and consent to the blood test at the hospital. We reject those contentions. Even assuming, arguendo, that defendant's thought process was affected by his head injury and the pain he experienced from his fractured leg, we conclude that the record does not support a finding that he was "unable to understand the meaning of his statements" (*People v Schompert*, 19 NY2d 300, 305). Defendant responded appropriately to questions asked of him by the deputy and the medical personnel who treated him. For instance, when questioned by a nurse at the hospital, defendant was able to state his name, his date of birth, and the reason he was at the hospital. According to the nurse, who testified at the *Huntley* hearing, defendant was aware of his surroundings and did not appear to have difficulty understanding anything that she said. Furthermore, when speaking to the deputy at the hospital, defendant recalled the name of the bar he was at earlier that evening, and accurately stated the name of the road on which the accident occurred. As the court noted in its suppression decision, at no time did defendant "give nonsensical or otherwise inappropriate

answers to questions, nor did he ramble or rant on unrelated topics." Under the circumstances, we conclude that defendant's cognitive ability was not so impaired as to render him unable to make voluntary and trustworthy statements (*see generally People v Meissler*, 305 AD2d 724, 725-726, *lv denied* 100 NY2d 644; *People v Mercado*, 198 AD2d 380, 381, *lv denied* 82 NY2d 927*; People v Pearson*, 106 AD2d 588, 588-589), or to waive his *Miranda* rights knowingly and voluntarily (*see People v Torres*, 220 AD2d 785, 786, *lv denied* 87 NY2d 908; *People v Butler*, 175 AD2d 252, 253, *lv denied* 79 NY2d 854).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1354

KA 14-00788

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HECKERMAN, DEFENDANT-APPELLANT.

SESSLER LAW PC, GENESEO (STEVEN D. SESSLER OF COUNSEL), FOR DEFENDANT-APPELLANT.

MICHAEL HECKERMAN, DEFENDANT-APPELLANT PRO SE.

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 January 28, 2014. The judgment convicted defendant, upon his plea of guilty, of promoting prison contraband in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of promoting prison contraband in the first degree (Penal Law § 205.25 [2]). We reject defendant's contention that he was denied effective assistance of counsel on his motion to withdraw his guilty plea, and that County Court should have assigned new counsel before addressing the motion (*see generally People v Mitchell*, 21 NY3d 964, 966-967). We conclude based on the record before us that defense counsel never took a position adverse to defendant's interests or in opposition to the motion (*cf. id.* at 967). Indeed, we note that defendant never sought new counsel on the motion but, rather, he contends for the first time on appeal that he was entitled to new counsel because his lawyer might have taken a position that was adverse to his interests (*see generally People v Porto*, 16 NY3d 93, 100-101). Under such circumstances, we perceive no error by the court.

Defendant's contention in his pro se supplemental brief that he "was coerced [into accepting the plea is] belied by his statements during the plea colloquy" in which he stated that he had not been pressured or coerced (*People v Farley*, 34 AD3d 1229, 1230, *lv denied* 8 NY3d 880; *see People v Garner*, 86 AD3d 955, 955).

Defendant contends in his pro se supplemental brief that the indictment is defective because the item he possessed, i.e., a padlock tied to a shoelace, is not "dangerous contraband" (Penal Law § 205.00 [4]; *see* § 205.25 [2]). Inasmuch as defendant's contention concerns an alleged nonjurisdictional defect, it was forfeited by his guilty plea (*see generally People v Konieczny*, 2 NY3d 569, 572; *People v Hansen*, 95 NY2d 227, 231-232). Defendant's further contention in his pro se supplemental brief challenging the evidence supporting the indictment was also forfeited by his guilty plea. "While [defendant's] constitutional right to be prosecuted on a jurisdictionally valid indictment survived the guilty plea, his right to challenge [the] evidence did not" (*Hansen*, 95 NY2d at 232).

We have reviewed defendant's remaining contention in his pro se supplemental brief and conclude that it is without merit.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1357

CAF 14-01768

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

IN THE MATTER OF JERIKKOH W.

ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

REBECCA W., RESPONDENT-APPELLANT.

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

GARY L. CURTISS, COUNTY ATTORNEY, CANANDAIGUA (HOLLY A. ADAMS OF COUNSEL), FOR PETITIONER-RESPONDENT.

SONALI R. SUVVARU, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Ontario County (Craig J. Doran, J.), entered March 20, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, terminated the parental rights of respondent.

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

Memorandum: In this proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that, inter alia, terminated her parental rights with respect to the subject child on the ground of permanent neglect and transferred guardianship and custody of the child to petitioner. The child was removed from the mother's custody after he suffered a broken femur in August 2010, and the mother pleaded guilty to assault in the third degree in connection with that injury (Penal Law § 120.00 [2]). In August 2011, the child suffered further injuries during an overnight unsupervised visit with the mother and, in May 2012, the mother was convicted of assault in the third degree and endangering the welfare of a child (§ 260.10 [1]) for inflicting those injuries. As part of the mother's sentence on the second assault conviction, a no-contact order of protection was issued in favor of the child through December 2014. Petitioner then commenced this proceeding.

Contrary to the mother's contention, petitioner demonstrated by the requisite clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and the child (*see Matter of Davianna L. [David R.]*, 128 AD3d 1365, 1365, *lv denied* 25 NY3d 914; *see generally Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1149-1150, *lv denied* 23 NY3d 901).

Among other things, petitioner arranged for a psychological evaluation of the mother, facilitated visitation between the mother and the child, provided the mother with parenting classes, referred the mother for counseling, invited the mother to participate in service plan reviews, and contacted potential guardians, whom the mother had identified, for the child.

Contrary to the mother's further contention, petitioner established that, despite those efforts, the mother failed to plan appropriately for the child's future (*see Alex C., Jr.*, 114 AD3d at 1150; *Matter of Whytnei B. [Jeffrey B.]*, 77 AD3d 1340, 1341). It is well settled that, to plan substantially for a child's future, "the parent must take meaningful steps to correct the conditions that led to the child's removal" (*Matter of Tatianna K. [Claude U.]*, 79 AD3d 1184, 1185-1186; *see Matter of Nathaniel T.*, 67 NY2d 838, 840). Here, the mother failed to accept responsibility for the events that led to the child's removal and the entry of the order of protection against her, and she failed to attend the recommended counseling aimed at dealing with the mental health issues underlying those events. In addition, the mother failed to identify any meaningful plan for the child while the order of protection was in place, and that failure, like the failure of an incarcerated parent to plan, supports a finding of permanent neglect (*see Matter of Gena S. [Karen M.]*, 101 AD3d 1593, 1594, *lv dismissed* 21 NY3d 975). We therefore reject the mother's contention that it was not in the child's best interests for the court to terminate her parental rights.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1366

KA 12-00210

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN M. MINEMIER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered January 20, 2012. The appeal was held by this Court by order entered January 2, 2015, decision was reserved and the matter was remitted to Monroe County Court for further proceedings (124 AD3d 1408). The proceedings were held and completed.

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 one count of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]), two counts of assault in the first degree (§ 120.10 [1], [4]), and one count of assault in the second degree (§ 120.05 [4]). The crimes were committed by defendant when he was 18 years old, and his conduct involved attempting to kill a woman by repeatedly stabbing her in the face, head, and eye, causing wounds that required more than 100 stitches to close. Defendant also stabbed a man who attempted to stop the attack on the woman. Consistent with the plea agreement, County Court sentenced defendant to concurrent determinate terms of imprisonment, the three longest of which are terms of 20 years, plus five years of postrelease supervision.

On a prior appeal, we concluded that the court failed to determine whether defendant should be adjudicated a youthful offender (*see People v Minemier*, 124 AD3d 1408, 1408). We therefore remitted the matter to County Court " 'to make and state for the record a determination whether defendant should be granted youthful offender status' " (*id*. at 1408, quoting *People v Potter*, 114 AD3d 1183, 1184). Inasmuch as the record further indicated that the court had reviewed at sentencing written statements that were not disclosed to defendant, we also directed the court "to make a record of what statements it

reviewed and to state its reasons for refusing to disclose them to defendant" (*id.* at 1409). Upon remittal, the court expressly denied defendant's request for youthful offender treatment. With respect to the undisclosed statements it reviewed at sentencing, the court stated that it reviewed the last page of the presentence investigation report, which was marked confidential, and that the information contained therein was provided to the probation department "on the promise of confidentiality."

Defendant now contends that the court erred in failing to state its reasons for not adjudicating him a youthful offender. We reject that contention. Although CPL 720.20 (1) requires the sentencing court to determine on the record whether an eligible youth is a youthful offender (*see People v Rudolph*, 21 NY3d 497, 499), the statute does not require the court to state its reasons for denying youthful offender status to the defendant. To the extent that *People v Lee* (79 AD3d 1641, 1641) and other cases from this Court hold otherwise, they should not be followed. Contrary to defendant's further contention, we conclude that the court sufficiently complied with our prior decision by identifying what statements it reviewed at sentencing, and that defendant was not entitled to disclosure of any confidential information (*see* CPL 390.50 [2]; *People v Perry*, 36 NY2d 114, 120; *Matter of Shader v People*, 233 AD2d 717, 717).

Finally, based on our review of the record and the relevant factors, we conclude that the court's refusal to adjudicate defendant a youthful offender was not an abuse of discretion (*see People v Mix*, 111 AD3d 1417, 1418), and we decline to grant defendant's request to exercise our interest of justice jurisdiction to adjudicate him a youthful offender (*see People v Facen*, 67 AD3d 1478, 1479, *lv denied* 14 NY3d 800, *reconsideration denied* 15 NY3d 749; *cf. People v Shrubsall*, 167 AD2d 929, 930-931).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1371

KA 14-00380

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HENRY S. SPENCER, IV, DEFENDANT-APPELLANT.

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

LORI PETTIT RIEMAN, DISTRICT ATTORNEY, LITTLE VALLEY (AMBER L. KERLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered January 13, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Cattaraugus County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment of conviction convicting him upon his plea of guilty of two counts of burglary in the third degree (Penal Law § 140.20), defendant contends that his waiver of the right to appeal is not valid, and he challenges the severity of his sentence. We agree with defendant that his waiver of the right to appeal is invalid "inasmuch as the minimal perfunctory inquiry made by County Court was insufficient to 'establish that [he] understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Finch*, 120 AD3d 1524, 1525, quoting *People v Lopez*, 6 NY3d 248, 256; *see People v Hunt*, 125 AD3d 1275, 1276). We nevertheless conclude that the sentence is not unduly harsh or severe.

