SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

NOVEMBER 9, 2017

HON. GERALD J. WHALEN, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. BRIAN F. DEJOSEPH

HON. PATRICK H. NEMOYER

HON. JOHN M. CURRAN

HON. SHIRLEY TROUTMAN

HON. JOANNE M. WINSLOW, ASSOCIATE JUSTICES

MARK W. BENNETT, CLERK

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

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CA 17-00216

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

SARAH J. GREGORY AND BRIAN C. GREGORY,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEVEN R. CAVARELLO, DEFENDANT,
NATIONAL FUEL GAS DISTRIBUTION CORP.,
MUNICIPAL PIPE CO., LLC, AND CITY OF
BUFFALO, DEFENDANTS-APPELLANTS.

GOLDBERG SEGALLA LLP, BUFFALO (MEGHAN M. BROWN OF COUNSEL), FOR DEFENDANTS-APPELLANTS NATIONAL FUEL GAS DISTRIBUTION CORP. AND MUNICIPAL PIPE CO., LLC.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (DAVID M. LEE OF COUNSEL), FOR DEFENDANT-APPELLANT CITY OF BUFFALO.

STEVE BOYD, P.C., WILLIAMSVILLE, D.J. & J.A. CIRANDO, ESQS., SYRACUSE (JOHN A. CIRANDO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered October 17, 2016. The order, insofar as appealed from, denied the motions of defendants National Fuel Gas Distribution Corp., Municipal Pipe Co., LLC, and City of Buffalo for summary judgment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motions of defendants-appellants are granted and the second amended complaint and cross claims against them are dismissed.

Memorandum: Plaintiffs commenced this action seeking damages for injuries allegedly sustained by Sarah J. Gregory (plaintiff) when, as a pedestrian on a street in defendant City of Buffalo (City), she was struck by a motor vehicle operated by defendant Steven R. Cavarello. In addition to Cavarello, plaintiffs sued defendants National Fuel Gas Distribution Corp., Municipal Pipe Co., LLC, and the City (collectively, defendants-appellants) alleging that they were negligent, inter alia, in failing to provide proper and adequate temporary traffic control during construction on the City-owned street where the accident occurred. Defendants-appellants moved for summary judgment dismissing the second amended complaint and cross claims against them on the ground that none of their alleged negligent acts or omissions was a proximate cause of the accident. Plaintiffs cross-

moved for partial summary judgment on the issues of negligence and serious injury and opposed the motions with, inter alia, the affidavit of an engineering expert who opined that the temporary traffic control in place at the accident location did not comply with various provisions of the Manual of Uniform Traffic Control Devices (MUTCD) and that those deviations were a proximate cause of the accident.

At the time of the accident, plaintiff was attempting to cross the street in a location that was not a designated crosswalk. As she stepped into the street she observed that the opposite side of the street was cordoned off with orange cones and vertical panel delineators. As Cavarello simultaneously approached that location in his vehicle, the vehicle in front of him abruptly engaged its left turn signal and began making an abrupt left turn. Cavarello swerved to the right to avoid a rear-end collision with the vehicle in front of him. In doing so, Cavarello's vehicle swerved into the parking lane, struck plaintiff and pinned her against a lawfully parked vehicle, which resulted in plaintiff's significant injuries. Supreme Court granted the cross motion on the issue of serious injury and determined that the accident occurred within a "work zone or construction zone" and denied the motions of defendants-appellants. We reverse the order insofar as appealed from.

We conclude that defendants-appellants met their initial burden on the motions by submitting, inter alia, the deposition transcripts of Cavarello and plaintiff, the sworn statement of Cavarello given as part of the police accident investigation, and photographs of the accident location (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Cavarello testified at his deposition that, if the vehicle in front of him had not abruptly turned left, he would have had no difficulty continuing in his lane of travel without having to use the parking lane and without striking any parked vehicles. In Cavarello's sworn statement to the police, he stated that there were "2 buses coming" in the opposite lane of travel, and he testified at his deposition that going into the opposite lane of travel was a "guaranteed collision" and that swerving to the right toward plaintiff was "the lesser of two evils."

Even assuming, arguendo, that the accident occurred within a "work zone" under MUTCD and that defendants-appellants were negligent in the design and placement of temporary traffic control as provided for pursuant to MUTCD, as plaintiffs contend, we conclude that such negligence was not a proximate cause of the accident (*see Latchman v Peterson*, 134 AD3d 774, 775 [2d Dept 2015]; *Stein v Pat Noto, Inc.*, 226 AD2d 624, 625 [2d Dept 1996]). "A showing of negligence is not enough; there must also be proof that the negligence was a proximate cause of the event that produced the harm" (*Swauger v White*, 1 AD3d 918, 920 [4th Dept 2003]; *see Pontello v County of Onondaga*, 94 AD2d 427, 430 [4th Dept 1983], *lv dismissed* 60 NY2d 560 [1983]). We reject plaintiffs' contention that the temporary traffic control at the site was a proximate cause of the accident. Any negligence with respect to the construction work merely furnished the condition or occasion for plaintiff being struck by a vehicle while crossing the street and was not a proximate cause of the accident (*see Latchman*, 134 AD3d at 775).

We also agree with defendants-appellants that the opinion of plaintiffs' engineering expert with respect to causation was speculative (*see Omer v Rodriguez*, 294 AD2d 202, 202-203 [1st Dept 2002]; *Long v Cleary*, 273 AD2d 799, 800 [4th Dept 2000], *lv denied* 95 NY2d 763 [2000]), and that plaintiffs failed to raise an issue of fact to defeat their motions (*see Mendrykowski v New York Tel. Co.*, 2 AD3d 1410, 1410 [4th Dept 2003]).

In light of our determination, we do not address the remaining contentions of defendants-appellants.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

960

CA 17-00258

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

JOSEPH SALLUSTIO AND SYLVIA SALLUSTIO,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

R. KESSLER AND ASSOCIATES, INC., AND ROBERT
KESSLER, DEFENDANTS-RESPONDENTS.

E. STEWART JONES HACKER MURPHY, LLP, TROY (DAVID IVERSON OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

SAUNDERS KAHLER, L.L.P., UTICA (MERRITT S. LOCKE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (David A. Murad, J.), entered May 26, 2016. The order, insofar as appealed from, denied that part of the motion of plaintiffs seeking to dismiss defendants' fourth counterclaim.

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

Memorandum: Plaintiffs contracted with defendants for the construction of a single family residence, and construction began but was halted when a dispute arose. Plaintiffs refused to approve any further draws until the alleged defects were cured, and defendants sent plaintiffs an invoice and filed a notice of mechanic's lien. For a period of approximately six weeks thereafter, plaintiffs placed a sign on their property that said "R. KESSLER SCREWED US BEWARE." Plaintiffs commenced this breach of contract action, and defendants asserted various counterclaims in their answer, including one for defamation based on the sign that plaintiffs had erected. We conclude that Supreme Court properly denied that part of plaintiffs' motion pursuant to CPLR 3211 (a) (7) seeking to dismiss the defamation counterclaim. Contrary to plaintiffs' contention, the statement is "reasonably susceptible of a defamatory connotation" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380 [1995]). Furthermore, it is a mixed statement of opinion and fact and thus is actionable inasmuch as it is "an opinion that 'implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it' " (*Davis v Boeheim*, 24 NY3d 262, 269 [2014]; *see Zulawski v Taylor* [appeal No. 2], 63 AD3d 1552, 1553 [4th Dept 2009]). The answer thus sufficiently states a counterclaim for defamation (*see Davis*, 24 NY3d at 274).

All concur except CARNI, J., who dissents and votes to reverse the order insofar as appealed from in accordance with the following memorandum: Inasmuch as I conclude that the statement "R. KESSLER SCREWED US BEWARE" constitutes rhetorical hyperbole or nonactionable opinion, I respectfully dissent. Plaintiffs published this statement on a sign placed on their property in a subdivision being developed by defendants, within which defendants were constructing a home for plaintiffs. During construction, a significant dispute arose concerning defendants' alleged deviations from design specifications and, ultimately, plaintiffs refused to authorize any further progress payments and directed defendants to cease work. Defendants filed a mechanics' lien, which allegedly caused plaintiffs to lose their bank financing for the project. Plaintiffs commenced this litigation and defendants answered and asserted counterclaims for, inter alia, defamation.

In my view, the statement at issue, made within the context of the above dispute, "is no more than rhetorical hyperbole, and, as such, is not to be taken literally" (*Rand v New York Times Co.*, 75 AD2d 417, 422 [1st Dept 1980]) or, alternatively, it is pure opinion (*see Morrison v Woolley*, 45 AD3d 953, 954 [3d Dept 2007] [Defendants' sign on their property stating, "MORRISON BUILT OUR HOUSE CONTACT US BEFORE HE BUILDS YOURS!!," which sign was sometimes affixed with "frowning 'smiley' faces," and defendants' website displaying images of plaintiff's purported workmanship constituted mere expressions of opinion and not of fact]; *see also Pappas v Ollie's Seafood Grille & Bar L.L.C.*, 2007 WL 8326636, *8 [Ct App SC 2007] [Statement that plaintiffs had "cheated" or "screwed" defendants nonactionable opinion]; *Jarrett v Goldman*, 67 Va Cir 361, 2005 WL 1323115, *8 [Va Cir Ct 2005] [Use of the words "screwed up" best characterized as nonactionable opinion]; *Corporate Training Unlimited, Inc. v National Broadcasting Co., Inc.*, 868 F Supp 501, 511 [ED NY 1994] [Statement that plaintiffs "screwed up my husband's life, screwed up my life, screwed up our whole—the whole family's life" is not a "statement of verifiable fact"]; *Sandler v Marconi Circuit Tech. Corp.*, 814 F Supp 263, 268 [ED NY 1993] [Statement that plaintiff "screwed up" was nothing more than an expression of opinion and did not amount to defamation under New York law]).

I respectfully disagree with the majority's conclusion that the statement constitutes a mixed statement of opinion and fact. The statement, in the context in which it was published, was an expression of disapproval and, as such, it was a pure opinion and not actionable (*see Steinhilber v Alphonse*, 68 NY2d 283, 295 [1986]). There is no expression or implication in the statement or its context that plaintiffs possess undisclosed defamatory facts. To the contrary, all the facts one needs to interpret the sign are presented in full public view. Notably, the record contains a request in defendants' opposing papers for permission from the court to clarify its pleadings by, inter alia, "clarifying the context in which the defamatory statements were made," including the fact that "the premises upon which the sign was placed were within a building subdivision of nine (9) buildings lots containing Plaintiffs' lot, one (1) fully built home and seven vacant lots for sale." Plaintiffs' lot contains a partially

constructed home foundation and incomplete home construction project, all of which is open to public view. Defendants fail to identify any facts, defamatory or otherwise, beyond those available for public viewing, i.e., disclosed, that are allegedly implied by the statement or its context but unknown to those reading it.

In light of the foregoing, I would reverse the order insofar as appealed from and grant that part of plaintiffs' motion to dismiss the fourth counterclaim, for defamation.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

972

KA 13-01697

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DARIUS L. BURSEY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (James J. Piampiano, J.), rendered June 27, 2013. The judgment convicted defendant, upon a jury verdict, of manslaughter in the first degree and criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the first degree (Penal Law § 125.20 [1]) and criminal possession of a weapon in the second degree (§ 265.03 [3]). He contends that the evidence is not legally sufficient to support his conviction of criminal possession of a weapon in the second degree as an accessory because the People did not establish that he possessed the requisite mental state (*see* § 20.00). That contention is not preserved for our review inasmuch as defendant failed to move for a trial order of dismissal on that ground (*see People v Gray*, 86 NY2d 10, 19 [1995]; *People v Leta*, 151 AD3d 1761, 1762 [4th Dept 2017]). In any event, we conclude that defendant's contention is without merit (*see People v Johnson*, 94 AD3d 1408, 1409 [4th Dept 2012], *lv denied* 19 NY3d 998 [2012]). Viewing the evidence in light of the elements of the crime of criminal possession of a weapon in the second degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we likewise conclude that the verdict is not against the weight of the evidence with respect to that crime (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's contention, County Court properly granted the People's request to charge the jury on manslaughter in the first degree as a lesser included offense of murder in the second degree (Penal Law § 125.25 [1]). There is " 'a reasonable view of the evidence to support a finding that . . . defendant committed the lesser offense but not the greater' " (*People v Ingram*, 140 AD3d 1777,

1778 [4th Dept 2016], quoting *People v Van Norstrand*, 85 NY2d 131, 135 [1995]), i.e., that he intended to cause serious physical injury to the victim rather than to kill him (*see People v Atkinson*, 21 AD3d 145, 147, 154 [2d Dept 2005], *mod on other grounds* 7 NY3d 765 [2006]; *People v Straker*, 301 AD2d 667, 668 [2nd Dept 2003], *lv denied* 100 NY2d 587 [2003]; *People v Stevens*, 186 AD2d 832, 832-833 [2nd Dept 1992], *lv denied* 81 NY2d 766 [1992]). We reject defendant's further contention that the evidence is not legally sufficient to support his conviction of manslaughter as an accessory. There is a valid line of reasoning and permissible inferences that could lead a rational person to conclude that defendant and the codefendant shared a community of purpose to cause serious physical injury to the victim (*see Danielson*, 9 NY3d at 349). Specifically, the People presented evidence at trial that defendant accompanied the codefendant to the apartment where the shooting occurred, engaged in a physical altercation with the victim and another man prior to the shooting, observed the codefendant with a gun, and ultimately left the residence, fleeing with the codefendant after the codefendant shot the victim. In light of that evidence, we conclude that the verdict is not against the weight of the evidence with respect to the manslaughter conviction (*see generally Bleakley*, 69 NY2d at 495).

Contrary to defendant's further contention, the court did not abuse its discretion by adjourning the matter for the evening prior to the prosecutor's summation (*see People v Williams*, 148 AD3d 620, 620 [1st Dept 2017]).

Defendant's contention that the court assumed the role or appearance of a prosecutor is not preserved for our review inasmuch as, at the conclusion of the court's questioning of a prosecution witness, defense counsel made only a general objection (*see People v Dien*, 77 NY2d 885, 886 [1991]; *People v Ross*, 39 AD3d 1243, 1244 [4th Dept 2007], *lv denied* 9 NY3d 850 [2007]; *see also People v Pollard*, 70 AD3d 1403, 1405 [4th Dept 2010], *lv denied* 14 NY3d 891 [2010]). We decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

The sentence is not unduly harsh or severe. We have reviewed defendant's remaining contentions and conclude that they are without merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1002

CA 16-02128

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

RES EXHIBIT SERVICES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENESIS VISION, INC., DOING BUSINESS AS ROCHESTER OPTICAL, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

NIXON PEABODY LLP, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered September 22, 2016. The order, among other things, granted plaintiff's motion for partial summary judgment and denied defendant's cross motion for partial summary judgment.

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

Same memorandum as in *RES Exhibit Services, LLC v Genesis Vision, Inc.* ([appeal No. 3] ___ AD3d ___ [Nov. 9, 2017] [4th Dept 2017]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1003

CA 16-02207

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

RES EXHIBIT SERVICES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENESIS VISION, INC., DOING BUSINESS AS ROCHESTER OPTICAL, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

NIXON PEABODY LLP, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered October 14, 2016. The judgment awarded plaintiff the sum of $426,683.36 as against defendant.

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

Same memorandum as in *RES Exhibit Services, LLC v Genesis Vision, Inc.* ([appeal No. 3] ___ AD3d ___ [Nov. 9, 2017] [4th Dept 2017]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1004

CA 16-02208

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

RES EXHIBIT SERVICES, LLC, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

GENESIS VISION, INC., DOING BUSINESS AS ROCHESTER OPTICAL, DEFENDANT-APPELLANT.
(APPEAL NO. 3.)

NIXON PEABODY LLP, ROCHESTER (DAVID H. TENNANT OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHILLIPS LYTLE LLP, ROCHESTER (CHAD W. FLANSBURG OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an amended judgment of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered November 4, 2016. The amended judgment awarded plaintiff the sum of $452,376.22 as against defendant.

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

Memorandum: The parties executed an agreement that set forth the terms under which plaintiff would provide services and an exhibit enabling defendant, a manufacturer and seller of optical equipment including eyewear, to participate in industry trade shows. The agreement provided that the parties would execute Project Authorization Forms (PAFs) that would govern the scope of work for any particular project. The agreement itself would not set forth the price of a completed project; rather, the price for the work would be established in the PAFs in accordance with various categories of service listed therein. The parties executed two PAFs, which were incorporated by reference and made part of the agreement: the first authorized plaintiff to design and build an exhibit and amortized the price over three upcoming trade shows, and the second authorized various services to be provided by plaintiff for a trade show in fall 2014. Defendant attended the fall 2014 trade show with the agreed-upon services provided by plaintiff.

The parties thereafter modified the agreement by an amendment, which provided that plaintiff would have the exclusive right to provide all services and deliverables for defendant’s attendance at the spring and fall trade shows in both 2015 and 2016 as set forth in

corresponding PAFs, and that the construction cost of the exhibit would be amortized over those four shows, thereby representing a fixed cost per trade show. The agreement, as amended, further contained a termination provision that set forth a minimum aggregate amount that defendant was required to spend over the four trade shows, and provided that defendant's violation of that requirement would constitute grounds for termination of the agreement. The termination provision provided for liquidated damages in the event that defendant breached the agreement, including by failing to attend the trade shows referenced in the incorporated PAFs. Although defendant attended the spring 2015 trade show in accordance with the PAFs executed for that show, defendant subsequently indicated that it would not attend the fall 2015 show, and plaintiff thereafter issued correspondence terminating the agreement in compliance with its terms and commenced this action for, inter alia, breach of contract seeking liquidated damages.

In appeal No. 1, defendant appeals from an order that, among other things, granted plaintiff's motion for partial summary judgment on defendant's liability for breach of contract together with a partial money judgment, and denied defendant's cross motion for partial summary judgment seeking, inter alia, a determination that the parties' agreement was unenforceable and that the liquidated damages clause therein constituted an unenforceable penalty. In appeal No. 2, defendant appeals from a judgment awarding plaintiff damages and, in appeal No. 3, defendant appeals from an amended judgment that increased plaintiff's damages award following the parties' stipulation to a partial attorneys' fee award.

As a preliminary matter, we dismiss the appeal from the order in appeal No. 1 because the right to appeal from that intermediate order terminated upon the entry of the ensuing judgment challenged by defendant in appeal No. 2 (*see Matter of Aho*, 39 NY2d 241, 248 [1976]; *Charter Sch. for Applied Tech. v Board of Educ. for City Sch. Dist. of City of Buffalo*, 105 AD3d 1460, 1461 [4th Dept 2013]). In addition, the appeal from the judgment in appeal No. 2 must be dismissed inasmuch as it has been superseded by the amended judgment in appeal No. 3 (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]). The issues raised in appeal No. 1 concerning the order will be considered in the context of the appeal from the amended judgment in appeal No. 3 (*see Charter Sch. for Applied Tech.*, 105 AD3d at 1461).

Defendant contends that the agreement, standing alone, constitutes an unenforceable "agreement to agree" because, by its terms, it contemplated future negotiation and execution of four additional PAFs on an event-by-event basis to provide missing essential terms, thereby "le[aving] the creation of an enforceable agreement to await the execution of PAFs." We reject that contention. "In determining whether a contract exists, the inquiry centers upon the parties' intent to be bound, i.e., whether there was a meeting of the minds regarding the material terms of the transaction" (*Henri Assoc. v Saxony Carpet Co.*, 249 AD2d 63, 66 [1st Dept 1998] [internal

quotation marks omitted]). It is well settled that, "[i]f an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *rearg denied* 75 NY2d 863 [1990], *cert denied* 498 US 816 [1990]; *see Matter of 166 Mamaroneck Ave. Corp. v 151 E. Post Rd. Corp.*, 78 NY2d 88, 91 [1991]; *Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]). "[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109; *see 166 Mamaroneck Ave. Corp.*, 78 NY2d at 91). Nonetheless, the "doctrine of definiteness" should not be applied rigidly, and "[s]triking down a contract as indefinite and in essence meaningless 'is at best a last resort' " (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91; *see Cobble Hill Nursing Home*, 74 NY2d at 482-483). "Thus, where it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain" (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91; *see Joseph Martin, Jr., Delicatessen*, 52 NY2d at 110).

Here, the parties unequivocally expressed their intent to be bound by the agreement inasmuch as they agreed that plaintiff would be the exclusive provider of various services and deliverables for the trade shows as set forth in specifically designated PAFs, and that defendant's failure to perform pursuant to the terms of the agreement would constitute grounds for termination of the agreement and liquidated damages. The parties further agreed in the amendment and incorporated PAFs that a total of four shows in 2015 and 2016 would have a certain fixed cost representing the construction cost for the exhibit amortized over those shows. The amendment and the incorporated PAFs, when read in conjunction with the termination provision (*see Maven Tech., LLC v Vasile*, 147 AD3d 1377, 1378 [4th Dept 2017]), further establish that defendant was obligated to attend the four shows and spend a minimum amount on services and deliverables; otherwise, plaintiff would be entitled to liquidated damages.

The agreement itself is therefore sufficient to establish a binding contract inasmuch as the parties agreed to a fixed cost for each show that defendant was required to attend and set a minimum amount that defendant was obligated to spend in aggregate over the four shows, and the parties simply left the precise scope of work and variable costs to be customized to fit each show in accordance with the service categories listed in the pre-designated PAFs. Contrary to defendant's contention, "a contract is not necessarily lacking in all effect merely because it expresses the idea that something is left to future agreement" (*May Metro. Corp. v May Oil Burner Corp.*, 290 NY 260, 264 [1943]) and, here, the agreement contains no expression by the parties that they did not intend to be bound until each PAF was signed (*see Henri Assoc.*, 249 AD2d at 66; *see generally Tompkins Fin. Corp. v John M. Floyd & Assoc., Inc.*, 144 AD3d 1252, 1253 [3d Dept 2016]). We thus conclude that the agreement, as executed by the sophisticated parties here, clearly manifests their intention to be bound, and the creation of a binding agreement is not conditioned upon

the signing of each individual PAF (*see Trolman v Trolman, Glaser & Lichtman, P.C.*, 114 AD3d 617, 618 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]; *cf. Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 985-986 [3d Dept 2006]; *Uniland Partnership of Del. L.P. v Blue Cross of W. N.Y. Inc.*, 27 AD3d 1131, 1132-1133 [4th Dept 2006], *lv denied* 7 NY3d 713 [2006]; *see generally Cowen & Co., LLC v Fiserv, Inc.*, 141 AD3d 18, 22 [1st Dept 2016]).

We also reject defendant's related contention that the agreement is unenforceable because it contemplated future negotiations and the execution of PAFs to provide missing essential terms of scope and price for each trade show, and the parties failed to identify any objective method for supplying those terms. "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear" (*Cobble Hill Nursing Home*, 74 NY2d at 483). Thus, " '[w]here the parties have completed their negotiations of what they regard as essential elements, and performance has begun on the good faith understanding that agreement on the unsettled matters will follow, the court will find and enforce a contract even though the parties have expressly left these other elements for future negotiation and agreement, if some objective method of determination is available, independent of either party's mere wish or desire' " (*Metro-Goldwyn-Mayer v Scheider*, 40 NY2d 1069, 1070-1071 [1976]). " 'Such objective criteria may be found in the agreement itself, commercial practice or other usage and custom' " (*id.* at 1071; *see Cobble Hill Nursing Home*, 74 NY2d at 483; *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317-318 [1st Dept 1987]). Here, we conclude that the agreement itself and the parties' prior practice as expressed in the incorporated PAFs for the two attended trade shows provide the objective criteria for determining the scope and price of the remaining work beyond the fixed costs associated with the future shows (*see generally Henri Assoc.*, 249 AD2d at 66-67).

Therefore, inasmuch as defendant does not dispute that it breached the agreement, i.e., that it failed to attend certain trade shows and utilize plaintiff's services as required, we conclude that the court properly determined that plaintiff is entitled to partial summary judgment on the issue of defendant's liability under the breach of contract cause of action.

Contrary to defendant's further contention, we conclude that the court properly determined that the liquidated damages clause is enforceable. Such a clause is enforceable if, at the time the agreement is made, "the amount of actual loss is incapable or difficult of precise estimation" and the stipulated amount of damages "bears a reasonable proportion to the probable loss" (*Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 425 [1977]; *see Great Lakes Motor Corp. v Johnson*, 132 AD3d 1390, 1391 [4th Dept 2015]). Conversely, if the clause provides for damages that are "plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced" (*Truck Rent-A-Ctr.*, 41 NY2d at 425). Whether a contractual provision "represents an enforceable liquidation of damages or an unenforceable penalty is a question of

law, giving due consideration to the nature of the contract and the circumstances" (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379 [2005]). Although defendant, as the party seeking to avoid liquidated damages, bears the ultimate burden of establishing that the clause is unenforceable (*see 172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 24 NY3d 528, 536 [2014]; *JMD Holding Corp.*, 4 NY3d at 380), plaintiff, as the party moving for summary judgment, has the burden of tendering sufficient evidence to demonstrate that its "cause of action . . . shall be established sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see generally Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]).

"Where, as here, the parties to the agreement were sophisticated business [entities], and the terms of the agreement were mutually negotiated, with each party represented by experienced counsel, a liquidated damages provision which is reached at arm's length is entitled to deference" (*Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359, 360 [1st Dept 2009]; *see JMD Holding Corp.*, 4 NY3d at 382-383). The evidence in the record, including the amended agreement, establishes that plaintiff's damages "are sufficiently difficult to ascertain to satisfy the first requirement of a valid liquidated damages provision" (*BDO Seidman v Hirshberg*, 93 NY2d 382, 396 [1999]). With respect to the second requirement, we conclude that the negotiated amount of liquidated damages is not " 'conspicuously disproportionate to [plaintiff's] foreseeable losses' " (*Bates Adv. USA, Inc. v 498 Seventh, LLC*, 7 NY3d 115, 120 [2006], *rearg denied* 7 NY3d 784 [2006]). We further conclude that defendant's submissions are insufficient to defeat plaintiff's motion for summary judgment (*see generally Alvarez*, 68 NY2d at 324). In view of our determination, we further conclude that the court properly denied defendant's cross motion for partial summary judgment.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1014

KA 17-00218

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

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

THOMAS A. RAFFERTY, DEFENDANT-RESPONDENT.

