SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

FEBRUARY 11, 2016

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. HENRY J. SCUDDER, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

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

243/14

CA 13-01608

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

BOARD OF TRUSTEES, FOR AND ON BEHALF OF
SERVICE EMPLOYEES BENEFIT FUND,
PLAINTIFF-RESPONDENT,

V ORDER

BONADIO & CO., LLP, FORMERLY KNOWN AS
LOGUIDICE & KAMIDE, C.P.A., PLLC, AND
JOHN/JANE DOES 1-7, INDIVIDUALLY AND AS
EMPLOYEES, AGENTS, REPRESENTATIVES AND/OR
SERVANTS OF BONADIO & CO., LLP,
DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, ALBANY (JONATHAN M. BERNSTEIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (STEVEN W. WILLIAMS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Brian F. DeJoseph, J.), entered November 14, 2012. The order, insofar as appealed from, denied in part the motion of defendants to dismiss plaintiff's first amended complaint.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties and filed with the Court on December 11, 2015,

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1131

KA 12-01917

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DOUGLAS FARMER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered July 10, 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 criminally using drug paraphernalia in the second degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence, and as modified the judgment is affirmed, and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal 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]), criminal possession of a controlled substance in the fifth degree (§ 220.06 [5]), and two counts of criminally using drug paraphernalia in the second degree (§ 220.50 [2], [3]), defendant contends that County Court erred in refusing to suppress evidence seized by parole officers during the search of his apartment because the search was unlawful. We reject that contention. We conclude that "the record supports the court's determination that the search was 'rationally and reasonably related to the performance of the parole officer's duty' and was therefore lawful" (*People v Johnson*, 94 AD3d 1529, 1531-1532, *lv denied* 19 NY3d 974, quoting *People v Huntley*, 43 NY2d 175, 181). Indeed, "defendant's parole officer testified that he alone made the decision to include defendant on the list of parolees to be searched, and that he was motivated to do so by legitimate reasons related to defendant's status as a parolee" (*id.* at 1532). His testimony established that defendant's placement on a search detail list was motivated by "information supplied by [a confidential informant that] provided [defendant's parole officer with] a reasonable basis to believe that defendant was selling drugs" (*People v Felder*, 272 AD2d 884, 884, *lv*

denied 95 NY2d 905; *see People v Nappi*, 83 AD3d 1592, 1593-1594, *lv denied* 17 NY3d 820; *People v Johnson*, 54 AD3d 969, 970, *lv denied* 16 NY3d 798). To the extent that defendant challenges that testimony, we "afford deference to the court's determination that the parole officer's testimony was credible" (*Johnson*, 94 AD3d at 1532), and we conclude that there is no basis on this record to disturb the court's determination. The court thus properly determined that "[t]he search, initiated by the parole officer based upon information that defendant was selling drugs . . . , was substantially related to the performance of the parole officer's duty to detect and prevent parole violations" (*People v Smith*, 234 AD2d 1002, 1002, *lv denied* 89 NY2d 988).

Contrary to defendant's further contention, inasmuch as the search was initiated and conducted by the Division of Parole, and was in furtherance of parole purposes and related to the parole officers' duties, the fact that a police officer provided the parole officers with assistance in gaining entry to the apartment in order to facilitate the search does not demonstrate that the parole officers acted as agents or conduits for the police (*see People v Vann*, 92 AD3d 702, 703, *lv denied* 19 NY3d 868; *see also Johnson*, 94 AD3d at 1532; *Johnson*, 54 AD3d at 970; *People v Peterson*, 6 AD3d 363, 364, *lv denied* 3 NY3d 710). Indeed, we conclude that "the assistance of police officers at the scene did not render the search a police operation" (*Vann*, 92 AD3d at 703), and the record does not establish that the entry into defendant's apartment was otherwise unlawful.

Defendant also contends that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence on the ground that the People failed to show constructive possession of the drugs and drug paraphernalia by demonstrating that defendant " 'had dominion and control over the area where the contraband was found' " (*People v Davis*, 101 AD3d 1778, 1779, *lv denied* 20 NY3d 1060; *see* Penal Law § 10.00 [8]). We conclude that defendant's contentions are without merit. Each of the crimes with which defendant was charged required proof of knowing possession (*see* Penal Law §§ 220.06 [5]; 220.16 [1]; 220.50 [2], [3]). Under a theory of constructive possession, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573). Nonetheless, "exclusive access is not required" (*People v Nichol*, 121 AD3d 1174, 1177, *lv denied* 25 NY3d 1205; *see People v Torres*, 68 NY2d 677, 679; *People v Fuller*, 168 AD2d 972, 973, *lv denied* 78 NY2d 922). Here, the People established that defendant was living in an efficiency apartment as the sole tenant, and that his parole officer had conducted various home visits with defendant at that apartment (*see Davis*, 101 AD3d at 1779-1780). Despite defendant's testimony that other people had access to the apartment, we conclude that the circumstances here provided the jury with "a sufficient basis . . . to conclude that . . . defendant [was] guilty of constructive possession of [the] contraband found within the apartment" (*Torres*, 68 NY2d at 679). Thus, viewed in the light most favorable to the People, the evidence is legally sufficient to establish that he had dominion and control over the area where the

contraband was found (*see Davis*, 101 AD3d at 1780; *see generally People v Bleakley*, 69 NY2d 490, 495) and, viewing the evidence in light of the elements of these possessory crimes in this jury trial (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see Bleakley*, 69 NY2d at 495; *Davis*, 101 AD3d at 1780). To the extent that defendant contends that the drugs and drug paraphernalia were "planted" in his apartment, we note that "[i]t is well settled that issues of credibility are best determined by the jury, given its opportunity to observe the demeanor of the witnesses" and, here, "[i]t cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Blocker*, 281 AD2d 943, 944, *lv denied* 96 NY2d 826; *see generally Bleakley*, 69 NY2d at 495).

We agree with defendant, however, that the court abused its discretion in sentencing him as a second felony drug offender without affording him the opportunity to substantiate his constitutional challenge to the predicate felony conviction with the transcripts of the proceeding underlying that conviction and without holding a hearing for that purpose. Inasmuch as defendant did not controvert the existence of the predicate felony conviction, it was incumbent upon defendant "to allege and prove facts to establish his claim that the conviction was unconstitutionally obtained" (*People v Konstantinides*, 14 NY3d 1, 15; *see* CPL 400.21; *People v Harris*, 61 NY2d 9, 15). The record establishes that defendant, who was proceeding pro se, alleged certain constitutional violations in writing, and repeatedly and timely requested the necessary transcripts in order to prepare his constitutional challenge. The court promised to obtain the transcripts for defendant, acknowledged on the scheduled hearing date its oversight in failing to act on that promise and, upon being challenged by defendant at a rescheduled hearing, ultimately admitted that, after months of adjournments, it had decided not to order the transcripts as it had previously promised. Although there is no requirement that a trial court obtain such transcripts on a defendant's behalf, we conclude that, under the circumstances of this case, the court should not have proceeded to sentencing without at least attempting to obtain the transcripts sought by defendant and providing defendant a hearing on his constitutional challenge to the predicate felony conviction (*see People v Gonzalez*, 108 AD2d 622, 624; *cf. People v Ruscito*, 206 AD2d 841, 842, *lv denied* 84 NY2d 872; *see also People v Zeoli*, 212 AD2d 935, 935, *lv denied* 85 NY2d 916). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to fulfill those steps before sentencing defendant. In light of our determination, we do not reach defendant's challenge to the severity of the sentence.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1306

CA 15-00965

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

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

V MEMORANDUM AND ORDER

MAKOTO WATANABE, PEOPLE OF THE STATE OF NEW YORK,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (KATERINA M. KRAMARCHYK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered August 27, 2013. The order, inter alia, denied that part of the motion of plaintiff seeking to substitute an affidavit of merit and amount due and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion to substitute, nunc pro tunc, a newly signed affidavit of merit and amount due in place of the affidavit of merit and amount due that was attached to plaintiff's initial application for an order of reference, and reinstating the complaint, and as modified the order is affirmed without costs.

Memorandum: In this mortgage foreclosure action, plaintiff appeals from an order that denied that part of its motion seeking to substitute an affidavit of merit and amount due, and dismissed the complaint. Plaintiff obtained a judgment of foreclosure and sale on the subject residential property in November 2008. Subsequent to entry of the judgment of foreclosure and sale, but before the subject property was sold, the Chief Administrative Judge issued Administrative Order 548/10 on October 20, 2010, which has since been amended by Administrative Order 431/11 (hereafter, Administrative Order). The Administrative Order requires a plaintiff's attorney in a residential mortgage foreclosure action to file an affirmation indicating that he or she communicated with a representative of the plaintiff, and that the representative informed the attorney that "he/she/they (a) personally reviewed [the] plaintiff's documents and records relating to [the] case for factual accuracy; and (b) confirmed the factual accuracy of the allegations set forth in the [c]omplaint and any supporting affidavits or affirmations filed with the [c]ourt, as well as the accuracy of the notarizations contained in the supporting documents filed therewith." The filing of such attorney

affirmation is mandatory (*see U.S. Bank N.A. v Eaddy*, 109 AD3d 908, 909; *LaSalle Bank, NA v Pace*, 100 AD3d 970, 970-971). Plaintiff had to replace its prior counsel with a new law firm in December 2011. Plaintiff's new attorneys were advised by plaintiff that it could not "confirm the proper execution and/or notarizations" of the affidavit of merit and amount due that was attached to plaintiff's initial application to Supreme Court for an order of reference. Plaintiff was able, however, to verify that the amount and allegations set forth were true and accurate, and thus plaintiff's new attorneys moved to substitute, nunc pro tunc, the original affidavit of merit and amount due with a new, substantively identical affidavit of merit and amount due, the execution and notarization of which could be confirmed as accurate by plaintiff as required by the Administrative Order. We agree with plaintiff that the court erred in denying its motion and in dismissing the complaint sua sponte, and we therefore modify the order accordingly.

" 'A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal' " (*Deutsche Bank Natl. Trust Co. v Meah*, 120 AD3d 465, 466). Here, we conclude that "[t]he fact that . . . plaintiff's [new] attorney[s] attempted to comply, in good faith, with an Administrative Order of the Chief Administrative Judge that did not exist at the time that the action was commenced, or at the time [the judgment of foreclosure and sale was granted], does not qualify as such an 'extraordinary circumstance' " that would support a sua sponte dismissal (*id.*). Indeed, "[n]othing in the Administrative Order[] requires the dismissal of an action merely because the plaintiff's attorney[s] discover[] that there was some irregularity or defect in a prior submission" (*id.*). Thus, contrary to the court's determination, we conclude that plaintiff is not "effectively required to commence an entirely new action" (*id.*).

We further conclude that the court erred in denying that part of plaintiff's motion seeking to substitute the affidavit of merit and amount due. "CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (*Eaddy*, 109 AD3d at 910; *see Matter of Tagliaferri v Weiler*, 1 NY3d 605, 606). In addition, "[p]ursuant to CPLR 5019 (a), a trial court has the discretion to correct an order or judgment which contains a mistake, defect, or irregularity not affecting a substantial right of a party" (*Eaddy*, 109 AD3d at 910 [internal quotation marks omitted]; *see Page v Page*, 39 AD3d 1204, 1205). Here, we conclude that the substitution of the original affidavit of merit and amount due with a new, substantively identical affidavit of merit and amount due was a ministerial amendment permitted by CPLR 2001 and CPLR 5019 (a) inasmuch as the change affected only plaintiff's ability to comply with the Administrative Order, and "[t]he attorney affirmation is not itself substantive evidence" (*LaSalle*, 100 AD3d at 971; *see generally Eaddy*, 109 AD3d at 910). We further conclude that "[n]o substantial right of [defendant Makoto Watanabe would] be affected by the court's substitution" (*Eaddy*, 109 AD3d at 910). Indeed, that defendant did not reside in the subject property when plaintiff commenced the

mortgage foreclosure action and the property was vacant at that time, and he never joined this action nor made any effort to contest the foreclosure.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1310

CA 15-01031

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

SANTOKH S. BADESHA, SUDARSHAN S. BAINS, BHOOPINDER S. MEHTA, HARBHAJAN S. PUREWAL, MAGHAR S. CHANA, RAJDEEP K. CHEEMA, AS MEMBERS OF BOARD OF TRUSTEES OF GURUDWARA OF ROCHESTER, AND GURUDWARA OF ROCHESTER, A CORPORATION ORGANIZED AND EXISTING UNDER RELIGIOUS CORPORATION LAW OF STATE OF NEW YORK, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

PARMINDER S. SOCH, MANDEEP (MAKHAN) SINGH, AJAY SINGH, PUSHPINDER ANEJA, GURRINDER S. BEDI, IN HIS CAPACITY AS A MEMBER OF EXECUTIVE COMMITTEE GURUDWARA OF ROCHESTER, DAMAPAUL SONDHI AND SANDEEP S. GREWAL, IN THEIR CAPACITIES AS PURPORTED AUDITORS OF GURUDWARA OF ROCHESTER, DEFENDANTS-APPELLANTS.

HARRIS BEACH PLLC, PITTSFORD (MICHAEL J. MASINO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

WOODS OVIATT GILMAN LLP, ROCHESTER (WARREN B. ROSENBAUM OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment (denominated decision) of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 14, 2014. The judgment, inter alia, declared that the Board of Trustees of Gurudwara of Rochester is a self-perpetuating board under article 9 of the Religious Corporations Law.

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

Memorandum: Plaintiffs commenced this action seeking, inter alia, judgment declaring that the Board of Trustees (Board) of plaintiff Gurudwara of Rochester (GOR) is a self-perpetuating board under article 9 of the Religious Corporations Law. Defendants, by their second counterclaim, sought judgment declaring, inter alia, that GOR is incorporated under article 10 of the Religious Corporations Law, and that the Board is not self-perpetuating and must be elected pursuant to the GOR constitution. When this case was previously before us on appeal, we affirmed an order denying plaintiffs' motion and defendants' cross motion for summary judgment (*Badesha v Soch*, 104

AD3d 1268). Supreme Court thereafter conducted a nonjury trial and granted, inter alia, judgment in favor of plaintiffs for the relief sought in the complaint. We affirm.

It is undisputed that, although GOR was incorporated in 1983 under the Not-for-Profit Corporation Law, it was intended to be a religious corporation and operated as such. Thus, it "may be considered a 'de facto' religious corporation" (*Temple-Ashram v Satyanandji*, 84 AD3d 1158, 1160). The Board, however, did not comply with the formalities for incorporation under article 9 of the Religious Corporations Law, nor did it meet the requirements for incorporation under article 10 of the statute.

The focus of the parties' dispute at trial was whether GOR was intended to, and did in fact, operate with a self-perpetuating board pursuant to article 9 or an elected board pursuant to article 10. Contrary to defendants' contention, the record supports the court's conclusion that the type of governance intended and effectuated by the founders of GOR was a self-perpetuating board and, thus, GOR operated as a de facto religious corporation under article 9 of the Religious Corporations Law (*see generally Matter of Venigalla v Nori*, 11 NY3d 55, 62, *rearg denied* 11 NY3d 774). Although GOR had a constitution that contemplated elections and democratic governance, the weight of the evidence supports the court's conclusion that the Board did not adhere to the requirements of the constitution in practice (*see id.*).

We reject defendants' further contention that they are entitled to a new trial based upon the court's allegedly erroneous evidentiary rulings. The court properly excluded testimony proffered by defendants concerning the tenets and principles of the Sikh religion, inasmuch as it was required to resolve the parties' dispute without inquiring into Sikh religious doctrine (*see Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 NY3d 282, 286-287). Testimony concerning an unrelated Sikh gurudwara was also properly excluded as having no relevance to the issue whether GOR is a religious corporation under article 9 or article 10 of the Religious Corporations Law (*see generally Morris v Patane*, 39 AD3d 1054, 1055).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1351

KA 11-02443

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CALVIN K. JOHNSON, DEFENDANT-APPELLANT.

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

CALVIN K. JOHNSON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Victoria M. Argento, J.), rendered October 6, 2011. The judgment convicted defendant, upon a jury verdict, of murder in the second degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed for murder in the second degree to an indeterminate term of incarceration of 15 years to life and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of one count each of murder in the second degree (Penal Law § 125.25 [1]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]). We reject defendant's contention that County Court erred in denying his request to charge the defense of justification. "A trial court must charge the factfinder on the defense of justification 'whenever there is evidence to support it' . . . Viewing the record in the light most favorable to the defendant, a court must determine whether any reasonable view of the evidence would permit the factfinder to conclude that the defendant's conduct was justified. If such evidence is in the record, the court must provide an instruction on the defense" (*People v Petty*, 7 NY3d 277, 284; *see People v Cox*, 92 NY2d 1002, 1004; *People v Hunt*, 244 AD2d 956, 957, *lv denied* 91 NY2d 926). Where deadly physical force is used, the evidence must establish that the defendant reasonably believed that he was in imminent danger of being subjected to deadly physical force, and that he had satisfied

his duty to retreat, or was under no such duty (*see People v Goetz*, 68 NY2d 96, 106; *see also* Penal Law § 35.15 [2]). Here, we conclude that there is no reasonable view of the evidence from which the factfinder could have found that defendant's actions were justified. It was undisputed that defendant came out of his mother's house and shot the shirtless, unarmed victim three times as the victim stood with a group of people outside the fence enclosing the front yard of the home. During his video-recorded interview with the police, which was received in evidence, defendant admitted that he never observed anyone in the victim's group using or about to use deadly physical force (*see People v Saenz*, 27 AD3d 379, 380, *lv denied* 7 NY3d 762).

We reject defendant's further contention that the court erred in denying his request to charge the defense of justification with respect to criminal possession of a weapon in the second degree (Penal Law § 265.03 [1] [b]). It is well settled that the defense of justification does not apply to that crime (*see People v Pons*, 68 NY2d 264, 265; *People v Almodovar*, 62 NY2d 126, 129-130).