We agree with defendant, however, that the court erred in enhancing his sentence by imposing restitution without affording him the opportunity to withdraw his plea, inasmuch as restitution was not a part of the plea agreement (*see People v Pickett*, 90 AD3d 1526, 1527). Even assuming, arguendo, that defendant executed a valid waiver of the right to appeal, defendant's challenge to the imposition of restitution would not be encompassed by the waiver inasmuch as restitution was not included in the terms of the plea agreement (*see People v Tessitore*, 101 AD3d 1621, 1622, *lv denied* 20 NY3d 1104).

Although defendant did not object to the imposition of restitution at sentencing and thus failed to preserve that contention for our review (*see Pickett*, 90 AD3d at 1527), we nevertheless exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 460.15 [3] [c]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose the promised sentence or to afford defendant the opportunity to withdraw his plea (*see People v Wilson*, 125 AD3d 1303, 1303-1304; *Pickett*, 90 AD3d at 1527).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1372

KA 14-00322

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK W. UTLEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered October 24, 2013. The judgment convicted defendant, upon a jury verdict, of endangering the welfare of a child.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and the indictment is dismissed.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of endangering the welfare of a child (Penal Law § 260.10 [1]), defendant contends that County Court erred in allowing the jury to consider conduct for which defendant was not indicted. We agree. We note at the outset that, contrary to the People's contention, defendant preserved this issue for our review based on his exception to the court's response to the jury note (*cf. People v Harris*, 129 AD3d 1522, 1524-1525). As set forth in the indictment and bill of particulars, as well as pursuant to the People's theory at trial, the endangerment charge was based on the conduct alleged in the preceding six counts of rape in the second degree and incest in the second degree, of which defendant was acquitted. After receiving a jury note during deliberations, the court instructed the jurors that they were not precluded from considering conduct other than the alleged rape and incest when considering the endangerment charge. That instruction allowed the jury to consider conduct not charged in the indictment. " 'Because the jury may have convicted defendant of . . . act[s] . . . for which he was not indicted, defendant's right to have charges preferred by the [g]rand [j]ury rather than the prosecutor at trial was violated' " (*People v Shaughnessy*, 286 AD2d 856, 857, *lv denied* 97 NY2d 688; *see People v Duell*, 124 AD3d 1225, 1226, *lv denied* 26 NY3d 967). Additionally, based on the vague nature of the court's instruction, "[i]t is impossible to ascertain what alleged act of [endangerment] was found by the jury to have occurred, whether it was one . . . for which he was indicted, or indeed whether different jurors convicted defendant based on different acts" (*People v McNab*,

167 AD2d 858, 858; *see Shaughnessy*, 286 AD2d at 857).

In view of our decision, we do not address defendant's remaining contention.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1377

KA 11-02137

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RONALD COLEMAN, JR., ALSO KNOWN AS RONALD COLEMAN,
DEFENDANT-APPELLANT.

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

RONALD COLEMAN, JR., DEFENDANT-APPELLANT PRO SE.

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 August 31, 2011. The judgment convicted defendant, upon a jury verdict, of kidnapping in the first degree, robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts), robbery in the second degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of assault in the second degree and dismissing count eight of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of kidnapping in the first degree (Penal Law § 135.25 [1]), robbery in the second degree (§ 160.10 [1]), and assault in the second degree (§ 120.05 [2]), and two counts each of robbery in the first degree (§ 160.15 [2], [4]) and criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We agree with defendant that the evidence is legally insufficient to support his conviction of assault in the second degree because there is insufficient evidence that the victim sustained a physical injury, i.e., “impairment of physical condition or substantial pain” (§ 10.00 [9]; *see* § 120.05 [2]). Although the evidence at trial established that, after defendant hit the victim in the face with a gun, the victim sustained a small bruise with some swelling beneath the eye and felt some pain, the victim also testified that he did not seek medical attention, and there was no testimony about the extent or duration of the victim’s pain or whether the injury curtailed the victim’s activities (*see People v Perry*, 122 AD3d 775, 775-776, *lv*

denied 24 NY3d 1122; *People v Zalevsky*, 82 AD3d 1136, 1137, *lv denied* 19 NY3d 978, *reconsideration denied* 19 NY3d 1106; *see generally People v Haynes*, 104 AD3d 1142, 1142-1143, *lv denied* 22 NY3d 1156; *cf. People v Myers*, 87 AD3d 826, 827, *lv denied* 17 NY3d 954). We therefore modify the judgment accordingly.

With respect to the remaining counts of which defendant was convicted, we conclude that the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495). Additionally, viewing the evidence in light of the elements of the remaining crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we reject defendant's contention, also raised in his pro se supplemental brief, that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Also contrary to defendant's contention, the photo array used in the pretrial identification procedure was not unduly suggestive inasmuch as "the fact that he was photographed from a closer range did not impermissibly draw attention to his photograph in the array" (*People v Brown*, 125 AD3d 1550, 1550; *see People v Ofield*, 280 AD2d 978, 979, *lv denied* 96 NY2d 832). Defendant further contends that we should modify the judgment as a matter of discretion in the interest of justice by reversing one of his convictions of robbery in the first degree because both counts involved the forcible theft of the same property, and by reversing one of his convictions of criminal possession of a weapon in the second degree because both counts involved the possession of the same weapon. We decline to do so inasmuch as each count of which defendant was convicted was a separate crime (*see People v Rice*, 5 AD3d 1074, 1074, *lv denied* 2 NY3d 805).

Defendant failed to preserve for our review his contentions that County Court erred in its *Sandoval* ruling (*see People v Tolliver*, 93 AD3d 1150, 1151, *lv denied* 19 NY3d 968), and that the indictment is multiplicitous (*see People v Jefferson*, 125 AD3d 1463, 1464, *lv denied* 25 NY3d 990; *People v Quinn*, 103 AD3d 1258, 1258, *lv denied* 21 NY3d 946). Defendant also failed to preserve for our review his contention in his pro se supplemental brief that the court erred in its charge to the jury (*see People v Humphrey*, 109 AD3d 1173, 1174, *lv denied* 24 NY3d 1044), as well as his contention therein that the verdict is repugnant (*see People v Spears*, 125 AD3d 1401, 1402, *lv denied* 25 NY3d 1172). 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's remaining contentions are set forth in his pro se supplemental brief. His contention that the court erred in refusing to suppress statements that he made to the police is moot because the prosecution did not introduce those statements at trial (*see People v Wegman*, 2 AD3d 1333, 1335, *lv denied* 2 NY3d 747). We reject defendant's contention that defense counsel's failure to make a motion pursuant to CPL 190.50 (5) (c) deprived him of effective assistance of counsel. Defendant "has not established that 'he was prejudiced by the failure of [defense counsel] to effectuate his appearance before the grand jury' or that, 'had he testified in the grand jury, the

outcome would have been different' " (*People v James*, 92 AD3d 1207, 1208, *lv denied* 19 NY3d 962, quoting *People v Simmons*, 10 NY3d 946, 949; *see People v Dixon*, 37 AD3d 1124, 1124-1125, *lv denied* 10 NY3d 764). Finally, we have examined defendant's remaining contention in his pro se supplemental brief and conclude that it lacks merit.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1381

CA 15-00145

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

ZRAJ OLEAN, LLC AND ZAMIAS SERVICES, INC.,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

ERIE INSURANCE COMPANY OF NEW YORK, RAYMOND WANGELIN, DOING BUSINESS AS ADAMS SEPTIC & SOUTHERN SUMMIT, AND NANCY J. WANGELIN, AS ADMINISTRATRIX OF THE ESTATE OF RAYMOND L. WANGELIN, DECEASED, DEFENDANTS-RESPONDENTS.

LAW OFFICES OF JOHN WALLACE, BUFFALO (JAMES J. NAVAGH OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

CHELUS, HERDZIK, SPEYER & MONTE, P.C., BUFFALO (THOMAS P. KAWALEC OF COUNSEL), FOR DEFENDANT-RESPONDENT ERIE INSURANCE COMPANY OF NEW YORK.

AUGELLO & MATTELIANO, LLP, BUFFALO (JOSEPH A. MATTELIANO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS RAYMOND WANGELIN, DOING BUSINESS AS ADAMS SEPTIC & SOUTHERN SUMMIT, AND NANCY J. WANGELIN, AS ADMINISTRATRIX OF THE ESTATE OF RAYMOND L. WANGELIN, DECEASED.

Appeal from a judgment (denominated order) of the Supreme Court, Cattaraugus County (Michael L. Nenno, A.J.), entered August 27, 2014. The judgment, among other things, granted defendants' cross motions for summary judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying the cross motion of defendants Raymond Wangelin, doing business as Adams Septic & Southern Summit, and Nancy J. Wangelin, as Administratrix of the Estate of Raymond L. Wangelin, deceased, and reinstating the contractual indemnification and failure to procure insurance causes of action in the action under Index No. 76791; granting that part of plaintiffs' cross motion for summary judgment with respect to the cause of action for contractual indemnification in that action; denying the cross motion of defendant Erie Insurance Company of New York in the action under Index No. 80570; and granting that part of plaintiffs' cross motion for declaratory relief on the issue of the duty to defend and entering judgment in favor of plaintiff Zamias Services, Inc. in the action under Index No. 80570 as follows:

It is ADJUDGED and DECLARED that defendant Erie Insurance Company of New York is obligated to defend

plaintiff Zamias Services, Inc. in the underlying action from the date that such plaintiff was served with the amended complaint in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: Following a slip and fall on ice in a roadway at the Olean Center Mall, Brenda Johnson and Gary Johnson commenced an action (hereafter, underlying action) against the mall owner, plaintiff ZRAJ Olean, LLC (ZRAJ), and the mall's property manager, plaintiff Zamias Services, Inc. (Zamias), seeking damages for injuries sustained by Brenda Johnson. Pursuant to a written Service Agreement, Southern Summit Development by its owner, Raymond Wangelin, had agreed to perform snow removal, sanding and salting services on behalf of plaintiffs at the shopping mall during the period of time inclusive of Brenda Johnson's slip and fall. Raymond Wangelin, doing business as Adams Septic & Southern Summit (hereafter, Southern Summit), died during the pendency of the underlying action. Plaintiffs thereafter commenced a third-party action against defendants Southern Summit and Nancy J. Wangelin, as Administratrix of the Estate of Raymond L. Wangelin (hereafter, decedent's estate), asserting causes of action for contractual indemnification, common-law indemnification, contribution and failure to procure insurance for ZRAJ as an additional insured. Southern Summit moved for summary judgment dismissing the second amended third-party complaint against it, and Supreme Court granted the motion in part and dismissed the causes of action for common-law indemnification and contribution on the ground that Southern Summit owed no duty of care to the Johnsons, as strangers to the Service Agreement, under any of the *Espinal* exceptions (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140).