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (JEFFERY R. FRIESEN OF COUNSEL), FOR APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Ontario County Court (Frederick G. Reed, A.J.), dated June 23, 2016. The order, insofar as appealed from, granted defendant's omnibus motion insofar as it sought dismissal of counts one through three of the indictment.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to dismiss counts one through three of the indictment is denied, those counts of the indictment are reinstated, and the matter is remitted to Ontario County Court for further proceedings on the indictment.

Memorandum: The People appeal from an order granting that part of defendant's omnibus motion seeking to dismiss counts one through three of the indictment, each of which charged defendant with offering a false instrument for filing in the first degree (Penal Law § 175.35 [1]). The charges stemmed from defendant's submission of reports containing false information to Casella Waste Systems, Inc. (Casella), a private corporation under contract with Ontario County (County). According to the evidence before the grand jury, pursuant to the contract, Casella assumed responsibility for the day-to-day operation of a landfill facility on behalf of the County, which retained the State permit for the facility and occasionally audited Casella's operations. The contract further provided that several County employees, including defendant, were allowed to continue working at the facility after Casella began operating it. We agree with the People that County Court erred in granting that part of defendant's omnibus motion seeking to dismiss, on the ground of legally insufficient evidence before the grand jury, counts one through three of the indictment, and we therefore reinstate those counts.

"The essential elements of the crime of offering a false

instrument for filing in the first degree . . . are (1) knowledge that a written instrument contains a false statement or false information, (2) intent to defraud the State or any political subdivision thereof, and (3) offering or presenting such instrument to a public office or public servant with the knowledge or belief that it will be filed" (*People v Asar*, 136 AD2d 712, 713 [2d Dept 1988]; *see People v Hure*, 16 AD3d 774, 775 [3d Dept 2005], *lv denied* 4 NY3d 854 [2005]). The term "public servant" is defined as "(a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee" (Penal Law § 10.00 [15]).

Here, we agree with the People that the evidence before the grand jury was legally sufficient to establish that Casella, in accepting the reports from defendant for purposes of complying with the County's permit issued by the State, was "not acting as a private concern" but rather was exercising a governmental function as an agent of the County (*People v Fiedler*, 155 AD2d 613, 614-615 [2d Dept 1989], *lv denied* 75 NY2d 868 [1990]; *see People v Scotti*, 232 AD2d 775, 776 [3d Dept 1996], *lv denied* 89 NY2d 946 [1997]; *cf. People v Miller*, 70 NY2d 903, 905-907 [1987]), and thus was acting as a public servant within the meaning of the statute. In addition, we conclude that the evidence before the grand jury, viewed in the light most favorable to the People (*see People v Manini*, 79 NY2d 561, 568-569 [1992]; *People v Bianco*, 67 AD3d 1417, 1418-1419 [4th Dept 2009], *lv denied* 14 NY3d 797 [2010]), was sufficient to allow the grand jury to infer that defendant intended to defraud the County by submitting reports with fabricated information while still receiving a salary as a County employee (*see generally People v Scutt*, 19 AD3d 1131, 1132 [4th Dept 2005], *lv denied* 5 NY3d 810 [2005]; *People v Swain*, 309 AD2d 1173, 1174 [4th Dept 2003], *lv denied* 1 NY3d 581 [2003]). We reject defendant's contention that such an inference is too attenuated as a matter of law.

Defendant alternatively contends that the court properly dismissed counts one through three of the indictment because the evidence before the grand jury was not legally sufficient to establish that the reports contained false statements or false information. Defendant failed to preserve that contention for our review (*see* CPL 470.05 [2]) and, in any event, because the court did not make a finding adverse to the People on that issue, we are precluded from reviewing it on the People's appeal (*see* CPL 470.15 [1]; *People v Concepcion*, 17 NY3d 192, 194-196 [2011]; *People v LaFontaine*, 92 NY2d 470, 473-474 [1998], *rearg denied* 93 NY2d 849 [1999]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1028

CA 16-01736

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

ANTONIO JACKSON, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO AND JASON AUSTIN,
DEFENDANTS-APPELLANTS.

CITY OF BUFFALO, THIRD-PARTY PLAINTIFF,

V

TANEKA JACKSON, THIRD-PARTY DEFENDANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (CHRISTOPHER R. POOLE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

THE COSGROVE LAW FIRM, BUFFALO (EDWARD C. COSGROVE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (James H. Dillon, J.), entered April 27, 2016. The order, insofar as appealed from, denied the motion of defendants for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries that he sustained while he was a passenger in a vehicle driven by his wife, third-party defendant. Defendant Jason Austin was operating a dump truck with an attached trailer, both of which were owned by defendant City of Buffalo. Austin and third-party defendant were traveling in the same direction on Eggert Road, when Austin turned right and collided with the vehicle driven by third-party defendant, which was to his right. On a prior appeal, this Court affirmed an order denying third-party defendant's motion for summary judgment dismissing the third-party complaint (*Jackson v City of Buffalo*, 144 AD3d 1555, 1555 [4th Dept 2016]).

Supreme Court properly denied defendants' motion for summary judgment dismissing the complaint. Defendants failed to meet their initial burden of establishing that third-party defendant was negligent as a matter of law and that her negligence was the sole proximate cause of the accident (*see Russo v Pearson*, 148 AD3d 1762,

1763 [4th Dept 2017]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Although defendants submitted the expert affidavit of an engineer who opined that there is only one lane of travel in each direction on the portion of Eggert Road where the accident occurred, defendants also submitted the deposition testimony of plaintiff, third-party defendant, and Austin, each of whom testified that two cars can fit side-by-side each way on that portion of road, "thereby functionally creating two lanes in the same direction from a single lane" (*Jackson*, 144 AD3d at 1556). Moreover, plaintiff further testified at his deposition that the vehicle in which he was riding was positioned on the right side of Austin's dump truck, and that Austin did not activate his turn signal before turning. We thus conclude that there are issues of fact whether the road has one or two lanes of travel in each direction and whether Austin made an improper right turn from the left lane (*see id.*).

Defendants also failed to meet their initial burden of establishing that plaintiff did not sustain a serious injury under the 90/180-day category of Insurance Law § 5102 (d) (*see Summers v Spada*, 109 AD3d 1192, 1193 [4th Dept 2013]). To qualify as serious injury under that category, " 'there must be objective evidence of a medically determined injury or impairment of a non-permanent nature . . . as well as evidence that plaintiff's activities were curtailed to a great extent' " (*Crewe v Pisanova*, 124 AD3d 1264, 1265 [4th Dept 2015]; *see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 357 [2002]). In support of their motion, defendants submitted the transcript of plaintiff's General Municipal Law § 50-h hearing, which occurred 176 days after the accident. Plaintiff testified at the hearing that he went to the hospital the day after the accident, that he was then forbidden by his physician from returning to work because he had two herniated discs and a torn disc in his back, and that he had not yet returned to work after the accident. Although defendants' expert physician opined in his affirmed report that plaintiff could continue working, that opinion was based upon an examination of plaintiff that occurred over four years after the accident, and thus the physician " 'did not examine plaintiff during the relevant statutory period and did not address plaintiff's condition during the relevant period' " (*Crewe*, 124 AD3d at 1265-1266).

With respect to the permanent consequential limitation of use and significant limitation of use categories of serious injury, even assuming, arguendo, that defendants met their initial burden of establishing their entitlement to judgment as a matter of law, we conclude that plaintiff raised an issue of fact by submitting the expert opinion of his treating chiropractor, "who relied upon objective proof of plaintiff's injury, provided quantifications of plaintiff's loss of range of motion along with qualitative assessments of plaintiff's condition, and concluded that 'plaintiff's injury was significant, permanent, and causally related to the accident' " (*Moore v Gawel*, 37 AD3d 1158, 1159 [4th Dept 2007]; *see Strangio v Vasquez*, 144 AD3d 1579, 1580 [4th Dept 2016]; *Stamps v Pudetti*, 137 AD3d 1755,

1757 [4th Dept 2016]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1032.1

CA 17-00407

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

MARY ANN CELANI, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF MARIA TERRITO, AN INFANT OVER THE AGE OF 14 YEARS OLD, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

ALLSTATE INDEMNITY COMPANY, DEFENDANT-APPELLANT, AND LOUIS TERRITO, DEFENDANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JESSICA L. FOSCOLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered December 7, 2016. The order granted the motion of plaintiff to compel disclosure, and denied the cross motion of defendant Allstate Indemnity Company for a protective order.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying those parts of the motion seeking to compel disclosure and granting those parts of the cross motion seeking a protective order with respect to the legal opinion of the outside counsel of defendant Allstate Indemnity Company and the pre-disclaimer claim notes related thereto, and with respect to the claim notes containing defendant Allstate Indemnity Company's reserve information, and by denying that part of the motion seeking to compel disclosure of the claim investigation manual, and as modified the order is affirmed without costs, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Plaintiff, individually and on behalf of her daughter (hereafter, infant), commenced this action seeking damages for injuries sustained by the infant in July 2010, when she was injured as a result of being accidentally shot with a gun that was owned by her father, defendant Louis Territo (father). Plaintiff previously filed a claim on the infant's behalf with Allstate Indemnity Company (defendant) pursuant to a homeowner's insurance policy issued to the father. Defendant disclaimed coverage on the ground that the policy excluded coverage for "bodily injury" to an "insured person," and that the infant was an "insured person" because she was a relative of the policyholder, her father, and a "resident" of his household. Plaintiff alleged in the amended complaint that the infant's injuries were caused by the father's negligence and, pursuant

to the terms of the insurance policy, defendant had agreed to indemnify the father for bodily injury. Thereafter, plaintiff moved to compel disclosure of defendant's entire claim file, including a legal opinion prepared by defendant's outside counsel and a claim investigation manual prepared by defendant's employees. Defendant cross-moved for a protective order preventing disclosure of, inter alia, pre-disclaimer claim notes containing statements made by the father, the legal opinion of outside counsel and pre-disclaimer claim notes related thereto, pre-disclaimer claim notes containing information about defendant's reserves, and the claim investigation manual. Supreme Court granted plaintiff's motion to compel in its entirety, and denied defendant's cross motion.

Contrary to defendant's contention, the court properly ordered disclosure of pre-disclaimer claim notes containing statements made by the father. It is well settled that "there must be full disclosure of accident reports prepared in the ordinary course of business that were motivated at least in part by a business concern other than preparation for litigation" (*Calkins v Perry*, 168 AD2d 999, 999 [4th Dept 1990]; *see Beaumont v Smyth*, 306 AD2d 921, 921 [4th Dept 2003]). Here, the father made his statements to defendant's investigators before defendant made the decision to disclaim, and there is no dispute that defendant's employees relied on those statements in making that decision.

We agree with defendant, however, that the court abused its discretion in granting that part of plaintiff's motion seeking disclosure of the legal opinion of outside counsel and pre-disclaimer claim notes related thereto and denying that part of defendant's cross motion seeking a protective order with respect to those items, and we therefore modify the order accordingly. Although reports prepared in the regular course of business are discoverable (*see Lalka v ACA Ins. Co.*, 128 AD3d 1508, 1508-1509 [4th Dept 2015]), documents prepared by an attorney that are "primarily and predominantly of a legal character," and made to furnish legal services, are absolutely privileged and not discoverable, regardless of whether there was pending litigation at the time they were prepared (*Spectrum Sys. Intl. Corp. v Chem. Bank*, 78 NY2d 371, 379 [1991]; *see VGFC Realty II, LLC v D'Angelo*, 114 AD3d 765, 766 [2d Dept 2014]). We therefore conclude that the legal opinion and the related claim notes are absolutely privileged, and thus a protective order should have been granted in that regard.

We also agree with defendant that the court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's reserve information and denying that part of defendant's cross motion with respect thereto inasmuch as that information is not "material and necessary" to the action (CPLR 3101 [a]; *see 40 Rector Holdings, LLC v Travelers Indem. Co.*, 40 AD3d 482, 482-483 [1st Dept 2007]). We therefore further modify the order accordingly.

We conclude that the court abused its discretion in granting that part of plaintiff's motion seeking disclosure of defendant's claim investigation manual and denying that part of defendant's cross motion

with respect thereto without first conducting an in camera review. As the moving party, plaintiff had the burden of demonstrating that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (*Crazytown Furniture v Brooklyn Union Gas Co.*, 150 AD2d 420, 421 [2d Dept 1989]; *see Quinones v 9 E. 69th St., LLC*, 132 AD3d 750, 750 [2d Dept 2015]). Inasmuch as the employee of defendant who made the ultimate decision to disclaim testified that the manual did not contain a definition of "resident," the court should have reviewed the manual in camera to determine whether it contained information material and relevant to the issues to be decided in the action (*see generally Barnes v Habuda*, 118 AD3d 1443, 1444 [4th Dept 2014]). We therefore further modify the order accordingly, and we remit the matter to Supreme Court to determine those parts of the motion and cross motion following an in camera review of the claim investigation manual.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1034

KA 15-01223

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ERICA DAVIS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS 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 August 11, 2014. The judgment convicted defendant, upon a jury verdict, of welfare fraud in the fourth degree and offering a false instrument for filing in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of welfare fraud in the fourth degree and dismissing count one of the indictment, and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of welfare fraud in the fourth degree (Penal Law § 158.10) and offering a false instrument for filing in the first degree (§ 175.35 [1]). Defendant's conviction stems from her receipt of a Section 8 housing subsidy financed by the United States Department of Housing and Urban Development (HUD) (*see* 42 USC § 1437f [b]; *Matter of Malek v Franco*, 263 AD2d 427, 428 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000]). The Section 8 funds were administered by the Salamanca Housing Agency as a division of the Salamanca Industrial Development Agency, and were not administered through the Cattaraugus County Department of Social Services (DSS). The People established that defendant, who lived in New Jersey, obtained Section 8 benefits for housing in Salamanca, but she never lived in Salamanca during the five-month period during which she received benefits. The People's theory was that defendant applied for and obtained the benefits in Salamanca because of the relatively short waiting list for Section 8 benefits in that area, but she did not intend to move there and instead intended to transfer her Section 8 subsidy to New Jersey under the federal portability rules after the expiration of the requisite one-year waiting period (*see* 24 CFR 982.353 [b], [c]).

We reject defendant's contention that a conversation among a

juror, County Court, the prosecutor, defendant, and defense counsel constituted a mode of proceedings error, requiring reversal regardless of waiver or lack of preservation. The error was not a mode of proceedings error because it did not " 'go to the essential validity of the process' " and was not " 'so fundamental that the entire trial [was] irreparably tainted' " (*People v Mack*, 27 NY3d 534, 541 [2016], *rearg denied* 28 NY3d 944 [2016]). Here, we conclude that defendant waived her right to raise that contention on appeal inasmuch as both defendant and defense counsel participated in the conversation and defendant thus consented to manner in which the court responded to the juror's questions (*see People v Walker*, 96 AD3d 1481, 1482 [4th Dept 2012], *lv denied* 20 NY3d 989 [2012]; *see generally People v Webb*, 78 NY2d 335, 339 [1991]).

Defendant contends that her conviction of welfare fraud in the fourth degree is based on legally insufficient evidence because the Section 8 subsidy that she received did not constitute "public assistance benefits" under Penal Law § 158.10. We agree, and we therefore modify the judgment by reversing that part convicting her of that crime and dismissing the first count of the indictment. "A person is guilty of welfare fraud in the fourth degree when he or she commits a fraudulent welfare act and thereby takes or obtains public assistance benefits, and when the value of the public assistance benefits exceeds [$1,000]" (§ 158.10). Public assistance benefits are defined as "money, property or services provided directly or indirectly through programs of the federal government, the state government or the government of any political subdivision within the state and administered by the department of social services or social services districts" (§ 158.00 [1] [c]).

Defendant contends that the statutory definition of public assistance benefits has two elements: first, the money, property, or services must be provided through either the federal government, the state government, or the government of any political subdivision within the state; and second, the money, property, or services must be administered by the department of social services or social services district. According to defendant, the second element must be established regardless of which entity (federal government, state government, or government of any political subdivision within the state) supplies the funds. Inasmuch as the Section 8 subsidy was not administered through DSS, defendant contends that she did not receive public assistance benefits, and thus she could not have committed welfare fraud in the fourth degree.

The People, however, contend that the definition of public assistance benefits requires that the money, property, or services be provided through programs of (1) the federal government *or* (2) the state government *or* (3) the government of any political subdivision within the state and administered by the department of social services or social services district. In other words, the People interpret the statute such that the requirement that the funds be administered through a social services agency applies only to funds provided by "any political subdivision within the state" (Penal Law § 158.00 [1] [c]). We note that the People's interpretation is supported by

another subdivision of the statute, which defines a public benefit card as "any medical assistance card, food stamp assistance card, public assistance card, or any other identification, authorization card or electronic device issued by the state or a social services district . . . , *which entitles a person to obtain public assistance benefits under a local, state, or federal program administered by the state, its political subdivisions, or social services districts*" (§ 158.00 [1] [a] [emphasis added]). Thus, according to its definition, a public benefit card may be used to obtain certain types of public assistance benefits, i.e., those "administered by the state, its political subdivisions, or social services districts" (*id.*). That language indicates that public assistance benefits include funds administered by the state and "its political subdivisions," in addition to funds administered by social services agencies. Therefore, defendant's proposed interpretation that any funds constituting "public assistance benefits" must be administered through a social services agency cannot be harmonized with the statutory definition of a public benefit card. It is well settled that " '[a]ll parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof' " (*People v Pabon*, 28 NY3d 147, 152 [2016]).

Nevertheless, defendant's interpretation of the statutory definition of public assistance benefits is supported by the legislative history of the statute, which shows that it was enacted primarily to combat Medicaid fraud (*see* Governor's Approval Mem, Bill Jacket, L 1995, Ch 81 at 10), and Medicaid benefits are administered by the department of social services or social services district. In addition, we note that the People's interpretation of the statute would extend its reach beyond its intended meaning to include *any* "money, property or services provided directly or indirectly through programs of the federal government," without qualification (Penal Law § 158.00 [1] [c]). For example, under the People's interpretation, veteran's benefits would be "money, property or services" falling within the definition of "[p]ublic assistance benefits" (*id.*), but it seems unlikely that the Legislature intended the improper receipt of such benefits to be considered welfare fraud.

We conclude that both interpretations of the statute are plausible. In such situations, the rule of lenity applies and we must adopt the interpretation of the statute that is more favorable to defendant (*see People v Thompson*, 26 NY3d 678, 687-688 [2016]). The People were therefore required to establish that the Section 8 funds were "administered by the department of social services" (Penal Law § 158.00 [1] [c]), which they failed to do. Instead, it is undisputed that the funds were not administered by DSS. The People contend that the crime of welfare fraud in the fourth degree should encompass defendant's conduct because the overall goal of the statute is to combat fraud in social welfare programs, and fraudulent activities harm both the taxpayers and those truly in need of such benefits. As shown by the facts of this case, when defendant fraudulently obtained Section 8 benefits, that resulted in residents of Salamanca waiting longer for those benefits. The People's contention, however, is one

that should be directed to the Legislature.

Defendant's contention that she was denied a fair trial by prosecutorial misconduct is for the most part unpreserved for our review because she failed to object to the majority of the alleged instances of misconduct (*see* CPL 470.05 [2]; *People v Diaz*, 52 AD3d 1230, 1231 [4th Dept 2008], *lv denied* 11 NY3d 831 [2008]). In any event, we conclude that " '[a]ny improprieties were not so pervasive or egregious as to deprive defendant of a fair trial' " (*Diaz*, 52 AD3d at 1231). We have considered defendant's remaining contention and conclude that it is without merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1041

KA 14-01960

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRAOLIO J. VARGAS, DEFENDANT-APPELLANT.

DAVISON LAW OFFICE PLLC, CANANDAIGUA (MARY P. DAVISON 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 June 13, 2013. 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]). We reject defendant's contention that County Court erred in denying his challenge for cause to a prospective juror on the ground that, in response to questioning by defense counsel, the prospective juror said that he would "certainly try" to be fair and impartial. Contrary to defendant's contention, the word "try" is not a talismanic word that automatically rendered equivocal the prospective juror's assertion that he could be fair (*see People v Rivera*, 33 AD3d 303, 305 [1st Dept 2006], *affd* 9 NY3d 904 [2007]; *People v Shulman*, 6 NY3d 1, 28 [2005], *cert denied* 547 US 1043 [2006]). We further note that the prospective juror also made two unqualified statements that he could be fair and impartial (*see People v Fowler-Graham*, 124 AD3d 1403, 1403-1404 [4th Dept 2015], *lv denied* 25 NY3d 1072 [2015]).

After several jurors had been sworn and seated, but before jury selection was completed, a sworn juror indicated that he had failed to mention potentially relevant information when he was questioned prior to being sworn. We reject defendant's contention that the court erred in denying defense counsel's challenge for cause to the sworn juror "based upon a ground not known to the challenging party" before the juror was sworn (CPL 270.15 [4]). Defendant waived his further contention that the court thereafter erred in granting defense

counsel's peremptory challenge with respect to that sworn juror inasmuch as defendant requested that the court perform the very act that he now contends was error (*see generally People v Richardson*, 88 NY2d 1049, 1051 [1996]; *People v Rush*, 148 AD3d 1601, 1604 [4th Dept 2017], *lv granted* 29 NY3d 1133 [2017]).

Although we agree with defendant that the prosecutor engaged in misconduct by improperly eliciting prejudicial testimony about defendant's nickname, "Diablo," for purposes other than identification from witnesses who knew defendant by his real name (*see People v Tolliver*, 93 AD3d 1150, 1150-1151 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]), we conclude that such conduct was not so egregious as to deny defendant a fair trial (*see generally People v Chatman*, 281 AD2d 964, 966 [4th Dept 2001], *lv denied* 96 NY2d 899 [2001]). The remaining instances of prosecutorial misconduct alleged by defendant are not preserved for our review (*see* CPL 470.05 [2]), and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We also reject defendant's contention that defense counsel's failure to object to those alleged instances of prosecutorial misconduct constitutes ineffective assistance of counsel (*see generally People v Rickard*, 26 AD3d 800, 801 [4th Dept 2006], *lv denied* 7 NY3d 762 [2006]). We further reject defendant's contention that he was otherwise denied effective assistance of counsel. Defense counsel, inter alia, vigorously cross-examined witnesses, made a specific and competent midtrial motion for a trial order of dismissal, called several witnesses for the defense, and renewed the motion for a trial order of dismissal following the close of defendant's proof. Thus, we conclude that "the evidence, the law, and the circumstances of [this] case, viewed in totality and as of the time of the representation, reveal that [defense counsel] provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Contrary to defendant's further contention, we conclude that the court did not err in refusing to repeat the instruction on justification after providing the instruction for each count of the indictment. A court need not instruct justification seriatim where, as here, "the court's charge was a correct statement of the law when viewed in its entirety . . . and adequately conveyed to the jury the correct principles of law to be applied to the case" (*People v Bolling*, 24 AD3d 1195, 1197 [4th Dept 2005] [internal quotation marks omitted], *affd* 7 NY3d 874 [2006]). We reject defendant's contention that the sentence is unduly harsh and severe.

Finally, we have reviewed defendant's remaining contention and conclude that it is without merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1044

CA 17-00352

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

ROBERT HUDSON, PLAINTIFF-APPELLANT-RESPONDENT,

V MEMORANDUM AND ORDER

SUNNYSIDE CORPORATION,
DEFENDANT-RESPONDENT-APPELLANT,
ET AL., DEFENDANT.

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

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Marianne Furfure, A.J.), entered June 1, 2016. The order, among other things, granted the cross motion of defendant Sunnyside Corporation to dismiss plaintiff's complaint against it.

It is hereby ORDERED that said cross appeal is unanimously dismissed and the order is affirmed without costs.

Memorandum: Plaintiff appeals and Sunnyside Corporation (defendant) cross-appeals from an order that, among other things, granted that part of plaintiff's motion seeking to dismiss two of defendant's affirmative defenses and granted defendant's cross motion to dismiss the complaint against it for failure to state a cause of action. Plaintiff commenced this action seeking damages for injuries that he sustained as a result of inhaling fumes from muriatic acid while using that product in an undiluted form to clean an indoor swimming pool. Plaintiff alleged that defendant manufactured the subject muriatic acid and was liable for plaintiff's injuries because it failed to warn him of the risks associated with the product.

Supreme Court properly granted defendant's cross motion. The Federal Hazardous Substances Act (FHSA) "and its enabling regulations 'provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use' " (*Richards v Home Depot, Inc.*, 456 F3d 76, 78 [2d Cir 2006], quoting *Milanese v Rust-Oleum Corp.*, 244 F3d 104, 109 [2d Cir 2001]; *see* 15 USC § 1261 *et seq.*). Although "[f]ederal statutes creating labeling requirements, such as those contained in the [FHSA], preempt common-law failure to warn and inadequate warning claims" (*Beyrle v Finneron*,

229 AD2d 1010, 1010 [4th Dept 1996]), a plaintiff may assert a cause of action based on allegations that the label "failed to comply with pertinent [f]ederally-mandated requirements" (*Sabbatino v Rosin & Sons Hardware & Paint*, 253 AD2d 417, 419 [2d Dept 1998], *lv denied* 93 NY2d 817 [1999]). "Such a claim is valid, 'so long as a plaintiff charges a manufacturer with violations of FHSA-mandated labeling requirements and does not seek more stringent requirements' " (*Wallace v Parks Corp.*, 212 AD2d 132, 140 [4th Dept 1995], quoting *Moss v Parks Corp.*, 985 F2d 736, 740-741 [4th Cir 1993], *cert denied* 509 US 906 [1993]; *see Hanly v Quaker Chem. Co., Inc.*, 29 AD3d 860, 861 [2d Dept 2006], *lv denied* 7 NY3d 713 [2006]; *Sabbatino*, 253 AD2d at 419).

It is prohibited under the FHSA to introduce or deliver "into interstate commerce . . . any misbranded hazardous substance" (15 USC § 1263 [a]). A hazardous substance as defined in 15 USC § 1261 (f) is "misbranded" if its label does not contain the information set forth in 15 USC § 1261 (p) (1) and any additional information required by regulations promulgated by the Consumer Product Safety Commission pursuant to 15 USC § 1262 (b).