We agree with defendant, however, that the sentence of an indeterminate term of incarceration of 25 years to life for the murder conviction is unduly harsh and severe under the circumstances of this case. This Court "has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range" (*People v Delgado*, 80 NY2d 780, 783; *see* CPL 470.15 [6] [b]). That "sentence-review power may be exercised, if the interest of justice warrants, without deference to the sentencing court" (*Delgado*, 80 NY2d at 783). As a result, we may "substitute our own discretion for that of a trial court which has not abused its discretion in the imposition of a sentence" (*People v Suitte*, 90 AD2d 80, 86; *see People v Patel*, 64 AD3d 1246, 1247). We conclude that a reduction in the sentence imposed on the murder count is appropriate under the circumstances presented here and, as a matter of discretion in the interest of justice, we therefore modify the judgment by reducing the sentence imposed on that count to an indeterminate term of incarceration of 15 years to life (*see* CPL 470.20 [6]).

We have considered the contentions in defendant's pro se supplemental brief and conclude that none requires reversal or further modification of the judgment.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1359

CA 15-01016

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

IN THE MATTER OF BROCKPORT STUDENT GOVERNMENT, WILLIAM MITCHELL, PRESIDENT OF BROCKPORT STUDENT GOVERNMENT, KENTON DECROSS, VICE PRESIDENT OF BROCKPORT STUDENT GOVERNMENT, AND ANDREW DOLE, TREASURER OF BROCKPORT STUDENT GOVERNMENT, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

STATE UNIVERSITY OF NEW YORK AT BROCKPORT, JOHN HALSTEAD, PRESIDENT OF SUNY BROCKPORT, KATY WILSON, VICE PRESIDENT OF ENROLLMENT MANAGEMENT AND STUDENT AFFAIRS OF SUNY BROCKPORT, JAMES WILLIS, VICE PRESIDENT FOR ADMINISTRATION AND FINANCE OF SUNY BROCKPORT, AND LEAH BARRETT, ASSOCIATE VICE PRESIDENT FOR STUDENT AFFAIRS OF SUNY BROCKPORT, RESPONDENTS-APPELLANTS.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

LAW OFFICES OF PULLANO & FARROW, PLLC, ROCHESTER (CHRISTIAN VALENTINO OF COUNSEL), FOR PETITIONERS-RESPONDENTS.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (Ann Marie Taddeo, J.), entered August 15, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted the petition in part.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by denying that part of the petition seeking to annul respondents' determination to the extent that respondents refused to certify that part of petitioners' proposed budget allocating $49,800 of mandatory student activity fees to employ a business manager, and as modified the judgment is affirmed without costs.

Memorandum: Petitioners, members of the SUNY Brockport student government (BSG), commenced this CPLR article 78 proceeding challenging respondents' determination to modify petitioners' proposed 2014-2015 budget for the allocation of mandatory student activity fees. BSG had submitted a budget that included a proposed allocation of approximately $50,000 to finance the renewal of an existing position, i.e., a personal business manager, to assist with BSG's

internal operations. Upon review of the budget, respondents determined that BSG's proposed budget allocation for a business manager was inconsistent "with the practices, policies, and procedures used by the rest of the [SUNY Brockport] campus" and that BSG's proposed $49,800 salary for a business manager was excessive and not consistent with, inter alia, other SUNY Brockport organizations. Respondents therefore replaced that allocation with an allocation for BSG to instead retain Brockport Auxiliary Services Corporation (BASC), which had offered to serve as BSG's business manager at a cost savings of approximately $20,000. Thereafter, respondents approved the modified budget, thereby requiring BSG to retain BASC as its business manager for the 2014-2015 academic year. BSG and its members filed the instant article 78 petition, asserting that respondents' refusal to certify the budget as submitted was arbitrary and capricious. Supreme Court found that under 8 NYCRR 302.14, respondents lacked the authority to limit who BSG hired and stated that "[t]he fact that some other student organizations are content with the services that BASC offers is not relevant to this discussion as long as the salary paid to BSG's business manager is not wholly out of proportion to the services rendered." The court determined that the proposed BSG salary was not "wholly out of proportion," reversed respondents' determination, and ordered that petitioners be allowed to retain a business manager of their choosing. We conclude that the court erred in determining that respondents' denial of BSG's budget allocation for a business manager was arbitrary and capricious, and we therefore modify the judgment accordingly.

Initially, we reject respondents' contention that the court applied the incorrect standard of review. "It is well established that '[j]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis' " (*Matter of Walker v State Univ. of N.Y. [Upstate Med. Univ.]*, 19 AD3d 1058, 1059, *lv denied* 5 NY3d 713). Here, although the court did not use the term "arbitrary and capricious" or "lacks a rational basis" in its judgment, we conclude that the court implicitly applied the correct standard (*cf. Matter of Restituyo v Berbary*, 278 AD2d 859, 859).

We reject respondents' further contention that it had authority to direct petitioners to retain BASC. There is no dispute that 8 NYCRR 302.14 specifically controls the approval, collection, and expenditure of mandatory student activity fees, and vests BSG with exclusive authority to propose budgets regarding the allocation of those funds. If a proposed budget complies with section 302.14 (c) (3), respondents "shall so certify" the budget as proposed by BSG (8 NYCRR 302.14 [c] [1] [i]). BSG is permitted to expend funds on "salaries for professional nonstudent employees of the student government to the extent that they are consistent with hiring practices and compensation rates of other campus-affiliated organizations" (8 NYCRR 302.14 [c] [3] [xiv]). The regulation contains no other restriction on the allocation of funds towards salaries other than the general requirement that any allocation must support the "benefit of the campus community" (8 NYCRR 302.14 [c] [3]). The plain language of the regulation does not support

respondents' position that it has the authority to compel BSG to hire BASC.

We agree with respondents, however, that the court erred in determining that their denial of BSG's budget allocation for a business manager was arbitrary and capricious. It is well established that "[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts . . . An agency's determination is entitled to great deference and, [i]f the [reviewing] court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Thompson v Jefferson County Sheriff John P. Burns*, 118 AD3d 1276, 1277 [internal quotation marks omitted]). Here, we conclude that respondents' discretionary determination to reject BSG's proposed $49,800 salary for a business manager which was based on a comparison of the "hiring practices and compensation rates of other campus-affiliated organizations" (8 NYCRR 302.14 [c] [3] [xiv]), is supported by a rational basis.

The remaining contentions raised by the parties are unpreserved and, in any event, are without merit.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1362

CA 15-00891

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

PRESBYTERIAN HOME FOR CENTRAL NY, INC.,
PLAINTIFF-RESPONDENT-APPELLANT,

V MEMORANDUM AND ORDER

MICHELLE GOREA THOMPSON, FORMERLY KNOWN AS
MICHELLE GOREA FAGA,
DEFENDANT-APPELLANT-RESPONDENT,
ET AL., DEFENDANTS.

RALPH W. FUSCO, UTICA, FOR DEFENDANT-APPELLANT-RESPONDENT.

FELT EVANS, LLP, CLINTON (JAY G. WILLIAMS, III, OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered February 13, 2015. The order, inter alia, granted the motion of plaintiff to compel disclosure, denied the cross motion of defendant Michelle Gorea Thompson, formerly known as Michelle Gorea Faga, for summary judgment, and denied the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action to recover a balance of $69,713.59 allegedly due for room, board, and nursing services it provided to Vivian Gorea, the now-deceased mother of defendant-appellant-respondent (defendant), between August 1, 2010, and Gorea's death on April 9, 2011. When Gorea was admitted to plaintiff's facility in November 2008, defendant signed, among other things, a "private pay agreement" naming her as Gorea's "responsible party" and obligating her to: (1) pay for Gorea's care from Gorea's resources; (2) not transfer Gorea's assets in a manner that would result in Gorea's ineligibility for Medicaid coverage; and (3) pay for Gorea's care if Medicaid coverage were denied "solely as a result of [defendant's] actions." It is undisputed that, at the time Gorea was admitted to plaintiff's facility, there was approximately $54,000 in a revocable trust owned by Gorea and that defendant was cotrustee of that trust. It is also undisputed that Gorea was found to be ineligible for Medicaid until October 2012 because of over $305,000 in "uncompensated" transfers from her accounts, including from the revocable trust, between July 2006 and January 2009.

After commencing this action, plaintiff moved to compel disclosure from defendant of, inter alia, records relating to the transfers made from the revocable trust. Defendant cross-moved for summary judgment dismissing the amended complaint against her in her individual capacity and as cotrustee of the revocable trust, contending, among other things, that a "gratuitous" payment of over $133,000 she made to plaintiff in August 2010 more than paid the outstanding account balance sought by plaintiff. Plaintiff subsequently moved for summary judgment on, inter alia, its cause of action for breach of contract against defendant, individually. Specifically, plaintiff sought in its motion a determination that defendant breached the private pay agreement when, in her capacity as cotrustee of the revocable trust, she used the $54,000 in the revocable trust at the time of Gorea's admission for purposes other than paying plaintiff, as well as damages in the amount due on Gorea's account. Supreme Court granted plaintiff's motion to compel disclosure and, upon defendant's stipulation, the court sua sponte granted plaintiff summary judgment against defendant in her capacity as executrix of Gorea's estate. The court denied the cross motion of defendant and motion of plaintiff for summary judgment. With respect to the cause of action alleging breach of the private pay agreement, the court found issues of fact whether defendant's August 2010 payment to plaintiff of over $133,000 "effectively reimbursed" plaintiff for the approximately $54,000 that was transferred from the revocable trust after Gorea's admission to plaintiff's facility. We affirm.

A "responsible party" for a nursing home patient may "be held personally liable for the cost of [a patient's] care if it [is] shown that [he or] she breached the terms of the agreement by impeding the nursing home from collecting its fees from the [patient's] funds or resources over which [he or she] exercised control" (*Sunshine Care Corp. v Warrick*, 100 AD3d 981, 982; *see Troy Nursing & Rehabilitation Ctr., LLC v Naylor*, 94 AD3d 1353, 1354-1356, *lv dismissed* 19 NY3d 1045). Here, we conclude that plaintiff established its prima facie entitlement to a determination that defendant breached the private pay agreement by demonstrating defendant's control over Gorea's resources, defendant's agreement to pay plaintiff from those resources, and the existence of approximately $54,000 in the revocable trust on the date Gorea was admitted, which could have been, but was not, used to pay plaintiff (*see Sunshine Care Corp.*, 100 AD3d at 982). The record thus establishes that defendant "accepted personal responsibility to utilize her access to [Gorea's] funds to pay for [Gorea's] care and then breached that agreement by failing to apply available assets to pay [Gorea's] nursing home bills" (*Troy Nursing & Rehabilitation Ctr.*, 94 AD3d at 1354-1355). We nevertheless conclude that the court properly denied the cross motion and motion with respect to the cause of action for breach of contract. Although plaintiff established that defendant breached the private pay agreement, neither party eliminated all triable issues of fact with respect to the amount of damages, if any, suffered by plaintiff as a result of defendant's breach. After breaching the private pay agreement, defendant made a payment to plaintiff of over $133,000 in August 2010, and we conclude that there are issues of fact whether that payment was made "gratuitously," as defendant contends, and compensated plaintiff for any damages flowing

from defendant's breach, or whether uncompensated transfers made by defendant from Gorea's accounts prior to Gorea's admission to plaintiff's facility were the sole cause of Gorea's Medicaid ineligibility. In the latter case, the private pay agreement would obligate defendant to pay plaintiff the outstanding account balance plaintiff now seeks, notwithstanding the payment made by defendant in August 2010.

Finally, we reject defendant's contention that disclosure with respect to Gorea's accounts has been rendered moot by the entry of a judgment against Gorea's estate.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1408

CA 15-00895

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

RICHARD REGAN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF GENEVA, CITY OF GENEVA POLICE DEPARTMENT, FRANK PANE, JEFF TRICKLER, JOHN CATELINE, ERIC HEIECK, MATTHEW D. HORN, COUNCIL 82 LAW ENFORCEMENT UNION, ENNIO CORSI, GREG CAREY, JEFF POTTER, DEFENDANTS-RESPONDENTS, ET AL., DEFENDANTS.

BOSMAN LAW FIRM, LLC, ROME (DANIEL W. FLYNN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (PHILLIP OSWALD OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CITY OF GENEVA, CITY OF GENEVA POLICE DEPARTMENT, FRANK PANE, JEFF TRICKLER, JOHN CATELINE, ERIC HEIECK AND MATTHEW D. HORN.

ENNIO CORSI, GENERAL COUNSEL, ALBANY (CHRISTINE CAPUTO GRANICH OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COUNCIL 82 LAW ENFORCEMENT UNION, ENNIO CORSI, GREG CAREY AND JEFF POTTER.

Appeal from an order and judgment (one paper) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered October 3, 2014. The order and judgment granted the motions of defendants City of Geneva, City of Geneva Police Department, Frank Pane, Jeff Trickler, John Cateline, Eric Heieck, Matthew D. Horn, Council 82 Law Enforcement Union, Ennio Corsi, Greg Cary and Jeff Potter to dismiss the amended complaint and dismissed the amended complaint against those defendants.

Now, upon the stipulation of discontinuance signed by the attorneys for plaintiff and for defendants Council 82 Law Enforcement Union, Ennio Corsi, Greg Carey, and Jeff Potter on July 31, 2015 and filed in the Oneida County Clerk’s Office on August 7, 2015,

It is hereby ORDERED that said appeal from said order and judgment insofar as it concerns defendants Council 82 Law Enforcement Union, Ennio Corsi, Greg Cary, and Jeff Potter is unanimously dismissed upon stipulation, and the order and judgment is modified on the law by denying in part the motion of defendants City of Geneva, City of Geneva Police Department, Frank Pane, Jeff Trickler, John

Cateline, Eric Heieck, and Matthew D. Horn and reinstating the sixth and eighth causes of action in the amended complaint against those defendants, and as modified the order and judgment is affirmed without costs.

Memorandum: Immediately after his arrest for driving while intoxicated, plaintiff was suspended from his position as a police officer with defendant City of Geneva Police Department (Department). Approximately one week into his suspension, plaintiff entered a rehabilitation program, where he was diagnosed with posttraumatic stress disorder and anxiety disorder, which were related to his work as a police officer at the site of the World Trade Center in the days following the September 11, 2001 attack. Shortly after plaintiff's release from the rehabilitation program, defendant Frank Pane, the Department's Chief of Police, notified plaintiff that his employment was terminated.

Plaintiff commenced this action alleging, inter alia, unlawful employment discrimination based upon his psychological disability. Supreme Court, inter alia, granted the pre-answer motion of defendants City of Geneva (City), Department, Pane, Jeff Trickler, John Cateline, Eric Heieck and Matthew D. Horn (collectively, City defendants) to dismiss the amended complaint against them. We note at the outset that, on appeal, plaintiff seeks reinstatement of only the fourth, sixth, seventh, eighth, and ninth causes of action in the amended complaint against those defendants, and he has thus abandoned any issues concerning the propriety of the order and judgment insofar as it granted those parts of the motion of the City defendants seeking dismissal of the first, second, third, and fifth causes of action against them (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984).

We agree with the court, for reasons stated in its decision, that the fourth, seventh and ninth causes of action, which are premised upon alleged violations of the Equal Protection Clauses of the United States and New York Constitutions (US Const, 14th Amend, § 1; NY Const, art 1, § 11;), fail to state a cause of action (*see* CPLR 3211 [a] [7]). We conclude, however, that the court erred in granting the motion of the City defendants insofar as it sought dismissal of the sixth cause of action, for disability discrimination under the Human Rights Law (Executive Law § 290 *et seq*.), and the eighth cause of action, for disability discrimination under the Rehabilitation Act of 1973 ([Rehabilitation Act] 29 USC § 701 *et seq*.). We therefore modify the order and judgment by denying the City defendants' motion in part and reinstating the sixth and eighth causes of action against the City defendants. Accepting plaintiff's factual allegations as true, and according him the benefit of every favorable inference, we conclude that plaintiff has stated causes of action for disability discrimination under both statues (*see generally Leon v Martinez*, 84 NY2d 83, 87-88).

Plaintiff sufficiently stated a cause of action for disability discrimination under the Human Rights Law by alleging that: he has a disability and is therefore a member of a protected class; he is qualified for his position; he suffered an adverse employment action,

i.e., termination of his employment; and the termination occurred under circumstances giving rise to an inference of discrimination (*see Gill v Maul*, 61 AD3d 1159, 1160; *see also Brathwaite v Frankel*, 98 AD3d 444, 445). Similarly, plaintiff sufficiently stated a cause of action for discriminatory termination under the Rehabilitation Act by alleging that: "(1) he has a disability; (2) he is otherwise qualified to perform the job; (3) he was terminated solely because of his disability; and (4) the program or activity receives federal funds" (*Pickering v Virginia State Police*, 59 F Supp 3d 742, 745 [ED Va 2014]).

The court erred in concluding that plaintiff failed to allege sufficiently that his termination was based upon his disability rather than the criminal charge, and in dismissing the causes of action under the Human Rights Law and the Rehabilitation Act on that ground. In support of those causes of action, plaintiff alleged that the City did not terminate the employment of two nondisabled employees after they were arrested for criminal misconduct, thus raising an inference that his termination was based upon his disability. The court stated in its decision that plaintiff's allegations "equally support" the conclusions that those two employees and plaintiff were similarly situated, and that they were not similarly situated. On the motion to dismiss pursuant to CPLR 3211 (a) (7), however, facts that equally support opposing inferences must be resolved in plaintiff's favor (*see Leon*, 84 NY2d at 87-88).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

1429

CA 14-01948

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

MICHAEL C. WEIDNER, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LISA FIX WEIDNER, DEFENDANT-APPELLANT.