Zamias subsequently commenced a declaratory judgment action against defendant Erie Insurance Company of New York (Erie) and decedent's estate seeking a declaration that Zamias was entitled to a defense and indemnification with respect to the underlying action as an additional insured under the commercial general liability policy issued by Erie to Southern Summit. The underlying action was settled in January 2013. The court then consolidated the third-party action and the declaratory judgment action.

In response to two motions by Zamias for protective orders, Erie cross-moved for summary judgment in the declaratory judgment action seeking a declaration that it had no duty to defend or indemnify Zamias. Plaintiffs cross-moved for summary judgment in the declaratory judgment action seeking a declaration that Erie has a duty to defend Zamias with respect to the underlying action, and they sought summary judgment on the causes of action for contractual indemnification from Southern Summit and failure to procure insurance for ZRAJ as an additional insured. Southern Summit and decedent's estate then cross-moved for summary judgment dismissing the causes of action in the third-party action for contractual indemnification and failure to procure insurance.

By the judgment on appeal, the court granted the cross motion of

Southern Summit and decedent's estate and dismissed plaintiffs' causes of action in the third-party action for contractual indemnification and failure to procure insurance. The court also granted Erie's cross motion in the declaratory judgment action and determined that Erie had no obligation to defend or indemnify Zamias in the underlying action. The court further determined that Zamias' motions for protective orders and that part of plaintiffs' cross motion for summary judgment on their cause of action for failure to procure insurance were "moot." Plaintiffs appeal.

As a preliminary matter, we note that plaintiffs have abandoned any contentions with respect to the motions for protective orders and that part of their cross motion for summary judgment on their cause of action for failure to procure insurance inasmuch as they have not pursued any such issues in their brief (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with plaintiffs that the court erred in denying that part of their cross motion for summary judgment seeking contractual indemnification from Southern Summit and decedent's estate and in dismissing the cause of action for contractual indemnification. Initially, we note that the snow removal Service Agreement is not subject to General Obligations Law § 5-322.1 (1) because it is not a contract for "the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances" (*id.*; *see Pieri v Forest City Enters.*, 238 AD2d 911, 912-913). With respect to the language of the indemnification clause at issue, we note that the Service Agreement provides that Southern Summit would indemnify plaintiffs "from and against any and all occurrences, liability, claims, damages . . . , expenses, fees, fines, penalties, suits, proceedings, actions and causes of action of any and every kind whatsoever arising or growing out of or in any way connected with the work to be performed under [the] Agreement." We conclude that the unambiguous intent of that language was to provide for indemnification even where plaintiffs have been negligent (*see Gortych v Brenner*, 83 AD3d 497, 498; *Cortes v Town of Brookhaven*, 78 AD3d 642, 644). We further conclude that the unambiguous intent of the clause was also to provide for indemnification even though Southern Summit was not negligent (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178; *Brooklyn Union Gas Co. v Interboro Asphalt Surface Co.*, 303 AD2d 532, 535, *lv denied* 100 NY2d 506). Thus, we conclude that the issue whether the court's earlier dismissal of the contribution and common-law indemnification causes of action in the third-party action against Southern Summit and decedent's estate, which we note was on *Espinal* grounds, was entitled to collateral estoppel or res judicata treatment with respect to Southern Summit's negligence or performance under the Service Agreement is irrelevant under the language of the indemnification clause. We thus further conclude that the court erred in denying that part of plaintiffs' cross motion for summary judgment on the issue of contractual indemnification and in granting the cross motion of Southern Summit and decedent's estate dismissing the cause of action for contractual indemnification (*see Brown*, 76 NY2d 172, 178; *see also Cortes*, 78 AD3d at 644-645). We therefore modify the judgment accordingly.

We also agree with plaintiffs that the court erred in granting that part of the cross motion of Southern Summit and decedent's estate for summary judgment dismissing the cause of action for failure to procure insurance for ZRAJ as an additional insured. The Service Agreement provides that Southern Summit was obligated to maintain insurance naming ZRAJ as an additional insured and Southern Summit failed to establish that it met that obligation. Thus, we further modify the judgment accordingly.

We agree with Zamias that it was entitled to a defense as an additional insured under Erie's policy, beginning on the date upon which Zamias was served with the amended summons and complaint in the underlying action. We therefore further modify the judgment accordingly. It is well settled that an insurer's duty to defend is "exceedingly broad" (*Colon v Aetna Life & Cas. Ins. Co.*, 66 NY2d 6, 8). The fact that the amended complaint in the underlying action alleged negligence on the part of plaintiffs, and not Southern Summit, is of no consequence inasmuch as the allegations in the amended complaint "[brought] the claim potentially within the protection purchased" and triggered Erie's duty to defend Zamias as an additional insured (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 37).

Inasmuch as bodily injury liability coverage for an additional insured under Erie's policy, insofar as relevant herein, is provided for injuries caused in whole or in part by the "acts or omissions" of Southern Summit, we conclude on this record that Erie failed to make a prima facie showing that the slip and fall in the underlying action was not caused in whole or in part by the acts or omissions of its named insured, Southern Summit (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853). Nor did Erie meet its burden with respect to its claim of a storm in progress (*see Schuster v Dukarm*, 38 AD3d 1358, 1358-1359; *see generally Winegrad*, 64 NY2d at 853). We likewise conclude that Zamias failed to make a prima facie showing that Brenda Johnson's slip and fall was caused in whole or in part by the acts or omissions of Southern Summit (*see generally Winegrad*, 64 NY2d at 853). We therefore further modify the judgment by denying those parts of the respective cross motions of plaintiffs and Erie on the issue of indemnification under Erie's policy.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1382

CA 14-01806

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

IN THE MATTER OF WILLIAM MCKETHAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DAVID STALLONE, SUPERINTENDENT, CAYUGA
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

WILLIAM MCKETHAN, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Mark H. Fandrich, A.J.), entered August 29, 2014 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by providing that the petition is dismissed without prejudice and as modified the judgment is affirmed without costs.

Memorandum: Petitioner, an inmate, commenced this CPLR article 78 proceeding seeking, inter alia, to annul the determination to withhold three pieces of mail that had been sent to him. Supreme Court properly dismissed the petition on the ground that petitioner failed to exhaust his administrative remedies. Contrary to petitioner's contention, exhaustion of administrative remedies is required where, as here, he alleges that the withholding of his mail violated his constitutional rights inasmuch as " 'the alleged constitutional error could have been remedied in the administrative appeal process' " (*People ex rel. Bratton v Mellas*, 28 AD3d 1207, 1208, *lv denied* 7 NY3d 705; *see Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038-1039, *cert denied* ___ US ___, 133 S Ct 1502; *Matter of Roberts v Coughlin*, 165 AD2d 964, 965-966).

We likewise reject petitioner's alternative contention that he exhausted his administrative remedies and properly filed an administrative appeal by "writing [to] the superintendent" (7 NYCRR 720.4 [g] [2]). Even assuming, arguendo, that the superintendent's failure to respond in a timely manner to petitioner's appeal constituted a denial of the appeal, we conclude that petitioner failed to exhaust his administrative remedies inasmuch as "petitioner did not

appeal the [s]uperintendent's denial to the Central Office Review Committee as required" by 7 NYCRR 701.5 (d) (*Matter of Fulton v Reynolds*, 83 AD3d 1308, 1308-1309; *see generally Matter of Francis v Hollins*, 255 AD2d 1008, 1008, *lv denied* 93 NY2d 801).

Finally, as respondent correctly concedes, the petition should have been dismissed without prejudice based on the failure to exhaust administrative remedies, inasmuch as judicial review of a final determination rendered after the completion of the appropriate grievance procedure is not foreclosed (*see generally Matter of Patterson v Smith*, 53 NY2d 98, 100-101; *Roberts*, 165 AD2d at 966). We therefore modify the judgment accordingly.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1385

CA 15-00287

PRESENT: SCUDDER, P.J., CENTRA, CARNI, VALENTINO, AND DEJOSEPH, JJ.

BRANDON WILLIAM GARDNER, INDIVIDUALLY AND AS ADMINISTRATOR WITH WILL ANNEXED OF THE ESTATE OF WILLIAM G. GARDNER, DECEASED, CYNTHIA ANN GARDNER AND RYAN J. GARDNER, CLAIMANTS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-APPELLANT-RESPONDENT. (CLAIM NO. 109520.)

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FREDERICK A. BRODIE OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

ANTHONY F. ENDIEVERI, CAMILLUS, FOR CLAIMANTS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from a judgment of the Court of Claims (Diane L. Fitzpatrick, J.), entered October 6, 2014. The judgment awarded claimants money damages in a structured judgment.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by setting aside the award of damages for past loss of support, and as modified the judgment is affirmed without costs, and a new trial is granted on damages for past loss of support only unless claimants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for past loss of support to $175,000 for decedent's older son and $250,000 for decedent's younger son, in which event the judgment is modified accordingly and as modified the judgment is affirmed without costs.

Memorandum: Claimants' decedent died of injuries he sustained when the vehicle he was driving slid across the roadway, struck a snowbank packed against the concrete barrier, and vaulted off the highway bridge onto the roadway below. Following a trial on liability, the Court of Claims dismissed the claim, but on appeal we concluded that defendant was negligent and that its negligence was a proximate cause of decedent's accident (*Gardner v State of New York*, 79 AD3d 1635, 1637). We thus granted judgment on liability and remitted the matter to the Court of Claims for a trial on the issues of damages only (*id.*). Defendant now appeals and claimants cross-appeal from the judgment awarding damages for, inter alia, loss of inheritance, past and future loss of financial support, past and future loss of parental guidance, and preimpact terror.

With respect to the award of damages for loss of inheritance, we reject claimants' contention that the court erred in using a personal consumption rate of 45%. Claimants' expert used a personal consumption rate of 28.5%, while defendant's expert used a rate of 95-99%. The court properly concluded that the figure used by defendant's expert was too high in light of the evidence that decedent was frugal, but claimants' expert failed to consider decedent's spending habits the few years prior to his death and his limited assets at the time of his death. The court's determination is not against the weight of the evidence (*see generally Black v State of New York* [appeal No. 2], 125 AD3d 1523, 1524-1525). We further reject claimants' contention that the court erred in awarding claimants only 50% of the amount it determined that decedent would have accumulated in savings and investments at his normal life expectancy. The award of damages for loss of inheritance "may be based upon the decedent's age, character, earning capacity, [and] life expectancy, and the circumstances of the distributees" (*Motelson v Ford Motor Co.*, 101 AD3d 957, 962-963, *affd* 24 NY3d 1025). We conclude that the court considered those factors in its determination, which is not against the weight of the evidence (*see generally Black*, 125 AD3d at 1524-1525).