Here, plaintiff contends that the muriatic acid manufactured by defendant was misbranded because the label on the product did not contain the requisite "affirmative statement of the principal hazard or hazards" of the product (15 USC § 1261 [p] [1] [E]), and the "precautionary measures describing the action to be followed or avoided" (§ 1261 [p] [1] [F]). We reject that contention. With respect to the affirmative statement of the principal hazard or hazards, the label included the following language: "CAUSES SEVERE BURNS. VAPOR HARMFUL. MAY BE FATAL IF SWALLOWED. MAY CAUSE BLINDNESS IF SPLASHED IN EYES." We conclude that the statement "VAPOR HARMFUL," which is used in section 1261 (p) (1) (E) as an example of an affirmative statement of the principal hazard, is sufficient to comply with the statute and to warn users that inhalation of the muriatic acid fumes is harmful (*see Busch v Graphic Color Corp.*, 169 Ill 2d 325, 343-347, 662 NE2d 397, 407-408 [1996], *cert denied* 519 US 810 [1996]).

With respect to the precautionary measures describing the action to be followed or avoided, when 15 USC § 1261 (p) (1) (F) and the additional regulations are read together, "it is clear that the 'precautionary measures' a manufacturer must include on the label of a hazardous substance are those directed at minimizing or avoiding the principal hazard or hazards of the product" (*Mwesigwa v DAP, Inc.*, 637 F3d 884, 889 [8th Cir 2011]). Here, the label stated, "[n]ever use acid in a confined area; use only when ventilation is equivalent to outdoor conditions. It may be necessary to use mechanical ventilation if normal air movement is not sufficient to disperse fumes completely." Contrary to plaintiff's contention, the statute does not require a manufacturer of a hazardous substance to list on the product label each and every conceivable precautionary measure. Indeed, "analysis of compliance with the requirements of the federal statute is based upon the statutory language and the promulgations of the [Consumer Product Safety Commission]" (*Pennsylvania Gen. Ins. Co. v Landis*, 96 F Supp 2d 408, 417 [D NJ 2000], *affd* 248 F3d 1131 [3d Cir

2000]), and "[d]isagreement over the adequacy or sufficiency of the information provided on a label does not necessarily raise material issues of fact as to compliance. What matters is whether the label satisfies the requirements of the FHSA, not whether a label defines every phrase and addresses every potential hazard" (*Canty v Ever-Last Supply Co.*, 296 NJ Super 68, 90, 685 A2d 1365, 1377 [1996]; *see Torres-Rios v LPS Labs., Inc.*, 152 F3d 11, 14-15 [1st Cir 1998]). We conclude that the precautionary measures listed on the muriatic acid label are adequately "directed at minimizing or avoiding the principal hazard or hazards of the product" (*Mwesigwa*, 637 F3d at 889), i.e., inhaling the fumes, and the label therefore complied with section 1261 (p) (1) (F). Thus, because defendant established as a matter of law that the label on the bottle of muriatic acid complied with the FHSA, the court properly granted defendant's cross motion to dismiss the complaint against it (*see generally Gerrish v State Univ. of N.Y. at Buffalo*, 129 AD3d 1611, 1612 [4th Dept 2015]).

In light of our determination, defendant's cross appeal from that part of the order dismissing two of its affirmative defenses is dismissed as moot (*see generally McCabe v CSX Transp., Inc.*, 27 AD3d 1150, 1151 [4th Dept 2006]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1045

TP 17-00220

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

IN THE MATTER OF TOWN OF BOSTON, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES, RESPONDENT.

MICHAEL L. KOBIOLKA, HAMBURG, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE 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, Erie County [Diane Y. Devlin, J.], entered January 26, 2017) to review a determination of respondent. The determination permitted the establishment of a group home for developmentally disabled adults.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding challenging respondent's determination, made after a hearing, to permit the establishment of a community residential facility for the developmentally disabled within petitioner, and the matter was transferred to this Court pursuant to CPLR 7804 (g). We reject petitioner's contention that it was denied its right to due process based on the Hearing Officer's denial of its requests for an adjournment of the hearing (*see Matter of Frederick G. v New York State Cent. Register of Child Abuse & Maltreatment*, 53 AD3d 1075, 1076 [4th Dept 2008]; *cf. Matter of Crimi v Droskoski*, 217 AD2d 698, 699 [2d Dept 1995]). The record establishes that the Hearing Officer provided petitioner with an additional 21 days beyond the 15-day period within which it was required by statute to hold the hearing (*see* Mental Hygiene Law § 41.34 [c] [5]). Moreover, more than three months elapsed between the time the sponsoring agency gave notice that it had selected a site for the proposed facility and the date of the hearing, and thus petitioner had ample time to prepare for the hearing.

Petitioner contends that, if it had been given additional time to prepare for the hearing, it could have proposed alternative sites, and

thus the denial of an adjournment was an abuse of discretion. If petitioner believed that another site would be appropriate, however, it should have suggested another site in response to the sponsoring agency's initial notice or, if needed, asked for time to find such a site (*see* Mental Hygiene Law § 41.34 [c] [1] [B]). Instead, petitioner decided to object to the facility outright (*see* § 41.34 [c] [1] [C]), which led the sponsoring agency to request an "immediate hearing" (§ 41.34 [c] [5]). We therefore respectfully disagree with our dissenting colleague that there was no reason for petitioner to anticipate preparing for a hearing upon receiving notice from the sponsoring agency.

We further respectfully disagree with our dissenting colleague that an adjournment should have been granted so that petitioner could study traffic and waste disposal concerns. In its requests for an adjournment, petitioner did not state that it needed time to study those issues. It was not until after the decision of respondent's Acting Commissioner, in which she stated that petitioner's traffic and septic concerns were not based on any studies, that petitioner argued that it should have been granted an adjournment to study those issues. To the extent that petitioner contends that its stated reason of needing "time to prepare" encompassed those specific issues, we reject that contention. To conclude otherwise would mean that adjournments should always be granted upon request, even when it is well settled that the decision to grant or deny an adjournment is a matter of discretion (*see Redd v Juarbe*, 124 AD3d 1274, 1276 [4th Dept 2015]).

We reject petitioner's further contention that the determination is not supported by substantial evidence (*see generally Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 239 [1997]). Respondent considered the concentration of similar facilities in the area, and determined that the nature and character of the area in which the facility is to be based would not be substantially altered as a result of establishment of the facility (*see* Mental Hygiene Law § 41.34 [c] [5]; *Jennings*, 90 NY2d at 240-241). Although petitioner submitted evidence that two neighboring towns had fewer such facilities than petitioner, the record establishes that other neighboring towns had more facilities than petitioner. In any event, "[t]he mere presence of other facilities already situated in a particular area cannot be the sole basis for denying the establishment of a similar new facility when such need for that facility is demonstrated" (*Jennings*, 90 NY2d at 242; *see Matter of City of Mount Vernon v OMRDD*, 56 AD3d 771, 772 [2d Dept 2008]; *Matter of Town of Huntington v Maul*, 52 AD3d 725, 726 [2d Dept 2008]). Petitioner's objection to "the suitability of the proposed site[] was not relevant" to the issue whether the group home would substantially alter the nature and character of the neighborhood (*Town of Pleasant Val. v Wassaic Dev. Disabilities Servs. Off.*, 92 AD2d 543, 544 [2d Dept 1983]).

We have considered petitioner's remaining contention and conclude that it is without merit.

All concur except WHALEN, P.J., who dissents and votes to grant

the petition in part and annul the determination in accordance with the following memorandum: I respectfully dissent because I agree with petitioner that the Hearing Officer erred in denying its requests for an adjournment to enable it to prepare for the hearing. At the hearing, petitioner's witnesses expressed concerns that a community residential facility for the developmentally disabled at the proposed site, which is on a steep hill, could create traffic and waste disposal problems. In her decision, respondent's Acting Commissioner recognized those concerns as "important," but rejected them as speculative and conjectural absent "evidence such as septic or traffic studies to indicate that the proposed residence would detrimentally alter the nature and character of the neighborhood." Although the decision whether to grant an adjournment is a matter of discretion (*see Matter of Estafanous v New York City Envtl. Control Bd.*, 136 AD3d 906, 907 [2d Dept 2016]; *Redd v Juarbe*, 124 AD3d 1274, 1276 [4th Dept 2015]), I conclude that the denial of petitioner's requests was an abuse of discretion that may well have deprived petitioner of the opportunity to obtain the evidence it needed to prove its case.

Petitioner requested an adjournment well before the hearing date (*cf. Matter of A & U Auto Repair v New York State Dept. of Motor Vehs.*, 135 AD3d 856, 857 [2d Dept 2016]), and identified its grounds for an adjournment as a need to prepare its case and a need to consider hiring outside counsel in view of other obligations on the part of its Town Attorney. In my view, the basis for petitioner's requests was reasonable, and its need for an adjournment "did not result from [a] failure to exercise due diligence" (*Stevens v Auburn Mem. Hosp.*, 286 AD2d 965, 966 [4th Dept 2001]; *cf. Park Lane N. Owners, Inc. v Gengo*, 151 AD3d 874, 875-876 [2d Dept 2017]). The majority's conclusion that petitioner had ample time to prepare for the hearing presumes that petitioner should have started to prepare upon receipt of notice from the sponsoring agency that the site had been selected. One of the purposes of Mental Hygiene Law § 41.34, however, is "to encourage a process of joint discussion and accommodation between the providers of care and services to the mentally disabled and representatives of the community" (*Matter of Jennings v New York State Off. of Mental Health*, 90 NY2d 227, 240 [1997] [internal quotation marks omitted]), and here discussions between petitioner's representatives and the sponsoring agency took place during the period after the site selection notice and before the sponsoring agency's request for a hearing, which was made just over a month prior to the hearing. Under the circumstances, I agree with petitioner that it was not obligated to spend time and money preparing for a hearing before the sponsoring agency actually requested one. Moreover, petitioner's traffic and waste disposal concerns appear to be legitimate, and in my view they are relevant to the issue whether the proposed facility would substantially alter the nature and character of the area (*see Matter of Town of Bedford v State of New York Off. of Mental Retardation & Dev. Disabilities*, 144 AD2d 473, 474 [2d Dept 1988]; *see generally* § 41.34 [c] [5]; *Jennings*, 90 NY2d at 240-241).

Inasmuch as petitioner offered substantial reasons in support of its requests for an adjournment and there was no compelling reason to

deny the requests, I conclude that the Hearing Officer abused her discretion in denying them (*see Matter of Messina v Bellmore Fire Dist. Commn., Bd. of Fire Commrs.*, 242 AD2d 631, 633 [2d Dept 1997]; *see generally Chamberlain v Dundon* [appeal No. 2], 61 AD3d 1378, 1379 [4th Dept 2009]; *Matter of Treger*, 251 AD2d 1067, 1067 [4th Dept 1998]). I would therefore annul the challenged determination and remit the matter to respondent for a new hearing (*see Cenegal Manor v Casale*, 251 AD2d 259, 260 [1st Dept 1998]; *see also Treger*, 251 AD2d at 1067).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1069

CAF 16-00428

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

IN THE MATTER OF ERIC BURK,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

SABRINA TRENTO, RESPONDENT-APPELLANT.

IN THE MATTER OF SABRINA TRENTO,
PETITIONER-APPELLANT,

V

ERIC BURK, RESPONDENT-RESPONDENT.

PAUL M. DEEP, UTICA, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

PAUL SKAVINA, ROME, FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Oneida County (Julia Brouillette, J.), entered September 30, 2015 in a proceeding pursuant to Family Court Act article 6. The order, among other things, awarded Eric Burk sole custody of the subject child.

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

Memorandum: Respondent-petitioner mother appeals from an order that, inter alia, granted petitioner-respondent father's amended petition by awarding him primary physical residence and sole legal custody of the parties' child. We reject the mother's contention that Family Court's determination lacks a sound and substantial basis in the record.

It is well settled that a custody determination following a hearing is entitled to great deference (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), "particularly in view of the hearing court's superior ability to evaluate the character and credibility of the witnesses" (*Matter of Thillman v Mayer*, 85 AD3d 1624, 1625 [4th Dept 2011]). In our view, the court's written decision establishes that the court engaged in a " 'careful weighing of [the] appropriate factors' " (*Matter of Triplett v Scott*, 94 AD3d 1421, 1422 [4th Dept 2012]), and the court's determination has a sound and substantial

basis in the record (*see Matter of Bonnell v Rodgers*, 106 AD3d 1515, 1516 [4th Dept 2013], *lv denied* 21 NY3d 864 [2013]; *Thillman*, 85 AD3d at 1625 [2013]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1070

CA 17-00224

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

IN THE MATTER OF LAPC LOFTS, LLC,
PETITIONER-PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

CITY OF BUFFALO DEPARTMENT OF ASSESSMENT
AND TAXATION, CITY OF BUFFALO AND COUNTY
OF ERIE, RESPONDENTS-DEFENDANTS-RESPONDENTS.

GROSS, SHUMAN, BRIZDLE & GILFILLAN, P.C., BUFFALO (JOHN K. ROTTARIS OF COUNSEL), FOR PETITIONER-PLAINTIFF-APPELLANT.

TIMOTHY A. BALL, CORPORATION COUNSEL, BUFFALO (MELISSA SANCHEZ-FERNANDEZ OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-RESPONDENTS CITY OF BUFFALO DEPARTMENT OF ASSESSMENT AND TAXATION, AND CITY OF BUFFALO.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (JAMES P. BLENK OF COUNSEL), FOR RESPONDENT-DEFENDANT-RESPONDENT COUNTY OF ERIE.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (E. Jeannette Ogden, J.), dated October 7, 2016 in a CPLR article 78 proceeding and declaratory judgment action. The judgment denied the relief sought in the petition/complaint.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the declaration and as modified the judgment is affirmed without costs.

Memorandum: Petitioner-plaintiff (petitioner) purchased an historic building in Buffalo and converted it into a mixed-use residential/commercial facility. Petitioner then applied to respondent-defendant City of Buffalo (City) for a partial property tax exemption under RPTL 485-a, which incentivizes mixed-use development (485-a exemption). Petitioner simultaneously applied to respondent-defendant County of Erie (County) for a partial property tax exemption under RPTL 444-a, which incentivizes the restoration and adaptive reuse of historic buildings (444-a exemption). Under the terms of petitioner’s applications, the proposed 444-a exemption would be applied against the property’s County tax obligations; the proposed 485-a exemption, on the other hand, would be applied against the property’s City tax obligations. In accordance with local practice, both applications were referred to respondent-defendant City of Buffalo Department of Assessment and Taxation (Department) for review

and determination.

The Department granted petitioner's application for a 485-a exemption, but it later denied petitioner's application for a 444-a exemption. The Department cited RPTL 485-a (4) (d) to justify its determination denying petitioner's 444-a exemption application. Petitioner thereafter commenced the instant hybrid CPLR article 78 proceeding and declaratory judgment action. In the petition/complaint, petitioner sought, inter alia, declaratory relief and an order compelling the Department to grant its 444-a exemption application. Supreme Court declared in favor of respondents-defendants and denied the remaining relief sought by petitioner. Petitioner now appeals.

Preliminarily, we note that, with certain limited exceptions inapplicable here, "the proper vehicle for challenging an allegedly wrongful denial of a partial [property tax] exemption is a tax certiorari proceeding pursuant to RPTL article 7, and not a CPLR article 78 proceeding" (*Matter of Laurel Hill Farms, Inc. v Board of Assessors of Nassau County*, 51 AD3d 794, 795 [2d Dept 2008]; *see generally Hewlett Assoc. v City of New York*, 57 NY2d 356, 364 [1982]). A declaratory judgment action is likewise an inappropriate procedural vehicle for challenging the denial of a partial property tax exemption (*see Cablevision Sys. Dev. Co. v Board of Assessors of County of Nassau*, 49 NY2d 866, 867 [1980]). We therefore convert this hybrid CPLR article 78 proceeding and declaratory judgment action into an RPTL article 7 tax certiorari proceeding, and we modify the judgment by vacating the declaration (*see* CPLR 103 [c]; *see generally Guthrie v Mossow*, 145 AD3d 1495, 1496 [4th Dept 2016]).

We turn now to the merits of the converted proceeding. RPTL 485-a (4) (d), the provision upon which the Department relied to deny petitioner's application for a 444-a exemption, states in relevant part that a 485-a exemption may not be "granted concurrent with or subsequent to any other real property tax exemption granted to the same . . . real property." Throughout this proceeding, petitioner has advanced only a single ground for invalidating the Department's denial of its 444-a exemption application. Specifically, petitioner contends that subdivision (4) (d) applies only when the taxpayer receives multiple tax exemptions "for taxes in the same taxing jurisdiction –i.e., if the application sought both tax exemptions for City taxes only." Thus, according to petitioner, the Department erroneously denied its 444-a exemption application on the authority of RPTL 485-a (4) (d) because the 444-a application applied only to County taxes, whereas the 485-a application applied only to City taxes.

We reject petitioner's contention. Even assuming, arguendo, that petitioner's construction of subdivision (4) (d) is " 'plausible,' " it is not " 'the only reasonable construction' " of that provision (*Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582 [2006], quoting *Matter of Federal Deposit Ins. Corp. v Commissioner of Taxation & Fin.*, 83 NY2d 44, 49 [1993]). An equally plausible construction is that subdivision (4) (d) bars a 485-a exemption whenever the property has concurrently or previously received another

tax exemption from *any* taxing jurisdiction. Petitioner "has thus failed to sustain its burden of unequivocal entitlement to the exemption it seeks" (*id.* at 583).

Finally, we note that even though RPTL 485-a (4) (d), by its own terms, limits *only* the availability of the 485-a exemption, petitioner does not contend that subdivision (4) (d) is categorically irrelevant to a taxpayer's entitlement to a 444-a exemption and thus could not have justified the Department's denial of its 444-a exemption application. We therefore express no view on that issue.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1117

CA 17-00370

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

JAMES P. HORTON AND JUDI L. HORTON,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

BOARD OF EDUCATION OF CAMPBELL-SAVONA CENTRAL SCHOOL DISTRICT, CAMPBELL-SAVONA CENTRAL SCHOOL DISTRICT AND CAMPBELL-SAVONA HIGH SCHOOL,
DEFENDANTS-APPELLANTS-RESPONDENTS.

PETRONE & PETRONE, P.C., UTICA (MARK J. HALPIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LEARNED, REILLY, LEARNED & HUGHES, LLP, ELMIRA (MATTHEW C. GAGLIARDO OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross appeal from an order of the Supreme Court, Steuben County (Joseph W. Latham, A.J.), entered May 24, 2016. The order, inter alia, denied that part of the motion of defendants for summary judgment dismissing the Labor Law § 240 (1) claim and denied the cross motion of plaintiffs for partial summary judgment on the issue of liability under section 240 (1).

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of defendants' motion with respect to the Labor Law § 240 (1) claim and dismissing the second cause of action in its entirety, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages for injuries sustained by James P. Horton (plaintiff) as a result of, among other things, an alleged violation of Labor Law § 240 (1). Plaintiff, a journeyman electrician, was employed by a subcontractor hired to perform renovation work on defendant Campbell-Savona High School. On the day of the accident, plaintiff and a coworker were instructed by their foreman to move two heavy switchgear segments from a loading dock to a room in the basement of the school. Plaintiff, the coworker, and the foreman successfully moved the first segment without incident by first using a hand truck to move the segment to a freight elevator and into the basement, subsequently laying the segment on its side upon a flat cart with four wheels that was approximately one foot high in order to maneuver the segment below obstructions in the basement hallway, and then moving the segment into the room and raising it to an upright position. They used essentially

the same process to move the second segment into the room. Plaintiff and the coworker then began to lift the second segment off of the cart with one of them positioned on each side of the segment, while the foreman secured the base. According to plaintiff, as he and the coworker were lifting the second segment from an angled to an upright position, he felt a sharp pain in his back when the segment dropped or "rock[ed]" approximately half an inch on his coworker's side and, for a "split second," the weight of the segment felt unstable and increased in plaintiff's hands. Plaintiff and his coworker did not drop the segment and, after a momentary pause, they continued to raise it to an upright position. Defendants appeal and plaintiffs cross-appeal from an order that, inter alia, denied that part of defendants' motion for summary judgment dismissing the Labor Law § 240 (1) claim and denied plaintiffs' cross motion for partial summary judgment on the issue of liability under section 240 (1).

We agree with defendants that Supreme Court erred in denying that part of their motion seeking summary judgment dismissing the Labor Law § 240 (1) claim, and we therefore modify the order accordingly. "Liability may . . . be imposed under [Labor Law § 240 (1)] only where the 'plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential' " (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 97 [2015], *rearg denied* 25 NY3d 1195 [2015], quoting *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]). "Consequently, the protections of [the statute] 'do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity' " (*id.*, quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Rather, the statute "was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*" (*Ross*, 81 NY2d at 501; *see Runner*, 13 NY3d at 603).

Here, the harm to plaintiff was not "the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner*, 13 NY3d at 603); rather, the submissions establish that plaintiff was injured while lifting the heavy switchgear segment when the weight thereof momentarily shifted to his side as a result of instability or a slight downward movement of half an inch on the coworker's side (*cf. Finocchi v Live Nation Inc.*, 141 AD3d 1092, 1093-1094 [4th Dept 2016]; *Zarnoch v Luckina*, 112 AD3d 1336, 1337 [4th Dept 2013]). Although plaintiff's back injury "was tangentially related to the effects of gravity upon the [switchgear segment that] he was lifting, it was not caused by the limited type of elevation-related hazards encompassed by Labor Law § 240 (1)" (*Carr v McHugh Painting Co., Inc.*, 126 AD3d 1440, 1442 [4th Dept 2015] [internal quotation marks omitted]). We thus conclude that defendants established as a matter of law that plaintiff's injuries resulted from a "routine workplace risk[]" of a construction site and not a "pronounced risk[] arising from construction work site elevation differentials" (*Runner*, 13 NY3d at 603; *see Carr*, 126 AD3d at 1442), and plaintiffs failed to raise a triable issue of fact (*see Zuckerman*

v City of New York, 49 NY2d 557, 562 [1980]). For the same reasons, we reject plaintiffs' contention in their cross appeal that the court erred in denying their cross motion for partial summary judgment on liability under section 240 (1).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1121.1

KA 15-00947

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMIRE Y. BARBER, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, 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 February 17, 2015. The judgment convicted defendant, upon a jury verdict, of unlawful imprisonment in the first degree, assault in the second degree, criminal contempt in the second degree and attempted criminal contempt in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing those parts convicting defendant of unlawful imprisonment in the first degree and assault in the second degree and as modified the judgment is affirmed, and a new trial is granted on counts one and two of the indictment.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of unlawful imprisonment in the first degree (Penal Law § 135.10), assault in the second degree (§ 120.05 [6]), criminal contempt in the second degree (§ 215.50 [3]), and attempted criminal contempt in the second degree (§§ 110.00, 215.50 [3]). The charges arose from an incident in which defendant allegedly forced his former girlfriend into a vehicle, drove her around the City of Buffalo, and struck her repeatedly. While defendant was driving the victim through the streets of Buffalo, she threw herself from the moving vehicle and sustained numerous injuries as a result.

Defendant contends that his conviction of assault in the second degree must be reversed because Supreme Court's instruction created the possibility that the jury convicted him upon a theory different from the one charged in the indictment. We agree. As a preliminary matter, we reject the People's contention that defendant was required to preserve his contention for our review. It is well settled that " 'defendant has a "fundamental and nonwaivable" right to be tried only on the crimes charged' " (*People v Graves*, 136 AD3d 1347, 1348 [4th Dept 2016], *lv denied* 27 NY3d 1069 [2016]; *see People v McNab*,

167 AD2d 858, 858 [4th Dept 1990]; *see generally People v Miles*, 289 NY 360, 363 [1942]). With respect to the merits of defendant's contention, "[w]here the court's jury instruction on a particular count erroneously contains an additional theory that differs from the theory alleged in the indictment, as limited by the bill of particulars, and the evidence adduced at trial could have established either theory, reversal of the conviction on that count is required because there is a possibility that the jury could have convicted the defendant upon the uncharged theory" (*Graves*, 136 AD3d at 1348; *see People v Sanford*, 148 AD3d 1580, 1582 [4th Dept 2017], *lv denied* 29 NY3d 1133 [2017]). We may not apply harmless error analysis to such an error because it would be impossible to determine whether the jury based its guilty verdict on the uncharged theory (*see People v Badalamenti*, 27 NY3d 423, 439 [2016]).

Here, defendant was charged in count two of the indictment with assault in the second degree on the theory that, in the course of and in furtherance of the commission of an unlawful imprisonment in the first degree, he caused physical injury to the victim "by striking her" (*see* Penal Law § 120.05 [6]). At trial, the victim testified that, while she was seated in the passenger seat of the vehicle, defendant punched her in the left eye with a closed fist, causing blurred vision, inflicting pain that she described as 10 on a scale of 1 to 10, and leaving her with a black eye. On cross-examination, however, the victim testified that she sustained additional injuries when she threw herself from the moving vehicle, including a broken jaw, a gashed lip, lacerations to her face, and three broken teeth. During jury deliberations, the court received a note from the jury, asking: "If the victim suffers injuries in trying to escape, out of credible fear for her own safety, do these injuries, from a legal perspective, amount to assault by the defendant?" In response, the court reread the jury charge, which stated: "If you find that physical injury was caused by the defendant, then it does not matter that the physical injury was caused unintentionally or accidentally rather than with an intention to cause physical injury, or that it resulted from the victim's fear or fright." In so doing, the court effectively instructed the jurors that, in determining whether defendant was guilty of assault in the second degree, they could consider any injuries that the victim sustained when she threw herself from the moving vehicle. Inasmuch as those were not injuries that defendant caused "by striking" the victim, there is a possibility that the jury convicted defendant upon a theory different from the one charged in the indictment. We therefore modify the judgment by reversing that part convicting defendant of assault in the second degree, and we grant him a new trial on count two of the indictment (*see Graves*, 136 AD3d at 1348).