MICHAEL J. CROSBY, HONEOYE FALLS (FRANK BERETTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

TREVETT CRISTO SALZER & ANDOLINA P.C., ROCHESTER (JAMES A. VALENTI OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

MARY E. FEINDT, ATTORNEY FOR THE CHILDREN, WALWORTH.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered December 30, 2013. The judgment, inter alia, directed plaintiff to pay defendant maintenance for three years, directed defendant to pay weekly child support to plaintiff and awarded defendant counsel fees.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by decreasing defendant's child support obligation in the 11th decretal paragraph to $25 per month, and as modified the judgment is affirmed without costs, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: Defendant wife appeals from a judgment of divorce that, inter alia, directed plaintiff husband to pay defendant the sum of $3,000 per month in maintenance for a period of three years, directed defendant to pay plaintiff the sum of $142.53 per week in child support, and awarded defendant $5,000 in counsel fees.

We reject defendant's contention that Supreme Court abused its discretion in setting the amount and duration of the maintenance award. The record establishes that the court considered the requisite statutory factors, including the length of the marriage, as well as defendant's education, employment history, and ability to increase her earnings in the future, and the court properly determined that defendant was capable of future self-support (*see* Domestic Relations Law § 236 [B] [6] [a]; *Schmitt v Schmitt*, 107 AD3d 1529, 1529; *Burns v Burns*, 70 AD3d 1501, 1503).

We agree with defendant, however, that the court "erred in including the amount of maintenance awarded to her in determining her

income for the purpose of calculating the amount of child support that she was required to pay to [plaintiff]" (*Johnston v Johnston*, 63 AD3d 1555, 1555; *see Huber v Huber*, 229 AD2d 904, 904-905). When the amount of maintenance is omitted from the calculation of defendant's income, defendant's income falls below the poverty line, and thus the court erred in directing defendant to pay plaintiff more than the sum of $25 per month in child support (*see* Domestic Relations Law § 240 [1-b] [d]; Family Ct Act § 413 [1] [d]; *Matter of Paige v Austin*, 27 AD3d 474, 475). We therefore modify the judgment accordingly. In light of that modification, we further agree with defendant that she is entitled to recoupment of her child support overpayments, and we remit the matter to Supreme Court to determine the amount of recoupment that plaintiff owes to defendant. Although there is a strong public policy against recoupment of child support overpayments (*see Johnson v Chapin*, 12 NY3d 461, 466, *rearg denied* 13 NY3d 888), we conclude that recoupment is appropriate under the limited circumstances of this case. Here, the record establishes that defendant's income was below the poverty level, and that plaintiff held a high-income job. Moreover, requiring plaintiff to repay the child support erroneously ordered by the court will not detract from plaintiff fulfilling the needs of the children while they are in his care and, indeed, will restore needed funds to defendant that will assist her in maintaining a suitable household for the children and in meeting their reasonable needs during visitation (*cf. Smith v Smith*, 116 AD3d 1139, 1143; *see generally People ex rel. Breitstein v Aaronson*, 3 AD3d 588, 589; *Tuchrello v Tuchrello*, 233 AD2d 917, 918).

Finally, we reject defendant's contention that the court abused its discretion in awarding her only $5,000 in counsel fees. We conclude that the amount of the award is supported by the circumstances of this case, including the financial situations of both parties, the relative merit of the parties' positions, and defendant's dilatory and obstructionist conduct (*see Suppa v Suppa*, 112 AD3d 1327, 1329; *Blake v Blake* [appeal No. 1], 83 AD3d 1509, 1509).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

3

KA 12-01682

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS B. SIMCOE, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (MARY-JEAN BOWMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

THOMAS B. SIMCOE, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Niagara County Court (Sara S. Farkas, J.), dated August 8, 2012. The order denied defendant's motion pursuant to CPL 440.10 to vacate a judgment of conviction.

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

Memorandum: Defendant was convicted following a nonjury trial of, inter alia, attempted murder in the first degree (Penal Law §§ 110.00, 125.27 [1] [a] [i]; [b]) and attempted murder in the second degree (§§ 110.00, 125.25 [1]). The charges arose from defendant's savage beating of his wife and his stabbing of a police officer who responded to the scene. After we affirmed the judgment (*People v Simcoe*, 75 AD3d 1107, *lv denied* 15 NY3d 924), defendant moved pro se to vacate the judgment pursuant to CPL 440.10 on the ground that he was deprived of effective assistance of counsel. County Court denied the motion without a hearing, and we now affirm once again.

In support of his motion, defendant contended that his attorney was ineffective because he gave him inadequate advice regarding plea bargaining. More specifically, defendant complained that defense counsel never advised him that his maximum exposure if convicted after trial was an indeterminate term of imprisonment of 55 years to life, underestimated the strength of the People's case by stating that defendant would never be convicted of attempting to murder the police officer, and did not tell defendant that he "would" be sentenced consecutively if convicted at trial. According to defendant, he would have accepted the People's plea offer, which included a proposed

aggregate determinate term of 20 years plus a period of postrelease supervision.

"A postjudgment motion brought pursuant to [CPL 440.10] will not necessitate a hearing in every instance, and it is the trial court's prerogative to make the preliminary determination of whether such a hearing is necessary" (*People v Snyder*, 91 AD3d 1206, 1214, *lv denied* 19 NY3d 968, *cert denied* ___ US ___, 133 S Ct 791). Here, for reasons stated in the court's decision, we conclude that the court did not abuse its discretion in denying defendant's motion without a hearing (*see generally People v Blackman*, 90 AD3d 1304, 1311-1312, *lv denied* 19 NY3d 971). "Notably, the Judge who determined the motion was the same Judge who presided at the trial" (*People v Morehouse*, 5 AD3d 925, 926, *lv denied* 3 NY3d 644). We also note that defendant does not allege that any of counsel's advice was legally incorrect, e.g., he does not allege that his attorney told him that the consecutive sentences *could not* be imposed. Instead, defendant merely alleges, in sum and substance, that his attorney had an overly optimistic outlook on the case. We conclude that the evidence, the law, and the circumstances of this case, viewed in totality and as of the time of the representation, establish that defense counsel provided meaningful representation to defendant at the plea bargaining stage (*see generally People v Baldi*, 54 NY2d 137, 147).

We have reviewed the contentions advanced by defendant in his pro se supplemental brief and conclude that they lack merit.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

8

KA 14-00565

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAUL O. ACEVEDO, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (BRIAN D. DENNIS OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered July 10, 2013. The judgment convicted defendant, upon a jury verdict, of attempted assault in the second degree and criminal possession of a weapon in the third degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [2]) and criminal possession of a weapon in the third degree (§ 265.02 [1]), defendant contends that the verdict is against the weight of the evidence. We reject that contention. There is no dispute that defendant struck the 60-year-old victim four times with a pool cue in a bar. The only disputed issue at trial was whether defendant acted in self-defense. Defendant's actions were captured on a surveillance video that was admitted in evidence at trial. The video establishes that the victim did not make physical contact with defendant, who was much younger and larger than the victim, and did not display a weapon. Although defendant testified that the victim threatened him with a knife earlier that evening outside the bar, the victim denied that he had done so, and the jury was free to discredit defendant's testimony in that regard inasmuch as it was "in the best position to assess the credibility of the witnesses" (*People v Orta*, 12 AD3d 1147, 1147, *lv denied* 4 NY3d 801). Even assuming, arguendo, that a different verdict would not have been unreasonable, we conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Ohse*, 114 AD3d 1285, 1286-1287, *lv denied* 23 NY3d 1041; *see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant further contends that County Court should have instructed the jury that justification is a defense to the charge of criminal possession of a weapon in the third degree. During the charge conference, however, defense counsel requested that instruction only with respect to attempted assault in the second degree, and he thus failed to preserve his present contention for our review (*see* CPL 470.05 [2]). We note that, in any event, defendant correctly conceded at the time of the charge conference that justification was not a defense to the weapons offense (*see People v Pons*, 68 NY2d 264, 267; *People v Hawkins*, 113 AD3d 1123, 1124, *lv denied* 22 NY3d 1156; *People v Cohens*, 81 AD3d 1442, 1444, *lv denied* 16 NY3d 894).

Finally, based on our review of the record, and considering that defendant has been released to parole supervision, 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]).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

12

CAF 15-00313

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

IN THE MATTER OF MARIVI DEJESUS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

STEVEN A. GONZALEZ, RESPONDENT-RESPONDENT.

MARYBETH D. BARNET, ESQ., ATTORNEY FOR THE CHILD, APPELLANT.

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

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA, APPELLANT PRO SE.

SUSAN GRAY JONES, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

KIMBERLY WHITE WEISBECK, ATTORNEY FOR THE CHILD, ROCHESTER.

Appeals from an order of the Family Court, Ontario County (Maurice E. Strobridge, J.H.O.), entered December 29, 2014 in a proceeding pursuant to Family Court Act article 6. The order, among other things, directed that the parties shall continue to share joint custody of the subject children.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law and facts without costs, the petition is granted, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 6, petitioner mother and the Attorney for the Child (AFC) for the parties' daughter appeal from an order that denied the mother's petition seeking to modify a prior consent order. Pursuant to the prior order, the parties had joint legal custody of their son and daughter, with primary physical custody to respondent father, and by the instant petition the mother sought sole legal and primary physical custody of the children based on the father's use of inappropriate physical discipline while the children were in his care. Although Family Court determined that the mother failed to establish a sufficient change in circumstances warranting an inquiry into the best interests of the children, it nevertheless determined based on the evidence presented at the hearing that it was in the children's best interests to continue joint legal custody and primary physical

placement with the father.

Although an existing order of custody and visitation that is based on the consent of the parties is entitled to less weight than a disposition after a plenary trial, the court may not modify such an order unless a sufficient change in circumstances since the time of the consent order has been established, " 'and then only where a modification would be in the best interests of the child[ren]' " (*Matter of Pecore v Blodgett*, 111 AD3d 1405, 1405, *lv denied* 22 NY3d 864).

We agree with the mother and the AFC that the court erred in determining that the mother failed to establish a sufficient change in circumstances to warrant an inquiry into the best interests of the children. The record establishes that the father telephoned the mother to ask that she pick up the parties' three-year-old daughter from his residence in Pennsylvania because he was unable to handle her alleged misbehavior. Upon retrieving the child, the mother observed and photographed extensive bruising on the child's body, as well as scrapes on her knees, which the father later attributed to the child's increasingly serious tantrums that began while she was in his care. The daughter's injuries were observed by a Child Protective Services (CPS) investigator, and the daughter disclosed to the investigator that the father had struck her with a belt and that she sustained the scrapes on her knees from kneeling on a "cat scratcher" as a form of punishment. The son's statements to the investigator corroborated the daughter's account of the corporal punishment. In addition, the father admitted that he once spanked the daughter with a belt and made her kneel on the "cat scratcher." Although the father testified that each of those types of physical discipline was a one-time occurrence, the records of the daughter's medical examination documenting that the daughter had "multiple bruises all over her body in different stages of healing," as well as the son's statements with respect to the frequency of the father's physical discipline, support the finding that the father repeatedly inflicted excessive corporal punishment on the daughter. We thus conclude that there was a sufficient change in circumstances to warrant an inquiry into the best interests of the children (*see Matter of Bartlett v Jackson*, 47 AD3d 1076, 1077-1078, *lv denied* 10 NY3d 707; *cf. Matter of Eller v Eller*, 126 AD3d 1242, 1242-1243; *see generally Matter of Terry I. v Barbara H.*, 69 AD3d 1146, 1147-1148). Furthermore, even crediting the father's assertion that the daughter's injuries resulted from tantrums, we conclude that there was a sufficient change in circumstances inasmuch as the father was admittedly unable to handle the daughter's behavioral issues, resorted to inappropriate physical discipline to punish the daughter for her alleged misbehavior, and requested that the mother remove the daughter from his care (*see Matter of Burrell v Burrell*, 101 AD3d 1193, 1194; *Matter of Robinson v Cleveland*, 42 AD3d 708, 709).

We further agree with the mother and the AFC that the court's custody determination lacks a sound and substantial basis in the record (*see Gilman v Gilman*, 128 AD3d 1387, 1388; *see generally Fox v Fox*, 177 AD2d 209, 211-212). Upon our review of the relevant factors (*see generally Eschbach v Eschbach*, 56 NY2d 167, 171-174; *Fox*, 177

AD2d at 210), "including an evaluation of the character and relative parental fitness of the parties" (*Matter of Amy L.W. v Brendan K.H.*, 37 AD3d 1060, 1061), we conclude that it is in the best interests of the children to award the mother sole legal and primary physical custody. Here, the record establishes that the father resorted to excessive physical discipline of the daughter, which resulted in an indicated CPS report (*see Gilman*, 128 AD3d at 1388), and we conclude that the court erred in discounting that report in favor of an "unfounded" report by a Pennsylvania investigator who had closed his case because the children had been removed to New York. The record also establishes that the father struck the son with a belt as punishment, and exposed him to a home environment wherein he witnessed the excessive corporal punishment directed at the daughter (*see generally Matter of Demers v McLear*, 130 AD3d 1259, 1261). Contrary to the court's determination, we conclude that the record establishes that the mother's involvement with the son's schooling was not significantly different from that of the father. In addition, the son's wish to reside with the father is not determinative in light of his young age (*see Matter of Holtz v Weaver*, 94 AD3d 1557, 1558).

The court's finding that the daughter was in need of psychological intervention and that the father had made proper attempts to improve the daughter's behavior in that regard likewise is unsupported by the record. Rather, the record establishes that the father's parenting skills are inadequate with respect to his ability to provide for the daughter's psychological and emotional needs because, despite his testimony that the daughter's behavior deteriorated while in his care, he never sought assistance from, e.g., a child psychologist or the daughter's pediatrician with respect to the tantrums, and instead resorted to inappropriate physical discipline and requested that the mother remove the daughter from his care (*see Gilman*, 128 AD3d at 1388).

We note in addition that the court improperly focused on the mother's past sexual behavior and relationships despite the absence of any showing that such conduct may adversely affect the welfare of the children (*see Sitts v Sitts*, 74 AD3d 1722, 1723, *lv dismissed* 15 NY3d 833, *lv denied* 18 NY3d 801; *Matter of Hess v Pedersen*, 211 AD2d 1000, 1001). To the extent that the court found that the mother's relationship and pregnancy affected the children's living arrangements at the mother's residence, we conclude that those conditions were not significantly different from those at the father's residence.

We thus reverse the order and grant the petition by awarding the mother sole legal and primary physical custody of the children, with visitation to the father, and we remit the matter to Family Court to fashion an appropriate visitation schedule.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

13

CAF 15-00739

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

IN THE MATTER OF CONNIE M. SCHOENL,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN M. SCHOENL, RESPONDENT-APPELLANT.

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

Appeal from an order of the Family Court, Monroe County (Paul M. Riordan, R.), entered June 30, 2014 in a proceeding pursuant to Family Court Act article 8. The order, among other things, directed respondent to stay away from petitioner.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the provision directing that respondent is not to use or possess firearms nor hold or apply for a pistol permit during the pendency of the order, and as modified the order is affirmed without costs.

Memorandum: On appeal from a two-year order of protection issued upon Family Court's determination that he willfully violated a prior order of protection issued in favor of petitioner (*see* Family Ct Act § 846-a), respondent contends that the evidence does not support that determination. We reject respondent's contention. The prior order of protection directed respondent not to communicate with petitioner except by text message "regarding health, safety and welfare of the[ir] children." It is undisputed that respondent contacted petitioner via text message regarding matters unrelated to their children during the pendency of the order of protection. Although respondent contends that a separate order allowing him to communicate with petitioner regarding the removal of some of his personal items from the marital residence permitted him to send the offending text messages, that separate order was limited to a period of time in November 2013, and did not authorize respondent to send the offending text messages in March 2014. Respondent also contended that he misunderstood the earlier order, but the court did not credit that contention. "According deference to that credibility determination, as we must, we conclude that petitioner established by clear and convincing evidence that [respondent] willfully violated the relevant order of protection" (*Matter of Duane H. v Tina J.*, 66 AD3d 1148, 1149).

We agree with respondent, however, that the court erred in imposing restrictions on his ability to use or possess firearms during the pendency of the order. Under Family Court Act § 846-a, the court may revoke a license to carry and possess a firearm "[i]f the court determines that the willful failure to obey [a protective] order involves violent behavior constituting the crimes of menacing, reckless endangerment, assault or attempted assault." Where, as here, no such determination is made, the court is not authorized to revoke a respondent's firearms permit (*see Matter of Kappel v Kappel*, 234 AD2d 872, 874). Moreover, restriction of respondent's right to use or possess firearms was not warranted under Family Court Act § 842-a, inasmuch as the court did not find, and could not find based on the evidence at the hearing, "that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury . . . , (ii) the use or threatened use of a deadly weapon or dangerous instrument . . . , or (iii) behavior constituting any violent felony offense" (§ 842-a [2] [a]), or that there is a "substantial risk that the respondent may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection is issued" (§ 842-a [2] [b]). We thus modify the order by vacating the provision directing that respondent is not to use or possess firearms nor hold or apply for a pistol permit during the pendency of the order.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

19

CA 15-00751

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

NICHOLAS BOWMAN, PLAINTIFF-APPELLANT,

V ORDER

JEANETTE E. ZUMPANO, JOHN S. ZUMPANO,
DEFENDANTS-RESPONDENTS,
ET AL., DEFENDANTS.

ATHARI & ASSOCIATES, LLC, NEW HARTFORD (MO ATHARI OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FELDMAN KIEFFER, LLP, BUFFALO (ALAN J. BEDENKO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Patrick F. MacRae, J.), entered April 5, 2015. The order, inter alia, granted the motion of defendants Jeanette E. Zumpano and John S. Zumpano for summary judgment and dismissed the complaint against them.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on January 13, 2016,

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

24

KA 10-02453

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. SCHLUTER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Richard A. Keenan, J.), rendered October 7, 2010. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree, criminal sexual act in the second degree, criminal sexual act in the third degree, rape in the third degree and falsely reporting an incident in the second degree.

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, inter alia, course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the third degree (§ 130.40 [2]).