We reject defendant's contention that the court erred in directing the award of damages for loss of inheritance to be paid in periodic payments pursuant to CPLR 5041 (e). Defendant relies on CPLR 5041 (b) in arguing that the award should have been paid in a lump sum, but we reject that argument. CPLR 5041 (b) provides, in relevant part, that "[t]he court shall enter judgment in lump sum for past damages, for future damages not in excess of [$250,000], and for any damages, fees or costs payable in lump sum or otherwise under subdivisions (c) and (d) of this section." CPLR 5041 (b) is not applicable because the loss of inheritance award does not constitute past damages (*see generally Milbrandt v Green Refractories Co.*, 79 NY2d 26, 33), or future damages less than $250,000, and CPLR 5041 (c) and (d) are not applicable. Although defendant contends that this was an oversight by the Legislature, we note that, "[i]f a change should be made, it is for the Legislature, and not the courts, to make" (*Liff v Schildkrout*, 49 NY2d 622, 634).

We agree with defendant that the award of damages for past loss of financial support, i.e., the 8½ years between the date of the accident and the date of the court's decision, is not supported by the evidence and must be set aside (*see generally Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1133-1134, *lv denied* 11 NY3d 708; *Allison v Erie County Indus. Dev. Agency*, 35 AD3d 1159, 1161). Damages may be recovered for the loss of support to claimants (*see Gonzalez v New York City Hous. Auth.*, 77 NY2d 663, 668). The court "may consider both the evidence of the support decedent provided to the [claimants] before [his] death and evidence of the support the [claimants] could reasonably have expected but for [his] death" (*Valicenti v Valenze*, 68 NY2d 826, 829). The court's awards of damages for past loss of financial support of $275,100 for decedent's older son, who was 19 years old at the time of decedent's death, and $473,400 for decedent's younger son, who was 15 years old at the time of decedent's death, are not supported by the evidence. We instead conclude that an award of

damages of $175,000 for the older son and $250,000 for the younger son for past loss of financial support are the maximum amounts that are supported by the evidence (*see generally Allison*, 35 AD3d at 1161). We therefore modify the judgment accordingly, and we grant a new trial on damages for past loss of financial support only unless claimants, within 20 days of service of a copy of the order of this Court with notice of entry, stipulate to reduce the award of damages for past loss of financial support to $175,000 for decedent's older son and $250,000 for decedent's younger son, in which event the judgment is modified accordingly. Contrary to defendant's further contention, the award of damages for future loss of financial support is supported by the evidence.

We reject defendant's contention that the award of damages for past and future loss of parental guidance deviates materially from what would be considered reasonable compensation (*see* CPLR 5501 [c]). Here, decedent's children were teenagers, but it is well settled that an award of damages for loss of parental guidance is not limited to children, and the court may even award damages to financially independent adults (*see Gonzalez*, 77 NY2d at 668-669). We decline to disturb the award, which totaled $875,000 for both children for both past and future loss of parental guidance. Contrary to claimants' contention, the award of $250,000 for preimpact terror did not deviate materially from what would be reasonable compensation (*see generally Lang v Bouju*, 245 AD2d 1000, 1001; *cf. Klos v New York City Tr. Auth.*, 240 AD2d 635, 636-638, *lv dismissed* 91 NY2d 846, 885).

Defendant contends that, on the prior appeal, we should have directed that on remittal there should also be a new trial on the issue of decedent's alleged contributory negligence, as we did in the similar case of *Grevelding v State of New York* (91 AD3d 1309, 1310-1311). That contention, however, was raised by the claimant in the appeal in *Grevelding*, and it was not raised in the prior appeal in this case. We note in any event that, "even if decedent was negligent in the operation of his vehicle, such negligence would not have resulted in the vehicle leaving the roadway. Rather, the snow ramp defendant negligently created was the sole proximate cause of decedent's vehicle vaulting over the concrete guard barrier" (*Grevelding v State of New York* [appeal No. 2], 132 AD3d 1332, 1334).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1389

KA 14-01524

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HEATH M. CUMMINGS, DEFENDANT-APPELLANT.

WILLIAM J. GABLER, OLEAN, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Joseph W. Latham, J.) rendered June 12, 2013. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction of sexual abuse in the first degree (Penal Law § 130.65 [3]) and sentencing him to a term of incarceration. Contrary to defendant's contention, the violation of probation was not de minimis nor a mere technicality. Defendant was sentenced to probation for an offense involving sexual contact with a young boy, and one of the conditions of probation was that defendant was prohibited from having any contact or association with children under the age of 18. The evidence at the revocation hearing established that defendant was developing a relationship with a man who is the father of two boys, that defendant rode in a vehicle with those boys, that he gave a false name to the boys' parents, and that he began to ingratiate himself with the boys by letting them play with his dogs.

Furthermore, given the nature of his prior offense and the violation, we conclude that the term of incarceration, which is approximately one half of the maximum sentence, is not unduly harsh or severe. We have considered defendant's remaining contention and conclude that it is without merit.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1391

KA 14-01962

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERMAINE RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered August 12, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal contempt 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 and on the law by amending the order of protection to expire on April 8, 2025, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of criminal contempt in the first degree (Penal Law § 215.51 [c]), defendant contends that County Court erred in issuing a no-contact order of protection on behalf of the victim, who stated at sentencing that she wanted only a no-offensive-contact order of protection. We reject that contention. The sentencing court had authority to issue an order of protection, and set the terms thereof, even "in the absence of the victim's consent" (*People v Lilley*, 81 AD3d 1448, 1448, *lv denied* 17 NY3d 860; *see People v Paul*, 117 AD3d 1499, 1499-1500; *People v Monacelli*, 299 AD2d 916, 916, *lv denied* 99 NY2d 617).

We agree with defendant, however, that the court, in setting the expiration date of the order of protection, erred in failing to take into account the time he had served in jail prior to sentencing (*see People v DeFazio*, 105 AD3d 1438, 1439, *lv denied* 21 NY3d 1015; *People v Goins*, 45 AD3d 1371, 1372). Although defendant failed to preserve for our review his contention concerning the expiration date of the order of protection (*see People v Nieves*, 2 NY3d 310, 315-316), we exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Clinkscales*, 35

AD3d 1266, 1267). The People correctly concede that the order of protection should expire on April 8, 2025, rather than August 12, 2025, as set by the court, and we therefore modify the judgment accordingly.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1392

KA 14-02188

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JERMAINE RICHARDSON, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (ROBERT TUCKER OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered August 12, 2014. The judgment revoked defendant's sentence of probation and imposed a sentence of imprisonment.

It is hereby ORDERED that said appeal is unanimously dismissed (*see People v Scholz*, 125 AD3d 1492, *lv denied* 25 NY3d 1077).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1393

KA 12-02261

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TIMOTHY SMITH, DEFENDANT-APPELLANT.

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

TIMOTHY SMITH, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered November 15, 2012. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the third degree, criminal possession of a controlled substance in the fifth degree and criminal possession of a controlled substance in the seventh degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on the second and third counts of the indictment, and the fourth count of the indictment is dismissed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), the fifth degree (§ 220.06 [5]), and the seventh degree (§ 220.03). The charges arose from the seizure of a baggie containing crack cocaine from a vehicle in which defendant was a passenger. Contrary to defendant's contention, we conclude that County Court properly refused to suppress tangible property, including the crack cocaine, as the product of an allegedly illegal search. The evidence at the suppression hearing supports the court's determination that the conduct of the police "was justified in its inception and at every subsequent stage of the encounter" (*People v Nicodemus*, 247 AD2d 833, 835, *lv denied* 92 NY2d 858; *see People v De Bour*, 40 NY2d 210, 215). The police officer had an objective, credible reason to approach the parked vehicle and request information from its occupants (*see People v Ocasio*, 85 NY2d 982, 985; *People v Witt*, 129 AD3d 1449, 1450, *lv denied* 26 NY3d 937). After the officer observed defendant and another passenger acting suspiciously, the officer was justified in opening the door and

ordering the occupants out of the vehicle (*see People v Carter*, 60 AD3d 1103, 1105, *lv denied* 12 NY3d 924). The officer then observed the baggie containing crack cocaine, which provided probable cause to seize the cocaine and arrest defendant (*see People v Robinson*, 38 AD3d 572, 573).

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, based on the applicability of the automobile presumption . . . , is not against the weight of the evidence" (*People v Campbell*, 109 AD3d 1142, 1142, *lv denied* 22 NY3d 1039). We reject defendant's contention that the court erred in denying his request for substitution of counsel, inasmuch as defendant did not explicitly request new counsel (*see People v Singletary*, 63 AD3d 1654, 1654, *lv denied* 13 NY3d 839), nor did his general complaints concerning counsel constitute a showing of good cause for such substitution (*see People v Watkins*, 77 AD3d 1403, 1404, *lv denied* 15 NY3d 956).

We agree with defendant, however, that the judgment of conviction should be reversed and a new trial granted because the court erred in summarily denying, as untimely, his request to proceed pro se (*see generally People v McIntyre*, 36 NY2d 10, 14). "Although requests [to proceed pro se] on the eve of trial are discouraged, the Court of Appeals has found that a request may be considered timely when it is 'interposed prior to the prosecution's opening statement,' as here" (*People v Atkinson*, 111 AD3d 1061, 1062, quoting *McIntyre*, 36 NY2d at 18).

Finally, as the People correctly concede, the count of criminal possession of a controlled substance in the seventh degree should be dismissed as a inclusory concurrent count of either of the remaining charges (*see* CPL 300.30 [4]; 300.40 [3] [b]; *People v Lee*, 39 NY2d 388, 390-391).

In view of our decision, we do not address the remaining contentions in defendant's main and pro se supplemental briefs.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1395

KA 11-01664

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN L. LOVE, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Frank P. Geraci, Jr., J.), rendered June 8, 2011. The judgment convicted defendant, upon a jury verdict, of rape in the first degree and rape in the third degree.

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of rape in the first degree (Penal Law § 130.35 [1]), and rape in the third degree (§ 130.25 [2]), defendant contends that County Court erred in admitting in evidence the recording of the victim's call to 911 as an excited utterance (*see generally People v Cotto*, 92 NY2d 68, 78-79). We reject that contention. The People established that the victim left defendant's house, where the incident occurred, and went directly to a pay phone, and that defendant's mother was following the victim in a car. The recording and the victim's testimony also established that the victim initially believed that defendant was in that car, and the recording confirms that she was frantically asking the dispatcher to send help before defendant could reach her. We conclude that the court properly reviewed the facts of the case and considered the atmosphere surrounding the statements in making its determination (*see People v Mulligan*, 118 AD3d 1372, 1373, *lv denied* 25 NY3d 1075), and we agree with the court that the victim's statements on the 911 recording are "the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative" (*People v Vasquez*, 88 NY2d 561, 574).