Defendant further contends that his conviction of unlawful imprisonment in the first degree also must be reversed because the court erred in refusing to charge the lesser included offense of unlawful imprisonment in the second degree. We agree. A defendant is entitled to a lesser included offense charge upon showing that (1) the offense to be charged is a lesser included offense, and (2) "there is a reasonable view of the evidence in the particular case that would

support a finding that he committed the lesser offense but not the greater" (*People v Glover*, 57 NY2d 61, 63 [1982]; *see* CPL 300.50 [1], [2]). "A person is guilty of unlawful imprisonment in the second degree when he [or she] restrains another person" (Penal Law § 135.05). A person is guilty of unlawful imprisonment in the first degree when he or she performs such an act "under circumstances which expose the latter to a risk of serious physical injury" (§ 135.10). In this case, the bill of particulars limited the risk of serious physical injury to the risk exhibited by defendant in threatening the victim with serious bodily harm.

With respect to the first prong, unlawful imprisonment in the second degree is a lesser included offense of unlawful imprisonment in the first degree inasmuch as it is theoretically impossible to commit the greater offense without also committing the lesser offense (*see People v Subik*, 112 AD2d 480, 481 [3d Dept 1985]; *see generally Glover*, 57 NY2d at 63).

With respect to the second prong, we conclude that there is a reasonable view of the evidence that defendant committed the lesser offense, but not the greater. At trial, the victim testified that defendant chased her down, put her in a headlock, dragged her kicking and screaming into the vehicle, and then drove away. In addition, three eyewitnesses who observed those events gave testimony consistent with the victim's testimony. The victim further testified that, while defendant drove her through the streets of Buffalo, he repeatedly threatened to kill her. In his own defense, defendant testified that he did not force the victim into the vehicle, never struck her or inflicted any injuries upon her, and never threatened her. The jury reasonably could have credited that part of the victim's testimony in which she stated that defendant restrained her within the vehicle, yet rejected that part of her testimony in which she stated that, after she was in the vehicle, defendant threatened to kill her. That is particularly so given that the testimony of the eyewitnesses corroborated the victim's testimony only up to the time that she was restrained within the vehicle. We thus conclude that "a charge-down to the lesser offense [was] appropriate [because] it would [have been] reasonable for the jury to reject a portion or segment of the witness['s] testimony establishing the greater offense, while crediting that portion of the testimony establishing the lesser crime" (*People v Negron*, 91 NY2d 788, 792 [1998]; *see generally People v Jones*, 129 AD3d 592, 593 [1st Dept 2015], *lv denied* 27 NY3d 1134 [2016]). We therefore further modify the judgment by reversing that part convicting defendant of unlawful imprisonment in the first degree, and we grant him a new trial on count one of the indictment.

Defendant also contends that he was denied a fair trial as a result of several instances of alleged prosecutorial misconduct. Although defendant did not object to all of the prosecutor's allegedly improper remarks and thus failed to preserve his contention for our review with respect to those remarks, we exercise our power to review his contention with respect to all of the prosecutor's allegedly improper remarks as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We note one remark in particular that

occurred during the People's opening statement. The prosecutor stated that "the signs of [defendant's] unbridled obsession were still on him in the form of his white T-shirt covered in [the victim's] blood." As the prosecutor was well aware, however, defendant's shirt had been destroyed by the police and was unavailable for defendant's inspection or as evidence at trial. It was later revealed through cross-examination of the forensic biologist who examined the shirt that there had been just three small spots of blood on the shirt, the largest of which was slightly larger than one square centimeter. Thus, it is apparent that the prosecutor grossly exaggerated the amount of the victim's blood on that piece of lost evidence. Although the prosecutor's remark was improper, we conclude that reversal is unwarranted because " 'the misconduct [did] not substantially prejudice[] . . . defendant's trial' " (*People v Galloway*, 54 NY2d 396, 401 [1981]). Nevertheless, we take this opportunity to remind the prosecutor that she is "charged with the responsibility of presenting competent evidence fairly and temperately, not to get a conviction at all costs" (*People v Mott*, 94 AD2d 415, 418 [4th Dept 1983]).

We reject defendant's contention that erroneous evidentiary rulings compel reversal. Any error is harmless with respect to defendant's conviction of counts three and four of the indictment inasmuch as the evidence of his guilt on those counts is overwhelming and there is no reasonable possibility that any error contributed to the jury's verdict (*see generally People v Crimmins*, 36 NY2d 230, 237 [1975]). Contrary to defendant's further contention, we conclude that he received effective assistance of counsel inasmuch as "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [his] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Inasmuch as defendant has completed serving the sentence imposed on the remaining misdemeanor counts of which he was convicted, "his contention that the sentence is unduly harsh and severe has been rendered moot" (*People v Swick*, 147 AD3d 1346, 1346 [4th Dept 2017], *lv denied* 29 NY3d 1001 [2017] [internal quotation marks omitted]).

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1122

KA 13-00446

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAHARI JONES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 22, 2013. The judgment convicted defendant, upon a jury verdict, of assault in the first degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]), and two counts of criminal possession of a weapon in the second degree (§ 265.03 [3]). The assault count and the first weapon count charged defendant with possessing a handgun and using it to shoot a man in December 2011, and the second weapon count charged him with possessing the same handgun in January 2012.

Defendant contends that he was deprived of a fair trial by numerous acts of alleged misconduct by the prosecutor on summation. Defendant did not object to any of those instances of alleged misconduct, and thus he failed to preserve his contention for our review (*see People v Lane*, 106 AD3d 1478, 1480 [4th Dept 2013], *lv denied* 21 NY3d 1043 [2013]; *People v Rumph*, 93 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]). In any event, we reject defendant's contention. The majority of the comments challenged by defendant on appeal were within " 'the broad bounds of rhetorical comment permissible' " during summations (*People v Williams*, 28 AD3d 1059, 1061 [4th Dept 2006], *affd* 8 NY3d 854 [2007], quoting *People v Galloway*, 54 NY2d 396, 399 [1981]; *see People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012]). We note in particular that "the prosecutor's closing statement must be evaluated

in light of the defense summation, which put into issue the [witnesses'] character and credibility and justified the People's response" (*People v Halm*, 81 NY2d 819, 821 [1993]). Thus, we conclude that the prosecutor's comments at issue on summation were "a fair response to defense counsel's summation and did not exceed the bounds of legitimate advocacy" (*People v Melendez*, 11 AD3d 983, 984 [4th Dept 2004], *lv denied* 4 NY3d 888 [2005]; *see generally Halm*, 81 NY2d at 821). Additionally, even assuming, arguendo, that any of the prosecutor's comments may have exceeded the bounds of propriety, we further conclude that such comments " 'were not so pervasive or egregious as to deprive defendant of a fair trial' " (*People v Jackson*, 108 AD3d 1079, 1080 [4th Dept 2013], *lv denied* 22 NY3d 997 [2013]; *see People v Miller*, 104 AD3d 1223, 1224 [4th Dept 2013], *lv denied* 21 NY3d 1017 [2013]). We have considered defendant's further claims of prosecutorial misconduct and conclude that they are without merit.

Defendant further contends that he was deprived of effective assistance of counsel because of numerous alleged errors by defense counsel, including the failure to object to prosecutorial misconduct, the improper cross-examination of a witness, and the failure to introduce certain evidence. We reject defendant's contention with respect to alleged prosecutorial misconduct on summation. As noted above, any such misconduct was "not so egregious as to deprive defendant of a fair trial, [and therefore] defense counsel's failure to object thereto did not deprive defendant of effective assistance of counsel" (*People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *see People v Lewis*, 151 AD3d 1727, 1729 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Henley*, 145 AD3d 1578, 1580 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]). In addition, defendant failed to meet his burden of demonstrating "the absence of strategic or other legitimate explanations" for counsel's alleged deficiencies in cross-examining a prosecution witness (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see People v Wallace*, 60 AD3d 1268, 1271 [4th Dept 2009], *lv denied* 12 NY3d 922 [2009]). Defendant's claim that he was deprived of effective assistance of counsel by defense counsel's failure to introduce evidence that the weapon at issue was a "community gun" is based on matters outside the record and thus cannot be reviewed on direct appeal (*see People v Rohlehr*, 87 AD3d 603, 604 [2d Dept 2011]; *People v Dawkins*, 81 AD3d 972, 972 [2d Dept 2011], *lv denied* 17 NY3d 794 [2011], *reconsideration denied* 17 NY3d 858 [2011]). We have considered defendant's remaining claims of ineffective assistance of counsel, and we conclude that he was afforded meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant failed to preserve for our review his contention that the People failed to establish with respect to the January weapon count that the firearm was operable, i.e., that it was loaded with operable ammunition. His motion for a trial order of dismissal was not specifically directed at that alleged deficiency in the People's proof (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, that

contention is without merit. A firearms examiner testified that he test-fired the weapon with the ammunition found in it, and thus the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction with respect to the January weapon count (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Furthermore, viewing the evidence with respect to all three counts of which defendant was convicted in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant further contends that Supreme Court erred in refusing to suppress the weapon and other evidence seized by the police after the police pursued, detained, and searched him because the officer lacked the requisite reasonable suspicion that he was involved in criminal activity. We reject that contention.

The Court of Appeals has promulgated a "graduated four-level test for evaluating street encounters initiated by the police" (*People v Moore*, 6 NY3d 496, 498 [2006]). The Court explained that "level one permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality; level two, the common-law right of inquiry, permits a somewhat greater intrusion and requires a founded suspicion that criminal activity is afoot; level three authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; level four, arrest, requires probable cause to believe that the person to be arrested has committed a crime" (*id.* at 498-499; *see generally People v De Bour*, 40 NY2d 210, 222-223 [1976]).

Here, the People contend that the officer who confronted defendant had a founded suspicion that criminal activity was afoot, and that his initial approach of defendant was therefore proper under level two. It is well settled that, in determining whether the officer had the requisite founded suspicion, the court must consider the totality of the circumstances (*see People v Mercado*, 120 AD3d 441, 442 [1st Dept 2014], *affd* 25 NY3d 936 [2015]) including, inter alia, the nature and location of the area in which the stop occurs (*see People v Bronston*, 68 NY2d 880, 881 [1986]). Here, the evidence at the hearing established that the neighborhood in question is a high-crime area in which violent gang activity occurs frequently. The evidence at the hearing also established that, before exiting an unmarked police vehicle to approach defendant, the officer observed defendant and two others acting furtively while keeping their hands under their sweatshirts at the waistbands of their pants. The officer testified at the hearing that an informant told him that a man fitting defendant's description had run from the scene of an incident that occurred one day before the stop, and that shots were fired during that incident. The informant also told the officer that the man lived in the 100 block of Alvord Street and was a member of a gang known as

the Highland Street Boys. The officer had learned that the weapon used in that incident was a .380 caliber weapon, the same caliber as the weapon used in the shooting in this case, which had taken place in the same vicinity a few weeks earlier. Furthermore, the officer knew that defendant lived in the 100 block of Alvord Street and was a member of the aforementioned gang. Based on that information, we agree with the People that the officer had at least the requisite founded suspicion that criminal activity was afoot, and thus that his initial approach of defendant was proper under level two.

When defendant then immediately fled, the officer pursued him, which was a level three intrusion requiring reasonable suspicion that defendant had committed or was committing a crime. "In determining whether a pursuit was justified by reasonable suspicion, the emphasis should not be narrowly focused on . . . any . . . single factor, but [rather should be based] on an evaluation of the totality of circumstances, which takes into account the realities of everyday life unfolding before a trained officer" (*People v Bachiller*, 93 AD3d 1196, 1197 [4th Dept 2012], *lv dismissed* 19 NY3d 861 [2012] [internal quotation marks omitted]; *see People v Corona*, 142 AD3d 889, 889 [1st Dept 2016], *lv denied* 28 NY3d 1144 [2017]). We also note that, although "flight alone is insufficient to justify pursuit, 'defendant's flight in response to an approach by the police, *combined with other specific circumstances indicating that the suspect may be engaged in criminal activity*, may give rise to reasonable suspicion, the necessary predicate for police pursuit' " (*People v Rainey*, 110 AD3d 1464, 1465 [4th Dept 2013], quoting *People v Sierra*, 83 NY2d 928, 929 [1994]; *see People v Walker*, 149 AD3d 1537, 1538 [4th Dept 2017]; *People v Price*, 109 AD3d 1189, 1190 [4th Dept 2013], *lv denied* 22 NY3d 1043 [2013]). Here, we agree with the People that the specific information known to the officer, coupled with the officer's observations of defendant's actions, furtive behavior, and immediate flight, gave the officer reasonable suspicion to believe that defendant was engaged in criminal activity, thereby justifying the officer's pursuit, detainment, and search of defendant.

We agree with defendant, however, that the court erred in failing to determine whether he should be afforded youthful offender status (*see generally People v Rudolph*, 21 NY3d 497, 501 [2013]). Defendant was convicted of an armed felony offense and therefore is ineligible for a youthful offender adjudication unless the court determines that certain statutory factors exist (*see* CPL 720.10 [3] [i]). "If the court determines, in its discretion, that neither of the CPL 720.10 (3) factors exist and states the reasons for that determination on the record, no further determination by the court is required. If, however, the court determines that one or more of the CPL 720.10 (3) factors are present, and the defendant is therefore an eligible youth, the court then must determine whether or not the eligible youth is a youthful offender" (*People v Dukes*, 147 AD3d 1534, 1535 [4th Dept 2017] [internal quotation marks omitted]; *see People v Middlebrooks*, 25 NY3d 516, 527 [2015]). Inasmuch as the court failed to follow the procedure set forth in *Middlebrooks*, we hold the case, reserve decision, and remit the matter to Supreme Court to "make and state for the record 'a determination of whether defendant is a youthful

offender' " (*People v Wilson*, 151 AD3d 1836, 1837 [4th Dept 2017], quoting *Rudolph*, 21 NY3d at 503).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1147

CA 16-01460

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

IN THE MATTER OF DEBORAH SOULE,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

TINA STANFORD, IN HER OFFICIAL CAPACITY
AS CHAIRPERSON OF BOARD OF PAROLE,
RESPONDENT-RESPONDENT.

LAW OFFICES OF JOSHUA DUBS, PLLC, BUFFALO (JOSHUA E. DUBS OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (John L. Michalski, A.J.), entered June 9, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing her petition pursuant to CPLR article 78 seeking to annul the determination of the Parole Board denying her release to community supervision. Because petitioner has appeared again before the Parole Board during the pendency of this appeal, and was denied release to community supervision again, we dismiss this appeal as moot (*see Matter of Ventura v Fischer*, 122 AD3d 1303, 1303 [4th Dept 2014]; *Matter of Mann v Fischer*, 122 AD3d 1386, 1387 [4th Dept 2014]). We conclude that the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1149

CA 17-00403

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

U.S. ENERGY DEVELOPMENT CORPORATION,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SUPERIOR WELL SERVICES, INC., NOW KNOWN AS
NABORS COMPLETION & PRODUCTION SERVICES, CO.,
AS SUCCESSOR IN INTEREST TO SUPERIOR WELLS
SERVICES, LTD., DEFENDANT-APPELLANT.

SHAUB, AHMUTY, CITRIN & SPRATT, LLP, LAKE SUCCESS (TIMOTHY R. CAPOWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (ROBERT J. LANE, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered March 2, 2016. The order, among other things, denied the motion of defendant insofar as it sought summary judgment dismissing the third amended complaint.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of defendant's motion with respect to the third and fourth causes of action and the fifth cause of action insofar as it asserts claims prior to September 7, 2007 and dismissing those causes of action to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action to recover damages it allegedly sustained when defendant improperly performed hydraulic fracturing (fracking) operations on 97 natural gas wells owned by plaintiff between 2005 and 2007. In the third amended complaint (complaint), plaintiff asserted causes of action for breach of contract, subordination payments, promissory estoppel, unjust enrichment, and negligence. After issue was joined, defendant moved for, inter alia, summary judgment dismissing the complaint. Plaintiff cross-moved for partial summary judgment on the issue of defendant's liability with respect to the causes of action for breach of contract and negligence. In the alternative, plaintiff sought an order finding certain facts undisputed pursuant to CPLR 3212 (g). As relevant to the issues presented on appeal, Supreme Court denied defendant's motion insofar as defendant sought summary judgment dismissing the complaint in its entirety. The court also denied plaintiff's cross motion with respect to the causes of action for

breach of contract and negligence. The court, however, granted in part the alternative relief sought by plaintiff by determining that certain facts were not in dispute.

Defendant contends that it is entitled to summary judgment dismissing the complaint because "field invoices," which were provided to plaintiff's representatives at the work site, limited defendant's liability. We reject that contention. Although the field invoices contain various terms and conditions limiting defendant's liability, it is undisputed that defendant did not provide the field invoices to plaintiff until after defendant completed its work on a particular well, and thus the postperformance terms and conditions relied upon by defendant never became part of the parties' contract (*see Lorbrook Corp. v G & T Indus.*, 162 AD2d 69, 73 [3d Dept 1990]; *see also G.W. White & Son v Gosier*, 219 AD2d 866, 867 [4th Dept 1995]; *Tuck Indus. v Reichhold Chems.*, 151 AD2d 566, 567 [2d Dept 1989]; *cf. F.W. Myers & Co. v Gerald Indus.*, 178 AD2d 890, 891 [3d Dept 1991]). It is also undisputed that plaintiff never remitted payment based upon the field invoices. Rather, plaintiff paid defendant based upon separate invoices that were mailed to plaintiff's office, and those mailed invoices reflected the agreed-upon discounted price that often differed from the price quoted on the field invoices, and did not contain the relevant terms and conditions. We therefore conclude, contrary to defendant's related contention, that plaintiff did not accept or ratify the terms and conditions contained in the field invoices (*cf. Maklihon Mfg. Corp. v Air-City, Inc.*, 224 AD2d 187, 187-188 [1st Dept 1996]; *F.W. Myers & Co.*, 178 AD2d at 891).

We reject defendant's further contention that plaintiff's negligence cause of action is barred by the economic loss doctrine. The damages sought by plaintiff "were not the result of the failure of [defendant's fracking operations] to perform [their] intended purpose" (*Hodgson, Russ, Andrews, Woods & Goodyear v Isolatek Intl. Corp.*, 300 AD2d 1051, 1052-1053 [4th Dept 2002]). Rather, the allegedly negligent fracking operations caused damage to the wells themselves, thus rendering the economic loss doctrine inapplicable (*see id.*; *see also Triple R Farm Partnership v IBA, Inc.*, 21 AD3d 1260, 1261 [4th Dept 2005]; *Flex-O-Vit USA v Niagara Mohawk Power Corp.*, 292 AD2d 764, 766 [4th Dept 2002], *lv dismissed* 99 NY2d 532 [2002]). We agree with defendant, however, that the court erred in denying that part of the motion seeking summary judgment dismissing the negligence cause of action insofar as it asserts claims with respect to any of plaintiff's wells fracked prior to September 7, 2007, and we therefore modify the order accordingly. Those claims are time-barred. Plaintiff did not commence the instant action until September 7, 2010, and the applicable statute of limitations for defendant's cause of action is three years (*see* CPLR 214 [4]; *5 Awnings Plus, Inc. v Moses Ins. Group, Inc.*, 108 AD3d 1198, 1199 [4th Dept 2013]).

We also agree with defendant that the court erred in denying those parts of the motion seeking summary judgment dismissing the causes of action for promissory estoppel and unjust enrichment inasmuch as a valid and enforceable contract exists between the parties (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572

[2005]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]; *Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 610 [2d Dept 2017]; *cf. Denhaese v Buffalo Spine Surgery, PLLC*, 144 AD3d 1519, 1519-1520 [4th Dept 2016]), and we therefore further modify the order accordingly.

With respect to plaintiff's purported claim for negligent misrepresentation, defendant's contention that plaintiff cannot establish the requisite special relationship between the parties is raised for the first time on appeal and is thus not properly before us (*see Kimmell v Schaefer*, 89 NY2d 257, 263-264 [1996]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). In any event, there are issues of fact concerning the existence of such a special relationship. Finally, we reject defendant's contention that the court erred in granting in part the alternative relief sought by plaintiff in its cross motion (*see* CPLR 3212 [g]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1155

TP 17-00857

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

IN THE MATTER OF STEVEN J. MAROCCIA, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT.

KURT D. SCHULTZ, UTICA, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (ROBERT M. GOLDFARB 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 an order of the Supreme Court, Oneida County [Samuel D. Hester, J.], entered October 24, 2014) to review a determination of respondent. The determination revoked petitioner's certification to perform New York State motor vehicle inspections.

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

Memorandum: Petitioner, the operator of a motor vehicle dealership and inspection station, commenced this CPLR article 78 proceeding challenging those parts of respondent's determination finding that he violated Vehicle and Traffic Law § 303 (e) (3) and revoking his certification as a vehicle inspector and his facility's license to perform inspections. Contrary to petitioner's contention, substantial evidence supports respondent's determination that he violated section 303 (e) (3) (*see Matter of A & U Auto Repair v New York State Dept. of Motor Vehs.*, 135 AD3d 856, 857 [2d Dept 2016]; *Matter of Falbo v Fialo*, 108 AD3d 1228, 1229 [4th Dept 2013]; *see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]), i.e., that he engaged in fraud by arranging for the use of an electronic "simulator" to obtain an inspection certificate for a vehicle that had not legitimately passed the requisite emissions inspection (*see Matter of DeMarco v New York State Dept. of Motor Vehs.*, 150 AD3d 1671, 1672-1673 [4th Dept 2017]; *see generally Matter of Khan Auto Serv., Inc. v New York State Dept. of Motor Vehs.*, 123 AD3d 1258, 1258-1260 [3d Dept 2014]). Petitioner's testimony denying knowledge that a simulator had been used by the person who performed the emissions inspection merely presented an issue of credibility that the Administrative Law Judge was entitled to resolve against him (*see DeMarco*, 150 AD3d at 1673; *JLM Auto Repair v*

Martinez, 309 AD2d 503, 504 [1st Dept 2003]; *see generally Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Contrary to petitioner's further contention, the penalty of revocation is not "so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 237 [1974]; *see Matter of Lynch v New York State Dept. of Motor Vehs. Appeals Bd.*, 125 AD3d 1326, 1327 [4th Dept 2015]; *Matter of Watson v Fiala*, 101 AD3d 1649, 1651 [4th Dept 2012]), particularly given that petitioner had previously been disciplined for similar misconduct in performing emissions inspections (*see Matter of Somma v Jackson*, 268 AD2d 763, 764-765 [3d Dept 2000]; *Matter of A & F Gulf Serv. v Jackson*, 260 AD2d 474, 474 [2d Dept 1999]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1156

TP 16-00896

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

IN THE MATTER OF DEAN DEROBERTS, PETITIONER,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES, RESPONDENT.

FINOCCHIO, ENGLISH & DORN, SYRACUSE (VINCENT J. FINOCCHIO, JR., OF COUNSEL), FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN 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, Onondaga County [Hugh A. Gilbert, J.], entered May 23, 2016) to review a determination of respondent. The determination denied petitioner's request that a report maintained in the New York State Central Register of Child Abuse and Maltreatment, indicating petitioner for maltreatment, be amended to unfounded.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul respondent's determination, made after a fair hearing, that denied his request to amend to unfounded an indicated report of maltreatment. The Administrative Law Judge (ALJ) who presided at the hearing recommended that the request be granted, but the designee of respondent's Commissioner (Designee) denied the request. Contrary to petitioner's contention, the Designee adequately set forth in his decision his reasons for reaching a decision different from that of the ALJ (*see* 9 NYCRR 4.131 [II] [F]; *Matter of Concerned Citizens of Allegany County v Zagata*, 231 AD2d 851, 852 [4th Dept 1996], *lv denied* 89 NY2d 814 [1997]). It is well settled that a designee " 'is not required to adhere to the ALJ's findings of fact or credibility, and [he or she] is free to reach [his or her] own determination, so long as it is supported by substantial evidence in the record as a whole' " (*Matter of Cauthen v New York State Justice Ctr. for the Protection of People with Special Needs*, 151 AD3d 1438, 1439 [3d Dept 2017]; *see Matter of Simpson v Wolansky*, 38 NY2d 391, 394 [1975]). The Designee found that petitioner struck the subject child five times in the back of the head, causing the child to sustain

a head injury with nausea, some double vision, and balance issues. Contrary to petitioner's contention, we conclude that substantial evidence supports the determination of maltreatment (*see Matter of Emerson v New York State Off. of Children & Family Servs.*, 148 AD3d 1627, 1627 [4th Dept 2017]; *Matter of Castilloux v New York State Off. of Children & Family Servs.*, 16 AD3d 1061, 1062 [4th Dept 2005], *lv denied* 5 NY3d 702 [2005]), as well as the determination that such maltreatment was relevant and reasonably related to childcare employment (*see Matter of Dawn M. v New York State Cent. Register of Child Abuse & Maltreatment*, 138 AD3d 1492, 1494 [4th Dept 2016]; *Castilloux*, 16 AD3d at 1062).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1157

TP 17-00866

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

IN THE MATTER OF LAWRENCE PEREZ, PETITIONER,

V MEMORANDUM AND ORDER

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

LAWRENCE PEREZ, PETITIONER PRO SE.

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

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Seneca County [Dennis F. Bender, A.J.], entered May 9, 2017) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Memorandum: Petitioner commenced this proceeding seeking to annul a determination finding him guilty of violating inmate rule 113.24 (7 NYCRR 270.2 [B] [14] [xiv] [drug use]). Petitioner contends that the correction officer who performed the urinalysis did not comply with 7 NYCRR 1020.4 (f) (1) (iii) and respondent's Directive No. 4937, both of which concern procedures to be followed in connection with such testing, and that such noncompliance requires annulment. We note at the outset that, "[b]ecause the petition did not raise a substantial evidence issue, Supreme Court erred in transferring the proceeding to this Court" (*Matter of Nieves v Goord*, 262 AD2d 1042, 1042 [4th Dept 1999]). We nevertheless address the issue raised in the interest of judicial economy (*see id.*).