Contrary to defendant's contention in appeal No. 1, County Court properly refused to suppress statements defendant made to the police during a recorded interrogation. Defendant waived his *Miranda* rights at the outset of the interrogation, but he contends that his waiver was rendered invalid by police conduct during the interrogation. Defendant failed to raise that specific contention in his motion papers or at the suppression hearing as a ground for suppressing his statements, and thus he failed to preserve that contention for our review (*see People v Brown*, 120 AD3d 954, 955, *lv denied* 24 NY3d 1118). In any event, we reject his contention "that the validity of the waiver was vitiated by police conduct that occurred *after* the waiver" (*Matter of Jimmy D.*, 15 NY3d 417, 424). Contrary to defendant's further contention, the court properly concluded that he did not make an unequivocal request for counsel during the

interrogation (*see People v Hicks*, 69 NY2d 969, 970, *rearg denied* 70 NY2d 796; *People v Regan*, 21 AD3d 1357, 1358).

We reject defendant's contention in both appeals that the court erred in denying his pro se motion to withdraw his pleas without conducting a hearing. The record of the plea proceeding belies his contention that he did not have sufficient time to consult with counsel (*see People v Griffin*, 89 AD3d 1235, 1236) and, moreover, counsel's advice to defendant that he would likely receive a harsher sentence after trial does not constitute coercion (*see People v Griffin*, 120 AD3d 1569, 1570, *lv denied* 24 NY3d 1084).

In view of our determination affirming the judgment in appeal No. 1, there is no basis to grant defendant's request to reverse the judgment in appeal No. 2 and to vacate his plea of guilty (*cf. People v Fuggazzatto*, 62 NY2d 862, 863).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

31

KA 10-02454

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL D. SCHLUTER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (DAVID R. JUERGENS 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 (Richard A. Keenan, J.), rendered October 7, 2010. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the third degree.

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

Same memorandum as in *People v Schluter* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2016]).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

32

CAF 14-02151

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

IN THE MATTER OF ANNABELLA B.C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

SANDRA L.C., RESPONDENT-APPELLANT.

ALAN BIRNHOLZ, LAKE WORTH, FLORIDA, FOR RESPONDENT-APPELLANT.

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

DAVID E. BLACKLEY, ATTORNEY FOR THE CHILD, LOCKPORT.

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered August 18, 2014 in a proceeding pursuant to Family Court Act article 10. The order denied respondent's motion to vacate an order of fact-finding and disposition.

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, Erie County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order denying her motion to vacate an order of fact-finding and disposition, which was entered on the consent of the parties. We agree with the mother that Family Court erred in denying the motion on the sole ground that a direct appeal from that order was pending. It is well settled that "[n]o appeal lies from an order entered upon the parties' consent" (*Matter of Bambi C.*, 238 AD2d 942, 942-943, *lv denied* 90 NY2d 805) and, indeed, we dismissed the mother's appeal from the consent order for that very reason (*Matter of Annabella B.C. [Sandra L.C.]*, 129 AD3d 1550). Thus, contrary to the court's determination, the mother's sole remedy was " 'to move in Family Court to vacate the order, at which time [she] [could] present proof in support of [her] allegations of duress, proof which is completely absent from this record' " (*Matter of Andresha G.*, 251 AD2d 1005, 1005; *see Matter of Polyak v Toyber*, 2 AD3d 642, 643*; Bambi C.*, 238 AD2d at 943). We therefore reverse the order and remit the matter to Family Court for further proceedings on the motion.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

34

CAF 14-00567

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

IN THE MATTER OF DALE A. MAKOWSKI,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LISA M. MAUERMAN, RESPONDENT-APPELLANT.

IN THE MATTER OF DALE A. MAKOWSKI,
PETITIONER-RESPONDENT,

V

LISA M. MAUERMAN, RESPONDENT-APPELLANT.

IN THE MATTER OF LISA M. MAUERMAN,
PETITIONER-APPELLANT,

V

DALE A. MAKOWSKI, RESPONDENT-RESPONDENT.

IN THE MATTER OF DALE A. MAKOWSKI,
PETITIONER-RESPONDENT,

V

LISA M. MAUERMAN, RESPONDENT-APPELLANT.

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

SHARON OSGOOD, BUFFALO, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

MELISSA A. REESE, ATTORNEY FOR THE CHILD, CHEEKTOWAGA.

Appeal from an order of the Family Court, Erie County (Rosalie Bailey, J.), entered August 30, 2013 in proceedings pursuant to Family Court Act article 6. The order, among other things, granted sole custody of the parties' child to Dale A. Makowski.

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

Memorandum: In these proceedings pursuant to Family Court Act article 6, respondent-petitioner mother appeals from an order that, among other things, awarded petitioner-respondent father sole custody of the parties' child. Contrary to the mother's contention that she was deprived of a fair hearing because of certain erroneous evidentiary rulings, we conclude that any errors are harmless (*see Sheridan v Sheridan*, 129 AD3d 1567, 1567; *Matter of Higgins v Higgins*, 128 AD3d 1396, 1397; *see generally* CPLR 2002). Furthermore, according due deference to Family Court's assessment of witness credibility, we conclude that the court's determination to award sole custody of the child to the father with liberal visitation to the mother is supported by a sound and substantial basis in the record (*see Matter of DeNise v DeNise*, 129 AD3d 1539, 1540; *see generally Eschbach v Eschbach*, 56 NY2d 167, 172-174).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

42

CA 15-00382

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

GMAC MORTGAGE, LLC, SUCCESSOR BY MERGER TO GMAC MORTGAGE CORPORATION, FORMERLY KNOWN AS GMAC MORTGAGE CORPORATION OF PA, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL H. SPINDELMAN AND MARGARET A. SPINDELMAN, DEFENDANTS-APPELLANTS.

DREW & DREW, LLP, BUFFALO (DEAN M. DREW OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

HINSHAW & CULBERTSON LLP, NEW YORK CITY (BENJAMIN NOREN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Thomas P. Franczyk, A.J.), entered May 19, 2014. The order denied the motion of defendants for leave to reargue and renew their prior motion to vacate a judgment of foreclosure.

It is hereby ORDERED that said appeal from the order insofar as it denied leave to reargue is unanimously dismissed and the order is otherwise affirmed without costs.

Memorandum: After plaintiff commenced this mortgage foreclosure action, a default judgment of foreclosure was entered against defendants in April 2008. Five years later, defendants moved to vacate the judgment pursuant to CPLR 5015 (a) (1) contending, inter alia, that plaintiff lacked standing to commence the action against them. Supreme Court denied that motion, concluding that defendants had waived their right to assert the affirmative defense of plaintiff's lack of standing to commence the action and that, in any event, plaintiff had standing to commence the action. Defendants' appeal from that order was dismissed for failure to perfect (*see* 22 NYCRR 1000.12).

Meanwhile, defendants filed a motion that was identified as a motion for leave to reargue the motion to vacate. Attached to that motion, however, were documents not previously submitted on the motion to vacate. The court informed the parties that it was treating the motion as a "hybrid" motion for leave to reargue and leave to renew and permitted them to submit additional documentary evidence. Ultimately, the court denied the motion for leave to reargue and leave to renew "in all respects." Defendants now appeal from the order

denying that motion.

Plaintiff contends that this appeal is not properly before us because defendants' motion was "identified specifically" as a motion for leave to reargue (CPLR 2221 [d] [1]), and it is well settled that "no appeal lies from an order denying leave to reargue" (*Hill v Milan*, 89 AD3d 1458, 1458). While we agree with plaintiff that defendants failed to identify the motion as a motion for leave to renew (*see* CPLR 2221 [e] [1]) and, to the extent that defendants' motion was a combined motion for leave to reargue and leave to renew, failed to "identify separately and support separately each item of relief sought" (CPLR 2221 [f]), we reject plaintiff's contention that those failures are fatal to the entire appeal (*see Boakye-Yiadom v Roosevelt Union Free Sch. Dist.*, 57 AD3d 929, 930-931; *Petsako v Zweig*, 8 AD3d 355, 355-356; *Matter of Hurley v Avon Cent. Sch. Dist.*, 187 AD2d 983, 983; *see generally* CPLR 103 [c]; 104).

We agree with plaintiff, however, that the appeal from that part of the order denying leave to reargue must be dismissed (*see Hill*, 89 AD3d at 1458). Even assuming, arguendo, that defendants' contentions arise from the denial of the motion for leave to renew, we conclude that the motion for leave to renew was properly denied. All of the new facts submitted by defendants on the motion for leave to renew were obtained from public documents on file with the Erie County Clerk, which could have been obtained at any time during the five-year period between the time the judgment was issued and the time defendants filed the original motion to vacate (*see N.A.S. Partnership v Kligerman*, 271 AD2d 922, 923; *see also Vieyra v Penn Toyota, Ltd.*, 116 AD3d 840, 841, *lv dismissed in part and denied in part* 24 NY3d 1217; *Welch Foods v Wilson*, 247 AD2d 830, 830). Inasmuch as defendants failed to establish "a 'reasonable justification for the failure to present [the new] facts on the . . . motion [to vacate],' " the court lacked discretion to grant the motion seeking leave to renew (*Robinson v Consolidated Rail Corp.*, 8 AD3d 1080, 1080; *see Sobin v Tylutki*, 59 AD3d 701, 702).

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

44

KA 14-00668

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SYROYA N. CLARK, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered January 21, 2014. The judgment convicted defendant, upon her plea of guilty, of burglary in the third degree and grand larceny in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of burglary in the third degree (Penal Law § 140.20) and grand larceny in the fourth degree (§ 155.30 [4]). Defendant never requested new assigned counsel, "and thus it cannot be said that [County Court] erred in failing to conduct an inquiry to determine whether good cause was shown to substitute counsel" (*People v Singletary*, 63 AD3d 1654, 1654, *lv denied* 13 NY3d 839).

Contrary to defendant's further contention, the court did not err in refusing to suppress defendant's oral statements to the police. Here, defendant voluntarily answered the police officer's investigatory questions, was not handcuffed, was left unsupervised in a parking lot during a break in the questioning, and "was not subjected to lengthy, coercive or accusatory questioning" (*People v Brown*, 111 AD3d 1385, 1385, *lv denied* 22 NY3d 1155; *see People v Vargas*, 109 AD3d 1143, 1143, *lv denied* 22 NY3d 1044). "The mere fact that the police may have suspected defendant of having [been involved in a crime] prior to questioning [her] . . . does not compel a finding that defendant was in custody" (*People v Smielecki*, 77 AD3d 1420, 1421, *lv denied* 15 NY3d 956). We thus conclude that "a reasonable person, innocent of any crime, would not have thought he or she was in custody if placed in defendant's position" (*id.*; *see generally People v Yukl*, 25 NY2d 585, 589, *cert denied* 400 US 851).

We reject defendant's contention that her statements should have been suppressed because the police officers' testimony did not definitively establish the circumstances under which she was read her *Miranda* warnings. Here, one of the officers testified at the *Huntley* hearing that defendant was advised of her *Miranda* rights after she elected to sit in the back of his air-conditioned vehicle and that she waived those rights of her own accord, without being threatened, coerced, or made any promises. Although there was a discrepancy between the testimony of the officer at the hearing and at the grand jury proceeding, the discrepancy was explored on cross-examination and created an issue of credibility for the court (*see generally People v Button*, 56 AD3d 1043, 1045, *lv dismissed* 12 NY3d 781). The court's assessment of the credibility of a witness is entitled to great deference (*see People v Prochilo*, 41 NY2d 759, 761), and "should not be disturbed unless clearly erroneous" (*People v Stokes*, 212 AD2d 986, 987, *lv denied* 86 NY2d 741).

The sentence is not unduly harsh or severe (*see* CPL 470.15 [6] [b]).

We have examined defendant's remaining contentions and, to the extent that they are properly before us in the context of her plea of guilty, we conclude that none requires modification or reversal of the judgment.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

48

KA 14-00110

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DYLAN SCHUMAKER, DEFENDANT-APPELLANT.

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

DYLAN SCHUMAKER, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered January 10, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by reducing the sentence imposed to an indeterminate term of incarceration of 18 years to life, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]), arising from the death of his girlfriend's 23-month-old son. Defendant contends, inter alia, that the evidence is not legally sufficient to support the conviction and that the verdict is against the weight of the evidence. Although he concedes that his actions caused the victim's death, defendant challenges the sufficiency and weight of the evidence with respect to whether he intentionally caused the victim's death. We reject those challenges.

It is well settled that "[t]he standard for reviewing the legal sufficiency of evidence in a criminal case is whether 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt' " (*People v Contes*, 60 NY2d 620, 621, quoting *Jackson v Virginia*, 443 US 307, 319, *reh denied* 444 US 890). Consequently, we must "determine whether there is any 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).

Here, the testimony of the Medical Examiner established that the victim sustained ruptured blood vessels in his left ear and near his right eye, hemorrhages in his retina and perioptic nerve, and subdural and subarachnoid hemorrhaging. The Medical Examiner testified that the victim also had numerous contusions and abrasions on multiple areas of his torso, buttocks, scalp, face and neck. The Medical Examiner opined that the cause of the victim's death was "diffuse axonal injury," which resulted from shearing forces within the child's brain caused by his head whipping violently back and forth, and that such a result is consistent with the blows that defendant admitted inflicting upon the child. The Medical Examiner testified that the child's injuries were not consistent with a slip and fall as defendant testified occurred, but instead were the result of "multiple impacts." Other evidence, including text messages that defendant sent and his trial testimony, established that the child was initially injured before 5:00 p.m., and that defendant inflicted further injuries upon him over a period of several hours during the evening. Defendant admitted hitting the victim several times, including backhanded smacks to his face, and slamming his head on the ground while changing a diaper, all of which culminated in defendant placing the victim on a bed with a pillow over him and repeatedly punching him in the head. The Medical Examiner testified that the "diffuse axonal injury" caused the victim's death, and that the victim had "no prolonged survival [after he sustained that injury, but rather he] died soon thereafter, shortly thereafter."

The evidence also established that defendant frequently stopped attacking the victim while he sent an ongoing series of text messages. At approximately 5:00 p.m., he told the victim's mother that the victim had fallen, but for the next several hours he texted with her on that and other topics, flirted with a different young woman, and attempted to sell synthetic marihuana to a third person. Thus, the evidence is sufficient to establish that defendant spent the evening intermittently attacking the 23-month-old child while engaging in commercial and social activities, and then placed the victim on a bed and punched him repeatedly in the head through a pillow. "A jury is entitled to infer that a defendant intended the natural and probable consequences of his acts" (*People v Bueno*, 18 NY3d 160, 169; *see People v Hayes*, 163 AD2d 165, 166, *affd* 78 NY2d 876; *People v Watson*, 269 AD2d 755, 756, *lv denied* 95 NY2d 806). We conclude that the evidence is legally sufficient to establish that defendant intended to cause the death of the victim (*see generally Bleakley*, 69 NY2d at 495).

Furthermore, it is also well settled that, "in conducting its weight of the evidence review, a court must consider the elements of the crime, for even if the prosecution's witnesses were credible their testimony must prove the elements of the crime beyond a reasonable doubt" (*People v Danielson*, 9 NY3d 342, 349). Here, viewing the evidence in light of the elements of the crime of murder as charged to the jury (*see id.*), we further conclude that the verdict is not

against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). We note that, "[a]lthough defendant testified that he did not intend to kill [the] victim, the [jury] was free to reject that self-serving testimony" (*People v Simcoe*, 75 AD3d 1107, 1109, *lv denied* 15 NY3d 924).

Defendant further contends that Supreme Court erred in denying his *Batson* objection to the prosecutor's use of peremptory challenges to exclude two African-American prospective jurors. Defendant failed to preserve for our review that part of his contention concerning the court's procedure for determining his *Batson* objection (*see People v Collins*, 63 AD3d 1609, 1610, *lv denied* 13 NY3d 795; *People v Parker*, 304 AD2d 146, 156, *lv denied* 100 NY2d 585). We decline to exercise our power to review that part of defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

We reject those parts of defendant's *Batson* contention that are preserved for our review. We conclude that the court properly determined that the prosecutor's explanations for exercising peremptory challenges with respect to the two prospective jurors were race-neutral and not pretextual when it rejected defendant's *Batson* objections concerning those two prospective jurors (*see generally People v Smocum*, 99 NY2d 418, 422). The prosecutor challenged one of the prospective jurors based on her memberships in religious and human rights organizations that the prosecutor felt made her more sympathetic to defendant (*see People v Page*, 105 AD3d 1380, 1381, *lv denied* 23 NY3d 1023; *People v Wilson*, 43 AD3d 1409, 1411, *lv denied* 9 NY3d 994), and she challenged the other on the ground that the prospective juror's lack of life experiences and decision-making responsibilities made her a less-qualified candidate for jury service (*see People v Hinds*, 270 AD2d 891, 892, *lv denied* 95 NY2d 964). Finally, the prosecutor established that she struck other prospective jurors who were not members of a suspect class for those same reasons, and the court therefore properly concluded that the prosecutor's explanations were not pretextual (*see People v Simmons*, 79 NY2d 1013, 1015; *cf. People v Mallory*, 121 AD3d 1566, 1568; *see generally People v Lawrence*, 23 AD3d 1039, 1039, *lv denied* 6 NY3d 835).