Contrary to defendant's further contention, the verdict is not against the weight of the evidence. 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, although a different verdict would not have been unreasonable, the jury did not fail to give the evidence the weight it should be accorded (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to object to comments that the prosecutor made during opening statements and on summation, and thus he failed to preserve for our review his contention that such comments constituted prosecutorial misconduct that deprived him of a fair trial (*see* CPL 470.05 [2]; *People v Cullen*, 110 AD3d 1474, 1475, *affd* 24 NY3d 1014). In any event, the prosecutor's summation constituted fair response to defense counsel's summation, and did not exceed "the broad bounds of rhetorical comment permissible in closing argument" (*People v Galloway*, 54 NY2d 396, 399; *see People v Williams*, 28 AD3d 1059, 1061, *affd* 8 NY3d 854; *People v Ward*, 107 AD3d 1605, 1606, *lv denied* 21 NY3d 1078). Even assuming, arguendo, that the prosecutor's comments during opening statements or on summation were improper, we conclude that they were not so egregious as to deprive defendant of a fair trial (*see People v Figgins*, 72 AD3d 1599, 1600, *lv denied* 15 NY3d 893; *People v Sweney*, 55 AD3d 1350, 1351, *lv denied* 11 NY3d 901).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1397

KA 12-00249

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LOUIS KELLY, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered December 1, 2011. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the second degree.

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

Memorandum: 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 evidence is legally insufficient to support the conviction because the People failed to present evidence that he constructively possessed the handgun while he was a passenger in the minivan in which the handgun was found. We reject that contention. Defendant admitted to a police investigator that he possessed the handgun for at least two months prior to the time that it was found, he was the only backseat passenger in the minivan, and the handgun was found in plain view protruding from a pocket on the back of the front passenger seat. We conclude that the evidence, viewed in the light most favorable to the People, is legally sufficient to support defendant's conviction on a theory of either actual or constructive possession (*see generally People v Danielson*, 9 NY3d 342, 349).

Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see id.*), we reject defendant's further contention that the verdict is against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495). Even assuming, arguendo, that an acquittal would not have been unreasonable, we note that, where, as here, "witness credibility is of paramount importance to the determination of guilt or innocence, [we]

must give [g]reat deference . . . [to the jury's] opportunity to view the witnesses, hear the testimony and observe demeanor" (*People v Harris*, 15 AD3d 966, 967, *lv denied* 4 NY3d 831 [internal quotation marks omitted]; *see Bleakley*, 69 NY2d at 495). We decline to disturb the jury's resolution of the conflict between the testimony of the police investigator and the testimony of defendant. The jury's resolution of that conflict was reasonable, particularly in view of the fact that defendant's testimony contradicted the statements he had previously made to the police investigator at the time of his arrest.

We agree with defendant that County Court failed to make the proper two-part inquiry pursuant to *People v Ventimiglia* (52 NY2d 350) with respect to testimony that defendant told the police that he did not wish to reduce his statement to writing because, "based on his experience, nothing good would come of that," which was an apparent reference to prior contact with the criminal justice system. The court should have precluded that testimony, which "did not relate to a relevant and material issue in the case" (*People v Judd*, 96 AD3d 784, 784, *lv denied* 19 NY3d 998). Nonetheless, we conclude that the error in admitting the testimony is harmless, inasmuch as the evidence of defendant's guilt is overwhelming and there is no significant probability that the error contributed to his conviction (*see id.*; *see generally People v Crimmins*, 36 NY2d 230, 241-242).

Defendant also contends that the court erred in its *Sandoval* ruling by permitting the People to question him concerning a prior felony conviction, when it was later discovered, prior to sentencing, that defendant had been adjudicated a youthful offender on the underlying charge (*see generally People v Gray*, 84 NY2d 709, 712). By failing to object to the court's ultimate *Sandoval* ruling, defendant failed to preserve his contention for our review (*see People v Smith*, 90 AD3d 1565, 1566, *lv denied* 18 NY3d 998), and we decline to exercise our power to review it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1398

KA 12-02100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAQUEL WILLIAMS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 5, 2012. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the fourth degree.

It is hereby ORDERED that the case is held, decision is reserved, and the matter is remitted to Supreme Court, Onondaga County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the fourth degree (§ 265.01 [2]). 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), was legally sufficient to disprove defendant's justification defense (*see People v Jones*, 151 AD2d 997, 997, *lv denied* 74 NY2d 812), and to establish that he intended to cause serious physical injury when he stabbed the victim in the chest with a knife (*see People v Goley*, 113 AD3d 1083, 1083; *People v Almonte*, 7 AD3d 324, 324-325, *lv denied* 3 NY3d 670). 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 further conclude that the verdict finding defendant guilty of manslaughter in the first degree is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495). Contrary to defendant's contention, the jury did not fail "to give the evidence the weight it should be accorded when it determined that he intended to cause serious physical injury . . . and when it rejected his justification defense" (*People v Ford*, 114 AD3d 1273, 1275, *lv denied* 23 NY3d 962).

Supreme Court properly refused to instruct the jury that it could consider the victim's reputation for violence in determining whether defendant reasonably believed that it was necessary to use deadly

physical force. The only evidence concerning the victim's reputation for violence consisted of defendant's hearsay statements to the People's psychiatric expert, and the court properly ruled that such statements were admissible "for the limited purpose of informing the jury of the basis of the expert's opinion and not for the truth of the matters related" (*People v Campbell*, 197 AD2d 930, 932, *lv denied* 83 NY2d 850). Inasmuch as there was no admissible evidence of the victim's reputation for violence, the court properly denied defendant's charge request.

We reject defendant's contention that he was denied a fair trial by prosecutorial misconduct. We conclude that the one preserved instance of misconduct was not so prejudicial that it warrants reversal (*see People v Jacobson*, 60 AD3d 1326, 1328, *lv denied* 12 NY3d 916). Defendant failed to preserve for our review his further contention that the court erred in admitting in evidence a recording of a jailhouse telephone call between him and his mother (*see People v Bennett*, 94 AD3d 1570, 1570, *lv denied* 19 NY3d 994), 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 agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see People v Rudolph*, 21 NY2d 497, 501). We therefore hold the case, reserve decision, and remit the matter to Supreme Court to make and state for the record "a determination of whether defendant is a youthful offender" (*id.* at 503).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1400

CAF 14-00970, CAF 14-01081

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

IN THE MATTER OF AALIYAH H.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARY H. AND ISAIAH H., RESPONDENTS-APPELLANTS.
(APPEAL NO. 1.)

STEPHEN L. CIMINO, SYRACUSE, FOR RESPONDENT-APPELLANT MARY H.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTOPHER E. BURKE, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeals from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 28, 2014 in a proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b. The order, among other things, terminated respondents' parental rights.

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

Memorandum: In appeal No. 1, respondents appeal from an order in a proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b that terminated their parental rights with respect to their child. In appeal No. 2, respondent mother appeals from an order in a similar proceeding terminating her parental rights with respect to another child.

Contrary to the contentions of respondents in both appeals, Family Court properly terminated their parental rights with respect to their child in appeal No. 1, and the mother's child in appeal No. 2, on the ground of permanent neglect. Respondents admitted that they permanently neglected their respective children, and the record of the dispositional hearing supports the court's determination that the best interests of the children would be served by terminating respondents' respective parental rights and freeing the children for adoption (*see Matter of La'Derrick J.W. [Ashley W.]*, 85 AD3d 1600, 1602, *lv denied* 17 NY3d 709; *Matter of Eleydie R. [Maria R.]*, 77 AD3d 1423, 1424).

Contrary to the mother's contention in both appeals, the record supports the court's determination that a suspended judgment would not serve the best interests of the children (*see Matter of Alex C., Jr. [Alex C., Sr.]*, 114 AD3d 1149, 1150, *lv denied* 23 NY3d 901; *Matter of Tiara B. [Torrence B.]*, 70 AD3d 1307, 1307-1308, *lv denied* 14 NY3d 709; *see generally Matter of Mercedes L.*, 12 AD3d 1184, 1185; *Matter of Saboor C.*, 303 AD2d 1022, 1023). The mother's "negligible progress" in addressing the issues that resulted in the children's removal from her custody was " 'not sufficient to warrant any further prolongation of the child[ren]'s unsettled familial status' " (*Matter of Alexander M. [Michael A.M.]*, 106 AD3d 1524, 1525; *see Matter of Joanna P. [Patricia M.]*, 101 AD3d 1751, 1752, *lv denied* 20 NY3d 863; *Matter of Keegan JJ. [Amanda JJ.]*, 72 AD3d 1159, 1161-1162).

Respondent father further contends in appeal No. 1 that, because the children had different parentage, they had different interests, thereby creating a conflict of interest for the Attorney for the Children (AFC), who represented both children at the same hearing. The father failed to preserve that contention for our review "inasmuch as []he made no motion to remove the AFC" (*Matter of Swinson v Dobson*, 101 AD3d 1686, 1687, *lv denied* 20 NY3d 862; *see Matter of Ordona v Cothern*, 126 AD3d 1544, 1546; *see generally Matter of Nelissa O. v Danny C.*, 70 AD3d 572, 573).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1401

CAF 14-00971

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

IN THE MATTER OF ROMARAH F.-O.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

MARY H., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

STEPHEN L. CIMINO, SYRACUSE, FOR RESPONDENT-APPELLANT.

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (CATHERINE Z. GILMORE OF COUNSEL), FOR PETITIONER-RESPONDENT.

CHRISTOPHER E. BURKE, ATTORNEY FOR THE CHILD, SYRACUSE.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered May 28, 2014 in a proceeding pursuant to Family Court Act article 6 and Social Services Law § 384-b. The order, among other things, terminated respondent's parental rights.

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

Same memorandum as in *Matter of Aaliyah H.* ([appeal No. 1] ___ AD3d ___ [Dec. 31, 2015]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1403

CAF 15-00831

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

IN THE MATTER OF HEATHER WILLIAMS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

JASON LUCZYNSKI, RESPONDENT-RESPONDENT.

MICHAEL N. KALIL, ESQ., LLC, UTICA (MICHAEL N. KALIL OF COUNSEL), FOR PETITIONER-APPELLANT.

DIANE MARTIN-GRANDE, ROME (LUCILLE M. RIGNANESE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

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

Appeal from an order of the Family Court, Oneida County (Joan E. Shkane, J.), entered June 10, 2014 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, denied the petition seeking permission to relocate with the subject child.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother appeals from an order denying her petition seeking permission for the parties' daughter, who is now six years old, to relocate with her from Clinton to Corning, which is approximately 125 miles away. Based on our review of the record, we conclude that the mother failed to demonstrate by a preponderance of the evidence that the proposed relocation is in the best interests of the child (*see generally Matter of Tropea v Tropea*, 87 NY2d 727, 738-741).