We reject petitioner's contention. According to petitioner, the documentation for the testing machine established that the testing officer failed to perform two of the required steps for daily maintenance of the urinalysis machine, as "recommended by the manufacturer for the operation of the testing apparatus" (7 NYCRR 1020.4 [f] [1] [iii]). That contention is based on the fact that the boxes on the maintenance checklist for those two items were not checked for the day the urinalysis was performed. Contrary to

petitioner's contention, however, "the hearing testimony established that this omission was a clerical error and the [daily] maintenance of the urinalysis testing machine was in fact performed" (*Matter of Williams v Annucci*, 141 AD3d 1062, 1063 [3d Dept 2016]; *see Matter of Van Dusen v Selsky*, 14 AD3d 979, 979-980 [3d Dept 2005]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1158

KA 16-00230

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DAREN FLOYD, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Livingston County Court (Robert B. Wiggins, J.), rendered January 5, 2016. The judgment convicted defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of aggravated unlicensed operation of a motor vehicle in the first degree (Vehicle and Traffic Law § 511 [3] [a] [ii]). Defendant's challenge to the factual sufficiency of the plea allocution is not preserved for our review (*see People v Newton*, 143 AD3d 1286, 1286 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]). Even assuming, arguendo, that this case falls within the rare exception to the preservation requirement, thus triggering County Court's duty to inquire further to ensure that the plea was knowingly and voluntarily entered (*see generally People v Lopez*, 71 NY2d 662, 666 [1988]), we conclude that the court's subsequent inquiry and offer to allow defendant to reject the plea and proceed to trial were sufficient to ensure that the plea was knowing and voluntary (*see People v Carter*, 147 AD3d 1514, 1516 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]). We note, however, that the certificate of conviction incorrectly identifies the section of the Vehicle and Traffic Law of which defendant was convicted, and must therefore be corrected accordingly (*see People v Maloney*, 140 AD3d 1782, 1783 [4th Dept 2016]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1159

KA 15-01073

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

V MEMORANDUM AND ORDER

RONALD MCCLELLAN, JR., DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT, FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Sara S. Farkas, J.), rendered August 8, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted assault in the first degree (Penal Law §§ 110.00, 120.10 [1]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses defendant's challenge to the severity of his sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1161

KAH 16-01019

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

THE PEOPLE OF THE STATE OF NEW YORK EX REL.
CHARLES B., PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

DEBORAH MCCULLOCH, EXECUTIVE DIRECTOR,
CENTRAL NEW YORK PSYCHIATRIC CENTER,
RESPONDENT-RESPONDENT.

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

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

Appeal from a judgment (denominated order) of the Supreme Court, Oneida County (David A. Murad, J.), entered April 19, 2016 in a habeas corpus proceeding. The judgment, among other things, denied petitioner's application to proceed as a poor person and directed the dismissal of the petition if petitioner failed to reimburse the county clerk the filing fees for the habeas corpus petition within 120 days.

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

Memorandum: Petitioner, who is involuntarily confined pursuant to Mental Hygiene Law article 10, commenced this proceeding seeking a writ of habeas corpus, and he sought poor person relief. Respondent contended in response to the habeas corpus petition that such relief was not appropriate because petitioner had other adequate remedies, i.e., Mental Hygiene Law article 10 proceedings. Supreme Court agreed with respondent that there was no reason to depart from the traditional orderly proceedings as set forth in Mental Hygiene Law article 10, including the right to annual reviews, and the court thus denied petitioner's application to proceed as a poor person because he failed to show that he had a claim with arguable merit (*see Jefferson v Stubbe*, 107 AD3d 1424, 1424 [4th Dept 2013], *appeal dismissed and lv denied* 22 NY3d 928 [2013]). The court ordered petitioner to reimburse the county clerk the filing fees for the habeas corpus petition within 120 days of the date of its order and, if payment of the fees was not made by petitioner within that time, the habeas corpus proceeding would be dismissed on that date without further order of the court. Petitioner did not pay the filing fees.

Initially, we reject respondent's contention that the appeal should be dismissed because it is an appeal from an ex parte order denying permission to proceed as a poor person, and no appeal lies from an ex parte order (*see generally Sholes v Meagher*, 100 NY2d 333, 335 [2003]). This appeal also encompasses the dismissal of petitioner's habeas corpus petition, for which notice to respondent was not required (*see* CPLR 7002 [a]; *People ex rel. Pierce v Hogan*, 92 AD3d 1230, 1230 [4th Dept 2012], *lv denied* 19 NY3d 803 [2012]; *cf. People ex rel. De Capua v Lape*, 17 AD3d 1041, 1041-1042 [4th Dept 2005]). We therefore conclude that the appeal should not be dismissed.

Contrary to petitioner's contention, however, the court did not abuse its discretion in denying his application to proceed as a poor person because the habeas corpus petition "does not have 'arguable merit' " (*Jefferson*, 107 AD3d at 1424). Petitioner's challenges to the probable cause hearing are moot inasmuch as petitioner is currently being held pursuant to the most recent order entered on annual review (*see People ex rel. Bourlaye T. v Connolly*, 25 NY3d 1054, 1056 [2015]). Petitioner's remaining challenges are that he was deprived of due process because there is insufficient proof that he has a mental abnormality and the diagnosis of paraphilia NOS is not a valid diagnosis. We agree with the court that "the article 10 proceeding itself is the proper forum for petitioner to challenge the validity of the . . . underlying article 10 petition" (*id.*).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1162

CAF 16-00933

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

IN THE MATTER OF CATHY ANN EMMONS,
PETITIONER-APPELLANT,

V ORDER

SCOTT W. TOUSLEY, JR., RESPONDENT-RESPONDENT.

IN THE MATTER OF SCOTT W. TOUSLEY, JR.,
PETITIONER-RESPONDENT,

V

CATHY ANN EMMONS, RESPONDENT-APPELLANT.

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

DAVIS LAW OFFICE PLLC, OSWEGO (STEPHANIE N. DAVIS OF COUNSEL), FOR RESPONDENT-RESPONDENT AND PETITIONER-RESPONDENT.

PAMELA A. MUNSON, ATTORNEY FOR THE CHILDREN, FULTON.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered March 18, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the children to Scott W. Tousley, Jr.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1163

CAF 17-00597

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

IN THE MATTER OF CARL J. COLLINS,
PETITIONER-RESPONDENT,

V ORDER

ELISHA M. WOODWARD, RESPONDENT-APPELLANT.

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

MICHAEL STEINBERG, ROCHESTER, FOR PETITIONER-RESPONDENT.

PAMELA A. MUNSON, ATTORNEY FOR THE CHILD, FULTON.

Appeal from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered June 30, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted sole legal and physical custody of the child to Carl J. Collins.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1164

CAF 16-00341

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

IN THE MATTER OF CORY MORENO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JAN ELLIOTT, RESPONDENT-APPELLANT.

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

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

VIVIAN CLARA STRACHE, ATTORNEY FOR THE CHILDREN, BATH.

Appeal from an order of the Family Court, Steuben County (Marianne Furfure, A.J.), entered January 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent's willful violations of the court's orders constituted civil contempt.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, held her in civil contempt for willfully violating prior orders and directed her to stay away from petitioner father until their youngest child's 18th birthday. "A motion to punish a party for civil contempt is addressed to the sound discretion of the [hearing] court" (*Matter of Philie v Singer*, 79 AD3d 1041, 1042 [4th Dept 2010] [internal quotation marks omitted]; *see Fernandez v Fernandez*, 278 AD2d 882, 882 [4th Dept 2000]), and we conclude that Family Court did not abuse its discretion in determining that the father met his burden of establishing, by clear and convincing evidence (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]; *Belkhir v Amrane-Belkhir*, 128 AD3d 1382, 1382 [4th Dept 2015]), that the mother willfully violated orders that required her, inter alia, to permit the father to have visitation and telephone contact with the children; to share medical information; to be absent during visitation exchanges; to complete the intake process at the Parent Resource Center Visitation Program as soon as possible after a May court appearance so that the father could have visitation with the children at the Center in June; and to re-enroll the children in counseling services (*cf. Matter of Amrane v Belkhir*, 141 AD3d 1074, 1076-1077 [4th Dept 2016]). The record supports the

court's finding that the mother's violations of the orders unjustifiably impaired the father's rights to communicate with the children, to visit with the children, and to participate in decision-making with respect to the children's healthcare. Thus, we conclude that the court properly determined that the mother violated a lawful and unequivocal mandate of the court that was in effect at the time of the filing of a petition, that her actions caused prejudice to a right of the father, who was a party (*see* Judiciary Law § 753 [A]; *McCain v Dinkins*, 84 NY2d 216, 226 [1994]), and that the mother's violations were willful (*see Matter of Chapman v Tucker*, 74 AD3d 1905, 1906 [4th Dept 2010]; *see also Matter of Constantine v Hopkins*, 101 AD3d 1190, 1191 [3d Dept 2012]).

Contrary to the mother's further contention, the court was authorized, under article 6 of the Family Court Act, to make an order of protection a condition of the order on appeal. Inasmuch as the father had served and filed a petition, and the order of protection "set forth reasonable conditions of behavior to be observed for a specific time by [the mother]" (§ 656), we see no reason to vacate the condition that the mother stay away from the father (*see* § 656 [a]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1167

CAF 16-01509

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

IN THE MATTER OF GLENN A. GARTNER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

KERA H. REED, RESPONDENT-APPELLANT.

ROGER B. WILLIAMS, ATTORNEY FOR THE CHILD,
APPELLANT.

AMDURSKY, PELKY, FENNELL & WALLEN, P.C., OSWEGO (COURTNEY S. RADICK OF COUNSEL), FOR RESPONDENT-APPELLANT.

ROGER B. WILLIAMS, ATTORNEY FOR THE CHILD, SYRACUSE, APPELLANT PRO SE.

LISA DIPOALA HABER, SYRACUSE, FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Oswego County (Kimberly M. Seager, J.), entered August 18, 2016 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, granted petitioner sole legal and physical custody of the subject child.

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

Memorandum: Petitioner father commenced this proceeding seeking custody of his child with respondent mother, and the mother and the Attorney for the Child (AFC) appeal from an order that, inter alia, granted sole legal and physical custody of the child to the father. We affirm. A year after the child was born, the parties stipulated that the mother would have sole legal and physical custody of the child, and the father shortly thereafter moved first to Delaware and then to New Jersey, where he currently resides. The mother, an admitted drug user who has been incarcerated for petit larceny, relied on her grandmother to care for the child and her four other children. Neglect proceedings were brought against the mother in 2015 based on her drug use, and the father sought custody of the child in May 2016.

Inasmuch as the father was not the custodial parent when he relocated to New Jersey and when he filed his petition seeking custody, we reject the contention of the mother and the AFC that Family Court should have applied the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 740-741 [1996]), which defines “the

scope and nature of the inquiry that should be made in cases where a *custodial parent* proposes to relocate and seeks judicial approval of the relocation plan" (*id.* at 732 [emphasis added]; *see Matter of Daniel R. v Liza R.*, 309 AD2d 714, 714 [1st Dept 2003]). As the court here properly recognized, however, the relocation of the child to New Jersey was an issue for it to consider in determining whether custody to the father was in the child's best interests (*see Matter of Zwack v Kosier*, 61 AD3d 1020, 1022-1023 [3d Dept 2009], *lv denied* 13 NY3d 702 [2009]). We afford great deference to the court's custody determination and decline to disturb it where, as here, it is supported by a sound and substantial basis in the record (*see Matter of Ladd v Krupp*, 136 AD3d 1391, 1393 [4th Dept 2016]). The father inexcusably had no contact with the child once he moved away, and only recently regained contact with him around the time he sought custody of the child. Nevertheless, the father showed through his testimony that he wanted to remedy that absence and was prepared to care for the child, who lived with him for several weeks before the hearing began. We agree with the court that the fitness of the father, the quality of his home environment, and the parental guidance he would be able to provide for the child were superior to that of the mother (*see generally Matter of O'Connell v O'Connell*, 105 AD3d 1367, 1367-1368 [4th Dept 2013]). We reject the contention of the mother and the AFC that the court erred in discounting the child's wishes. The child's wishes were simply a factor to consider, and the court concluded that the wishes of the 11-year-old child were not entitled to great weight where it appeared that they were due at least in part to the lack of discipline in the homes of the mother and grandmother (*see generally Fox v Fox*, 177 AD2d 209, 211 [4th Dept 1992]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1169

CA 17-00698

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

IN THE MATTER OF ARBITRATION BETWEEN
MICHELLE WIDRICK, PETITIONER-RESPONDENT,

AND MEMORANDUM AND ORDER

SHERIFF MICHAEL CARPINELLI, LEWIS COUNTY
SHERIFF'S DEPARTMENT AND LEWIS COUNTY
ATTORNEY, RESPONDENTS-APPELLANTS.

THE LAW FIRM OF FRANK W. MILLER, EAST SYRACUSE (FRANK W. MILLER OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Lewis County (Charles C. Merrell, J.), entered January 10, 2017. The order denied the motion of respondents to dismiss the petition and granted the petition to compel arbitration.

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

Memorandum: Petitioner commenced this CPLR article 75 proceeding seeking to compel arbitration of a purported grievance arising from the termination of her employment with respondent Lewis County Sheriff's Department. We agree with respondents that Supreme Court erred in granting the petition and in denying their motion to dismiss the petition. Pursuant to the express terms of the collective bargaining agreement between petitioner's union and the County of Lewis, only the union had the right to demand arbitration of a grievance arising from a dispute involving her employment. Here, the union made no demand for arbitration, and petitioner's demand for arbitration had no legal effect (*see County of Westchester v Mahoney*, 56 NY2d 756, 758 [1982]; *Matter of Gonzalez v County of Orange Dept. of Social Servs.*, 250 AD2d 849, 850 [2d Dept 1998]; *East Ramapo Cent. Sch. Dist. v Symanski*, 90 AD2d 821, 821-822 [2d Dept 1982]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1172

CA 17-00724

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

ROBERT M. KNAB, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DREW ROBERTSON, ET AL., DEFENDANTS,
AND OAKGROVE CONSTRUCTION, INC.,
DEFENDANT-APPELLANT.

LAW OFFICES OF JOHN WALLACE, BUFFALO (NANCY A. LONG OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered October 14, 2016. The order denied the motion of defendant Oakgrove Construction, Inc., for summary judgment dismissing the complaint against it.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted and the complaint against defendant Oakgrove Construction, Inc. is dismissed.

Memorandum: Plaintiff commenced this Labor Law and common-law negligence action seeking damages for injuries he sustained while working in the median of the New York State Thruway. The New York State Thruway Authority (Authority) hired defendant Oakgrove Construction, Inc. (Oakgrove) to work on the thruway, including repaving a section thereof, and the Authority hired defendant Foit-Albert Associates, Architecture, Engineering and Surveying, P.C. (Foit-Albert) to inspect Oakgrove's work. Foit-Albert subcontracted some of that work to plaintiff's employer. Oakgrove began to perform drainage and clearing work in August 2010, but suspended the work in late November for the winter shutdown period. Oakgrove removed all of its equipment and employees from the work site, and all lanes of the thruway in the area of the proposed construction were opened. Before suspending its work, Oakgrove noted that some of the elevation measurements provided by the Authority were incorrect. Foit-Albert, whose contract with the Authority stated that its inspection responsibilities also included surveying, assigned plaintiff to take new measurements, including during Oakgrove's winter construction hiatus. In December, plaintiff was taking those measurements when a vehicle operated by defendant Drew Robertson left the roadway and

struck him. Plaintiff commenced this action, asserting claims under Labor Law §§ 200 and 241 (6) as well as a common-law negligence cause of action against Oakgrove.

Supreme Court erred in denying Oakgrove's motion seeking summary judgment dismissing the complaint against it. Addressing first the claim under Labor Law § 241, we note that, while under that statute "owners and general contractors are generally absolutely liable for statutory violations . . . , other parties may be liable under th[at] statute[] only if they are acting as the 'agents' of the owner or general contractor by virtue of the fact that they had been given the authority to supervise and *control* the work being performed at the time of the injury" (*Walsh v Sweet Assoc.*, 172 AD2d 111, 113 [3d Dept 1991], *lv denied* 79 NY2d 755 [1992]; *see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 318 [1981]; *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 813 [2d Dept 2013]). "The owner or general contractor is not synonymous with the prime contractor . . . Generally speaking, the prime contractor for general construction (especially in State construction projects) has no authority over the other prime contractors . . . unless the prime contractor is delegated work in such a manner that it stands in the shoes of the owner or general contractor with the authority to supervise and control the work" (*Walsh*, 172 AD2d at 113; *see Kulaszewski v Clinton Disposal Servs.*, 272 AD2d 855, 856 [4th Dept 2000]).

Here, Oakgrove and Foit-Albert were both prime contractors, and plaintiff's employer contracted only with Foit-Albert. Oakgrove did not supervise or instruct plaintiff. Rather, plaintiff reported to a supervisor at Foit-Albert. Oakgrove established as a matter of law that it had no control over plaintiff or the work he was performing, and plaintiff failed to raise a triable issue of fact (*see Kulaszewski*, 272 AD2d at 856; *Greenleaf v Bristol-Myers Squibb Co.*, 231 AD2d 902, 903 [4th Dept 1996]). Plaintiff's reliance on the fact that Oakgrove provided GPS units for plaintiff to use is misplaced inasmuch as "[t]he determinative factor on the issue of control is not whether a [contractor] furnishes equipment but[, rather, is] whether [it] has control of the work being done and the authority to insist that proper safety practices be followed" (*Everitt v Nozkowski*, 285 AD2d 442, 443-444 [2d Dept 2001]; *see Grimes v Pyramid Cos. of Onondaga*, 237 AD2d 940, 940-941 [4th Dept 1997]). Here, there is nothing in the record to indicate that Oakgrove had such control over plaintiff's work, and the court therefore should have dismissed the Labor Law § 241 (6) claim against Oakgrove.

We further agree with Oakgrove that it established that it did not have control over the work site at the time of plaintiff's accident, and plaintiff failed to raise a triable issue of fact. Thus, the court should have dismissed the Labor Law § 200 claim and common-law negligence cause of action against Oakgrove (*see Miano v State Univ. Constr. Fund*, 291 AD2d 830, 830-831 [4th Dept 2002]; *Fenton v Monotype Sys.*, 289 AD2d 194, 194 [2d Dept 2001]; *see generally Steiger v LPCiminelli, Inc.*, 104 AD3d 1246, 1248 [4th Dept 2013]). Furthermore, Oakgrove also established that it did not create or have actual or constructive notice of the dangerous condition of

the work site, thereby establishing an additional ground for dismissal of that claim and cause of action against it (*see generally Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Gloria v MGM Emerald Enters.*, 298 AD2d 355, 356 [2d Dept 2002]), and plaintiff failed to raise a triable issue of fact (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In light of our determination, we do not address Oakgrove's remaining contentions on appeal.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1173

CA 17-00606

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS
BY PROCEEDING IN REM PURSUANT TO ARTICLE 11
OF THE REAL PROPERTY TAX LAW BY THE COUNTY OF
ONTARIO.
---------- MEMORANDUM AND ORDER
COUNTY OF ONTARIO, PETITIONER-RESPONDENT;

LUNDQUIST 1996 LIVING TRUST,
RESPONDENT-APPELLANT,
AND FIVE STAR BANK, RESPONDENT.

DAVIDSON FINK LLP, ROCHESTER (THOMAS A. FINK OF COUNSEL), FOR RESPONDENT-APPELLANT LUNDQUIST 1996 LIVING TRUST.

JASON S. DIPONZIO, ROCHESTER, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Ontario County (Frederick G. Reed, A.J.), entered March 7, 2017. The order, insofar as appealed from, denied the motion of respondent Lundquist 1996 Living Trust to vacate a default judgment of foreclosure against it.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed in the exercise of discretion without costs, the motion is granted and the default judgment of foreclosure is vacated against respondent Lundquist 1996 Living Trust.

Memorandum: In this proceeding pursuant to RPTL article 11, respondent Lundquist 1996 Living Trust (Trust) appeals from an order denying its motion pursuant to RPTL 1131 to vacate the default judgment of foreclosure. We conclude that Supreme Court erred in failing to recognize its inherent authority to vacate the default judgment " 'for sufficient reason and in the interests of substantial justice' " (*Matter of County of Ontario [Middlebrook]*, 59 AD3d 1065, 1065 [4th Dept 2009], quoting *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *see Matter of County of Genesee [Spicola]*, 125 AD3d 1477, 1477 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]; *Matter of County of Genesee [Butlak]*, 124 AD3d 1330, 1331 [4th Dept 2015], *lv denied* 25 NY3d 904 [2015]).

Here, as in *Middlebrook* (59 AD3d at 1065), we further conclude that the court improvidently exercised its discretion in denying the Trust's motion. The record establishes that an office manager transposed the due date for payment from January 13 to January 31 and that the Trust attempted to make payment on January 25, i.e., within

the deadline communicated to it by its office manager. Moreover, the Trust established its "ability to pay the taxes after the redemption period had ended and the lack of any prejudice to petitioner" (*Butlak*, 124 AD3d at 1331; *see Spicola*, 125 AD3d at 1477). Considering the facts and circumstances of this case, we conclude that "the entry of a default judgment based on the failure to pay [the taxes] would result in a disproportionately harsh result" and that " 'this is an appropriate case in which to exercise our broad equity power to vacate [the] default judgment' " against the Trust (*Middlebrook*, 59 AD3d at 1065).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1175

CA 16-02129

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

ANDRE B. COOK, PLAINTIFF-RESPONDENT,

V ORDER

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHARLES C. RITTER, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 19, 2016. The order granted the motion of plaintiff for summary judgment.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Hughes v Nussbaumer, Clarke & Velzy*, 140 AD2d 988, 988 [4th Dept 1988]; *Chase Manhattan Bank, N.A. v Roberts & Roberts*, 63 AD2d 566, 567 [1st Dept 1978]; *see also* CPLR 5501 [a] [1]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1176

CA 16-02131

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

ANDRE B. COOK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

UNDERBERG & KESSLER LLP, BUFFALO (COLIN D. RAMSEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

DUKE, HOLZMAN, PHOTIADIS & GRESENS LLP, BUFFALO (CHARLES C. RITTER, JR., OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 28, 2016. The judgment awarded plaintiff money damages.

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

Memorandum: Plaintiff, an insurance agent, commenced this action asserting causes of action for, inter alia, breach of contract arising from the sale of a group of universal life insurance policies in 1997, for which defendant received a $50 million premium. Plaintiff's commission payments for the sale were deferred over a period of 20 years pursuant to a deferred compensation schedule. Plaintiff was assisted in procuring the 1997 transaction by a fellow insurance agent (hereafter, co-producer). Plaintiff and the co-producer entered into a split commission agreement, whereby each would receive a percentage of the total commission earned. In 1998, more than seven months after the transaction closed, defendant and the co-producer entered into an insurance producer contract. The producer contract contained the same 20-year deferred compensation schedule to which plaintiff had agreed in 1997 and the same split commission percentages to which plaintiff and the co-producer had previously agreed, but it contained an additional condition that commissions would be paid by defendant only if no policy within the group of policies was surrendered or exchanged. Plaintiff did not sign the producer contract, and he did not become aware of its existence until 2013. Some of the policies within the group that was sold in 1997 were surrendered in 2007 and 2008, and defendant reduced the amount of commissions that it paid to plaintiff in policy years 11 through 16. Defendant terminated plaintiff's commission payments in 2012.

Plaintiff moved for, inter alia, summary judgment on the complaint on the ground that, pursuant to his agreement with defendant in 1997, he would be paid a commission on the entire $50 million premium over a period of 20 years, and there was no agreement to reduce or terminate plaintiff's commissions upon a surrender of any or all of the policies. Supreme Court granted the motion, and we affirm.

There is no dispute that plaintiff earned a commission in 1997 that was payable over 20 years, and there is similarly no dispute that plaintiff did not sign the producer contract in 1998 that contained the surrender condition, pursuant to which defendant discontinued plaintiff's commission payments prior to the expiration of the 20-year deferral period. The sole issue before us is whether the co-producer had the authority to bind plaintiff to the producer contract.

We agree with the court that plaintiff met his initial burden of establishing that he was not bound by the producer contract, and defendant failed to raise a material issue of fact (*see L.S. & Sons Farms, LLC v Agway, Inc.*, 41 AD3d 1152, 1153 [4th Dept 2007]). In support of his motion, plaintiff established that he had no agency relationship with the co-producer, inasmuch as the co-producer had neither actual nor apparent authority to bind him (*see Network Mgt. Servs. Group v Rosenkrantz Lyon & Ross*, 211 AD2d 584, 584-585 [1st Dept 1995]; *Sedig v Okemo Mtn.*, 204 AD2d 709, 710 [2d Dept 1994]; *Bubonia Holding Corp. v Jeckel*, 189 AD2d 957, 958-959 [3d Dept 1993]). With respect to actual authority, the written agreements between plaintiff and the co-producer expressly provided that neither party had the authority to enter into any agreement or contract on behalf of the other. With respect to apparent authority, we note that, "[e]ssential to the creation of [such] authority are words or conduct of the principal, communicated to the third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" (*Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *see Ford v Unity Hosp.*, 32 NY2d 464, 472-473 [1973]; *see also Greene v Hellman*, 51 NY2d 197, 204 [1980]). Here, defendant does not attribute any conduct or words by plaintiff that gave rise to the appearance or a reasonable belief that the co-producer possessed the authority to enter into a contract on plaintiff's behalf. Rather, defendant relies upon several documents that it contends, when read together, created the appearance that the co-producer had the requisite authority to bind plaintiff. We reject that contention. It is the conduct of the principal that is relevant in determining whether apparent authority exists (*see Hallock*, 64 NY2d at 231), and defendant's reliance on documents that contained no representations of plaintiff and in no way suggested that the co-producer had the authority to act on plaintiff's behalf was unreasonable (*see id.*; *cf. Regency Oaks Corp. v Norman-Spencer McKernan, Inc.*, 129 AD3d 1454, 1456 [4th Dept 2015], *appeal dismissed and lv dismissed* 26 NY3d 980 [2015]). Defendant failed to inquire about the scope of the co-producer's authority to bind plaintiff (*see Davis v CEC, Inc.*, 135 AD3d 1049, 1051-1052 [3d Dept 2016], *lv denied* 27 NY3d 904 [2016]; *150 Beach 120th St., Inc. v Washington Brooklyn Ltd. Partnership*, 39 AD3d 722, 723-724 [2d Dept 2007]; *Pyramid Champlain Co. v R.P. Brosseau &*

Co., 267 AD2d 539, 544 [3d Dept 1999], *lv denied* 94 NY2d 760 [2000]), and thus entered into the producer contract without plaintiff at its own peril (*see Ford*, 32 NY2d at 472).