We reject defendant's further contention that he was denied effective assistance of counsel. Defendant's contention that he was deprived of effective assistance of counsel by his attorney's failure to pursue a defense of extreme emotional disturbance is without merit. That defense requires that a defendant establish that he "suffered from a mental infirmity not rising to the level of insanity at the time of the homicide, typically manifested by a loss of self-control" (*People v Roche*, 98 NY2d 70, 75; *see People v Wall*, 48 AD3d 1107, 1107, *lv denied* 11 NY3d 742). Here, "[w]e conclude that proof of the objective element [of the defense] is lacking . . . , inasmuch as defendant's behavior immediately before and after the killing was inconsistent with the loss of control associated with the affirmative defense" (*People v Mohamud*, 115 AD3d 1227, 1228, *lv denied* 23 NY3d 965 [internal quotation marks omitted]; *see People v Jarvis*, 60 AD3d 1478, 1479, *lv denied* 12 NY3d 916). It is well settled that "[t]here can be

no denial of effective assistance of trial counsel arising from counsel's failure to 'make a motion or argument that has little or no chance of success' " (*People v Caban*, 5 NY3d 143, 152, quoting *People v Stultz*, 2 NY3d 277, 287, *rearg denied* 3 NY3d 702). Furthermore, in order "[t]o prevail on a claim of ineffective assistance of counsel, it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations" for defense counsel's allegedly deficient conduct (*People v Rivera*, 71 NY2d 705, 709; *see People v Benevento*, 91 NY2d 708, 712), and defendant failed to make such a showing here.

We likewise reject defendant's contention that he was denied effective assistance of counsel based on his attorney's failure to seek a *Dunaway* hearing " 'where, as here, such [a request] was potentially futile' " (*People v Smith*, 128 AD3d 1434, 1434-1435, *lv denied* 26 NY3d 1011). Similarly, there is no evidence in the record that the Sheriff's detectives who questioned defendant used any ploy that might constitute a "highly coercive deception[]" that would justify suppression of his statements (*People v Thomas*, 22 NY3d 629, 642; *see People v Moore*, 132 AD3d 496, 496-497; *see generally People v Knapp*, 124 AD3d 36, 41-42), and thus defendant was not denied effective assistance of counsel by his trial attorney's failure to move to suppress his statements on that ground. Defendant's contention in his pro se supplemental brief that trial counsel was ineffective in failing to challenge prosecutorial misconduct occurring in the grand jury is baseless, inasmuch as there is no evidence that trial counsel had access to the grand jury minutes. We have considered defendant's remaining contentions in his main and pro se supplemental briefs with respect to the alleged ineffective assistance of counsel and, viewing the evidence, the law and the circumstances of this case, in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147).

Defendant failed to preserve for our review his contention that the investigators who questioned him should have advised him of his *Miranda* rights a second time, before he began to write out his statement (*see People v Rodriguez*, 70 AD3d 729, 730, *lv denied* 14 NY3d 892; *People v Kemp*, 266 AD2d 887, 887, *lv denied* 94 NY2d 921). In any event, that contention lacks merit. Where " 'a person in police custody has been issued *Miranda* warnings and voluntarily and intelligently waives those rights, it is not necessary to repeat the warnings prior to subsequent questioning within a reasonable time thereafter, [where, as here,] the custody [was] continuous' " (*People v Johnson*, 20 AD3d 939, 939, *lv denied* 5 NY3d 853; *see People v Peterkin*, 89 AD3d 1455, 1455-1456, *lv denied* 18 NY3d 885).

Defendant waived his present contention that the court erred, following a *Ventimiglia* hearing, in allowing the prosecutor to present evidence of a prior bad act, i.e., an altercation he had with the victim's mother the day before this incident, inasmuch as he consented to the admission of that evidence (*see People v McCain*, 307 AD2d 764, 765, *lv denied* 100 NY2d 622; *see generally People v Carr*, 267 AD2d

1062, 1063, *lv denied* 95 NY2d 833).

We agree with defendant, however, that the sentence imposed is unduly harsh and severe in light of defendant's youth and lack of parental guidance, his lack of prior criminal convictions, and his mental health issues. Thus, we modify the judgment by reducing the sentence, as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]), to an indeterminate term of incarceration of 18 years to life.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

49

KA 12-00045

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BARBARA J. GARNER, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (LINDA M. CAMPBELL 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 (Melchor E. Castro, A.J.), rendered July 1, 2011. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her following a jury trial of assault in the first degree (Penal Law § 120.10 [1]). By failing to renew her motion for a trial order of dismissal after presenting evidence, defendant failed to preserve for our review her challenge to the legal sufficiency of the evidence with respect to the element of serious physical injury (*see generally People v Brown*, 120 AD3d 1545, 1546, *lv denied* 24 NY3d 1082). In any event, that contention is without merit. The testimony of the People's medical expert that, if left untreated, the victim's pneumothorax created a significant risk of death is legally sufficient to establish the element of serious physical injury (*see People v Barbuto*, 126 AD3d 1501, 1502, *lv denied* 25 NY3d 1159; *People v Guillen*, 65 AD3d 977, 977, *lv denied* 13 NY3d 939). 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 is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

Defendant failed to preserve for our review her contention that she was denied a fair trial based on prosecutorial misconduct (*see* CPL 470.05 [2]), and we decline to exercise our power to review defendant's contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). Defendant likewise failed to preserve for our review her contention that County Court, in determining the sentence to be imposed, penalized her for exercising

her right to a jury trial (*see People v Stubinger*, 87 AD3d 1316, 1317, *lv denied* 18 NY3d 862; *People v Brink*, 78 AD3d 1483, 1485, *lv denied* 16 NY3d 742, *reconsideration denied* 16 NY3d 828). In any event, that contention is without merit. "[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 [her] right to trial . . . , and there is no indication in the record before us that the sentencing court acted in a vindictive manner based on defendant's exercise of the right to a trial" (*Brink*, 78 AD3d at 1485 [internal quotation marks omitted]). "In addition, '[t]he fact that defendant's sentence was greater than that of [her] codefendant[, who accepted a plea agreement,] does not substantiate [her contention] that [she] was improperly punished for going to trial' " (*People v Smith*, 90 AD3d 1565, 1567, *lv denied* 18 NY3d 998). Defendant's sentence is not unduly harsh or severe.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

50

KA 14-00852

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH A. STEFANOVICH, DEFENDANT-APPELLANT.

BRUCE R. BRYAN, SYRACUSE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oswego County Court (James M. Metcalf, A.J.), rendered February 21, 2014. The judgment convicted defendant, upon a jury verdict, of rape in the first degree.

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

Memorandum: On appeal from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [1]), defendant contends that he was deprived of effective assistance of counsel at trial. According to defendant, his attorney was ineffective because he allowed the jury to learn that he was a registered sex offender who had previously been convicted of a felony sexual offense. We agree with that contention and grant defendant a new trial.

On the evening of July 30, 2005, the victim reported to the police in the Village of Phoenix that a young man whom she did not know dragged her into the woods and raped her. She had injuries consistent with a violent assault, and semen from the victim's vagina was recovered at the hospital by use of a rape kit. In 2010, approximately five years after the attack, the police learned that the DNA from the semen matched defendant's DNA profile, which was in the Combined DNA Index System (CODIS) because he was a convicted felon. When a police investigator interviewed defendant two years later, in December 2012, defendant said that he did not know or recognize the victim and never had sexual intercourse with her. Defendant agreed to give an oral swab, providing the police with his DNA, and subsequent testing conclusively established that defendant's DNA matched that from the semen preserved in the rape kit. Defendant was arrested on January 31, 2013 and charged with rape in the first degree.

At the outset of the jury trial, and before commencement of voir

dire, defense counsel informed County Court that defendant would be testifying at trial. During the ensuing *Sandoval* hearing, the prosecutor stated that he wished to cross-examine defendant with respect to three criminal convictions: a 2008 misdemeanor conviction, for driving while intoxicated, a 2005 felony conviction, for sexual abuse in the first degree, and a 1994 felony conviction, for driving while intoxicated. With respect to the sexual abuse conviction, the prosecutor, acknowledging that "the nature of that offense" is "so similar to the present charge," requested a *Sandoval* compromise pursuant to which he would be allowed to ask defendant "if he was convicted of a felony offense but not specify the title of that offense or the underlying facts." The court agreed to that request, noting that the probative value of allowing the jury to know of defendant's prior sex offense "would not outweigh [its] prejudicial effect." With respect to the driving while intoxicated convictions, the court ruled that defendant could be impeached with the misdemeanor but not the felony, which the court deemed too remote.

The prosecutor then advised the court of a potential problem arising from the audio recording of the police investigator's interview with defendant, i.e., that during the interview repeated mention was made of defendant's status as a registered sex offender. Although the references to defendant being a sex offender could easily have been edited out of the recording, defense counsel stated that he did not object to the recording being played in its entirety for the jury inasmuch as the People would "probably introduce" documents pertaining to the testing of defendant's DNA that refer to his status as a sex offender. Defense counsel evidently concluded that the jury would learn that defendant was a registered sex offender even if an edited recording were played to the jury.

During voir dire, defense counsel twice informed the prospective jurors that defendant had previously committed a sexual offense, asking whether that would affect anyone's ability to be impartial. One prospective juror answered "Yeah," explaining that, given defendant's prior sexual conviction, he probably could not entertain the concept of defendant being not guilty of the sexual crime charged in this case. Defense counsel revealed his trial strategy during his opening statement, which was to argue that the police locked in on defendant as a suspect merely because he is a registered sex offender. "Ladies and gentlemen," defense counsel added, "my client, even though he is a registered sex offender, is presumed innocent."

At trial, the investigator who interviewed defendant testified for the People, and the recording of that interview was played for the jury, including the parts that refer to defendant being a registered sex offender. The investigator testified that he developed defendant as a suspect because defendant's DNA profile in CODIS matched the DNA profile of the rapist. During cross-examination of the investigator, defense counsel made reference once again to defendant being a registered sex offender. Defendant later took the stand in his own defense, acknowledging on direct examination that he pleaded guilty to a felony sexual offense in 2005, which required him to register as a sex offender. Defendant then testified that he met the victim on the

day in question and had consensual sexual intercourse with her in the woods.

During his summation, defense counsel conceded that the victim had been raped in the woods, but maintained that defendant merely had consensual intercourse with her earlier that same day in those same woods. Defense counsel then made one last reference to defendant's status as a registered sex offender: "The state thought that this was going to be easy. My client is a registered sex offender. He's not here - - he's not here to be judged on his morality." The jury returned a guilty verdict.

It is well settled that "mere disagreement with trial strategy is insufficient to establish that defense counsel was ineffective" (*People v Henry*, 74 AD3d 1860, 1862, *lv denied* 15 NY3d 852). At the same time, however, an attorney should not be deemed effective simply because he or she followed a strategy. Rather, there must be some examination of the reasonableness of the strategy. The Court of Appeals made that point clear when it wrote: "As long as the defense reflects a *reasonable and legitimate strategy* under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance . . . a claim of ineffective assistance of counsel will be sustained only when it is shown that counsel partook *'an inexplicably prejudicial course'* " (*People v Benevento*, 91 NY2d 708, 712-713, quoting *People v Zaborski*, 59 NY2d 863, 865 [emphasis added]).

Here, we conclude that defense counsel's strategy, i.e., to allow the jury to know that defendant was a registered sex offender and then argue that the police focused their investigation on defendant because he was a registered sex offender, was based on an obviously false premise. The police focused their investigation on defendant because his DNA profile matched that of the rapist, not because he was a registered sex offender. Moreover, defendant's DNA profile was in CODIS because he was a convicted felon, not because he had committed a sexual offense. This is not to say that defense counsel pursued an unreasonable defense *theory* at trial. The theory was that defendant had consensual intercourse with the victim on the same day that she was raped by someone else. In pursuing that theory, however, it was unnecessary for defense counsel to inform the jury that defendant was a registered sex offender. In fact, any chance that the jurors would have believed defendant's testimony about the intercourse being consensual was likely extinguished once they learned that he had previously committed a sex offense. In short, defendant derived no discernible benefit from the jury knowing that he was a registered sex offender, and was highly prejudiced thereby.

It must be emphasized that defendant received a favorable *Sandoval* ruling pursuant to which he could have testified at trial without being asked about the prior conviction of a sexual offense. The prosecutor was permitted to ask merely whether he was convicted of a felony. Also, as previously noted, the references to defendant's status as a registered sex offender on the audio recording of the police investigator's interview with defendant could easily have been

redacted. The relevant parts of the interview related to defendant's assertions that he did not know the victim and did not have sexual intercourse with her. Indeed, the court was open to the idea of redacting the prejudicial portions of the recording until defense counsel stated that he did not object to the recording being played in its entirety. Similarly, any references to defendant as a sex offender on the DNA documents could have been redacted. In any event, no such documents were offered by the People at trial or otherwise admitted in evidence.

In sum, we conclude that defense counsel "partook 'an inexplicably prejudicial course' " of action by allowing the jury to know that defendant is a registered sex offender (*id.*). Although the proof of guilt may have been overwhelming, defense counsel's error was so "egregious and prejudicial as to compromise . . . defendant's right to a fair trial" (*People v Caban*, 5 NY3d 143, 152; *see generally People v Crimmins*, 36 NY2d 230, 237-238).

Defendant's further contention that the evidence is legally insufficient to establish his guilt is unpreserved for our review (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678) and, in any event, it lacks merit. Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621), we conclude that there is a valid line of reasoning and permissible inferences that could lead a rational person to the conclusion reached by the jury based on the evidence at trial, i.e., that defendant had sexual intercourse with the victim by forcible compulsion (*see generally People v Bleakley*, 69 NY2d 490, 495). 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 is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Even assuming, arguendo, that a different verdict would not have been unreasonable, we cannot conclude that the jury failed to give the evidence the weight it should be accorded (*see id.*).

We have reviewed defendant's remaining contentions, and conclude that none constitutes a further ground for reversal.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

55

CAF 14-02118

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

IN THE MATTER OF MARK A. MANDILE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KATRINA V. DESHOTEL, RESPONDENT-APPELLANT.

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

MAUREEN A. PINEAU, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered October 29, 2014 in a proceeding pursuant to Family Court Act article 4. The order, among other things, confirmed the Support Magistrate's determination that respondent willfully violated a court order and awarded petitioner a judgment in the sum of $4,129.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by reinstating respondent's objections to the Support Magistrate's denial of her cross petition, and as modified the order is affirmed without costs, and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: Respondent mother appeals from an order adjudging that she willfully violated a prior order of child support and denying her cross petition for downward modification of her child support obligation. Contrary to respondent's contention, Family Court properly confirmed the finding of the Support Magistrate that she willfully violated the child support order. "There is a presumption that a respondent has sufficient means to support his or her . . . minor children . . . , and the evidence that respondent failed to pay support as ordered constitutes 'prima facie evidence of a willful violation' " (*Matter of Christine L.M. v Wlodek K.*, 45 AD3d 1452, 1452, quoting Family Ct Act § 454 [3] [a]; *see Matter of Barksdale v Gore*, 101 AD3d 1742, 1742). Here, it was undisputed that respondent failed to pay the amounts directed by the order, and the burden thus shifted to her to submit "some competent, credible evidence of [her] inability to make the required payments" (*Matter of Powers v Powers*, 86 NY2d 63, 70; *see Matter of Jelks v Wright*, 96 AD3d 1488, 1489). Respondent failed to meet that burden. Although respondent presented evidence of a medical condition disabling her from work, that evidence relates only to the period after the violation petition was filed, not to the two-month period in which

respondent failed to comply with the support order before the petition was filed. Respondent thus "failed to demonstrate that [she] had made reasonable efforts to obtain gainful employment to meet [her] child support obligation" (*Matter of Seleznov v Pankratova*, 57 AD3d 679, 681).

We agree with respondent, however, that the court erred in failing to consider her objections to the Support Magistrate's denial of her cross petition for a downward modification of child support. Upon receiving those objections and any rebuttal, the court was required to "(i) [remit] one or more issues of fact to the support magistrate, (ii) make, with or without a new hearing, his or her own findings of fact and order, or (iii) deny the objections" (Family Ct Act § 439 [e]). Instead of reviewing the mother's objections, however, the court implicitly dismissed them when it stated on the record that, if the cross petition was denied by the Support Magistrate, the mother "will have to file another one." We therefore modify the order by reinstating the mother's objections, and we remit the matter to Family Court to review respondent's objections to the Support Magistrate's denial of her cross petition in accordance with Family Court Act § 439 (e).

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

56

CA 15-01079

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

ADAM DAILEY, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LABRADOR DEVELOPMENT CORP., DEFENDANT-APPELLANT.

CHEROUTES ZWEIG, PC, HAMBURG (STEVEN M. ZWEIG OF COUNSEL), FOR DEFENDANT-APPELLANT.

STANLEY LAW OFFICES, LLP, SYRACUSE (BRIANNE CARBONARO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered September 22, 2014. The amended order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for injuries he sustained when he was downhill skiing on defendant's premises. The accident occurred when plaintiff lost control while skiing down a trail, fell to the ground, slid down the mountain for approximately 15 to 30 feet, and collided headfirst into a metal pole of a snowmaking machine. Although there was padding on the upper portion of the pole, plaintiff collided with the lower, unpadded portion of the pole. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff assumed the risks associated with the sport of skiing. We agree with plaintiff that Supreme Court properly denied the motion. We note at the outset that General Obligations Law § 18-107 provides that, "[u]nless otherwise specifically provided in this article, the duties of skiers, passengers, and ski operators shall be governed by common law" and, contrary to defendant's contention, the precise circumstances of plaintiff's accident are not covered by article 18 of the General Obligations Law. Thus, the common law applies where, as here, plaintiff is alleging the negligent placement and inadequate padding of defendant's snowmaking machines, a condition not "specifically addressed by the statute" (*Sytner v State of New York*, 223 AD2d 140, 143).

It is well settled under the common law that "[v]oluntary participants in the sport of downhill skiing assume the inherent risks

of personal injury caused by, among other things, terrain, weather conditions, ice, trees and man-made objects that are incidental to the provision or maintenance of a ski facility" (*Fabris v Town of Thompson*, 192 AD2d 1045, 1046). Here, although defendant met its initial burden by establishing that the accident was caused by the inherent risks in the sport of downhill skiing, plaintiff raised a triable issue of fact by submitting the affidavit of his expert (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Plaintiff's expert asserted therein that the snowmaking machine was on the ski trail and was insufficiently padded, thus raising an issue of fact whether defendant "failed to maintain its property in a reasonably safe condition" (*Basilone v Burch Hill Operations*, 199 AD2d 779, 780; *see Fabris*, 192 AD2d at 1046-1047; *cf. Bennett v Kissing Bridge Corp.*, 17 AD3d 990, 990-991, *affd* 5 NY3d 812).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

60

CA 15-01094

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

HARRY E. LORENZO, ESQ., PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOGANWILLIG, DEFENDANT-RESPONDENT,
AND STEVEN M. COHEN, ESQ., INTERVENOR-RESPONDENT.