As the mother acknowledges, her primary motivation for relocating is to live with her fiancé in Corning, and her income would not increase as a result of the move. Although the mother's standard of living would improve if she were to live with her fiancé, neither she nor her fiancé testified that he could not or would not move to Clinton. Moreover, the child's half sister resides in Clinton, as does respondent father and many other relatives on both sides of the child's family. In fact, the father spends significant time with the child in Clinton, and his relationship with her likely would be adversely affected if she were to move to Corning. In sum, we conclude that Family Court's determination to deny the mother's

relocation petition has a sound and substantial basis in the record and therefore should not be disturbed (*see Matter of Yaddow v Bianco*, 115 AD3d 1338, 1339).

Finally, we conclude that the mother lacks standing to challenge the court's appointment of assigned counsel for the father.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1404

CAF 13-02244

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

IN THE MATTER OF CATTARAUGUS COUNTY DEPARTMENT OF SOCIAL SERVICES, ON BEHALF OF MARK P. QUINN, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

EMILY N. GILROY, RESPONDENT-RESPONDENT.

STEPHEN D. MILLER, OLEAN, FOR PETITIONER-APPELLANT.

HEATHER A. TOMES, DELEVAN, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered September 23, 2013 in a proceeding pursuant to Family Court Act article 4. The order denied petitioner's objections to the order of the Support Magistrate.

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

Memorandum: Petitioner appeals from an order denying its objections to the order of the Support Magistrate insofar as it reduced the amount of respondent mother's child support obligation. Contrary to petitioner's contention, we conclude that Family Court did not abuse its discretion in declining to impute income to respondent (*see Matter of Disidoro v Disidoro*, 81 AD3d 1228, 1230, *lv denied* 17 NY3d 705), or in calculating her child support obligation based upon her current income (*see Chiotti v Chiotti*, 12 AD3d 995, 997).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1407

CA 14-00654

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

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

V MEMORANDUM AND ORDER

FRANK CONNOR, RESPONDENT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR RESPONDENT-APPELLANT.

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

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered March 11, 2014 in a proceeding pursuant to Mental Hygiene Law article 10. The order, inter alia, committed respondent to a secure treatment facility.

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

Memorandum: Respondent appeals from an order pursuant to Mental Hygiene Law article 10 determining, following a jury trial, that he is a detained sex offender who has a mental abnormality within the meaning of Mental Hygiene Law § 10.03 (i) and determining, following a dispositional hearing, that he is a dangerous sex offender requiring confinement in a secure treatment facility. We reject respondent's contention that the verdict is against the weight of the evidence. Here, petitioner's two expert psychologists testified that respondent suffered from a mental abnormality, and although respondent's expert testified to the contrary, " '[t]he jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony' " (*Matter of State of New York v Gierszewski*, 81 AD3d 1473, 1474, *lv denied* 17 NY3d 702; *see Matter of State of New York v Parrott*, 125 AD3d 1438, 1439, *lv denied* 25 NY3d 911). Upon our review of the record, we conclude that "the evidence does not preponderate[] so greatly in [respondent's] favor that the jury could not have reached its conclusion on any fair interpretation of the evidence" (*Gierszewski*, 81 AD3d at 1474 [internal quotation marks omitted]). Contrary to respondent's further contention, we conclude that petitioner established by clear and convincing evidence at the dispositional hearing that he is a dangerous sex offender requiring confinement (*see* §§ 10.03 [e]; 10.07 [f]). "Supreme Court, as the trier of fact, was in the best position to evaluate the weight and credibility of the conflicting

[psychological] testimony presented . . . , and we see no basis to disturb its decision to credit the testimony of petitioner's expert over that of respondent's expert" (*Matter of State of New York v Gooding*, 104 AD3d 1282, 1282, *lv denied* 21 NY3d 862 [internal quotation marks omitted]).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1409

CA 15-01024

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

WELLS FARGO BANK, N.A., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

LUKE BUFFENMYER, DEFENDANT-RESPONDENT,
AND HOME HEADQUARTERS, INC., DEFENDANT.

REED SMITH LLP, NEW YORK CITY (JOSEPH B. TEIG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), dated October 1, 2014. The order denied plaintiff's motion to restore this action to the court's calender.

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

Memorandum: In seeking to restore this foreclosure action to Supreme Court's calendar after it had been dismissed, plaintiff was required to "demonstrate a potentially meritorious cause of action, a reasonable excuse for the delay in prosecuting the action, a lack of intent to abandon the action, and a lack of prejudice to the defendants" (*Vaream v Corines*, 78 AD3d 933, 933). We agree with plaintiff that the order of reference and judgment of foreclosure and sale are sufficient to establish the merit of the action (*see GMAC Mtge., LLC v Alfred*, 2015 NY Slip Op 51621[U], *1 [Sup Ct, Albany County, 2015]). Plaintiff failed, however, to establish a reasonable excuse for its delay (*see Okun v Tanners*, 11 NY3d 762, 763; *Sang Seok Na v Greyhound Lines, Inc.*, 88 AD3d 980, 981), lack of intent to abandon the action, or lack of prejudice to defendants (*see Sierra R. v Jamaica Hosp. Med. Ctr.*, 101 AD3d 701, 703).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1412

KA 14-01914

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERECK M. CATHY, DEFENDANT-APPELLANT.

JAMES S. KERNAN, PUBLIC DEFENDER, LYONS (DAVID M. PARKS OF COUNSEL), FOR DEFENDANT-APPELLANT.

RICHARD M. HEALY, DISTRICT ATTORNEY, LYONS (BRUCE A. ROSEKRANS OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Wayne County Court (Daniel G. Barrett, J.), dated October 1, 2014. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.), defendant contends that County Court erred in calculating his risk level, and that he was entitled to a downward departure from his presumptive risk level. We reject those contentions.

Contrary to defendant's contention, the court properly assessed 15 points for defendant's drug and alcohol use under risk factor 11. According to the SORA 2006 Risk Assessment Guidelines and Commentary (Guidelines), that factor "focuses on the offender's history of [substance] abuse and the circumstances at the time of the offense" (*id.* at 15). "[T]he fact that alcohol was not a factor in the underlying offense is not dispositive inasmuch as the [G]uidelines further provide that '[a]n offender need not be abusing alcohol or drugs at the time of the instant offense to receive points in this category' " (*People v Faul*, 81 AD3d 1246, 1248). In addition, although we agree with defendant that the court erred in calculating his total point score, the correct total of 100 points would still yield a presumptive level two assessment. We have considered defendant's further contentions with respect to the court's point assessments, and we conclude that they are without merit. Thus, the court properly concluded that defendant is a presumptive level two risk.

Furthermore, the court did not err in denying defendant's request for a downward departure from that level inasmuch as defendant "failed to establish by a preponderance of the evidence any ground for a downward departure from his risk level" (*People v Gillotti*, 119 AD3d 1390, 1391; *see People v Martinez-Guzman*, 109 AD3d 462, 463, *lv denied* 22 NY3d 854). Defendant is correct that "[a] court may choose to downwardly depart from the presumptive risk assessment level 'in an appropriate case and in those instances where (i) the victim's lack of consent is due only to inability to consent by virtue of age and (ii) scoring 25 points [for sexual contact with the victim, risk factor 2] results in an over-assessment of the offender's risk to public safety' " (*People v Fryer*, 101 AD3d 835, 836, *lv denied* 20 NY3d 859, quoting Guidelines, at 9). Here, however, based on defendant's repeated sexual contact with a person he knew to be less than the age of consent, resulting in her becoming pregnant, and his lack of remorse, it cannot be said that the 25 points assessed for sexual contact with the victim "result[ed] in an over-assessment" of defendant's risk to public safety (*id.*; *see People v Sawyer*, 78 AD3d 1517, 1518, *lv denied* 16 NY3d 704).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1413

KA 14-01681

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAVID JACKSON, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered September 5, 2014. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act ([SORA] Correction Law § 168 *et seq*.). Contrary to defendant's contention, Supreme Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse. That assessment is supported by the reliable hearsay contained in the presentence report and the case summary, and defendant admitted at the SORA hearing that he had a history of drug abuse (*see People v Okafor*, 117 AD3d 1579, 1580, *lv denied* 24 NY3d 902; *People v Ramos*, 41 AD3d 1250, 1250, *lv denied* 9 NY3d 809). Defendant's purported abstinence while incarcerated "is not necessarily predictive of his behavior when [he is] no longer under such supervision" (*People v Lowery*, 93 AD3d 1269, 1270, *lv denied* 19 NY3d 807 [internal quotation marks omitted]; *see People v Green*, 104 AD3d 1222, 1223, *lv denied* 21 NY3d 860; *Ramos*, 41 AD3d at 1250).

We reject defendant's further contention that the People failed to present clear and convincing evidence to support the assessment of 20 points under risk factor 7, i.e., that the victim was a stranger. The People "presented evidence establishing that the victim . . . did not know [defendant's] legal name, and knew no other personal information about him" (*People v Lewis*, 45 AD3d 1381, 1381, *lv denied* 10 NY3d 703). The victim gave a general description to the police of the man who raped her, and defendant was not identified as a

suspect until two years later, when a search of the New York State DNA Index System resulted in a match between a DNA specimen taken from defendant and a semen specimen found on slides taken from the victim as part of her rape kit. Defendant's assertion during his presentence investigation that he had met the victim at a "drug house," without more, does not establish that they were acquaintances (*see generally People v Odum*, 101 AD3d 1693, 1693, *lv dismissed* 20 NY3d 1094).

Finally, contrary to defendant's contention, the court properly assessed 15 points under risk factor 12 for defendant's failure to accept responsibility and expulsion from treatment. Defendant reported during his presentence investigation that the sexual relations with the victim were consensual, thus establishing his failure to accept responsibility (*see People v Urbanski*, 74 AD3d 1882, 1883, *lv denied* 15 NY3d 707; *People v Baker*, 57 AD3d 1472, 1473, *lv denied* 12 NY3d 706). In addition, the court "properly relied on the case summary . . . in finding that the defendant refused or was expelled from[] sex offender treatment" (*People v Murphy*, 68 AD3d 832, 833, *lv dismissed* 14 NY3d 812; *see People v Guzman*, 96 AD3d 1441, 1442, *lv denied* 19 NY3d 812). The case summary stated that defendant was removed from sex offender treatment on two occasions for disciplinary reasons, and has since refused to participate in the program.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1414

KA 13-00674

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LASHAWN RHODAFOX, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (John H. Crandall, A.J.), rendered January 24, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), defendant contends that County Court erred in refusing to suppress a handgun seized from his bedroom. We reject that contention. The record establishes that probation officers of an individual with whom defendant shared his residence conducted a warrantless search of the residence, and that a police officer had entered the residence after being notified that probation officers had discovered evidence of illegal drugs. The handgun was seized during the subsequent execution of a search warrant obtained by the police. Contrary to defendant's contention, the court properly concluded that there was probable cause for the issuance of the warrant based on information obtained by the police independent of the police officer's unlawful entry into defendant's bedroom during the warrantless search (*see People v Arnau*, 58 NY2d 27, 33, *cert denied* 468 US 1217). We likewise reject defendant's contention that there was an insufficient basis for issuance of the warrant to search the entire residence, including his bedroom. We conclude that "[t]he information in the [search warrant] application was indicative of an ongoing drug operation at defendant's residence, and thus the application 'established probable cause to believe that a search of defendant's residence would result in evidence of drug activity' " (*People v*

Casolari, 9 AD3d 894, 895, *lv denied* 3 NY3d 672).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1415

KA 11-02499

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JERROD A. PUGH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE ABBATOY LAW FIRM, PLLC (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 22, 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 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]). The charges arose from an incident in which defendant and an accomplice entered a nail salon wearing black masks, and the accomplice pointed a gun at the salon owner's head while defendant guarded the door and prevented the occupants from escaping. Almost immediately after they entered the salon, the shop owner disarmed the accomplice, and defendant and the accomplice fled. It was undisputed at trial that defendant never handled the weapon.