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1178

KA 16-01551

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS M. GARCIA, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Richard C. Kloch, Sr., A.J.), rendered August 4, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]). Contrary to defendant's contention and the "concession" of the People, the record establishes that defendant validly waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Upon our review of the colloquy, we conclude that Supreme Court "did not indicate to defendant that he automatically forfeited his right to appeal upon pleading guilty" (*People v Tabb*, 81 AD3d 1322, 1322 [4th Dept 2011], *lv denied* 16 NY3d 900 [2011]; *cf. People v Moyett*, 7 NY3d 892, 892-893 [2006]). "Rather, the court 'engaged in a fuller colloquy, describing the nature of the right being waived without lumping that right into the panoply of trial rights automatically forfeited upon pleading guilty' " (*Tabb*, 81 AD3d at 1322, quoting *Lopez*, 6 NY3d at 257). Defendant's valid waiver of the right to appeal, which specifically included a waiver of the right to challenge the severity of the sentence, encompasses his contention that the sentence imposed is unduly harsh and severe (*see Lopez*, 6 NY3d at 255-256; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1181

KA 15-00452

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAVELLE L. SCOTT, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered August 21, 2014. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance in the third degree (Penal Law §§ 110.00, 220.16 [12]). Pursuant to the terms of the plea agreement, County Court sentenced defendant to a period of interim probation for one year but, after defendant violated one of the conditions thereof by absconding from probation supervision, the court sentenced him to a determinate term of incarceration of four years with two years of postrelease supervision. Defendant's only contention on appeal is that the periods of incarceration and postrelease supervision are unduly harsh and severe and should be reduced in the interest of justice. We reject that contention. Defendant pleaded guilty to a reduced charge knowing that, upon a violation of his interim probation, he would receive the sentence ultimately imposed by the court, and he failed to abide by the conditions of the plea. We thus perceive no reason to reduce the periods of incarceration or postrelease supervision as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]; *see generally People v Farrar*, 52 NY2d 302, 305-306 [1981]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1182

KA 16-02120

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN P. MCCABE, DEFENDANT-APPELLANT.

RIORDAN & SCALIONE, KENMORE (SCOTT F. RIORDAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered November 10, 2016. The judgment convicted defendant, upon a jury verdict, of manslaughter in the second degree and endangering the welfare of a child (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of manslaughter in the second degree (Penal Law § 125.15 [1]), and two counts of endangering the welfare of a child (§ 260.10). The conviction arises from an incident occurring at 1:30 p.m. on October 8, 2015 in which defendant, while driving his pickup truck, collided with the back of a tractor-trailer that was being driven slowly, partially on the shoulder of a road in Erie County. The collision resulted in the death of defendant's four-year-old son, who was in the front center seat of the truck, and injuries to defendant's eight-year-old niece, who was in the front passenger seat. Neither child was in an appropriate child safety restraint.

Defendant contends that the evidence is not legally sufficient to establish that he had the requisite mens rea of recklessness to support the manslaughter conviction. We reject that contention, and we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), is legally sufficient to support the conviction.

Insofar as relevant here, "[a] person acts recklessly with respect to a result or to a circumstance . . . when he [or she] is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.

The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto" (Penal Law § 15.05 [3]). Thus, pursuant to that statute, "[a] person who fails to perceive a substantial and unjustifiable risk by reason of his [or her] intoxication acts recklessly rather than with criminal negligence" (*People v Elysee*, 12 NY3d 100, 105 [2009]; *see People v Bruno*, 127 AD3d 1101, 1102 [2d Dept 2015], *lv denied* 25 NY3d 1199 [2015]; *People v Walker*, 58 AD2d 737, 737-738 [4th Dept 1977]). Furthermore, "[d]rugs have been recognized as a cause of voluntary intoxication" (*People v Morton*, 100 AD2d 637, 638 [3d Dept 1984]; *see People v Heier*, 90 AD3d 1336, 1336-1337 [3d Dept 2011], *lv denied* 18 NY3d 994 [2012]).

Here, the evidence at trial, viewed in the light most favorable to the People, established that defendant drove his pickup truck while he had significant quantities of methamphetamine in his system. Furthermore, his son and niece were also in the front seat and, although both were of an age that required child or infant safety restraints (*see* Vehicle and Traffic Law § 1229-c [2]), neither was in the requisite restraint. A witness testified that, prior to the collision, defendant's "pickup truck flew past [him] and was very close to [his] vehicle," that shortly thereafter the pickup truck made an unnecessary abrupt maneuver that almost caused it to hit the guardrail, and that the collision took place within minutes thereafter. The People also established that the collision occurred in the early afternoon of a sunny day, and that defendant's vehicle was being driven partially on the shoulder of the road when it struck the rear of the tractor-trailer, which was 13 feet tall and had moved mostly onto the shoulder of the road to make a right turn while allowing other vehicles to pass it. The pickup truck's data recorder indicated that the brakes were applied for one or two seconds prior to impact, but there were no skid marks on the road, and the pickup truck was going approximately 52 miles per hour at the time of impact. Defendant's pickup truck hit the trailer with enough force that it bent the steel ICC bumper on the back of the trailer, and the pickup truck continued to travel forward after that impact until it struck the trailer's rear wheels, ending up with the front of the pickup truck wedged up to its dashboard under the trailer. Defendant denied ingesting any legal or illegal drugs, and told the police that his son was seated in an infant seat in the back of the truck, contrary to the evidence establishing that the child was removed from the front center seat of the pickup truck. Based on our review of the record, we conclude that the evidence is legally sufficient to establish that defendant acted recklessly (*see generally People v Goldblatt*, 98 AD3d 817, 819-820 [3d Dept 2012], *lv denied* 20 NY3d 932 [2012]), and that he endangered the welfare of the children (*see generally People v Rogalski*, 93 AD3d 1322, 1322-1323 [4th Dept 2012]; *People v Walcott*, 43 Misc 3d 141 [A], 2014 NY Slip Op 50817 [U], * 2 [App Term, 2d Dept, 9th & 10th Jud Dists 2014], *lv denied* 23 NY3d 1069 [2014]).

Contrary to defendant's further contention, viewing the evidence

in light of the elements of all of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Issues of credibility and the weight to be accorded to the evidence are primarily for the jury's determination (*see People v Hernandez*, 288 AD2d 489, 490 [2d Dept 2001], *lv denied* 97 NY2d 729 [2002]; *see also People v Lewis*, 151 AD3d 1727, 1728 [4th Dept 2017], *lv denied* 29 NY3d 1129 [2017]; *People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010]), and we perceive no reason to disturb the jury's determinations with respect thereto.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1183

KA 13-00883

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS T. KING, DEFENDANT-APPELLANT.

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON 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 (John L. DeMarco, J.), rendered March 20, 2013. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal sexual act in the first degree (Penal Law § 130.50 [4]). Defendant's challenge to County Court's order compelling him to provide a buccal swab for DNA analysis is forfeited by his guilty plea (*see People v Smith*, 138 AD3d 1415, 1416 [4th Dept 2016]; *see generally People v Hansen*, 95 NY2d 227, 230-232 [2000]). Contrary to defendant's further contention, we conclude that the negotiated sentence is not unduly harsh or severe.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1187

CAF 16-00949

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

IN THE MATTER OF JASON B., LAURA B., SARA B.,
AND MIRANDA B.

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

GERALD B., RESPONDENT-APPELLANT,
AND PHYLLIS B., RESPONDENT.

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

ALEXANDRA BURKETT, CANANDAIGUA, FOR PETITIONER-RESPONDENT.

JOSEPH S. DRESSNER, ATTORNEY FOR THE CHILDREN, CANANDAIGUA.

MARYBETH D. BARNET, ATTORNEY FOR THE CHILD, CANANDAIGUA.

Appeal from an order of the Family Court, Yates County (W. Patrick Falvey, J.), entered May 18, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order terminated the parental rights of respondents.

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

Memorandum: Petitioner commenced this proceeding to terminate the parental rights of, inter alia, respondent father with respect to his four children on the grounds of mental illness and permanent neglect. After a fact-finding hearing, Family Court terminated the father's parental rights on the ground of mental illness, and declined to rule on whether the father had permanently neglected the children. We affirm.

As an initial matter, the father's contention that the children should have been returned to his care a month after their initial removal from the home is not preserved for our review because he never raised that contention at the hearing to terminate his parental rights (*see generally Matter of Omia M. [Tykia B.]*, 144 AD3d 1637, 1637 [4th Dept 2016]). In any event, we conclude that the contention is without merit.

Contrary to the father's further contention, we conclude that petitioner established "by clear and convincing evidence that [the father], by reason of mental illness, is presently and for the

foreseeable future unable to provide proper and adequate care for [his] children" (*Matter of Jarred R.*, 236 AD2d 888, 888 [4th Dept 1997]; *see* Social Services Law § 384-b [3] [g] [i]; [4] [c]). The psychologist who examined the father on petitioner's behalf testified that the father suffered from delusional disorder, paranoid type and persecutory type. The psychologist further testified that, as a result of the disorder, the father was unable to parent the children effectively, and that the children would be in danger of being harmed or neglected if they were returned to his care at the present time or in the foreseeable future (*see Matter of Logan Q. [Michael R.]*, 119 AD3d 1010, 1011 [3d Dept 2014]). Reviewing the psychologist's testimony as a whole, we reject the father's contention that the testimony was equivocal with respect to his inability to parent the children (*see Matter of Darius B. [Theresa B.]*, 90 AD3d 1510, 1510 [4th Dept 2011]). In addition, inasmuch as the psychologist had performed a recent and extensive examination of the father, the fact that some of the records upon which the psychologist relied to form his opinion were older than other records "does not render the evidence insufficient to meet petitioner's burden" (*Matter of Deondre M. [Crystal T.]*, 77 AD3d 1362, 1363 [4th Dept 2010]).

The father's contention that the court erred in failing to conduct a separate dispositional hearing is not preserved for our review (*see Matter of Damion S.*, 300 AD2d 1039, 1040 [4th Dept 2002]). In any event, "a separate dispositional hearing is not required following the determination that [a parent] is unable to care for [a] child because of mental illness" (*Matter of Joseph E.K. [Lithia K.]*, 122 AD3d 1373, 1374 [4th Dept 2014] [internal quotation marks omitted]). In view of our determination that the court properly terminated the father's parental rights based on mental illness, we do not address his contention that petitioner failed to establish permanent neglect.

Lastly, we reject the father's contention that he was denied effective assistance of counsel "inasmuch as he did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings" (*Matter of Brown v Gandy*, 125 AD3d 1389, 1390 [4th Dept 2015] [internal quotation marks omitted]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1190

CA 17-00591

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

IN THE MATTER TO COMPEL THE SETTLEMENT OF THE VIOLET RENNOLDS AMOROSO TRUST AND TO IMPRESS A CONSTRUCTIVE TRUST ON 9 WIDEWATERS LANE, PITTSFORD.

---------- ORDER

PETER J. BRINA, PETITIONER-APPELLANT;

ARTHUR G. BRINA, AS TRUSTEE OF THE VIOLET RENNOLDS AMOROSO TRUST, RESPONDENT-RESPONDENT.

CONNORS, CORCORAN & BUHOLTZ, PLLC, ROCHESTER (EILEEN E. BUHOLTZ OF COUNSEL), FOR PETITIONER-APPELLANT.

HARRIS, CHESWORTH, JOHNSTONE & WELCH, LLP, ROCHESTER (JEFFREY M. JOHNSTONE OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Surrogate's Court, Monroe County (John M. Owens, S.), entered October 6, 2016. The order dismissed the petition.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1192

CA 17-00684

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

KRISTINA DOLINAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

KALEIDA HEALTH, DEFENDANT-APPELLANT.

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

LAW OFFICE OF MARK H. CANTOR, LLC, BUFFALO (DAVID J. WOLFF, JR. OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (J. David Sampson, A.J.), entered August 19, 2016. The order denied defendant's motion for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when she allegedly slipped and fell in a puddle in a hallway that had just been mopped in a building owned and maintained by defendant. We conclude that Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint.

Defendant had the initial burden on the motion of establishing that it did not create the allegedly dangerous condition and that it did not have actual or constructive notice thereof (*see Depczynski v Mermigas*, 149 AD3d 1511, 1511-1512 [4th Dept 2017]). We conclude that defendant failed to meet that burden. We agree with the court, specifically, that defendant failed to establish that it did not create the allegedly dangerous condition by negligently mopping the area and leaving excess water on the floor sufficient to create a puddle, and thus there is an issue of fact with respect thereto (*see Brown v Simone Dev. Co., L.L.C.*, 83 AD3d 544, 544-545 [1st Dept 2011]; *Leone v County of Monroe*, 284 AD2d 975, 975 [4th Dept 2001]; *see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We reject defendant's contention that the court should have granted the motion because the wet condition of the floor was readily observable and plaintiff was aware that the floor was wet. That contention concerns only "the issue of plaintiff's comparative negligence" and does "not negate defendant's duty to keep the premises

reasonably safe" (*Steenwerth v United Ref. Co. of Pa.*, 273 AD2d 878, 878 [4th Dept 2000]; *see Francis v 107-145 W. 135th St. Assoc., Ltd. Partnership*, 70 AD3d 599, 600 [1st Dept 2010]), and thus it does not establish defendant's entitlement to judgment as a matter of law.

We have reviewed defendant's remaining contentions and conclude that they are lacking in merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1197

CA 17-00064

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

DEBORAH VALERINO, PLAINTIFF-RESPONDENT,

V ORDER

ROBERT VALERINO, DEFENDANT-APPELLANT.

DIBBLE & MILLER, P.C., ROCHESTER (CRAIG D. CHARTIER OF COUNSEL), FOR DEFENDANT-APPELLANT.

PHETERSON SPATORICO LLP, ROCHESTER (MICHAEL LEESS OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered April 28, 2016 in a divorce action. The judgment, among other things, equitably distributed the marital assets.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1199

KA 14-01213

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CURTIS N. HENDERSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 20, 2010. The appeal was held by this Court by order entered December 23, 2016, decision was reserved and the matter was remitted to Supreme Court, Onondaga County, for further proceedings (145 AD3d 1554). The proceedings were held and completed.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of manslaughter in the first degree (Penal Law § 125.20 [1]). We previously held the case, reserved decision, and remitted the matter for Supreme Court to make and state for the record a determination whether defendant should be afforded youthful offender status (*People v Henderson*, 145 AD3d 1554, 1555 [4th Dept 2016]; *see generally People v Rudolph*, 21 NY3d 497, 499-501 [2013]). Upon remittal, the court determined that affording defendant youthful offender status would not serve the interest of justice (*see* CPL 720.20 [1] [a]). We conclude that the court did not thereby abuse its discretion, particularly in view of the gravity of the crime, in which defendant fired several gunshots at the victim's vehicle and killed the victim (*see People v Mohawk*, 142 AD3d 1370, 1371 [4th Dept 2016]; *People v Gibson*, 134 AD3d 1517, 1518-1519 [4th Dept 2015], *lv denied* 27 NY3d 1069 [2016]; *see also People v Wills*, 144 AD3d 952, 952-953 [2d Dept 2016]). In addition, upon our review of the record, we decline to exercise our discretion in the interest of justice to adjudicate defendant a youthful offender (*see Mohawk*, 142 AD3d at 1371; *cf. People v Thomas R.O.*, 136 AD3d 1400, 1402-1403 [4th Dept 2016]). Finally, we conclude that the sentence is not unduly harsh or

severe.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1200

KA 14-01984

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

ANTHONY ZAGOURSKY, DEFENDANT-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered September 19, 2013. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1201

KA 15-01194

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CRISTOBAL XOCOL TZEP, DEFENDANT-APPELLANT.

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

R. MICHAEL TANTILLO, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Ontario County Court (Craig J. Doran, J.), rendered June 1, 2015. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the first degree.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1203

KA 16-00445

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HARRISON LESTER, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 27, 2014. The judgment convicted defendant, upon his plea of guilty, of burglary in the first degree and burglary in the second degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of burglary in the first degree (Penal Law § 140.30 [3]) and burglary in the second degree (§ 140.25 [2]). The conviction arises from two separate incidents that occurred seven days apart. We agree with defendant that County Court erred in failing to determine whether he should be afforded youthful offender status with respect to his conviction of burglary in the second degree (*see People v Rudolph*, 21 NY3d 497, 501 [2013]). Defendant was 18 years old at the time of the incident underlying his conviction of burglary in the second degree and thus is an eligible youth with respect to that offense (*see* CPL 720.10 [1], [2]), and the court was therefore required to make an explicit youthful offender determination on the record (*see People v Minemier*, 29 NY3d 414, 421 [2017]). Because the court failed to make such a determination, we hold the case, reserve decision, and remit the matter to County Court to make and state for the record "a determination of whether defendant is a youthful offender" (*Rudolph*, 21 NY3d at 503).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1213

CAF 16-00860

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MELVIN JELKS,
PETITIONER-RESPONDENT,

V ORDER

KIM WRIGHT, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

THOMAS R. LOCHNER, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

JOSEPH BANIA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered May 9, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that the parties shall share joint custody of the subject child and designated petitioner the primary residential parent.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1214

CAF 16-00861

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF MELVIN JELKS,
PETITIONER-RESPONDENT,

V ORDER

KIM WRIGHT, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

BERNADETTE M. HOPPE, BUFFALO, FOR RESPONDENT-APPELLANT.

THOMAS R. LOCHNER, WILLIAMSVILLE, FOR PETITIONER-RESPONDENT.

JOSEPH BANIA, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Deanne M. Tripi, J.), entered May 9, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, adjudged that respondent willfully violated a prior court order.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1220

CA 16-00885

PRESENT: SMITH, J.P., CARNI, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF THE ACCOUNTING BY DONALD K. CZEIZINGER, AS ADMINISTRATOR OF THE ESTATE OF FREDERICK D. CZEIZINGER, DECEASED,
PETITIONER-RESPONDENT.

---------- ORDER

TINA CHAMBLISS-PARTEE, OBJECTANT-APPELLANT;

ROBERT F. BALDWIN, JR., GUARDIAN AD LITEM OF FREDERICK DONALD CZEIZINGER, DECEASED,
RESPONDENT.

TINA CHAMBLISS-PARTEE, OBJECTANT-APPELLANT PRO SE.

Appeal from an order of the Surrogate's Court, Onondaga County (Ava S. Raphael, S.), entered April 11, 2016. The order, among other things, denied the objections to an amended accounting by Donald K. Czeizinger, as Administrator of the Estate of Frederick D. Czeizinger.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1224

TP 17-00672

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

IN THE MATTER OF LEROY JOHNSON, PETITIONER,

V MEMORANDUM AND ORDER

STEWART ECKERT, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY, RESPONDENT.

LEROY JOHNSON, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO 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, Erie County [Russell P. Buscaglia, A.J.], entered November 1, 2016) to annul the determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier II hearing, that he violated inmate rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusal to obey order]) and 109.12 (7 NYCRR 270.2 [B] [10] [iii] [movement regulation violation]). Contrary to petitioner's contention, inasmuch as the issue raised in the petition is one of substantial evidence, Supreme Court properly transferred the proceeding to this Court pursuant to CPLR 7804 (g) (*see Matter of McMillian v Lempke*, 149 AD3d 1492, 1492-1493 [4th Dept 2017], *appeal dismissed* 30 NY3d 930 [2017]; *Matter of Tafari v Selsky*, 76 AD3d 1144, 1145 n [3d Dept 2010], *appeal dismissed* 16 NY3d 783 [2011]). Contrary to petitioner's further contention, the detailed misbehavior report and the testimony at the hearing, including petitioner's own admissions, constitute substantial evidence supporting the determination (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]). Although an inmate patient has the right to refuse treatment to the extent permitted by law and cannot be penalized exclusively upon assertion of that right (*see* 9 NYCRR 7651.26 [a] [6]; [b]), the evidence here established that petitioner received punishment for violating inmate rules after he refused to attend a mandatory medical callout where he could have invoked his right to refuse treatment (*see Matter of Siao-Pao v O'Keefe*, 244 AD2d 741, 741 [3d Dept 1997]). In any event, even if the

order to attend the medical callout was improper, petitioner was " 'not free to choose which orders to obey and which to ignore' " (*Matter of Hogan v Fischer*, 90 AD3d 1544, 1545 [4th Dept 2011], *lv denied* 19 NY3d 801 [2012]; *see Matter of Rivera v Smith*, 63 NY2d 501, 515-516 [1984]; *Matter of Parrilla v Senkowski*, 300 AD2d 870, 871 [3d Dept 2002], *lv denied* 99 NY2d 510 [2003]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1225

TP 17-00813

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

IN THE MATTER OF MARK INESTI, PETITIONER,

V MEMORANDUM AND ORDER

LT. RIZZO, D. VENETOZZI AND ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, RESPONDENTS.

MARK INESTI, PETITIONER PRO SE.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN 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, Seneca County [Dennis F. Bender, A.J.], entered April 25, 2017) to annul a determination, after a tier III hearing, that petitioner had violated various inmate rules.

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

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules, including rule 100.11 (7 NYCRR 270.2 [B] [1] [ii] [assaulting a staff member]) and rule 104.11 (7 NYCRR 270.2 [B] [5] [ii] [engaging in violent conduct]). Petitioner contends that the Hearing Officer improperly denied his request to call two inmate witnesses and a witness from the Office of Mental Health and failed to provide him with the reasons for that denial. Contrary to petitioner's contention, the Hearing Officer provided written reasons for the denial and read those reasons into the record. With respect to the two inmate witnesses, petitioner waived any claim that he was denied his right to call those witnesses when he stated at the hearing that he had "no problem" with the Hearing Officer's determination that their testimony would be redundant (*see Matter of Dixon v Brown*, 62 AD3d 1223, 1224 [3d Dept 2009], *lv denied* 13 NY3d 704 [2009]; *Matter of Vigliotti v Duncan*, 10 AD3d 776, 777 [3d Dept 2004], *lv dismissed* 4 NY3d 738 [2004]). We conclude that the Hearing Officer did not err in denying petitioner's request to call the remaining witness because "the record establishes that the Hearing Officer had already conducted a confidential interview with an Office of Mental Health [employee] who, with the

benefit of all of petitioner's records, provided information pertaining to petitioner's mental health status. Under [such] circumstances, the Hearing Officer properly found that any testimony by petitioner's requested witness would have been redundant" (*Matter of Allah v LeClaire*, 51 AD3d 1173, 1174 [3d Dept 2008]; *see Matter of Gray v Kirkpatrick*, 59 AD3d 1092, 1093 [4th Dept 2009]). Although petitioner also contends that he was improperly denied the right to confront the employee who provided the information to the Hearing Officer, he did not raise that contention on his administrative appeal. He thus failed to exhaust his administrative remedies with respect to that contention, "and we have no discretionary authority to reach it" (*Matter of Jeanty v Graham*, 147 AD3d 1323, 1325 [4th Dept 2017]; *see generally Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Petitioner further contends that the Hearing Officer failed to consider his mental health status at the time of the incident. It is well settled that, "in the context of a prison disciplinary proceeding in which the prisoner's mental state is at issue, a Hearing Officer is required to consider evidence regarding the prisoner's mental condition" (*Matter of Huggins v Coughlin*, 76 NY2d 904, 905 [1990]; *see* 7 NYCRR 254.6 [b]). Here, the record establishes that the Hearing Officer considered evidence with respect to petitioner's mental health, and there is substantial evidence in the record supporting the Hearing Officer's determination that petitioner's mental health status did not absolve him of his guilt of the rule violations (*see generally People ex. rel Vega v Smith*, 66 NY2d 130, 139 [1985]).

Contrary to petitioner's further contention, there is no indication in the record that "the determination of the Hearing Officer was influenced by [any] bias against petitioner. 'The mere fact that the Hearing Officer ruled against . . . petitioner is insufficient to establish bias' " (*Matter of Wade v Coombe*, 241 AD2d 977, 977 [4th Dept 1997]; *see Matter of Edwards v Fischer*, 87 AD3d 1328, 1329 [4th Dept 2011]). Petitioner's admission to violating rule 100.11 precludes him from challenging the sufficiency of the evidence with respect to that charge (*see Matter of Williams v Annucci,* 133 AD3d 1362, 1363 [4th Dept 2015]). In any event, we conclude that the misbehavior report, video recording of the incident, confidential testimony, and petitioner's admission that he committed the acts underlying the charges constitute substantial evidence of petitioner's guilt of all of the rule violations (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *Vega*, 66 NY2d at 140). Petitioner's testimony and the testimony of the inmate witnesses merely raised issues of credibility that the Hearing Officer was entitled to resolve against petitioner (*see Foster*, 76 NY2d at 966).

Finally, petitioner contends that the penalty imposed was excessive. Inasmuch as he failed to raise that contention in his administrative appeal, he " 'thereby failed to exhaust his administrative remedies[,] and this Court has no discretionary power to reach that issue' " (*Matter of Jay v Fischer*, 118 AD3d 1364, 1364-1365 [4th Dept 2014], *appeal dismissed* 24 NY3d 975 [2014]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1228

KA 15-01279

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RASHEED MILTON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DAVID A. HERATY OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), dated February 11, 2015. The order, inter alia, denied that part of the pro se motion of defendant seeking, pursuant to CPL 440.30 (1-a), DNA testing of a bra and shirt worn by the victim of defendant's sexual assault.