UNDERBERG & KESSLER LLP, BUFFALO (THOMAS F. KNAB OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HOGAN WILLIG, PLLC, AMHERST (DIANE R. TIVERON OF COUNSEL), FOR DEFENDANT-RESPONDENT AND INTERVENOR-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered November 17, 2014. The order, insofar as appealed from, granted that part of defendant's motion seeking partial summary judgment dismissing the fifth cause of action in plaintiff's amended complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion for partial summary judgment is denied in its entirety and the fifth cause of action is reinstated.

Memorandum: As part of a merger agreement between defendant and plaintiff's former firm, Lorenzo and Cohen, P.C. (L&C), defendant agreed to pay plaintiff one third of the net fees, and 50% of the pre-merger disbursements, arising from "contingency fee related files" transferred to defendant by L&C on the effective date of the merger, August 1, 2009. One such file is that of Lynn DeJac Peters (DeJac), who had been wrongly convicted of murder. At the time of the merger, a wrongful imprisonment claim against New York State and certain state officials, filed by L&C on behalf of DeJac, was pending in the Court of Claims (DeJac state action). In November 2010, after the effective date of the merger but before defendant was officially substituted as counsel for DeJac, defendant commenced a civil rights action on behalf of DeJac in federal court against, inter alia, the County of Erie and the City of Buffalo (DeJac federal action), which, like the DeJac state action, sought damages flowing from DeJac's wrongful imprisonment.

The DeJac state action settled in November 2012, and the State agreed to pay DeJac $2.7 million. A dispute arose over the amount of fees to which plaintiff was entitled from that settlement and from

other files transferred to defendant in the merger. As a result, plaintiff commenced this action, asserting two causes of action pursuant to Judiciary Law § 475 and two causes of action for breach of contract. When defendant thereafter indicated to plaintiff that he would not be entitled to fees that might arise from the DeJac federal action, plaintiff amended the complaint to assert a fifth cause of action, seeking a determination that the DeJac federal action was part of a "contingency fee related file" transferred to defendant as part of the merger, and that plaintiff therefore has a lien entitling him to one third of the net fees charged or derived by defendant in the DeJac federal action. Defendant moved for partial summary judgment seeking, inter alia, dismissal of the amended complaint. Supreme Court granted the motion in part and dismissed the fifth cause of action, determining that the DeJac federal action was not part of a "contingency fee related file" transferred to defendant pursuant to the merger agreement because the federal action had not been commenced before the date on which L&C's files were transferred to defendant.

We reverse the order insofar as appealed from. We conclude that defendant failed to establish as a matter of law that the "contingency fee related file" relating to L&C's representation of DeJac does not encompass claims asserted in litigation commenced after the effective date of the merger, including the claims in the DeJac federal action. The merger agreement directs that, "[o]n all L&C contingency fee related *files* that [defendant] assumes the control of on the date of the merger, [plaintiff] shall have a lien entitling him to the payment of ⅓ of the net fees charged or derived by [defendant] from the proceeds of the settlement or recovery by [defendant] of each contingency fee *claim*" (emphasis added). Because "[t]he use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 60-61; *see Platek v Town of Hamburg*, 24 NY3d 688, 696-697), we conclude that the merger agreement's use of the term "contingency fee claim" in the same paragraph as the term "contingency fee related files" at the very least raises an issue of fact whether the contingency fee related file arising from L&C's representation of DeJac is comprised of multiple claims, i.e., both federal and state claims arising from DeJac's alleged wrongful imprisonment, and thus includes the claims asserted in the DeJac federal action.

Finally, we decline plaintiff's invitation to search the record and grant summary judgment in his favor.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

65

TP 15-01072

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

IN THE MATTER OF DILLEN A. DEVEINES,
PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR
VEHICLES APPEALS BOARD,
RESPONDENT.

LEONARD & CURLEY, PLLC, ROME (JOHN G. LEONARD OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Oneida County [Norman I. Siegel, J.], entered October 30, 2014) to review a determination of respondent. The determination affirmed the decision of the Administrative Law Judge, dated July 17, 2013, revoking the license and/or privilege of the petitioner to operate a motor vehicle.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination revoking his driver's license based on his refusal to submit to a chemical test following his arrest for driving while intoxicated. A police officer initially stopped petitioner for a traffic violation, and ultimately took petitioner into custody after petitioner exhibited signs and made statements that indicated he was intoxicated. Petitioner refused to submit to a chemical test and, based on that refusal, his driver's license was temporarily suspended. A refusal revocation hearing was thereafter held pursuant to Vehicle and Traffic Law § 1194 (2) (c). The Administrative Law Judge revoked petitioner's license after concluding, inter alia, that the officer had lawfully stopped petitioner for violating Vehicle and Traffic Law § 375 (30) because petitioner's view was obstructed by objects hanging from his rearview mirror. In affirming the determination on petitioner's administrative appeal, respondent concluded that, pursuant to *People v Ingle* (36 NY2d 413, 420), the stop was lawful, i.e., the officer possessed specific and articulable facts which, taken together with the rational

inferences from those facts, reasonably warranted the stop.

We agree with petitioner that respondent reviewed the determination under an incorrect legal standard inasmuch as, "[s]ince *Ingle*, . . . the Court of Appeals has made it 'abundantly clear' . . . that 'police stops of automobiles in this State are legal only pursuant to routine, nonpretextual traffic checks to enforce traffic regulations or when there exists at least a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime' . . . [,] or where the police have 'probable cause to believe that the driver . . . has committed a traffic violation' " (*People v Washburn*, 309 AD2d 1270, 1271; *see People v Robinson*, 97 NY2d 341, 349). We nevertheless reject petitioner's contention that the record lacks substantial evidence to support the determination that the stop was lawful. Contrary to petitioner's contention, "[p]robable cause . . . 'does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a *reasonable belief* that an offense has been or is being committed' " (*People v Guthrie*, 25 NY3d 130, 133, *rearg denied* 25 NY3d 1191). Here, the record establishes that the officer had probable cause to believe that petitioner was violating Vehicle and Traffic Law § 375 (30) inasmuch as the officer testified that he observed objects measuring approximately four inches wide—later identified as air fresheners—hanging three or four inches below the rearview mirror, and that those objects may have obstructed petitioner's view through the windshield (*see People v Singleton*, ___ AD3d ___, ___ [Jan. 21, 2016]; *People v Bookman*, 131 AD3d 1258, 1260; *cf. People v O'Hare*, 73 AD3d 812, 813).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

66

TP 15-01033

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

IN THE MATTER OF FRANCES FLANNERY, PETITIONER,

V MEMORANDUM AND ORDER

HOWARD Z. ZUCKER, M.D., J.D., ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH, EILEEN TIBERIO, COMMISSIONER, ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, AND ONTARIO COUNTY DEPARTMENT OF SOCIAL SERVICES, RESPONDENTS.

LACY KATZEN LLP, ROCHESTER (RACHELLE H. NUHFER OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENTS.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Ontario County [William F. Kocher, A.J.], entered May 28, 2015) to review a determination of respondent New York State Department of Health. The determination, after a fair hearing, denied the application of petitioner for chronic care medical assistance.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to challenge a determination, made after a fair hearing, that she is ineligible for Medicaid coverage. We confirm that determination. When reviewing a Medicaid eligibility determination made after a fair hearing, we must determine whether the agency's decision is "supported by substantial evidence and [is] not affected by an error of law," bearing in mind that the petitioner "bears the burden of demonstrating eligibility" (*Matter of Albino v Shah*, 111 AD3d 1352, 1354 [internal quotation marks omitted]). We will uphold the agency's determination when it is "premised upon a reasonable interpretation of the relevant statutory provisions and is consistent with the underlying policy of the Medicaid statute" (*Matter of Golf v New York State Dept. of Social Servs.*, 91 NY2d 656, 658; *see Matter of Peterson v Daines*, 77 AD3d 1391, 1392-1393).

Here, we conclude that the agency's determination, which is based on its conclusion that the principal of a trust of which petitioner is a beneficiary is an "available resource," is supported by substantial evidence and is not affected by an error of law. The trust at issue grants petitioner's children, as cotrustees, "the authority to distribute so much of the principal to [petitioner that they,] in their sole discretion, deem advisable to provide for [petitioner's] health, maintenance and welfare." Because the principal of the trust may, in the discretion of petitioner's children, be paid for petitioner's benefit, the agency did not err in concluding that the principal of the trust is an available resource for purposes of petitioner's Medicaid eligibility determination (*see* 18 NYCRR 360-4.5 [b] [1] [ii]; *Matter of Vitale v Woodhouse*, 270 AD2d 951, 951-952; *Matter of Frey v O'Reagan*, 216 AD2d 565, 566), despite the fact that her children refuse to exercise their discretion to make such payments of principal. Contrary to petitioner's further contention, although the trust was funded at the time of the grantor's death, it is not a testamentary trust for purposes of 18 NYCRR 360.45 (c) because it was not "created by will" (SCPA 103 [48]; *see* 42 USC 1396p [d]).

Finally, we conclude that petitioner failed to meet her burden of demonstrating that the trust is an exempt third-party trust pursuant to 18 NYCRR 360-4.5 (b) (3) (ii) or (b) (4) because the evidence at the fair hearing failed to establish that none of petitioner's assets were used to fund the trust.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

67

KA 12-00213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE ACEVEDO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered July 19, 2011. The judgment convicted defendant, upon a jury verdict, of robbery in the first degree (two counts), robbery in the second degree (two counts) 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, inter alia, two counts of robbery in the first degree (Penal Law § 160.15 [3]). Defendant failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence. Although defendant moved at the close of the People's case for a trial order of dismissal, he did not renew the motion at the close of his case (*see People v Hines*, 97 NY2d 56, 61, *rearg denied* 97 NY2d 678). In any event, we conclude that defendant's contention is without merit (*see generally People v Bleakley*, 69 NY2d 490, 495). Because the conviction is supported by legally sufficient evidence, the contention of defendant that Supreme Court erred in refusing to dismiss the indictment based upon the alleged insufficiency of the evidence before the grand jury is not reviewable on appeal (*see* CPL 210.30 [6]; *People v Hawkins*, 113 AD3d 1123, 1125, *lv denied* 22 NY3d 1156). 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 conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's contention, the court properly denied his challenge for cause of a prospective juror. Although the prospective juror expressed concern regarding his financial hardship as a result

of his potential jury service, he reassured the court that his employment obligations would not prevent him from being fair and impartial (*see People v Wilson*, 52 AD3d 941, 942, *lv denied* 11 NY3d 743). "Considering that almost every potential juror is inconvenienced by taking a week or more away from one's work or normal routine, and that each has personal concerns which could cause some distraction from a trial, [the court] did not abuse its discretion in denying defendant's challenge for cause" (*id.*).

Defendant contends that the People improperly impeached their own witness by confronting him with his previous statement to the police. Defendant failed to preserve that contention for our review inasmuch as he did not object to the People's line of questioning at trial (*see People v Cruz*, 23 AD3d 1109, 1110, *lv denied* 6 NY3d 811), 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 reject defendant's contention that the court erred in failing to strike the testimony of the People's expert forensic examiner. Although the expert could not determine if the blood found on the knife in defendant's possession was human blood, her testimony was still probative on the issue whether defendant was involved, either as a principal or as an accomplice, in the robbery. "The trial court is granted broad discretion in making evidentiary rulings in connection with the preclusion or admission of testimony and such rulings should not be disturbed absent an abuse of discretion[,]" and we discern no abuse of discretion here (*People v Almonor*, 93 NY2d 571, 583).

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

81

CA 15-00820

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

BERNARD A. UNGER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MICHAEL A. GANCI, DEFENDANT-RESPONDENT.

LAW OFFICES OF GARY R. EBERSOLE, GRAND ISLAND (STEPHEN C. HALPERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LIPPES MATHIAS WEXLER FREIDMAN LLP, BUFFALO (KEVIN BURKE OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Drury, J.), entered September 12, 2014. The order granted the motion of defendant for partial summary judgment on the issue of liability on his first counterclaim and dismissed the complaint.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law, the motion is denied, and the complaint is reinstated.

Memorandum: Plaintiff commenced this action alleging that defendant breached an agreement providing, inter alia, that defendant would pay plaintiff for the "book of business/client list" of approximately 200 client accounts from plaintiff's financial services business, which he sold to defendant because he relocated to Florida in October 2010. In his answer, defendant asserted nine counterclaims, including that plaintiff willfully breached the agreement not to compete with defendant when plaintiff returned to Western New York and opened a new financial services business in late 2012, and that plaintiff "solicited" business from six of his former clients. Defendant alleged in the first counterclaim (counterclaim), which seeks rescission of the agreement, that the "breaches are so substantial and fundamental that they defeat the object of the agreement." Supreme Court granted defendant's motion seeking partial summary judgment on the issue of liability on the counterclaim, rescinded the agreement, and dismissed the complaint. That was error.

The record establishes that, at the time the action was commenced, plaintiff was handling the financial accounts for six of his former clients, four of whom were immediate family members and two of whom were dissatisfied with services provided by defendant. Plaintiff submitted affidavits from those former clients, who averred that plaintiff did not solicit their business but, instead, that they

requested that he manage their accounts. The court determined that plaintiff "took over" those six accounts and that he implied in an email to defendant that he intended to solicit business from other former clients, which constituted a material breach of the agreement warranting rescission.

We conclude that defendant failed to establish his entitlement to judgment as a matter of law on the counterclaim (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562). As a preliminary matter, "[t]o be entitled to summary judgment, the moving party has the burden of establishing that its construction of the agreement is the only construction which can fairly be placed thereon" (*Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890, 891 [internal quotation marks omitted]), and defendant failed to meet that burden here. The court rejected defendant's contention that the agreement prohibited plaintiff from operating a financial services business in Western New York, and we note that defendant does not contend on appeal, as an alternative basis for affirmance, that the court erred in that determination (*see generally Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546). Even assuming, arguendo, that defendant established that plaintiff breached the agreement by taking over the financial accounts of six of defendant's clients, " '[a]s a general rule, rescission of a contract is permitted for such a breach as substantially defeats its purpose. It is not permitted for a slight, casual[] or technical breach, but . . . only for such as are material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract' " (*WILJEFF, LLC v United Realty Mgt. Corp.*, 82 AD3d 1616, 1617). We conclude that defendant failed to establish as a matter of law that the alleged breach was material and willful, or so substantial and fundamental as to strongly tend to defeat the object of the agreement (*cf. id.* at 1617-1618).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

85

CA 15-01133

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

ALEXANDER G. WEISER, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

MARYCLAIRE P. WILBER AND FREDERICK J. WILBER,
DEFENDANTS-RESPONDENTS.

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

LAW OFFICES OF DESTIN C. SANTACROSE, BUFFALO (ELISE L. CASSAR OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Jeremiah J. Moriarty, III, J.), entered October 3, 2014. The order, insofar as appealed from, denied that part of the motion of plaintiff seeking to strike defendants' affirmative defense of failure to wear a seatbelt.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries he sustained in a motor vehicle accident. Contrary to plaintiff's contention, Supreme Court properly denied that part of his motion seeking to strike defendants' first affirmative defense insofar as that defense is premised on plaintiff's failure to wear a seat belt. Although plaintiff met his initial burden on that part of the motion, defendants raised a triable issue of fact by submitting expert proof in the form of an affidavit from a police officer, who conducted an investigation of the accident and concluded that plaintiff was not wearing his seatbelt (*see Regan v Ancoma, Inc.*, 11 AD3d 1016, 1017). Contrary to plaintiff's contention, the affidavit is not based on "mere speculation" (*Stickney v Alleca*, 52 AD3d 1214, 1215) and, "[i]f there is any doubt as to the availability of a defense, it should not be dismissed" (*Nahrebeski v Molnar*, 286 AD2d 891, 891 [internal quotation marks omitted]).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

91

KA 14-01328

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

VERNON THOMAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ROBERT L. KEMP OF COUNSEL), FOR DEFENDANT-APPELLANT.

VERNON THOMAS, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered June 24, 2014. The judgment convicted defendant, upon a jury verdict, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Defendant failed to preserve for our review his contention that his conviction is not supported by legally sufficient evidence, inasmuch as he moved for a trial order of dismissal on a ground different from that raised on appeal (*see People v Scott*, 61 AD3d 1348, 1349, *lv denied* 12 NY3d 920, *reconsideration denied* 13 NY3d 799). In any event, we reject defendant's present contention. By throwing gasoline on the victim and threatening to burn her while he held a lighter in his hand, defendant went "beyond mere preparation to the point that his conduct was potentially and immediately dangerous" (*People v Denson*, 26 NY3d 179, 192; *see People v Davis*, 83 AD3d 1492, 1492, *lv denied* 17 NY3d 815, *reconsideration denied* 17 NY3d 903; *see also People v Adams*, 222 AD2d 1124, 1124, *lv denied* 87 NY2d 1016). Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495).