Contrary to defendant's contention, the evidence is legally sufficient to support the conviction inasmuch as there is a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial" (*People v Bleakley*, 69 NY2d 490, 495). We conclude that the jury reasonably could have found " 'that defendant, acting with the mental culpability required for the commission of the crime, intentionally aid[ed] another in the conduct constituting the offense' " (*People v Trinidad*, 107 AD3d 1432, 1433, *lv denied* 21 NY3d 1046; *see* Penal Law § 20.00; *People v Witherspoon*, 300 AD2d 605, 605, *lv denied* 99 NY2d 634). We further conclude that the evidence is legally sufficient to establish that defendant jointly possessed the accomplice's loaded firearm (*see People v Velasquez*, 44 AD3d 412, 412, *lv denied* 9 NY3d 1040).

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1416

KA 12-02176

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY COOPER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered November 2, 2012. The judgment convicted defendant, upon a jury verdict, of attempted robbery in the first degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [4]) and assault in the second degree (§ 120.05 [2]). According to the trial testimony of the victim's sister, who was in the passenger seat of the victim's vehicle when the victim was engaged in the sale of marihuana to the codefendant, the codefendant held a gun to the victim's head. The victim's sister, who was screaming, then saw defendant at the passenger side of the vehicle. She testified that, when she exited the vehicle, which was parked under a street light, she saw that defendant was holding a knife, and she and defendant looked directly at each other while inches apart before she ran down the street. The victim's sister saw defendant stab the victim numerous times. Defendant was arrested when the victim's sister notified the prosecutor at the codefendant's preliminary hearing that the man who stabbed her brother was in the hall.

A police witness testified at trial that the victim's sister was unable to provide any identifying information when interviewed after the crimes occurred. The victim's sister admitted that she and the victim lied to the police regarding the location of the crime, and she stated that she did not tell police that the victim was selling marihuana when the crime occurred because she is the mother of four children and did not want to be connected to a drug sale. She

explained that her brother had picked her up from work where she had worked a 16-hour double shift and that he received a call on his cell phone while he was taking her home. Instead of taking her home, however, he proceeded to meet the caller to sell marihuana.

The victim refused to testify at trial, and Supreme Court held the victim in criminal contempt of court based upon that refusal, and sentenced him to 30 days' incarceration (*see* Judiciary Law § 750 [A] [3]; *People v Sweat,* 24 NY3d 348, 353-354). Contrary to defendant's contention, the court did not abuse its discretion in refusing to give a missing witness charge with respect to the victim. Although the victim was in the courtroom, he was "still . . . unavailable within the meaning of the [missing witness] rule" based upon his refusal to testify (*People v Savinon,* 100 NY2d 192, 198).

Contrary to defendant's contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson,* 9 NY3d 342, 349), we conclude that the verdict, which is based primarily upon the testimony of a single eyewitness, is not against the weight of the evidence. Because we conclude that a different verdict would not have been unreasonable, we have reviewed the record and independently assessed the evidence (*see People v Delamota,* 18 NY3d 107, 116-117; *People v Bleakley,* 69 NY2d 490, 495). Although the victim's sister testified that she gave the police information regarding a physical description, the police witness testified that she was unable to do so. Nevertheless, the victim's sister "never wavered in her testimony" regarding the events or her identification of defendant (*People v Calabria,* 3 NY3d 80, 82). When she saw defendant in the hall outside of the courtroom where she had attended the codefendant's preliminary hearing, she promptly alerted the prosecutor. The victim's sister testified that, when she exited the vehicle, she was inches from defendant in well-lit conditions, albeit briefly and during a very stressful situation; she testified that she and defendant looked directly at each other and she noted his eyes and that she was taller than defendant. The police witness testified that defendant is 5 feet 5 inches tall and the victim's sister testified that she is 5 feet 9 inches tall. The victim's sister testified on cross-examination that she would never forget the faces of the men who injured her brother because she thought she and her brother would be killed that night. Giving "[g]reat deference . . . to the [jury's] opportunity to view the witness[ ], hear the testimony and observe [her] demeanor" (*Bleakley,* 69 NY2d at 495), we perceive no basis to substitute our credibility determination for that of the jury and conclude that the "jury was justified in finding that guilt was proven beyond a reasonable doubt" (*Delamota,* 18 NY3d at 117).

We reject defendant's further contention that he was denied a fair trial based on the People's failure to provide the report from testing DNA evidence in a timely manner (*see* CPL 240.20 [1] [c]). The court advised the jury of the contents of the report, which excluded defendant and the codefendant as donors of the DNA and determined that all DNA collected came from a single male donor. Furthermore, the reports were admitted in evidence at defendant's request. Where, as

here, the People's violation of their obligation did not substantially prejudice defendant, reversal is not required (*see People v Watson,* 213 AD2d 996, 997, *lv denied* 86 NY2d 804).

Defendant failed to preserve for our review his contention that he was denied his statutory right to a speedy trial inasmuch as he failed to make a motion to dismiss the indictment on the ground that the People were not ready to proceed to trial within six months (*see* CPL 30.30 [1] [a]). In any event, the record is not sufficient for us to review the contention. Because "the applicability of various exclusions is debatable" (*People v Brunner,* 16 NY3d 820, 821), and the record does not clearly support defendant's contention, we likewise reject defendant's further contention that he was denied effective assistance of counsel based upon defense counsel's failure to make a motion to dismiss the indictment on that ground (*cf. People v Clermont,* 22 NY3d 931, 932-934). To the extent that defendant's contention concerning ineffective assistance of counsel involves matters that are outside the record on appeal, they must be raised by way of a motion pursuant to CPL 440.10 (*see generally People v Sweet,* 98 AD3d 1252, 1253, *lv denied* 20 NY3d 1015).

By failing to object to certain remarks made by the prosecutor during summation, defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see People v Brown,* 120 AD3d 1545, 1545, *lv denied* 24 NY3d 1082). In any event, we conclude that any improper remarks made by the prosecutor did not deny defendant a fair trial (*see People v Hendrix,* 132 AD3d 1348, 1348). We also reject defendant's contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged instances of prosecutorial misconduct during summation and failure to obtain an expert regarding eyewitness identification. Because the alleged improper remarks did not deny defendant a fair trial, he was not denied effective assistance of counsel based upon defense counsel's failure to object to those remarks (*see id.*). With respect to the failure of defense counsel to obtain expert testimony regarding eyewitness identification, defendant has failed to demonstrate the " 'absence of strategic or other legitimate explanations for counsel's alleged shortcoming[]' " (*People v Stanley,* 108 AD3d 1129, 1130, *lv denied* 22 NY3d 959). We note that there were two eyewitnesses, i.e., the victim and his sister, but only the victim's sister testified. Defense counsel cross-examined the victim's sister regarding her ability to view defendant, her state of exhaustion because she had worked 16 hours, the stress of the situation, and her failure to provide the police with any identifying information, in order to establish her inability to provide an accurate identification of defendant as the man who attacked her brother with a knife. Further, the court gave the jury an expanded charge on single-witness identification at defense counsel's request.

Finally, the sentence is not unduly harsh or severe.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1417

KA 14-00475

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH HARRIS, DEFENDANT-APPELLANT.

CHARLES J. GREENBERG, AMHERST, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Livingston County Court (Dennis S. Cohen, J.), rendered February 27, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree and attempted promoting prison contraband in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating that part of the plea of guilty to attempted promoting prison contraband in the first degree and as modified the judgment is affirmed and the matter is remitted to Livingston County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a weapon in the third degree (Penal Law §§ 110.00, 265.02 [1]), and attempted promoting prison contraband in the first degree (§§ 110.00, 205.25 [2]). Defendant was charged in an eight-count indictment with a series of charges, and he pleaded guilty to those two crimes as lesser included offenses of the crimes charged in the third and eighth counts of the indictment, respectively.

Defendant failed to preserve for our review his contention that his guilty plea was not entered knowingly, voluntarily and intelligently (*see People v Darling*, 125 AD3d 1279, 1279, *lv denied* 25 NY3d 1071), and we conclude that, to the extent he pleaded guilty to attempted criminal possession of a weapon, that part of his plea does not fall within the narrow exception to the preservation requirement such that County Court had a duty to inquire further into the voluntariness of the plea with respect to that crime (*see People v Lopez*, 71 NY2d 662, 666; *Darling*, 125 AD3d at 1279). We agree with defendant, however, that the plea of guilty falls within that exception to the extent defendant pleaded guilty to attempted promoting prison contraband. Although “no factual colloquy was required inasmuch as defendant pleaded guilty to a lesser included

offense" (*People v Thelbert*, 17 AD3d 1049, 1049), here, defendant expressly stated during the colloquy that he did not knowingly possess contraband, did not attempt to introduce any contraband into the jail, and did not intend to do so. This negated an element of the crime of attempted promoting prison contraband in the first degree, which requires, inter alia, that he "knowingly and unlawfully makes, obtains or possesses any dangerous contraband" (Penal Law § 205.25 [2]). Thus, defendant's denials created "that rare case . . . where the defendant's recitation of the facts underlying the crime pleaded to clearly casts significant doubt upon the defendant's guilt or otherwise calls into question the voluntariness of the plea[. Consequently,] the trial court [had] a duty to inquire further to ensure that defendant's guilty plea [was] knowing and voluntary" (*Lopez*, 71 NY2d at 666). The court having failed to do so, we vacate that part of the plea of guilty to attempted promoting prison contraband and remit the matter to County Court for further proceedings on count eight of the indictment.