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

Memorandum: Defendant appeals from an order that, inter alia, denied that part of his pro se motion seeking, pursuant to CPL 440.30 (1-a), DNA testing of a bra and shirt worn by the victim of defendant's sexual assault. Those clothing items were admitted in evidence at defendant's trial, which resulted in his conviction of, inter alia, two counts of predatory sexual assault (Penal Law § 130.95 [1] [b]; [3]). This Court previously affirmed the judgment of conviction (*People v Milton*, 90 AD3d 1636 [4th Dept 2011], *lv denied* 18 NY3d 996 [2012]). Inasmuch as DNA obtained from the victim's rape kit vaginal swab was tested and showed that defendant was the contributor, at trial defendant did not dispute that he had sexual intercourse with the victim. The defense theory, instead, was that the sexual encounter was consensual. We conclude that Supreme Court properly denied defendant's request for additional DNA testing without a hearing inasmuch as " 'defendant failed to establish that there was a reasonable probability that, had [the bra and shirt] been tested and had the results been admitted at trial, the verdict would have been more favorable to defendant' " (*People v Swift*, 108 AD3d 1060, 1061 [4th Dept 2013], *lv denied* 21 NY3d 1077 [2013]; *see People v Letizia*, 141 AD3d 1129, 1130 [4th Dept 2016], *lv denied* 28 NY3d 1073 [2016], *reconsideration denied* 28 NY3d 1186 [2017]). We further conclude that, contrary to defendant's contention, the court's decision read in totality shows that it applied the proper standard in

denying defendant's request (*see* CPL 440.30 [1-a] [a] [1]; *cf. People v Vanalst*, 103 AD3d 1227, 1227-1228 [4th Dept 2013]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1229

KA 17-00063

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOHN L. DRAKE, JR., DEFENDANT-APPELLANT.

BARRY J. DONOHUE, TONAWANDA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Penny M. Wolfgang, J.), rendered November 15, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of attempted criminal possession of a controlled substance (CPCS) in the fourth degree (Penal Law §§ 110.00, 220.09 [1]). As the People correctly concede, defendant's plea was induced by a promise that Supreme Court was unable to fulfill.

The record establishes that, pursuant to the terms of the negotiated plea agreement, the court agreed to sentence defendant to a definite term of one year to run concurrently with a sentence that defendant was already serving on a prior conviction and promised defendant that, as part of the agreed-upon sentence, he would receive credit for time served. The promise with respect to jail time credit, however, could not be fulfilled. Penal Law § 70.30 (3) provides that "[t]he term of a definite sentence . . . imposed on a person shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." Such credit, however, "shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject" (*id.*). Thus, "a person is prohibited 'from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' " (*Matter of Graham v Walsh*, 108 AD3d 1230, 1230 [4th Dept 2013]; *see Matter of Blake v*

Dennison, 57 AD3d 1137, 1138 [3d Dept 2008], *lv denied* 12 NY3d 710 [2009]). The correctional facility to which defendant was committed therefore properly determined that defendant was prohibited from receiving jail time credit against his sentence on the conviction of attempted CPCS in the fourth degree for the time that he had served between sentencing on the prior conviction and the subsequent sentencing proceeding (*see Graham*, 108 AD3d at 1230-1231; *Matter of Villanueva v Goord*, 29 AD3d 1097, 1098 [3d Dept 2006]).

It is well established that " '[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored' " (*People v Collier*, 22 NY3d 429, 433 [2013], *cert denied* ___ US ___, 134 S Ct 2730 [2014]). " 'The choice rests in the discretion of the sentencing court' and 'there is no indicated preference for one course over the other' " (*id.*). Where, as here, "the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations" (*id.* at 434). We therefore modify the judgment by vacating the sentence, and we remit the matter to Supreme Court to impose a sentence that comports with defendant's legitimate expectations of the negotiated plea agreement or to afford defendant an opportunity to withdraw his plea.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1230

CAF 15-01604

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

IN THE MATTER OF DEON M.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

VERNON B., RESPONDENT.

IN THE MATTER OF DAVID M.J.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

VERNON B., RESPONDENT.

IN THE MATTER OF DAVID M.J.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

VERNON B., RESPONDENT.

IN THE MATTER OF DAVID M.J.B.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

CYNTHIA M., RESPONDENT-APPELLANT.

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

ERIC R. ZIOBRO, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Margaret O. Szczur, J.), entered August 20, 2015 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, terminated the parental rights of respondent Cynthia M. with respect to her son, David M.J.B.

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

Memorandum: Respondent mother appeals from an order terminating her parental rights with respect to her son, David M.J.B., on the ground of mental illness. Contrary to the mother's contention, we conclude that petitioner met its burden of demonstrating by clear and convincing evidence that the mother is "presently and for the foreseeable future unable, by reason of mental illness . . . , to provide proper and adequate care for [the] child" (Social Services Law § 384-b [4] [c]; *see Matter of Christopher B., Jr. [Christopher B., Sr.]*, 104 AD3d 1188, 1188 [4th Dept 2013]). Petitioner presented clear and convincing evidence establishing that the mother is presently suffering from "a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking or judgment to such an extent that if such child were placed in . . . the custody of [the mother], the child would be in danger of becoming a neglected child" (§ 384-b [6] [a]).

The mother further contends that she was denied effective assistance of counsel at the fact-finding hearing. We reject that contention inasmuch as the mother " 'did not demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings' " (*Matter of Joey J. [Eleanor J.]*, 140 AD3d 1687, 1687 [4th Dept 2016]; *see Matter of London J. [Niaya W.]*, 138 AD3d 1457, 1458 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]; *see generally Matter of Brown v Gandy*, 125 AD3d 1390, 1390-1391 [4th Dept 2015]), and " '[t]he record, viewed in its totality, establishes that the [mother] received meaningful representation' " (*Matter of Kemari W.*, 153 AD3d 1667, 1668 [4th Dept 2017]; *see generally People v Baldi*, 54 NY2d 137, 1478 [1981]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1231

CAF 17-00320

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

IN THE MATTER OF KATHLEEN PHALEN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH ROBINSON, III, RESPONDENT-APPELLANT.

JUSTIN S. WHITE, WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

KATHLEEN PHALEN, PETITIONER-RESPONDENT PRO SE.

Appeal from an order of the Family Court, Erie County (Kevin M. Carter, J.), entered May 12, 2016 in a proceeding pursuant to Family Court Act article 4. The order denied respondent's objection to the order of the Support Magistrate.

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

Memorandum: Petitioner mother commenced this proceeding pursuant to Family Court Act article 4 alleging that respondent father violated his child support obligations by refusing to pay certain dental expenses for the parties' child. At the ensuing hearing, the Support Magistrate, over the father's objections, permitted a dentist to testify telephonically regarding the child's need for dental treatment. Contrary to the father's contention, we cannot say that the Support Magistrate abused her broad discretion in permitting the dentist's telephonic testimony under these circumstances (*see generally* Family Ct Act § 433 [c] [iii]; *Matter of Rodriguez v Feldman*, 126 AD3d 1557, 1558 [4th Dept 2015]; *Matter of Eileen R. [Carmine S.]*, 79 AD3d 1482, 1485 [3d Dept 2010]). Moreover, the father was not prejudiced by a ministerial error on the dentist's application for leave to testify by telephone.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1234

CAF 16-01310

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

IN THE MATTER OF RICHARD B. DEVITA AND
CONSTANCE J. DEVITA, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARIE L. DEVITA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

MICHAEL W. COLE, ALDEN, FOR PETITIONERS-RESPONDENTS.

JESSICA N. MUSSELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered June 6, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted petitioners sole custody of respondent's daughter.

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

Memorandum: In appeal No. 1, respondent mother appeals from an order that granted sole custody of her daughter to petitioners, the child's maternal grandparents (grandparents). In appeal No. 2, the mother appeals from an order that granted sole custody of her two sons to the grandparents. We reject the mother's contention in both appeals that Family Court should have sua sponte transferred venue from Erie County to Monroe County. The grandparents and the children all resided in Erie County at the commencement of these proceedings, and thus venue in Erie County was proper (*see* CPLR 503 [a]; Family Ct Act § 165; *Matter of Hudson v Villa*, 204 AD2d 1033, 1033 [4th Dept 1994]). The mother did not move for a change in venue to Monroe County, where she lived (*see* CPLR 510), and thus she did not set forth any good cause for such a change (*see* Family Ct Act § 174; *see generally Matter of Bonnell v Rodgers*, 106 AD3d 1515, 1515 [4th Dept 2013], *lv denied* 21 NY3d 864 [2013]).

Contrary to the mother's contention in both appeals, the court did not abuse its discretion in denying her request for an adjournment of the hearing (*see Matter of Sanchez v Alvarez*, 151 AD3d 1869, 1869 [4th Dept 2017]; *Matter of VanSkiver v Clancy*, 128 AD3d 1408, 1408 [4th Dept 2015]). We reject the mother's further contention in both appeals that she received ineffective assistance of counsel. With

respect to counsel's failure to move for a change in venue, we note that " '[t]here is no denial of effective assistance of counsel . . . arising from a failure to make a motion or argument that has little or no chance of success' " (*Matter of Lundyn S. [Al-Rahim S.]*, 144 AD3d 1511, 1512 [4th Dept 2016], *lv denied* 29 NY3d 901 [2017]). The mother "did not demonstrate the absence of strategy or other legitimate explanations for counsel's alleged shortcomings" (*VanSkiver*, 128 AD3d at 1408 [internal quotation marks omitted]), and we conclude that she received effective assistance of counsel (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1235

CAF 16-01311

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

IN THE MATTER OF RICHARD B. DEVITA AND
CONSTANCE J. DEVITA, PETITIONERS-RESPONDENTS,

V MEMORANDUM AND ORDER

MARIE L. DEVITA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

DENIS A. KITCHEN, JR., WILLIAMSVILLE, FOR RESPONDENT-APPELLANT.

MICHAEL W. COLE, ALDEN, FOR PETITIONERS-RESPONDENTS.

JESSICA L. VESPER, ATTORNEY FOR THE CHILD, BUFFALO.

FRANK LONGO, ATTORNEY FOR THE CHILD, KENMORE.

Appeal from an order of the Family Court, Erie County (Brenda M. Freedman, J.), entered June 6, 2016 in a proceeding pursuant to Family Court Act article 6. The order granted petitioners sole custody of respondent's two sons.

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

Same memorandum as in *Matter of DeVita v DeVita* ([appeal No. 1] ___ AD3d ___ [Nov. 9, 2017]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1236

CAF 15-01470

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

IN THE MATTER OF THOMAS MULLETT,
PETITIONER-APPELLANT,

V ORDER

DAWN MULLETT, RESPONDENT-RESPONDENT.

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

TIMOTHY R. LOVALLO, BUFFALO, FOR RESPONDENT-RESPONDENT.

MARY ANNE CONNELL, ATTORNEY FOR THE CHILD, BUFFALO.

Appeal from an order of the Family Court, Erie County (Mary G. Carney, J.), entered August 5, 2015 in a proceeding pursuant to Family Court Act article 6. The order dismissed the petition seeking modification of a prior order of joint custody.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1237

CA 17-00825

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

JOHN H. BAUSENWEIN, III, PLAINTIFF,

V ORDER

THOMAS J. WELSH, INDIVIDUALLY, AND DOING BUSINESS AS TJW CUSTOM HOMES, INC., ET AL., DEFENDANTS.

THOMAS J. WELSH, INDIVIDUALLY, AND DOING BUSINESS AS TJW CUSTOM HOMES, INC., TJW CUSTOM HOMES, INC., AND 299 MAIN STREET EA, INC., INDIVIDUALLY, AND DOING BUSINESS AS TJW CUSTOM HOMES, THIRD-PARTY PLAINTIFFS-APPELLANTS,

V

TIMOTHY ALLISON, THIRD-PARTY DEFENDANT-RESPONDENT.

BARCLAY DAMON, LLP, BUFFALO (VINCENT G. SACCOMANDO OF COUNSEL), FOR THIRD-PARTY PLAINTIFFS-APPELLANTS.

BURGIO, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 25, 2016. The order, among other things, denied that part of the third-party plaintiffs' motion for summary judgment seeking dismissal of the second affirmative defense in the amended answer of third-party defendant.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1238

CA 17-00860

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

JOHN KOLODZIEJSKI AND NANCY KOLODZIEJSKI,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

ROBERT JASKOLKA, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AALOK J. KARAMBELKAR OF COUNSEL), FOR DEFENDANT-APPELLANT.

VINAL & VINAL, P.C., BUFFALO (JEANNE M. VINAL OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Diane Y. Devlin, J.), entered January 31, 2017. The order, insofar as appealed from, denied the motion of defendant to compel plaintiff John Kolodziejski to undergo a second independent medical exam, or to preclude proof at trial of his physical injuries.

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

Memorandum: Defendant moved, inter alia, to compel John Kolodziejski (plaintiff) to undergo a second independent medical examination on the ground that plaintiff allegedly refused to perform certain tests during the initial independent medical examination. Supreme Court denied the motion, and we now affirm.

"While there is no restriction in CPLR 3121 limiting the number of examinations to which a party may be subjected, a party seeking a further examination must demonstrate the necessity for it" (*Rinaldi v Evenflo Co., Inc.*, 62 AD3d 856, 856 [2d Dept 2009]). Here, the examining physician was able to reach a definitive conclusion as a result of the initial independent medical examination, and she never indicated that her analysis and/or conclusion were affected by plaintiff's alleged refusal to perform certain tests. The court therefore properly declined to compel plaintiff to undergo a second independent medical examination (*see Tucker v Bay Shore Stor. Warehouse, Inc.*, 69 AD3d 609, 610 [2d Dept 2010]; *cf. Young v Kalow*, 214 AD2d 559, 559 [2d Dept 1995]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1239

CA 17-00381

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

JEANNE FUMERELLE, PLAINTIFF-APPELLANT,

V ORDER

VISONE BROS., INC., LAKEFRONT CONSTRUCTION CO., INC., AND JOHN VISONE, DEFENDANTS-RESPONDENTS.

VISONE BROS., INC., LAKEFRONT CONSTRUCTION CO., INC., AND JOHN VISONE, THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V

FHN AND BJH, INC., THIRD-PARTY DEFENDANTS-RESPONDENTS.

FLYNN WIRKUS YOUNG, P.C., BUFFALO (SCOTT R. ORNDOFF OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JENNA W. KLUCSIK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS AND THIRD-PARTY PLAINTIFFS-RESPONDENTS.

BARTH SULLIVAN BEHR, BUFFALO (REBECCA C. CRONAUER OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered November 15, 2016. The order, among other things, granted the motion of defendants-third-party plaintiffs and cross motion of third-party defendants for summary judgment dismissing plaintiff’s amended complaint and all cross claims.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1245

CA 17-00851

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

IN THE MATTER OF JOHN BENDER,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

LANCASTER CENTRAL SCHOOL DISTRICT,
RESPONDENT-APPELLANT.

HARRIS BEACH PLLC, BUFFALO (TRACIE L. LOPARDI OF COUNSEL), FOR RESPONDENT-APPELLANT.

COHEN & LOMBARDO, P.C., BUFFALO, AND BENDER & BENDER LLP (BRENDA J. JOYCE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered August 1, 2016. The order and judgment denied the motion of respondent to dismiss the petition.

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

Memorandum: Petitioner commenced the instant proceeding pursuant to Education Law § 3020-a (5) (a) and CPLR 7511 to vacate a compulsory arbitration determination terminating his employment as a middle school assistant principal. The initial notice of petition was served before the index number and return date were assigned, and it therefore contained neither an index number nor a return date. Petitioner subsequently served an updated notice of petition reflecting the newly-assigned index number, but which again omitted the still-unassigned return date. When the return date was eventually set, petitioner's attorney faxed a letter conveying the assigned date to respondent's attorney. The parties thereafter agreed to adjourn the return date for over two weeks in order to afford respondent additional time to answer. Before the adjourned return date, however, respondent moved to dismiss the petition for lack of personal jurisdiction due to the omitted return dates in the initial and updated notices of petition. Supreme Court denied the motion, and we now affirm.

A "notice of petition shall specify the time and place of the hearing on the petition" (CPLR 403 [a]). The omission of a return date in a notice of petition does not, however, deprive a court of personal jurisdiction over the respondent (*see Matter of Kennedy v New*

York State Off. for People with Dev. Disabilities, ___ AD3d ___, ___ [4th Dept Oct. 6, 2017]; *Matter of Oneida Pub. Lib. Dist. v Town Bd. of the Town of Verona*, 153 AD3d 127, 129-130 [3d Dept 2017]; *see also Matter of United Servs. Auto. Assn. v Kungel*, 72 AD3d 517, 517-518 [1st Dept 2010]; *see generally Matter of Garth v Board of Assessment Review for Town of Richmond*, 13 NY3d 176, 179-181 [2009]). Indeed, such a technical defect is properly disregarded under CPLR 2001 so long as the respondent had adequate notice of the proceeding and was not prejudiced by the omission (*see Kennedy*, ___ AD3d at ___; *Oneida Pub. Lib. Dist.*, 153 AD3d at 129-130; *United Servs. Auto. Assn.*, 72 AD3d at 517-518).

Here, it is undisputed that respondent had ample notice of the proceeding from its inception. Moreover, respondent has not identified any prejudice from the omitted return dates. The technical defects in the notices of petition should therefore be disregarded under CPLR 2001 (*see Oneida Pub. Lib. Dist.*, 153 AD3d at 130). Respondent's motion to dismiss was properly denied.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1246

CA 17-00576

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

JESSICA WROBEL, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOPS MARKETS, LLC, DEFENDANT-APPELLANT.

DIXON & HAMILTON, LLP, GETZVILLE (HARRY T. DIXON, JR., OF COUNSEL), FOR DEFENDANT-APPELLANT.

VANDETTE PENBERTHY LLP, BUFFALO (JAMES M. VANDETTE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), entered September 26, 2016. The order denied the motion of defendant for summary judgment dismissing the complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained when she slipped and fell on snow or ice in defendant's parking lot. Supreme Court properly denied defendant's motion for summary judgment dismissing the complaint on the ground that there was a storm in progress inasmuch as defendant failed to meet its burden of establishing that plaintiff's injuries were caused by a storm in progress (*see Walter v United Parcel Serv., Inc.*, 56 AD3d 1187, 1187 [4th Dept 2008]; *cf. Alvarado v Wegmans Food Mkts., Inc.*, 134 AD3d 1440, 1441 [4th Dept 2015]). In support of its motion, defendant submitted the deposition testimony of plaintiff, who testified that it was not snowing at the time of the accident. Moreover, the opinions of defendant's expert meteorologist are at best conclusory and have "no evidentiary support in the record" (*DeJesus v CEC Entertainment, Inc.*, 138 AD3d 1390, 1391 [4th Dept 2016], *lv denied* 28 NY3d 906 [2016] [internal quotation marks omitted]). Inasmuch as defendant failed to meet its initial burden, the burden never shifted to plaintiff "to raise a triable issue of fact 'whether the accident was caused by a slippery condition at the location where the plaintiff fell that existed prior to the storm, as opposed to precipitation from the storm in progress, and that the defendant had actual or constructive notice of the preexisting condition' " (*Quill v Churchville-Chili Cent. Sch. Dist.*, 114 AD3d 1211, 1212 [4th Dept 2014]). Thus, the court properly denied defendant's motion without regard to the sufficiency of plaintiff's opposing papers (*see*

generally Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1248

KA 15-02152

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRIAN EDELSTEIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Christopher S. Ciaccio, J.), entered November 10, 2015. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: In 1994, defendant was convicted, upon a plea of guilty, of sexual abuse in the first degree (Penal Law § 130.65 [3]) and was sentenced to an indeterminate term of incarceration. He was thereafter designated a level one sex offender pursuant to the Sex Offender Registration Act ([SORA] Correction Law art 6-C). In 2013, defendant was convicted of endangering the welfare of a child (Penal Law § 260.10 [1]) in full satisfaction of that charge and a charge of public lewdness (§ 245.00). The allegations supporting those charges were that the naked defendant stood in his doorway masturbating in full view of and while looking directly at a 10-year-old girl. Defendant was sentenced to a term of probation and, thereafter, the People petitioned, pursuant to Correction Law § 168-o (3), for an upward modification of his risk assessment level. County Court granted the petition, and we now affirm.

"Pursuant to Correction Law § 168-o (3), the People may file a petition for an upward modification of a sex offender's SORA risk level designation where the sex offender '(a) has been convicted of a new crime . . . and (b) the conduct underlying the new crime . . . is of a nature that indicates an increased risk of a repeat sex offense' " (*People v Williams*, 128 AD3d 788, 789 [2d Dept 2015], *lv denied* 26 NY3d 902 [2015]; *see People v Wroten*, 286 AD2d 189, 194 [4th Dept 2001], *lv denied* 97 NY2d 610 [2002]). "The district attorney shall bear the burden of proving the facts supporting the requested

modification, by clear and convincing evidence" (Correction Law § 168-o [3]; *see Williams*, 128 AD3d at 789).

As a preliminary matter, we agree with defendant that the court cited to the wrong standard in its written decision, when it wrote that the People had "sustained their burden of presenting, by a preponderance of the evidence, facts supporting an upward departure." We agree with the People, however, that the inclusion of the phrase "preponderance of evidence" was merely a clerical error, inasmuch as the court correctly stated that the appropriate standard was clear and convincing evidence both at the hearing and in its initial summary of the applicable law in its written decision. In any event, "remittal is not required because the record is sufficient to enable us to determine under the proper standard whether the court erred in [granting the People's petition]" (*People v Loughlin*, 145 AD3d 1426, 1427-1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]; *see generally People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]).

There is no dispute that defendant was convicted of a new crime, i.e., endangering the welfare of a child, which was based on inappropriate, sexually motivated conduct directed at a 10-year-old girl. "Despite the fact that this conviction did not qualify as a registerable sex offense (*see* Correction Law § 168-a [2]), the nature of the conduct underlying it is sufficient to establish, by clear and convincing evidence (*see* Correction Law § 168-o [3]), that defendant is at an increased risk to reoffend" (*People v Greene*, 83 AD3d 1304, 1304 [3d Dept 2011], *lv denied* 17 NY3d 706 [2011]). We thus conclude that the People sustained their burden of establishing by clear and convincing evidence that defendant was convicted of a new crime and that the crime was of a nature that would indicate an increased risk of a repeat sexual offense (*see* § 168-o [3]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1249

KA 16-01549

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH T. MULCAHY, DEFENDANT-APPELLANT.

DAVID J. FARRUGIA, PUBLIC DEFENDER, LOCKPORT (THERESA L. PREZIOSO OF COUNSEL), FOR DEFENDANT-APPELLANT.

KENNETH T. MULCAHY, DEFENDANT-APPELLANT PRO SE.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered July 15, 2016. The judgment convicted defendant, upon his plea of guilty, of use of a child in a sexual performance as a sexually motivated felony.

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 use of a child in a sexual performance as a sexually motivated felony (Penal Law §§ 130.91 [1]; 263.05). Contrary to defendant's contention in his main brief, the record establishes that he knowingly, voluntarily, and intelligently waived his right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and his challenge to the severity of the sentence is encompassed by that waiver (*see id.* at 255-256).

Defendant's remaining contentions are raised in his two pro se supplemental briefs. Defendant's valid waiver of the right to appeal encompasses his challenge to the factual sufficiency of the plea allocution (*see People v Gardner*, 101 AD3d 1634, 1634 [4th Dept 2012]). In any event, defendant failed to preserve that challenge for our review, and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665-666 [1988]). Although defendant's contention that defense counsel was ineffective for failing to intervene during the proceedings to make sure that he understood County Court's questions survives his valid waiver of the right to appeal (*see People v Griffin*, 120 AD3d 1569, 1570 [4th Dept 2014], *lv denied* 24 NY3d 1084 [2014]), that contention is without merit (*see generally People v Conway*, 148 AD3d 1739, 1741-

1742 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]). Defendant's remaining contentions regarding ineffective assistance of counsel are based upon matters dehors the record, and are thus not properly before us (*see People v Byng*, 148 AD3d 1752, 1753 [4th Dept 2017], *lv denied* 29 NY3d 1090 [2017]). Defendant waived his further contention that he was denied the opportunity to testify before the grand jury inasmuch as he "fail[ed] to move to dismiss the indictment on that ground within five days of his arraignment on the indictment" (*People v Braction*, 26 AD3d 778, 779 [4th Dept 2006], *lv denied* 6 NY3d 832 [2006], *reconsideration denied* 6 NY3d 846 [2006]).

We have reviewed defendant's remaining contentions in his pro se supplemental briefs and conclude that they are without merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1251

KA 15-01519

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHANON RICHARDSON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered September 1, 2015. The judgment convicted defendant, upon a jury verdict, of felony animal fighting (three counts), misdemeanor animal fighting, and cruelty to animals (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of three counts of felony animal fighting (Agriculture and Markets Law § 351 [2] [b], [d]), one count of misdemeanor animal fighting (§ 351 [6]), and two counts of cruelty to animals (§ 353). The underlying facts are essentially undisputed. Police officers lawfully entered defendant's home upon the consent of his wife, who was alone in the home and reported a burglary in progress. Upon entering the residence, the responding officers found one of defendant's four pit bulls causing a commotion on the first floor. The officers secured the dog, and then proceeded to sweep the home for intruders. While checking the basement, one of the responding officers observed a wounded dog in a cage with feces, and several treadmills that appeared to have been modified for use by dogs rather than humans. He also observed blood on the water heater and apparent dogfighting paraphernalia. The officer called a fellow officer to the basement for input, and the responding officers consulted with a lieutenant, a detective, and officers from the Society for the Prevention of Cruelty to Animals (SPCA). The police determined that they would seek a search warrant, and they did not go through the house any further until after the warrant was issued. Several officers remained at the house with defendant's wife to ensure that she did not disturb any evidence while the police waited for the warrant.

Prior to the issuance of the search warrant, an SPCA officer photographed some of the items and arranged some of the evidence for photographing. Supreme Court suppressed "photographs of the interior of the refrigerator or its contents . . . [and] any vitamins or 'supplements' found on the upper shelf in the basement or photographs of those items," which were seized by the SPCA officer prior to the issuance of the warrant. The court denied suppression, however, with respect to items that included the treadmills, dogs, cages, leashes, straps, training sticks and harnesses, all of which were in plain view.

We reject defendant's contention that the court erred in refusing to suppress all of the physical evidence that was recovered from his home as fruit of the poisonous tree. The plain view observations of dogfighting paraphernalia were properly made by the responding police officers from a lawful vantage point (*see e.g. People v Woods*, 93 AD3d 1287, 1288 [4th Dept 2012], *lv denied* 19 NY3d 969 [2012]), and those observations preceded any unlawful conduct on the part of the SPCA officer, and provided probable cause for a search warrant. The items that were photographed and manipulated by the SPCA officer, after the observations of the responding officers and prior to the issuance of the warrant, were properly suppressed prior to trial and "those items are no longer in issue" (*People v Burr*, 70 NY2d 354, 359-360 [1987], *cert denied* 485 US 989 [1988]). The SPCA officer's unlawful conduct did not, however, vitiate the probable cause that flowed from the police officers' plain view observations.