We conclude that any error in Supreme Court's *Sandoval* ruling is harmless inasmuch as the evidence of defendant's guilt is overwhelming, and there is no significant probability that defendant

would have been acquitted but for the error (*see People v Grant*, 7 NY3d 421, 424-425). Contrary to defendant's further contention, we conclude that the court properly allowed the People to present evidence that he engaged in uncharged criminal conduct immediately before and after the attempted assault. That evidence was properly admitted "to complete the narrative of the events charged in the indictment" (*People v Leeson*, 48 AD3d 1294, 1296, *affd* 12 NY3d 823) and, in any event, the court provided the jury with an appropriate limiting instruction, thereby minimizing any potential prejudice to defendant (*see People v Bassett*, 55 AD3d 1434, 1436, *lv denied* 11 NY3d 922). We reject defendant's contention that he was denied effective assistance of counsel based upon his attorney's failure to cross-examine the People's domestic violence trauma expert (*see People v Philbert*, 267 AD2d 607, 607-608, *lv denied* 94 NY2d 905; *People v Almanzar*, 188 AD2d 654, 655, *lv denied* 81 NY2d 881). Contrary to defendant's further contention, the court properly denied his motion to set aside the verdict pursuant to CPL 330.30 (3) without conducting a hearing. Defendant failed to show that the allegedly new evidence could not have been discovered earlier in the exercise of reasonable diligence (*see People v Sterina*, 108 AD3d 1088, 1091), nor in any event did he show that it was "of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant" (CPL 330.30 [3]; *see People v Simon*, 71 AD3d 1574, 1576, *lv denied* 15 NY3d 757, *reconsideration denied* 15 NY3d 856). The sentence is not unduly harsh or severe.

We have examined defendant's contentions in his pro se supplemental brief and conclude that none requires reversal or modification of the judgment.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

98

CAF 14-01133

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

IN THE MATTER OF DANIELLE R. LADD,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW F. KRUPP, RESPONDENT-APPELLANT.

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

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

KRISTIN A. SHANLEY, ATTORNEY FOR THE CHILD, OSWEGO.

Appeal from an amended order of the Family Court, Oswego County (Donald E. Todd, A.J.), entered February 5, 2014 in a proceeding pursuant to Family Court Act article 6. The amended order, among other things, awarded petitioner sole legal and physical custody of the subject child, with visitation to respondent.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent father appeals from an amended order that, among other things, awarded petitioner mother sole legal and physical custody of the subject child, with visitation to the father. We note at the outset that the father contends that the mother was required to establish that there was a significant change in circumstances since the date of entry of the prior custody order, i.e., February 5, 2013, rather than from the date of the court appearance underlying that order, i.e., July 19, 2012. According to the father, the mother supported her petition with evidence of events occurring prior to February 5, 2013 and thus failed to meet her burden. Even assuming, arguendo, that the father is correct that the mother was required to establish "that a significant change in circumstances occurred since the entry of the . . . custody order" (*Matter of Drew v Gillin*, 17 AD3d 719, 720; *see Matter of Pauline E. v Renelder P.*, 37 AD3d 1145, 1146), rather than from the date of the court appearance upon which the order was based (*see generally Matter of Giambattista v Giambattista*, 154 AD2d 920, 921), we conclude that the mother established the requisite change in circumstances subsequent to the entry of the prior order. It is well settled that "the continued deterioration of the parties' relationship is a significant change in

circumstances justifying a change in custody" (*Matter of Gaudette v Gaudette*, 262 AD2d 804, 805, *lv denied* 94 NY2d 790; *see Lauzonis v Lauzonis*, 120 AD3d 922, 924). Here, the evidence at the hearing established that "the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[], and it is well settled that joint custody is not feasible under those circumstances" (*Leonard v Leonard*, 109 AD3d 126, 128). Thus, Family Court properly concluded that there had been a sufficient change in circumstances justifying a review of the preexisting custody arrangement.

Contrary to the father's further contention, the court properly considered the appropriate factors in making its custody determination (*see generally Matter of Caughill v Caughill*, 124 AD3d 1345, 1346). The court's determination with respect to the child's best interests "is entitled to great deference and will not be disturbed [where, as here,] it is supported by a sound and substantial basis in the record" (*Sheridan v Sheridan*, 129 AD3d 1567, 1568; *see Fox v Fox*, 177 AD2d 209, 211-212). Here, the evidence in the record supports the court's determination that the mother had attempted to foster a relationship between the father and the child, while the father interfered with the mother's relationship with the child by, inter alia, blatantly and repeatedly violating the court's directive not to discuss the litigation with the child, repeatedly telling the child that the mother was irresponsible and unintelligent, and limiting the mother's access to the child or placing absurd restrictions on such access. It is well settled that a " 'concerted effort by one parent to interfere with the other parent's contact with the child is so inimical to the best interests of the child . . . as to, per se, raise a strong probability that [the interfering parent] is unfit to act as custodial parent' " (*Matter of Amanda B. v Anthony B.*, 13 AD3d 1126, 1127; *see Matter of Avdic v Avdic*, 125 AD3d 1534, 1536; *Matter of Orzech v Nikiel*, 91 AD3d 1305, 1306).

The father withdrew his request that the court recuse itself and thus failed to preserve for our review his contention that the court should have recused itself (*see generally Matter of Rath v Melens*, 15 AD3d 837, 837). In any event, that contention is without merit. " 'Where, as here, there is no allegation that recusal is statutorily required . . . , the matter of recusal is addressed to the discretion and personal conscience of the [judge] whose recusal is sought' " (*Kern v City of Rochester*, 217 AD2d 918, 918; *see Matter of Nunnery v Nunnery*, 275 AD2d 986, 987).

We have considered the father's remaining contention, and we conclude that it is without merit.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

100

CA 15-01232

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

MARK SQUAIRS AND MARY SQUAIRS,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

SAFECO NATIONAL INSURANCE COMPANY, A LIBERTY MUTUAL COMPANY, DEFENDANT-APPELLANT.

FINAZZO COSSOLINI O'LEARY MEOLA & HAGER, LLC, NEW YORK CITY (ROBERT M. WOLF OF COUNSEL), FOR DEFENDANT-APPELLANT.

GUSTAVE J. DETRAGLIA, JR., UTICA, FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Onondaga County (James P. Murphy, J.), entered April 22, 2015. The order and judgment, inter alia, granted the motion of plaintiffs for summary judgment and denied the motion of defendant for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously reversed on the law without costs, plaintiffs' motion is denied, defendant's motion is granted, and the complaint is dismissed.

Memorandum: Plaintiffs commenced this action seeking a determination that defendant is obligated to provide coverage for damages to their home pursuant to an insurance policy issued by defendant to them. Plaintiffs' home was allegedly damaged when four exterior posts supporting a deck, which was structurally integrated into the second floor of the home, were damaged by hidden decay and rot. We conclude that Supreme Court erred in granting plaintiffs' motion for summary judgment, and instead should have granted defendant's motion for summary judgment dismissing the complaint.

Insofar as relevant, the policy excludes coverage for "wear and tear," "wet or dry rot," and "settling" or "cracking" of, inter alia, foundations, patios, walls, floors, roofs, and ceilings. The policy provides coverage for "collapse" of a building or part of a building. "Collapse" is defined in the policy as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its intended purpose." The policy further provides that "[a] building or any part of a building that is in danger of falling down or caving in is not considered to be in a state of collapse" and that "[a] building

or any part of a building that is standing is not considered to be in a state of collapse even if it shows evidence of cracking, bulging, sagging, bending, leaning, settling, shrinkage or expansion."

Here, the record establishes that plaintiffs' home was standing when they submitted their claim to defendant, and there had been no "abrupt falling down or caving in." Thus, based on the unambiguous language of the policy, there was no "collapse" of plaintiffs' home (*see Viscosi v Preferred Mut. Ins. Co.*, 87 AD3d 1307, 1308, *lv denied* 18 NY3d 802; *Rector St. Food Enters., Ltd. v Fire & Cas. Ins. Co. of Conn.*, 35 AD3d 177, 178). Rather, the support posts were subject to rot and deterioration over time and, even assuming arguendo, as plaintiffs contend, that the home was in a state of "imminent collapse," we conclude that there is no coverage (*see Rector St. Food Enters., Ltd.*, 35 AD3d at 178). We note that plaintiffs erroneously rely on the line of cases finding a "collapse" in situations where the policy failed to define "collapse" (*see e.g. Wangerin v New York Cent. Mut. Fire Ins. Co.*, 111 AD3d 991; *Royal Indem. Co. v Grunberg*, 155 AD2d 187). In light of our determination, we do not address defendant's remaining contentions.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

114

KA 14-00041

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

STEVEN L. FOWLER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Michael F. Pietruszka, J.), rendered November 19, 2013. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]), defendant contends that County Court erred in refusing to grant his pro se motion to withdraw his plea, which defendant asserts was involuntary because his attorney failed to advise him of the possible defense of intoxication. We reject that contention. Defendant was represented by counsel and was not entitled to hybrid representation (*see People v Rodriguez*, 95 NY2d 497, 501-502; *People v Alsaifullah*, 96 AD3d 1103, 1103, *lv denied* 19 NY3d 944), and we therefore conclude that the court did not abuse its discretion in refusing to entertain the pro se motion. We note in any event that defendant admitted during the plea colloquy that he intended to cause serious physical injury to the victim when he stabbed him with a knife, and, thus, his claim that he was too intoxicated to form the requisite intent is belied by the plea transcript (*see generally People v Santana*, 110 AD2d 789, 789, *lv denied* 67 NY2d 656).

Defendant failed to preserve for our review his contention that the court erred in sentencing him as a second violent felony offender inasmuch as he failed to controvert the allegations in the predicate felony statement (*see People v Smith*, 73 NY2d 961, 962-963; *People v Lawrence*, 23 AD3d 1039, 1039-1040, *lv denied* 6 NY3d 835), and the narrow exception to the preservation rule does not apply (*see People v Nieves*, 2 NY3d 310, 315-316; *cf. People v Samms*, 95 NY2d 52, 55-57).

We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]; *People v Sullivan*, 4 AD3d 223, 224, *lv denied* 2 NY3d 765).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

115

KA 13-00154

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARREN HIGHTOWER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 19, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea is vacated, that part of the omnibus motion seeking to suppress physical evidence is granted, the indictment is dismissed, and the matter is remitted to Onondaga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1]), defendant contends that County Court erred in refusing to suppress physical evidence obtained by the police following a stop of the vehicle in which defendant was a passenger. We agree. At the outset, we note that defendant correctly concedes that the vehicle was lawfully stopped for having excessively tinted windows in violation of the Vehicle and Traffic Law (*see People v Estrella*, 48 AD3d 1283, 1284, *affd* 10 NY3d 945, *cert denied* 555 US 1032). Defendant further correctly concedes that, following the stop of the vehicle, the officer was entitled to make level one inquiries concerning defendant's identity and destination (*see People v Dewitt*, 295 AD2d 937, 938, *lv denied* 98 NY2d 709, *reconsideration denied* 98 NY2d 767; *see generally People v De Bour*, 40 NY2d 210, 223), and to direct him to exit the vehicle when the driver admitted that he had no driver's license and defendant was unable to produce identification (*see People v Jones*, 66 AD3d 1476, 1477, *lv denied* 13 NY3d 908).

Contrary to the determination of the suppression court, however, we conclude that the officer's further escalation of the encounter exceeded permissible bounds. The officer testified at the suppression

hearing that, when defendant responded to his level one inquiries, defendant appeared fidgety, grabbed at his pants pockets, looked around, and gave illogical and contradictory responses to the officer's questions, which prompted the officer to ask defendant whether he had any weapons or drugs. With that question, the officer "proceed[ed] to the next level of confrontation, the 'common-law inquiry,' which involves 'invasive questioning' focusing on the 'possible criminality' of the subject" (*People v Tejeda*, 217 AD2d 932, 933, quoting *People v Hollman*, 79 NY2d 181, 191-192). That escalation was not supported by the requisite founded suspicion of criminality (*see generally De Bour*, 40 NY2d at 223). Defendant's nervousness and the discrepancies in his explanation of where he was going did not give rise to a founded suspicion that criminal activity was afoot (*see People v Garcia*, 20 NY3d 317, 320; *People v Dealmeida*, 124 AD3d 1405, 1407).

Defendant responded to the officer's level two inquiry by saying, "you're harassing me," and then walking away. The encounter escalated further to a level three seizure when the officer commanded him to stop, defendant continued to walk away, and the officer pursued defendant with a taser (*see People v Moore*, 93 AD3d 519, 520-521, *lv denied* 19 NY3d 865). We reject the People's contention that defendant's conduct provided the officer with the requisite reasonable suspicion of criminality (*see generally De Bour*, 40 NY2d at 223). "Flight alone is insufficient to justify pursuit because an individual has a right to be let alone and refuse to respond to police inquiry" (*People v Riddick*, 70 AD3d 1421, 1422 [internal quotation marks omitted], *lv denied* 14 NY3d 844; *see People v Howard*, 50 NY2d 583, 590-591, *cert denied* 449 US 1023). Finally, we conclude that defendant's disposal of the bags containing cocaine during the officer's pursuit was precipitated by the illegality of that pursuit (*see People v Clermont*, 133 AD3d 612, 614). Thus, the court erred in refusing to suppress the bags of cocaine.

In light of our determination that the court should have granted that part of defendant's omnibus motion seeking to suppress physical evidence, defendant's guilty plea must be vacated (*see Riddick*, 70 AD3d at 1424). In addition, because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed (*see People v Cady*, 103 AD3d 1155, 1157). We therefore remit the matter to County Court for further proceedings pursuant to CPL 470.45.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

118

KA 14-00191

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD R. COOPER, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (GARY M. PHILLIPS 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 December 16, 2013. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class E felony and aggravated unlicensed operation of a motor vehicle in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of driving while intoxicated (Vehicle and Traffic Law § 1192 [2]) and aggravated unlicensed operation of a motor vehicle in the second degree (§ 511 [2] [a]). We note at the outset that the certificate of conviction contains a clerical error, i.e., it incorrectly recites that defendant was convicted of aggravated unlicensed operation of a motor vehicle in the first degree, and it must therefore be amended to reflect that he was convicted of aggravated unlicensed operation of a motor vehicle in the second degree (*see People v Saxton*, 32 AD3d 1286, 1286-1287).

We agree with defendant that his waiver of the right to appeal is not valid (*see People v Jackson*, 99 AD3d 1240, 1240-1241, *lv denied* 20 NY3d 987). During the plea colloquy, County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474, *affd* 19 NY3d 914) and, thus, "the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Jackson*, 99 AD3d at 1241 [internal quotation marks omitted]). Defendant failed to preserve for our review his contention with respect to the alleged inaccuracy of information relied upon by the court in sentencing him (*see People v Lord*, 59 AD3d 1010, 1011, *lv denied* 12 NY3d 855), 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 [3] [c]). Defendant's contention that he was denied effective assistance of counsel does not survive his plea because defendant "failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that [he] entered the plea because of his attorney['s] allegedly poor performance" (*People v Grandin*, 63 AD3d 1604, 1604 [internal quotation marks omitted], *lv denied* 13 NY3d 744). In any event, we conclude that defendant was afforded meaningful representation inasmuch as he "receive[d] an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404; *see People v Parson*, 122 AD3d 1441, 1443). Finally, the sentence is not unduly harsh or severe.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

119

KA 14-00403

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL HOGAN, DEFENDANT-APPELLANT.

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

FRANK A. SEDITA, III, DISTRICT ATTORNEY, BUFFALO (DANIEL J. PUNCH OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered February 10, 2014. The judgment convicted defendant, upon a nonjury verdict, of criminal possession of a weapon in the second degree and unlawful possession of marihuana.

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

Memorandum: On appeal from a judgment convicting him following a nonjury trial of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]) and unlawful possession of marihuana (§ 221.05), defendant contends that County Court erred in denying his motion to suppress the loaded handgun seized by the police from his vehicle. We reject that contention. It is undisputed that the two arresting officers lawfully stopped defendant's vehicle, which had excessively tinted windows in violation of Vehicle and Traffic Law § 375 (12-a) (b). The officers testified at the suppression hearing that, upon approaching defendant's vehicle after the stop, they detected an odor of marihuana emanating from the vehicle, in which defendant was the sole occupant. After determining that defendant's license was suspended, which provided probable cause for his arrest, one of the officers asked defendant whether he had anything on him that the officer should know about. In response, defendant said that he had "some blunts" on him. The officer then removed defendant from the vehicle and found a small bag of marihuana in defendant's pocket. During a subsequent search of the vehicle, the officers found a loaded firearm in the glove box.

As defendant acknowledges, the "odor of marihuana emanating from a vehicle, when detected by an officer qualified by training and experience to recognize it, is sufficient to constitute probable cause to search a vehicle and its occupants" (*People v Cuffie*, 109 AD3d

1200, 1201 [internal quotation marks omitted], *lv denied* 22 NY3d 1087; *see People v Black*, 59 AD3d 1050, 1051, *lv denied* 12 NY3d 851). Here, both arresting officers testified that they had been trained in the detection of marihuana by its odor, and both claimed to have smelled marihuana in or about defendant's vehicle. Defendant nevertheless contends that the officers' testimony that they smelled marihuana is not credible, and that the search of the vehicle was therefore unlawful. According to defendant, it is simply "incredible that a one inch square of marihuana in a plastic bag in [his] pocket could have produced an odor that could have been detected from outside" the vehicle.

It is well settled, however, 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" (*People v Layou*, 134 AD3d 1510, ___; *see People v Prochilo*, 41 NY2d 759, 761; *People v Gray*, 126 AD3d 1541, 1541). Here, the suppression court credited the officers' testimony that they smelled marihuana and, based on our review of the record, we cannot conclude that the court's determination in that regard was clearly erroneous or that the officers' testimony is incredible as a matter of law.

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

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

120

KA 15-01145

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS R.O., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 20, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree.

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice, the conviction is vacated, defendant is adjudicated a youthful offender, and the matter is remitted to Oneida County Court for sentencing.

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the second degree (Penal Law § 140.25 [2]) and, in appeal No. 2, he appeals from a judgment convicting him upon his plea of guilty of robbery in the first degree (§ 160.15 [3]). County Court sentenced defendant to concurrent terms of incarceration, the greater of which is a determinate term of eight years and a period of postrelease supervision of five years.