We note, however, that the People have been deprived of the benefit of their bargain. Thus, upon remittal, "the court should entertain a motion by the People, should the People be so disposed, to vacate the plea . . . in its entirety" (*People v Irwin*, 166 AD2d 924, 925; *see People v Speed*, 13 AD3d 1083, 1084, *lv denied* 5 NY3d 795; *see generally People v Farrar*, 52 NY2d 302, 307-308).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1419

KA 09-02477

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. JONES, DEFENDANT-APPELLANT.

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

SANDRA DOORLEY, DISTRICT ATTORNEY, ROCHESTER (ROBERT J. SHOEMAKER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Robert B. Wiggins, A.J.), rendered September 30, 2009. The judgment convicted defendant, upon a jury verdict, of attempted rape in the first degree, attempted criminal sexual act in the first degree and assault in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law and as a matter of discretion in the interest of justice and a new trial is granted.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of attempted rape in the first degree (Penal Law §§ 110.00, 130.35 [1]), attempted criminal sexual act in the first degree (§§ 110.00, 130.50 [1]) and assault in the second degree (§ 120.05 [6]), defendant contends that reversal is required based on pervasive prosecutorial misconduct on summation. We agree.

We note at the outset that, although defendant failed to preserve his contention for our review with respect to all but one alleged instance of prosecutorial misconduct (*see* CPL 470.05 [2]), we exercise our power to review defendant's contention with respect to the remaining instances as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Griffin*, 125 AD3d 1509, 1510). On summation, the prosecutor repeatedly invoked a "safe streets" argument (*see People v Tolliver*, 267 AD2d 1007, 1007, *lv denied* 94 NY2d 908), even after Supreme Court sustained defense counsel's objection to the prosecutor's use of that argument; denigrated the defense by calling defense counsel's arguments "garbage," "smoke and mirrors," and "nonsense" intended to distract the juror's focus from the "atrocious acts" that defendant committed against the victim (*see People v Morgan*, 111 AD3d 1254, 1255; *People v Spann*, 82 AD3d 1013, 1015; *People v Brown*, 26 AD3d 392, 393); improperly characterized the defense as being based on a "big

conspiracy" against defendant by the prosecutor and the People's witnesses (*see People v Cowan*, 111 AD2d 343, 345, *lv denied* 65 NY2d 978); and denigrated the fact that defendant had elected to invoke his constitutional right to a trial (*see People v Rivera*, 116 AD2d 371, 373). Perhaps most egregiously, given that "the potential danger posed to defendant when DNA evidence is presented as dispositive of guilt is by now obvious," the prosecutor engaged in misconduct when she mischaracterized and overstated the probative value of the DNA evidence in this case (*People v Wright*, 25 NY3d 769, 783).

We recognize, of course, that "[r]eversal is an ill-suited remedy for prosecutorial misconduct" (*People v Galloway*, 54 NY2d 396, 401). It is nevertheless mandated when the conduct of the prosecutor "has caused such substantial prejudice to the defendant that he [or she] has been denied due process of law. In measuring whether substantial prejudice has occurred, one must look at the severity and frequency of the conduct, whether the court took appropriate action to dilute the effect of that conduct, and whether review of the evidence indicates that without the conduct the same result would undoubtedly have been reached" (*People v Mott*, 94 AD2d 415, 419; *see Griffin*, 125 AD3d at 1511). In view of the substantial prejudice caused by the prosecutor's misconduct in this case, including the fact that the evidence of guilt is less than overwhelming (*see Griffin*, 125 AD3d at 1512), we agree with defendant that reversal is required.

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

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1420

KA 11-02608

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAWN D. WEEZORAK, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER, THE ABBATOY LAW FIRM, PLLC (DAVID M. ABBATOY, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Monroe County (Daniel J. Doyle, J.), rendered October 21, 2011. The judgment convicted defendant, after a nonjury trial, of overdriving, torturing and injuring animals in violation of Agriculture and Markets Law § 353.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of overdriving, torturing and injuring animals (Agriculture and Markets Law § 353). The charges arose from an incident in which defendant punched his dog and held its head underwater in a bathtub, after the dog excreted in defendant's home. Contrary to defendant's contention, viewing the evidence in light of the elements of the crime in this nonjury trial, we conclude that "an acquittal would have been unreasonable . . . , and thus the verdict is not against the weight of the evidence" (*People v Kreutter*, 121 AD3d 1534, 1535-1536, *lv denied* 25 NY3d 990). We conclude that defendant abandoned his further contention that Supreme Court erred in refusing to suppress the dog's exhumed remains because the warrantless search was illegal. Although defendant initially moved to suppress the evidence on that ground, he expressly limited the scope of the suppression hearing in his written closing statement following the hearing to the custodial interrogation issue, and he also failed to seek a ruling on that part of his omnibus motion in which he argued that the search and seizure was illegal (*see People v Britton*, 113 AD3d 1101, 1102, *lv denied* 22 NY3d 1154; *see generally People v Adams*, 90 AD3d 1508, 1509, *lv denied* 18 NY3d 954).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1422

CAF 14-00454

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

IN THE MATTER OF RAMEL H.

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

TENESE T., RESPONDENT-APPELLANT.

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

JOHN HERBOWY, UTICA, FOR PETITIONER-RESPONDENT.

WILLIAM L. KOSLOSKY, ATTORNEY FOR THE CHILD, UTICA.

Appeal from an order of the Family Court, Oneida County (Randal B. Caldwell, J.), entered March 5, 2014 in a proceeding pursuant to Social Services Law § 384-b. The order revoked a suspended judgment and terminated the parental rights of respondent.

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

Memorandum: In this permanent neglect proceeding, Family Court entered a suspended judgment following respondent mother's admission to permanent neglect of the subject child. The court, inter alia, placed the child in foster care and issued an order of supervision directing the mother to comply with certain terms and conditions of the suspended judgment. Prior to the scheduled termination of the suspended judgment, the court released the child from the foster care placement and ordered him to be returned to the mother's care, but directed that the suspended judgment and order of supervision continue and that the mother comply with its terms until it expired. Petitioner thereafter moved to revoke the suspended judgment, and the mother appeals from an order that, among other things, granted petitioner's motion and terminated her parental rights with respect to the subject child.

The mother initially contends that, by terminating the subject child's placement in foster care and returning him to her custody, the court thereby also terminated the suspended judgment, which in turn divested the court of jurisdiction over the petition to terminate her parental rights. Even assuming, arguendo, that the mother preserved her contention for our review (*see generally Matter of Imani J.*, 29 AD3d 467, 467, *lv denied* 7 NY3d 842, *cert denied* 549 US 1228), we conclude that the applicable statute provides that, after placing a

child in foster care, "the court shall maintain jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection or services have expired" (Family Ct Act § 1088). Here, the order of supervision had not expired, and thus her contention is without merit. In addition, the mother's contention is belied by the record, which reflects that, when the court released the child from foster care to the mother's custody, it unequivocally stated that "the prior order that [the court] just referenced will continue[;] that suspended judgment will run through November 1st of this year with the terms and conditions as set forth in that order." The court also instructed the mother that she will "need to abide by the terms and conditions" of the prior order. Consequently, the record establishes that the court did not terminate the suspended judgment (*see generally Matter of Christopher G. [Priscilla H.]*, 82 AD3d 1549, 1550-1551).

We reject the mother's further contention that the court erred in revoking the suspended judgment and terminating her parental rights. Where petitioner establishes "by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Ronald O.*, 43 AD3d 1351, 1352; *see* Family Ct Act § 633 [f]; *Matter of Terry L.G.*, 6 AD3d 1144, 1144). Here, the court properly concluded that the mother violated numerous terms of the suspended judgment, that "she was unable to overcome the specific problems that led to the removal of the child from her home" (*Matter of Erie County Dept. of Social Servs. v Anthony P.*, 45 AD3d 1384, 1384), and that it is in the child's best interests to terminate the mother's parental rights (*see Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483; *Matter of Christopher J.*, 63 AD3d 1662, 1662, *lv denied* 13 NY3d 706).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1423

CAF 15-00146

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

IN THE MATTER OF ISIDRO FIGUEROA, JR.,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANNETTE FIGUEROA, RESPONDENT-RESPONDENT.

LEGAL ASSISTANCE OF WESTERN NEW YORK, INC., GENEVA (MOLLIE A. DAPOLITO OF COUNSEL), FOR PETITIONER-APPELLANT.

CECILY G. MOLAK, LYONS, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Wayne County (John B. Nesbitt, J.), entered March 25, 2014 in a proceeding pursuant to Family Court Act article 4. The order affirmed the order of the Support Magistrate and denied the objections of petitioner to that order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Wayne County, for a new hearing.

Memorandum: Petitioner father appeals from an order denying his objections to the order of the Support Magistrate, who denied in part his petitions seeking a downward modification of his child support obligation. The Support Magistrate imputed income to the father in determining his child support obligation. "[I]n determining a party's child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential" (*Belkhir v Amrane-Belkhir*, 118 AD3d 1396, 1397 [internal quotation marks omitted]; *see Matter of Hurd v Hurd*, 303 AD2d 928, 928-929). We agree with the father that, in imputing income to him, the Support Magistrate erred in relying on facts that were not in evidence (*see Matter of Mentor v DeLorme*, 17 AD3d 1012, 1012-1013). We therefore reverse the order and remit the matter to Family Court for a new hearing. In light of our determination, we do not consider the father's remaining contentions.

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court

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

1424

CA 15-00517

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

BAC HOME LOANS SERVICING, LP, FORMERLY KNOWN AS COUNTRYWIDE HOME LOANS SERVICING LP,
PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

KENNETH MAESTRI, ALSO KNOWN AS KENNETH V. MAESTRI,
DEFENDANT-RESPONDENT.

FRENKEL LAMBERT WEISS WEISMAN & GORDON, LLP, BAY SHORE (MICHELLE MACCAGNANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 3, 2014. The order denied the motion of plaintiff to vacate an order dismissing the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order dated December 13, 2012 is vacated and the complaint is reinstated.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order that denied its motion seeking to vacate an order dated December 13, 2012, in which Supreme Court sua sponte dismissed the complaint as abandoned pursuant to CPLR 3215 (c). We agree with plaintiff that the court erred in denying the motion. The court erred in dismissing the complaint sua sponte inasmuch as "[u]se of the [sua sponte] power of dismissal must be restricted to the most extraordinary circumstances, and no such extraordinary circumstances are present in this case" (*Midfirst Bank v Bellinger*, 117 AD3d 1520, 1522 [internal quotation marks omitted]; *see HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 839). Indeed, a plaintiff has not abandoned a foreclosure action where, as here, the plaintiff has taken the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference within one year of the defendant's default (*see HSBC Bank USA, N.A.*, 124 AD3d at 839; *Klein v St. Cyprian Props., Inc.*, 100 AD3d 711, 712).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court