We reject defendant's further contention that the officers' continued presence in the house while the search warrant was being obtained was unlawful (*see People v Lubbe*, 58 AD3d 426, 426 [1st Dept 2009], *lv denied* 12 NY3d 818 [2009]). Although the express consent of defendant's wife to search the home was limited to a protective sweep for intruders (*see People v Love*, 273 AD2d 842, 842 [4th Dept 2000]), " 'securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents' " (*People v Osorio*, 34 AD3d 1271, 1272 [4th Dept 2006], *lv denied* 8 NY3d 883 [2007], quoting *Segura v United States*, 468 US 796, 810 [1984]). The fact that it took approximately six hours from the time of the initial entry for the police to obtain the warrant does not change our view (*see People v Pinkney*, 90 AD3d 1313, 1316 [3d Dept 2011]).

We reject defendant's further contention that the court committed an *O'Rama* violation that constituted a mode of proceedings error when it did not reveal the contents of a note in which the jury disclosed its verdict (*see People v O'Rama*, 78 NY2d 270, 276-278 [1991]; *see generally* CPL 310.30). "[T]he submission of a verdict does not constitute a jury communication requesting information or instruction . . . , and it does not trigger the 'meaningful notice' requirement set forth in CPL 310.30, implicated when a court receives such a communication from the jury" (*People v Williams*, 64 AD3d 734, 736 [2d Dept 2009], *affd* 16 NY3d 480 [2011]). Further, inasmuch as the court "was not obligated to discuss with counsel its proposed explanation in

response to the initial verdict prior to the court's addressing the jury" (*Williams*, 16 NY3d at 486), defense counsel was not ineffective for failing to object or to insist upon seeing the note sooner (*see generally People v Brown*, 13 NY3d 332, 341 [2009]; *People v Brooks*, 139 AD3d 1391, 1393 [4th Dept 2016], *lv denied* 28 NY3d 1026 [2016]).

Viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant intended to engage in dogfighting, that he possessed dogfighting paraphernalia, and that he deprived the dogs of medical treatment. The record establishes that defendant was training pit bulls on his premises with devices that would constitute dogfighting paraphernalia if used with such intent. Defendant possessed a collection of literature on dogfighting, and his dogs had extensive scarring and wounds in various stages of healing, the distribution of which was consistent with dogfighting, and inconsistent with defendant's cat-scratch and broken-window explanations. In the opinion of the People's veterinary expert, the dogs were suffering from a lack of medical treatment. Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the jury's verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[T]he jury was entitled to credit the testimony of the People's expert[s] over that of defendant's expert" (*People v Stein*, 306 AD2d 943, 944 [4th Dept 2003], *lv denied* 100 NY2d 599 [2003], *reconsideration denied* 1 NY3d 581 [2003]), and to discredit the testimony of defendant that he did not intend to engage in, promote, or facilitate dogfighting (*see generally id.*). "Even assuming, arguendo, that a different verdict would not have been unreasonable, we note that the jury was in the best position to assess the credibility of the witnesses and, on this record, it cannot be said that the jury failed to give the evidence the weight it should be accorded" (*People v Carter*, 145 AD3d 1567, 1568 [4th Dept 2016] [internal quotation marks omitted]).

Finally, the sentence imposed is not unduly harsh or severe.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1255

KA 16-01785

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TOMMY BRINSON, DEFENDANT-APPELLANT.

ROBERT A. DINIERI, CLYDE, FOR DEFENDANT-APPELLANT.

CHRISTOPHER BOKELMAN, ACTING DISTRICT ATTORNEY, LYONS (TIMOTHY G. CHAPMAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Wayne County Court (Dennis M. Kehoe, J.), rendered July 5, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts each of criminal sale of a controlled substance in the third degree (Penal Law § 220.39 [1]) and criminal possession of a controlled substance in the third degree (§ 220.16 [1]). Defendant failed to preserve for our review his contention that County Court erred in considering improper factors in sentencing him (*see People v Garson*, 69 AD3d 650, 652 [2d Dept 2010], *lv denied and dismissed* 15 NY3d 750 [2010]), and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [3] [c]). Furthermore, defendant waived his contention that the court erred in sentencing him in the absence of an updated presentence report (*see People v Willie T.J.*, 101 AD3d 1626, 1627 [4th Dept 2012], *lv denied* 20 NY3d 1105 [2013]). A preplea investigation report had been prepared within the preceding 12 months, and defendant explicitly waived the preparation of an updated presentence report (*see* CPL 390.20 [4] [a] [iii]; *People v Servey*, 96 AD3d 1428, 1429 [4th Dept 2012], *lv denied* 19 NY3d 1001 [2012]).

We reject defendant’s challenge to the severity of the sentence. We note, however, that the certificate of conviction incorrectly reflects that the sentences imposed on all counts are to run concurrently with each other, and must therefore be amended to reflect that the sentences imposed on counts three and four are to run

concurrently with each other and consecutively to the sentences imposed on counts one and two (*see People v Mosley*, 55 AD3d 1371, 1372 [4th Dept 2008], *lv denied* 11 NY3d 856 [2008]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1258

KA 16-00807

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PAUL J. PRIEST, DEFENDANT-APPELLANT.

EASTON THOMPSON KASPEREK SHIFFRIN LLP, ROCHESTER (DANIELLE C. WILD OF COUNSEL), FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN, FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered December 21, 2015. The judgment convicted defendant, upon his plea of guilty, of course of sexual conduct against a child in the first degree and rape in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the plea and waiver of indictment are vacated, the superior court information is dismissed and the matter is remitted to Jefferson County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a plea of guilty of course of sexual conduct against a child in the first degree (Penal Law § 130.75 [1] [b]) and rape in the third degree (§ 130.25 [2]). In a prior appeal, we reversed the judgment of conviction, determining that the superior court information (SCI) was jurisdictionally defective inasmuch as defendant had been charged with, inter alia, a class A felony and thus could not validly waive indictment or consent to be prosecuted by an SCI (*People v Priest*, 130 AD3d 1489 [4th Dept 2015]). We thus vacated the plea and waiver of indictment and dismissed the SCI, noting that " 'the People may present the case to the [g]rand [j]ury' " (*id.* at 1489).

On remittal, the People did not present the case to a grand jury but, rather, made a second attempt to proceed by SCI. As the People correctly concede, the SCI is again jurisdictionally defective inasmuch as the felony complaint charging defendant with the class A felony was not dismissed until *after* the waiver of indictment and plea to the SCI. As a result, defendant was still "charged" with a class A felony when he waived indictment and consented to be prosecuted by an SCI. "Where, as here, a defendant is charged with a class A felony, the defendant cannot validly waive indictment or consent to be prosecuted by a superior court information" (*People v Mayo*, 21 AD3d

1316, 1316-1317 [4th Dept 2005]; *see* CPL 195.10 [1] [b]; *People v Trueluck*, 88 NY2d 546, 551 [1996]; *Priest*, 130 AD3d at 1489). We therefore vacate defendant's plea and his waiver of indictment, and we dismiss the SCI, noting again that " 'the People may present the case to the [g]rand [j]ury' " (*Priest*, 130 AD3d at 1489).

Based on our determination, we do not address defendant's remaining contentions.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1259

CA 17-00227

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

JOHN THOMAS GALVIN, JR., AND JUDITH A. GALVIN, AS CO-TRUSTEES OF THE JOHN THOMAS GALVIN, JR. FAMILY TRUST, AND JOHN THOMAS GALVIN, JR., AND JUDITH A. GALVIN, AS CO-TRUSTEES OF THE JUDITH A. GALVIN FAMILY TRUST, PLAINTIFFS-APPELLANTS,

V ORDER

SINGER REAL ESTATE, L.P., SINGER REAL ESTATE, INC., DOUGLAS MUSINGER, CHERYL DINOLFO, MONROE COUNTY CLERK, COUNTY OF MONROE, COMMISSIONERS OF THE BRIGHTON HISTORIC PRESERVATION COMMISSION AND TOWN OF BRIGHTON, DEFENDANTS-RESPONDENTS.

DIBBLE & MILLER, P.C., ROCHESTER (G. MICHAEL MILLER OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

PIRRELLO, PERSONTE & FEDER, ROCHESTER (STEVEN E. FEDER OF COUNSEL), FOR DEFENDANTS-RESPONDENTS SINGER REAL ESTATE, L.P., SINGER REAL ESTATE, INC. AND DOUGLAS MUSINGER.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (ADAM M. CLARK OF COUNSEL), FOR DEFENDANTS-RESPONDENTS CHERYL DINOLFO, MONROE COUNTY CLERK AND COUNTY OF MONROE.

GORDON & SCHAAL, LLP, ROCHESTER (KENNETH W. GORDON OF COUNSEL), FOR DEFENDANTS-RESPONDENTS COMMISSIONERS OF THE BRIGHTON HISTORIC PRESERVATION COMMISSION AND TOWN OF BRIGHTON.

Appeal from an order of the Supreme Court, Monroe County (Debra A. Martin, A.J.), entered April 13, 2016. The order, among other things, dismissed the complaint against all defendants in its entirety.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1261

CA 17-00720

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

PATRICIA FINLEY, PLAINTIFF-RESPONDENT,

V ORDER

KEN CURRIE MOTORS, INC., DEFENDANT-APPELLANT.

LAW OFFICE OF SCOTT A. STEPIEN, NIAGARA FALLS (SCOTT A. STEPIEN OF COUNSEL), FOR DEFENDANT-APPELLANT.

Appeal from an order of the Niagara County Court (Sara Sheldon, J.), dated June 30, 2016. The order affirmed a judgment of the Niagara Falls City Court.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1262

CA 16-01971

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

IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE LORIE DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS.

LORIE M. DEHIMER, PETITIONER-APPELLANT;

HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS.

ORDER

IN THE MATTER OF THE APPLICATION FOR THE RESCISSION OF THE J. STEVEN DEHIMER IRREVOCABLE TRUST, SUCCESSOR TO THE MARION A. SEARS TRUSTS.

J. STEVEN DEHIMER, PETITIONER-APPELLANT;

HOWARD P. SEARS, JR., THOMAS A. SEARS AND DAVID H. WOOD, TRUSTEES, RESPONDENTS-RESPONDENTS.

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

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

Appeals from a decree of the Surrogate's Court, Oneida County (Louis P. Gigliotti, S.), entered June 9, 2016. The decree, among other things, granted the cross motions of respondents for summary judgment and dismissed the petitions.

It is hereby ORDERED that the decree is unanimously affirmed without costs for reasons stated in the decision by the Surrogate.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1266

CA 17-00408

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

LASHARIE JOHNSON, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

YALANDA D. CURRY AND MICHAEL H. STROH,
DEFENDANTS-RESPONDENTS.

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

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JOAN M. RICHTER OF COUNSEL), FOR DEFENDANT-RESPONDENT YALANDA D. CURRY.

LAW OFFICE OF JOHN WALLACE, BUFFALO (ALYSON C. CULLITON OF COUNSEL), FOR DEFENDANT-RESPONDENT MICHAEL H. STROH.

Appeal from an order and judgment (one paper) of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 15, 2016. The order and judgment granted the motions of defendants for summary judgment dismissing plaintiff's complaint.

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

Memorandum: Plaintiff commenced this action to recover damages for injuries that she allegedly sustained in a three-vehicle accident. We conclude that Supreme Court properly granted defendants' respective motions for summary judgment dismissing the complaint and any cross claims against them. Defendants met their initial burden of establishing as a matter of law that plaintiff's negligence in rear-ending defendant Michael H. Stroh's vehicle was the sole proximate cause of the accident (*see Gill v Braasch*, 100 AD3d 1415, 1415 [4th Dept 2012]), and plaintiff failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1269

KA 16-02266

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHAD J. COLSRUD, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Steuben County Court (Marianne Furfure, A.J.), dated December 15, 2015. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.), defendant contends that County Court erred in assessing points under the risk factor for failure to accept responsibility for his actions. We reject that contention. In statements to the probation officer preparing the presentence report, defendant denied committing the offense and indicated that the victim must have drugged him. We conclude that those statements "constitute clear and convincing evidence of defendant's failure to accept responsibility, thus justifying the assessment of 10 additional points for that risk factor" (*People v Urbanski*, 74 AD3d 1882, 1883 [4th Dept 2010], *lv denied* 15 NY3d 707 [2010]; *see People v Baker*, 57 AD3d 1472, 1473 [4th Dept 2008], *lv denied* 12 NY3d 706 [2009]).

We reject defendant's further contention that the court erred in granting the People's request for an upward departure from his presumptive classification as a level two risk. " 'The court's discretionary upward departure [to a level three risk] was based on clear and convincing evidence of aggravating factors to a degree not taken into account by the risk assessment instrument' " (*People v Tidd*, 128 AD3d 1537, 1537 [4th Dept 2015], *lv denied* 25 NY3d 913 [2015]). The People established by clear and convincing evidence that defendant had been convicted of endangering the welfare of a child, and that such conviction arose from an incident occurring contemporaneously with the acts that form the basis of the indictment

herein. That contemporaneous conviction provides the basis for an upward departure inasmuch it is " 'indicative that the offender poses an increased risk to public safety' " (*People v Ryan*, 96 AD3d 1692, 1693 [4th Dept 2012], *lv denied* 20 NY3d 929 [2012], quoting Sex Offender Registration Act: Risk Assessment Guidelines and Commentary, at 14 [2006]; *see People v Neuer*, 86 AD3d 926, 927 [4th Dept 2011], *lv denied* 17 NY3d 716 [2011]; *People v Vasquez*, 49 AD3d 1282, 1284-1285 [4th Dept 2008]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1278

CAF 17-00758

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

IN THE MATTER OF ROBERT BUCHANAN,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

COLLEEN KOCKE, RESPONDENT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (LAURA J. EMERSON OF COUNSEL), FOR RESPONDENT-APPELLANT.

EMILY A. VELLA, SPRINGVILLE, FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Cattaraugus County (Michael L. Nenno, J.), entered June 21, 2016 in a proceeding pursuant to Family Court Act article 6. The order, among other things, determined that petitioner shall pay child support at the prior agreed upon amount of $100.00 each week except for the weeks of the summer period of placement.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the ninth ordering paragraph, and as modified the order is affirmed without costs.

Memorandum: In May 2015, petitioner father sought enforcement of the parties' custody and visitation order, which had been entered on consent of the parties in December 2010. In August 2015, the father filed a separate petition for a modification of the consent order, seeking primary placement of the children with him instead of respondent mother. After conducting a hearing on the father's petitions, Family Court concluded that it was not in the children's best interests to change their primary placement and, inter alia, modified the parties' visitation schedule. The court also modified the father's weekly child support obligation despite the fact that the parties had agreed to a different amount in a separate proceeding. We agree with the mother that the court erred in granting the father a downward modification of child support inasmuch as the father did not raise any issue regarding his child support obligation in his petitions (*see Matter of Hayes v Hayes*, 294 AD2d 681, 683 [3d Dept 2002]; *see generally Matter of Lewis v Lewis*, 144 AD3d 1659, 1661 [4th Dept 2016]; *Matter of Young v Young*, 299 AD2d 783, 783-784 [3d Dept 2002]). We therefore modify the order by vacating the ninth ordering paragraph.

We have reviewed the mother's remaining contention and conclude

that it is without merit.

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1281

CA 16-01354

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

IN THE MATTER OF ANTHONY BLANKS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 17, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: Petitioner appeals from a judgment dismissing his petition pursuant to CPLR article 78 seeking to annul the determination denying him parole release. The Attorney General has advised this Court that, subsequent to that denial, petitioner reappeared before the Board of Parole in June 2017 and was again denied release. Consequently, this appeal must be dismissed as moot (*see Matter of Sanchez v Evans*, 111 AD3d 1315, 1315 [4th Dept 2013]). Contrary to petitioner's contention, the exception to the mootness doctrine does not apply (*see id.*; *see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1290

KA 14-01964

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONDALE COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1291

KA 14-01966

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RONDALE COOPER, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

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

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 29, 2014. The judgment convicted defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree (two counts).

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1293

KA 16-00441

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

RAYMOND J. COLEMAN, JR., DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (DONNA A. MILLING OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered February 19, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted murder in the second degree, assault in the second degree (two counts) and criminal possession of a weapon in the second degree.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1294

KA 15-00854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DONALD RODGERS, JR., DEFENDANT-APPELLANT.

KATHLEEN A. KUGLER, CONFLICT DEFENDER, LOCKPORT (EDWARD P. PERLMAN OF COUNSEL), FOR DEFENDANT-APPELLANT.

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (THOMAS H. BRANDT OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Niagara County Court (Matthew J. Murphy, III, J.), rendered April 27, 2015. The judgment convicted defendant, upon his plea of guilty, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [6]). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255-256; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1295

KA 15-00973

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HEIDI H. STUMBO, DEFENDANT-APPELLANT.

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

HEIDI H. STUMBO, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Ontario County Court (William F. Kocher, J.), rendered March 20, 2015. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of stolen property in the fourth degree, hindering prosecution in the third degree and tampering with physical evidence.

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

Memorandum: Defendant appeals from a judgment convicting her upon a jury verdict of, inter alia, criminal possession of a controlled substance in the first degree (Penal Law § 220.21 [1]). Defendant failed to preserve for our review her contention that she was deprived of a fair trial by prosecutorial misconduct (*see People v Williams*, 151 AD3d 1834, 1835 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]). In any event, we conclude that defendant's contention is without merit inasmuch as none of the alleged instances constituted misconduct. The prosecutor's comments during summation "were within the broad bounds of rhetorical comment permissible during summations . . . and they were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v Goodson*, 144 AD3d 1515, 1516 [4th Dept 2016], *lv denied* 29 NY3d 949 [2017] [internal quotation marks omitted]). In addition, the prosecutor properly cross-examined defendant on aspects of her direct examination testimony.

We reject defendant's further contention that she was denied effective assistance of counsel. Defense counsel erred in questioning defendant whether she had a prior "drug-related" conviction after County Court in its *Sandoval* ruling had limited the prosecutor to asking simply whether defendant had a prior felony conviction. We

conclude, however, that "defense counsel's error was 'not so egregious and prejudicial that [it] deprived defendant of [her] right to a fair trial' " (*People v Reitz*, 125 AD3d 1425, 1425 [4th Dept 2015], *lv denied* 26 NY3d 934 [2015], *reconsideration denied* 26 NY3d 1091 [2015]). Defense counsel made only a single reference to the conviction on direct examination, as did the prosecutor on cross-examination. No mention of it was made by the prosecutor on summation, and the jury was never told of the underlying facts of the conviction, which was 23 years ago. We have examined defendant's remaining instances of alleged ineffective assistance and conclude that, while defendant did not receive error-free representation, "[t]he test is 'reasonable competence, not perfect representation' " (*People v Oathout*, 21 NY3d 127, 128 [2013]). Viewing the evidence, the law, and the circumstances of this case as a whole and as of the time of the representation, we conclude that defendant was afforded meaningful representation (*see People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant next contends that the verdict with respect to criminal possession of a controlled substance in the first degree is against the weight of the evidence. We reject that contention. The recorded phone conversations between defendant and her incarcerated son established that defendant either had constructive possession of the drugs that were in her vehicle or acted as an accessory to the possession of the drugs by her son, and defendant's testimony at trial did nothing to refute the evidence of possession. Viewing the evidence in light of the elements of criminal possession of a controlled substance in the first degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The sentence is not unduly harsh or severe.

We have reviewed the contentions of defendant raised in her pro se supplemental brief and conclude that none of them is preserved for our review (*see* CPL 470.05 [2]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* 470.15 [6] [a]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1301

OP 17-00829

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

IN THE MATTER OF THOMAS J. DEACON, PETITIONER,

V ORDER

HON. RONALD D. PLOETZ, CATTARAUGUS COUNTY COURT JUDGE, AND TIMOTHY S. WHITCOMB, IN HIS OFFICIAL CAPACITY AS SHERIFF, CATTARAUGUS COUNTY SHERIFF'S DEPARTMENT, RESPONDENTS.

PALOMA A. CAPANNA, WEBSTER, FOR PETITIONER.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU OF COUNSEL), FOR RESPONDENT HON. RONALD D. PLOETZ, CATTARAUGUS COUNTY COURT JUDGE.

ERIC M. FIRKEL, COUNTY ATTORNEY, LITTLE VALLEY (THOMAS C. BRADY OF COUNSEL), FOR RESPONDENT TIMOTHY S. WHITCOMB, IN HIS OFFICIAL CAPACITY AS SHERIFF, CATTARAUGUS COUNTY SHERIFF'S DEPARTMENT.

Proceeding pursuant to CPLR article 78 (initiated in the Appellate Division of the Supreme Court in the Fourth Judicial Department pursuant to CPLR 506 [b] [1]) to annul the determination of respondent Hon. Ronald D. Ploetz, Cattaraugus County Court Judge. The determination adjudged that the pistol permit issued to petitioner shall remain suspended for an additional two years.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on September 11, 13 and 14, 2017,

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1304

CA 17-00816

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

LISA SAINSBURY, PLAINTIFF-APPELLANT,

V ORDER

FLORIAN BRZEZINSKI, DEFENDANT-RESPONDENT.

CAMPBELL & ASSOCIATES, EDEN (R. COLIN CAMPBELL OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICES OF JOHN TROP, ROCHESTER (TIFFANY L. D'ANGELO OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered August 1, 2016. The order denied the motion of plaintiff for a directed verdict and the motion of plaintiff to set aside the verdict.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1317

KA 15-01504

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JOSHUA C. BUTERA, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered September 12, 2012. The judgment convicted defendant, upon his plea of guilty, of criminal sexual act in the first degree.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1320

KA 16-00221

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JASMINE MILTON, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, 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 January 27, 2016. The judgment convicted defendant, upon her plea of guilty, 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 upon her plea of guilty of assault in the first degree (Penal Law § 120.10 [1]). Contrary to defendant's contention, the record establishes that she knowingly, intelligently, and voluntarily waived her right to appeal (*see People v Bryant*, 28 NY3d 1094, 1096 [2016]; *People v Walker*, 151 AD3d 1730, 1730 [4th Dept 2017], *lv denied* 29 NY3d 1135 [2017]). The fact that defendant simply answered "[y]es" to Supreme Court's questions does not render the waiver invalid (*see generally People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]). The valid waiver encompasses defendant's challenge to the court's suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]), and her challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255-256 [2006]; *People v Carr*, 147 AD3d 1506, 1506 [4th Dept 2017], *lv denied* 29 NY3d 1030 [2017]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1325

CAF 16-01455

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

IN THE MATTER OF SALVATORE A.M.,
RESPONDENT-APPELLANT.
---------- ORDER
MONROE COUNTY PROBATION DEPARTMENT,
PETITIONER-RESPONDENT.

CHARLES PLOVANICH, ROCHESTER, FOR RESPONDENT-APPELLANT.

MICHAEL E. DAVIS, COUNTY ATTORNEY, ROCHESTER (PAUL D. IRVING OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Family Court, Monroe County (Joan S. Kohout, J.), entered July 15, 2016 in a proceeding pursuant to Family Court Act article 7. The order, among other things, placed respondent in the custody of the Commissioner of Social Services of Monroe County for a period of 12 months.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Shannon R.*, 278 AD2d 939, 939 [4th Dept 2000]).

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1332

CA 16-01383

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

IN THE MATTER OF GEORGE FACCIO,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 17, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1346

CA 17-00075

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

ESSEX INSURANCE COMPANY, PLAINTIFF-RESPONDENT,

V ORDER

NDC REALTY, INC., DEFENDANT,
AND SCOTT LIGER, DEFENDANT-APPELLANT.

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

GOLDBERG SEGALLA, LLP, BUFFALO (SHARON ANGELINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered April 15, 2016. The judgment, inter alia, declared that plaintiff has no remaining duty to defend and indemnify defendant NDC Realty, Inc. in the underlying personal injury action brought by defendant Scott Liger.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

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

1355

CA 16-01999

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

IN THE MATTER OF KRAMBU PORTER,
PETITIONER-APPELLANT,

V ORDER

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

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

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

Appeal from a judgment of the Supreme Court, Wyoming County (Michael M. Mohun, A.J.), entered June 17, 2016 in a proceeding pursuant to CPLR article 78. The judgment dismissed the amended petition.

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

Entered: November 9, 2017

Mark W. Bennett
Clerk of the Court

MOTION NO. (1576/90) KA 90-01576. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V HARRY AYRHART, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND TROUTMAN, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (1569/03) KA 99-05622. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO JONES, ALSO KNOWN AS ANTONIO STEELE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: SMITH, J.P., CENTRA, CARNI, LINDLEY, AND DEJOSEPH, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (534/11) KA 06-00414. –- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DOUGLAS WORTH, DEFENDANT-APPELLANT. –- Motion for leave to renew and for other relief denied. PRESENT: WHALEN, P.J., CENTRA, CARNI, DEJOSEPH, AND NEMOYER, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (388/12) KA 08-00143. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V BRIAN T. SMITH, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, CARNI, AND CURRAN, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (771/12) KA 09-00281. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V LANCE J. REED, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, LINDLEY, AND CURRAN, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (611/13) KA 10-01873. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V DAYVON UNDERDUE, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, CURRAN, AND WINSLOW, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (1290/13) KA 12-00848. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JOSEPH M. BOWMAN, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CARNI, AND TROUTMAN, JJ. (Filed Nov. 9, 2017.)

MOTION NO. (855/17) CA 16-02059. -- IN THE MATTER OF KIM A. KIRSCH AND MICHAEL A. STARVAGGI, PETITIONERS-RESPONDENTS, V BOARD OF EDUCATION OF WILLIAMSVILLE CENTRAL SCHOOL DISTRICT AND WILLIAMSVILLE CENTRAL SCHOOL DISTRICT, RESPONDENTS-APPELLANTS. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., CENTRA, PERADOTTO, LINDLEY, AND NEMOYER, JJ. (Filed Nov. 9, 2017.)