At the outset, with respect to both appeals, we agree with defendant that his waiver of the right to appeal is invalid. Before this Court may enforce a waiver of the right to appeal, we must examine the record "to ensure that the waiver was voluntary, knowing and intelligent" (*People v Callahan*, 80 NY2d 273, 283; *see People v Seaberg*, 74 NY2d 1, 11). "It is the trial court's responsibility, 'in the first instance,' to determine 'whether a particular [appellate] waiver satisfies these requirements' " (*People v Bradshaw*, 18 NY3d 257, 264, quoting *Callahan*, 80 NY2d at 280). In making that determination, the court must consider "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" (*Seaberg*, 74 NY2d at 11). Further, while " 'a trial court

need not engage in any particular litany' or catechism in satisfying itself that a defendant has entered a knowing, intelligent and voluntary appeal waiver, [it] 'must make certain that a defendant's understanding' of the waiver, along with other 'terms and conditions of a plea agreement is evident on the face of the record' " (*Bradshaw*, 18 NY3d at 265, quoting *People v Lopez*, 6 NY3d 248, 256).

Here, defendant was 19 years old at the time of the plea proceeding and had no prior experience with the criminal justice system. In addition, as the court noted during the plea proceeding, defendant had a history of mental illness and psychiatric hospitalizations. With respect to the waiver of the right to appeal, the court advised defendant that it was a condition of the plea, and defendant stated that he understood. Immediately thereafter, however, defendant engaged the court in rambling and incoherent questioning concerning his sentence and doctors. Following that exchange, the court stated to defendant that it felt "like [they were] going over and over and over the same thing," and that defendant was "hearing, but [he was] not understanding." Recognizing that the waiver of the right to appeal was under consideration when defendant initiated that exchange, the court returned to that subject, asking defendant simply if he agreed to give up his right to appeal in exchange for the agreed-upon sentence, and defendant replied, "Yes."

In view of defendant's particular circumstances, i.e., his youth, inexperience, and history of mental illness, along with his statements during the plea proceeding, we conclude that defendant's understanding of the waiver of the right to appeal is not evident on the face of the record, and that the waiver is invalid. In reaching that conclusion, we note that the same oral colloquy may have been adequate in other circumstances for a defendant of a different "age, experience and background" (*Seaberg*, 74 NY 2d at 11). "[T]he same or similar oral colloquy . . . can produce an appeal waiver that is valid as to one defendant and invalid as to another defendant" (*People v Brown*, 122 AD3d 133, 143). Here, however, we "cannot be certain that . . . defendant comprehended the nature of the waiver of appellate rights" (*Lopez*, 6 NY3d at 256). Review of defendant's challenge to the denial of his application for youthful offender status is therefore not foreclosed by the waiver of the right to appeal.

We agree with defendant's contention in both appeals that he should be afforded youthful offender status. It is undisputed that defendant, who was between the ages of 16 and 19 when the crimes were committed, is eligible for youthful offender treatment under CPL 720.10 (1) and (2) (*see People v Rudolph*, 21 NY3d 497, 500). In determining whether to afford such treatment to a defendant, a court must consider "the gravity of the crime and manner in which it was committed, mitigating circumstances, defendant's prior criminal record, prior acts of violence, recommendations in the presentence reports, defendant's reputation, the level of cooperation with authorities, defendant's attitude toward society and respect for the law, and the prospects for rehabilitation and hope for a future constructive life" (*People v Cruickshank*, 105 AD2d 325, 334, *affd sub nom. People v Dawn Maria C.*, 67 NY2d 625; *see People v Shrubsall*, 167

AD2d 929, 930).

In our view, the only factor weighing against affording defendant youthful offender treatment here is the seriousness of the crimes (*see Shrubsall*, 167 AD2d at 930; *Cruickshank*, 105 AD2d at 335). At the time he committed the crimes, defendant had no criminal record or history of violence (*see People v Amir W.*, 107 AD3d 1639, 1641). The most significant mitigating circumstance here, defendant's history of mental illness, is detailed in the presentence report (PSR), a memorandum from the Center for Community Alternatives (CCA), and reports prepared by a psychologist and psychiatrist. All of those documents indicate that, at the time the crimes were committed, defendant suffered, inter alia, from bipolar disorder, which had been misdiagnosed and inappropriately treated with medication that exacerbated defendant's manic symptoms. The CCA memorandum further states that defendant's behavior during the period between the crimes "is an aberration from his character and can be directly linked to his mental illness." That statement was echoed in numerous letters submitted on defendant's behalf from members of the community. The CCA memorandum states, in addition, that defendant has accepted responsibility for his actions and expressed genuine remorse for the effect of his criminal conduct on the victims, and concludes that, with appropriate treatment, defendant has the capacity for a productive and law-abiding future. Finally, both the PSR and CCA memorandum recommend youthful offender treatment (*see id.* at 1641).

Although we do not conclude, after weighing the appropriate factors, that the court abused its discretion in denying defendant youthful offender status, we nevertheless choose to exercise our discretion in the interest of justice by reversing the judgments, vacating the convictions, and adjudicating defendant a youthful offender, and we remit the matters to County Court for sentencing on the adjudications (*see Cruickshank*, 105 AD2d at 335; *see generally People v Jeffrey VV.*, 88 AD3d 1159, 1160).

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

All concur except CARNI and DEJOSEPH, JJ., who dissent and vote to affirm in the following memorandum: We respectfully dissent and would affirm the judgments of conviction inasmuch as we are constrained by the valid waiver of the right to appeal. We conclude that the record establishes that the waiver was knowingly, voluntarily, and intelligently entered (*see People v Lopez*, 6 NY3d 248, 256). Indeed, the court explicitly stated as "[o]ne other condition" of defendant's guilty plea that defendant would be required to waive his right to appeal, thereby making clear to defendant " 'that the right to appeal [was] separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Dames*, 122 AD3d 1336, 1336, *lv denied* 25 NY3d 1162; *see People v Barber*, 117 AD3d 1430, 1430, *lv denied* 24 NY3d 1081; *People v Ware*, 115 AD3d 1235, 1235). We further conclude that the record as a whole establishes that defendant understood that the waiver of the right to appeal meant that entry of the judgments of conviction upon his plea of guilty would constitute

the final disposition of his case.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

121

KA 15-01148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

THOMAS R.O., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

FRANK POLICELLI, UTICA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Michael L. Dwyer, J.), rendered August 20, 2013. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree.

It is hereby ORDERED that the judgment so appealed from is reversed as a matter of discretion in the interest of justice, the conviction is vacated, defendant is adjudicated a youthful offender, and the matter is remitted to Oneida County Court for sentencing.

Same memorandum as in *People v Thomas R.O.* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2016]).

All concur except CARNI and DEJOSEPH, JJ., who dissent and vote to affirm in accordance with the same dissenting memorandum as in *People v Thomas R.O.* ([appeal No. 1] ___ AD3d ___ [Feb. 11, 2016]).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

127

KA 15-00126

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RAYMOND M. BURLEY, DEFENDANT-APPELLANT.

KATHLEEN E. CASEY, BARKER, FOR DEFENDANT-APPELLANT.

RAYMOND M. BURLEY, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered September 11, 2014. The judgment convicted defendant, upon his plea of guilty, of unlawful manufacture of methamphetamine in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of unlawful manufacture of methamphetamine in the third degree (Penal Law § 220.73 [1]). We reject defendant's contention that his waiver of the right to appeal is invalid. It is well settled that " '[n]o particular litany is required for an effective waiver of the right to appeal' " (*People v Fisher*, 94 AD3d 1435, 1435, *lv denied* 19 NY3d 973; *see People v Kemp*, 94 NY2d 831, 833). Here, "[t]he record establishes that defendant's waiver of the right to appeal was knowing, voluntary and intelligent and that it was 'intended comprehensively to cover all aspects of the case' " (*Fisher*, 94 AD3d at 1435). Defendant's valid waiver of the right to appeal encompasses his challenge to County Court's suppression ruling (*see Kemp*, 94 NY2d at 833; *People v McNew*, 117 AD3d 1491, 1492, *lv denied* 24 NY3d 1003).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

130

CAF 15-01276

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

IN THE MATTER OF MADISON J.S., TYLER D.S., BENTLEY P.S., AND BROOKE R.S.

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

STEUBEN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-APPELLANT;

VICTORIA M. AND JASON W., RESPONDENTS-RESPONDENTS.

CASEY E. ROGERS, BATH, FOR PETITIONER-APPELLANT.

SALLY A. MADIGAN, ATTORNEY FOR THE CHILDREN, BATH.

Appeal from an order of the Family Court, Steuben County (Joseph W. Latham, J.), entered July 27, 2015 in a proceeding pursuant to Family Court Act article 10. The order, insofar as appealed from, dismissed the petition insofar as it alleged that Madison J.S., Tyler D.S. and Brooke R.S. were derivatively neglected by respondents.

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

Memorandum: Petitioner appeals from an order that, insofar as appealed from, dismissed its petition to the extent that it alleged that Madison J.S., Tyler D.S., and Brooke R.S. (the subject children) were derivatively neglected by respondents. We affirm. Although Family Court determined that respondents neglected Bentley P.S., a sibling of the subject children, and Family Court Act § 1046 (a) (i) permits evidence of that neglect to be considered in determining whether the subject children were neglected, "the statute does not mandate a finding of derivative neglect" (*Matter of Jocelyne J.*, 8 AD3d 978, 979), and "such evidence typically may not serve as the sole basis of a finding of neglect" (*Matter of Evelyn B.*, 30 AD3d 913, 914, *lv denied* 7 NY3d 713). Because there is no evidence in the record that the "neglect was repeated . . . [or] was perpetrated on multiple victims," and it is unclear whether the subject children "were nearby when the [neglect] occurred" (*Matter of Cadejah AA.*, 33 AD3d 1155, 1157), we conclude that the court did not err in refusing to make a finding of derivative neglect.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

131

CA 15-00703

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

JOHN S. GIZZI, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

TINA M. GIZZI, DEFENDANT-RESPONDENT.

JOAN de R. O'BYRNE, ROCHESTER (MICHAEL STEINBERG OF COUNSEL), FOR PLAINTIFF-APPELLANT.

GARY MULDOON, ATTORNEY FOR THE CHILDREN, ROCHESTER.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered July 24, 2014. The order, among other things, denied plaintiff's post-divorce application to modify the parties' agreement concerning custody and visitation.

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

Memorandum: Plaintiff father appeals from an order that denied his post-divorce application seeking, inter alia, modification of the parties' agreement concerning custody of their three children. Contrary to the father's contention, there is a sound and substantial basis in the record for Supreme Court's determination that he failed to make the requisite evidentiary showing of a change in circumstances to warrant an inquiry into whether the children's best interests warranted modification of the existing custody arrangement (*see Matter of Avola v Horning*, 101 AD3d 1740, 1740-1741). In any event, the record also supports the court's further determination that continuation of the existing custody arrangement would serve the best interests of the children (*see Matter of Slade v Hosack*, 77 AD3d 1409, 1409). Each of the children expressed a preference to maintain the existing arrangement and, "[w]hile the express wishes of the children are not controlling, they are entitled to great weight, particularly where their age and maturity would make their input particularly meaningful" (*Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117; *see Matter of Dingeldey v Dingeldey*, 93 AD3d 1325, 1326). In addition, the record supports the court's determination that defendant mother had taken steps to address the children's school attendance problems and, "contrary to the father's allegations, there is no evidence that the mother's . . . financial difficulties ha[ve] placed the children in jeopardy" (*Matter of Bush v Bush*, 74 AD3d 1448, 1450, *lv denied* 15 NY3d 711). Finally, the record does not support the father's contention that the court was biased in favor of the mother (*see id.*

at 1449).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

135

CA 15-01085

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

TATTOOS BY DESIGN, INC., DOING BUSINESS AS "HARDCORE TATTOO", AND NICHOLE K. HUDSON, PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARK KOWALSKI, HANS KULLERKUPP, ERIE COUNTY DEPARTMENT OF HEALTH AND COUNTY OF ERIE, DEFENDANTS-APPELLANTS.

MICHAEL A. SIRAGUSA, COUNTY ATTORNEY, BUFFALO (JEREMY C. TOTH OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE LAW OFFICE OF PARKER R. MACKAY, KENMORE (PARKER R. MACKAY OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered April 29, 2015. The order denied the motion of defendants for summary judgment.

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

Memorandum: Plaintiffs commenced this action asserting in an amended complaint causes of action for defamation and tortious interference with business relations. Plaintiffs alleged that defendants published a press release associating them with a tattoo artist whose work had been linked to eight skin infections. The tortious interference cause of action was subsequently dismissed. We agree with defendants that Supreme Court erred in denying their motion for summary judgment seeking dismissal of the amended complaint.

In 2007, the New York State Department of Health (DOH) began to investigate a cluster of illnesses related to tattoos given by a certain tattoo artist. When interviewed by DOH officials, the tattoo artist stated that he had engaged in tattoo work in the past in Erie County while affiliated with plaintiff Tattoos By Design, Inc., doing business as "Hardcore Tattoo" (Hardcore). Although defendants were unable to confirm that the tattoo artist had been employed by or affiliated with Hardcore, defendant Erie County Department of Health issued a joint press release with DOH and the Niagara County Department of Health, advising that they had identified eight people who had developed skin infections after receiving tattoos from the

tattoo artist, and that the tattoo artist had "reported working in Erie County during 2004 and/or 2005 as an independent contractor for Hardcore" and had "reportedly performed tattoos at several home parties while associated with Hardcore." Earlier drafts of the press release stated definitively that the tattoo artist had worked for Hardcore, but one of the individual defendants asked that the press release be changed to state that the tattoo artist had only reported that he had worked for Hardcore.

"The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Accadia Site Contr., Inc. v Skurka*, 129 AD3d 1453, 1453 [internal quotation marks omitted]). Here, plaintiffs conceded in response to the motion that they could not prove that the statements set forth in the press release are false, thereby conceding that they could not establish a prima facie case of defamation.

Even assuming, arguendo, that plaintiffs could establish a prima facie case of defamation, we conclude that defendants established their entitlement to summary judgment as a matter of law by establishing that the statements are protected by a qualified privilege. "Generally, a statement is subject to a qualified privilege when 'it is fairly made by a person in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned' " (*Rosenberg v MetLife, Inc.*, 8 NY3d 359, 365, quoting *Toker v Pollak*, 44 NY2d 211, 219). Defendants, as public health officials, had a public duty to inform the public about the hazards of potential exposure to the subject tattoo artist's work (*see* Public Health Law § 2100; *Feldschuh v State of New York*, 240 AD2d 914, 915-916), and it was within the scope of that duty that the press release containing the allegedly defamatory statements was issued (*see Schell v Dowling*, 240 AD2d 721, 722).

Once defendants established that the statements in the press release were protected by a qualified privilege, the burden shifted to plaintiffs to raise a triable issue of fact "whether the statements were motivated solely by malice" (*Mancuso v Allergy Assoc. of Rochester*, 70 AD3d 1499, 1501; *Feldschuh*, 240 AD2d at 915-916), meaning "spite or a knowing or reckless disregard of a statement's falsity" (*Rosenberg*, 8 NY3d at 365; *see Kondo-Dresser v Buffalo Public Schs.*, 17 AD3d 1114, 1115). Plaintiffs failed to meet that burden. Indeed, plaintiffs conceded that there is no evidence that defendants acted with spite and, as noted, one of the individual defendants insisted on changes to a draft of the press release to make it accurately reflect that the allegedly defamatory statements were based only on what the tattoo artist had reported, thereby demonstrating that defendants did not act with reckless disregard of the statements' falsity.

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

remaining contentions.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

136

CA 14-01066

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

IN THE MATTER OF ANTWAN THOMPSON,
PETITIONER-APPELLANT,

V ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.
(APPEAL NO. 1.)

ANTWAN THOMPSON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), dated April 28, 2014 in a proceeding purusant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Loafin' Tree Rest. v Pardi* [appeal No. 1], 162 AD2d 985, 985).

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court

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

137

CA 14-01689

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

IN THE MATTER OF ANTWAN THOMPSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.
(APPEAL NO. 2.)

ANTWAN THOMPSON, PETITIONER-APPELLANT PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Seneca County (Dennis F. Bender, A.J.), entered September 9, 2014 in a proceeding pursuant to CPLR article 78. The judgment granted petitioner's motion for leave to reargue and, upon reargument, adhered to the prior determination dismissing his petition.

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

Memorandum: Petitioner commenced this proceeding pursuant to CPLR article 78 alleging, inter alia, that respondent erroneously calculated his sentence. We conclude that Supreme Court properly dismissed the petition. Contrary to petitioner's contention, respondent correctly calculated petitioner's sentence to reflect that, pursuant to Penal Law § 70.25 (2-a), the sentence imposed in 2013 runs consecutively to the sentences imposed in 1983 and 1986 (*see People ex rel. Gill v Greene*, 12 NY3d 1, 6-7, *cert denied sub nom. Gill v Rock*, 558 US 837). Petitioner's date of delinquency was properly determined to be the date of commission of the earliest of the four felonies that resulted in his 2013 conviction (*see Matter of Warley v Rodriquez*, 145 AD2d 901, 902). We reject petitioner's contention that he was denied his right to a final parole revocation hearing inasmuch as his parole was revoked by operation of law upon his conviction of a felony in New York and the imposition of an indeterminate term of incarceration (*see* Executive Law § 259-i [3] [d] [iii]; *People ex rel. Williams v Kirkpatrick*, 111 AD3d 1327, 1327-1328). Petitioner's challenges to the validity of the underlying 1986 conviction are not properly before us inasmuch as an article 78 proceeding is not the appropriate vehicle for those challenges (*see Matter of Hennessy v Gorman*, 58 NY2d 806,

807; *Matter of Rodriquez v LaValley*, 112 AD3d 1244, 1244-1245, *appeal dismissed* 23 NY3d 933, *reconsideration denied* 24 NY3d 1217). Finally, we have considered petitioner's remaining contentions and conclude that they are lacking in merit.

Entered: February 11, 2016

Frances E. Cafarell
Clerk of the Court