SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

JUNE 15, 2018

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

1277

KA 15-00937

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

JUSTIN M. NICHOLS, DEFENDANT-APPELLANT.

REEVE BROWN PLLC, ROCHESTER (GUY A. TALIA 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 (Joseph W. Latham, J.), rendered October 31, 2014. The judgment convicted defendant, upon a jury verdict, of criminal contempt in the first degree and reckless endangerment in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice by amending the order of protection and as modified the judgment is affirmed, and the matter is remitted to Steuben County Court for further proceedings in accordance with the following opinion by NEMOYER, J.:

This appeal presents a convenient opportunity to examine the murky relationship between factually inconsistent verdicts and legal sufficiency review in criminal cases. Excepting a minor technical problem with the final order of protection issued at sentencing, we see no error in the judgment appealed from.

FACTS

A grand jury indicted defendant on six counts arising out of a December 2013 altercation with his estranged wife in the Town of Cohocton, Steuben County. At the time of the altercation, defendant's wife had an order of protection against him issued by the Steuben County Family Court.

Because the interplay of the various counts is critical to this appeal, we will describe the indictment in some detail:

- Count one charged defendant with criminal contempt in the first degree (Penal Law § 215.51 [b] [i]) and alleged that he, in violation of a "duly served order of protection, or

such order of which he has actual knowledge because he was present in court when such order was issued," intentionally placed or attempted to place his wife in reasonable fear of physical injury, serious physical injury, or death by displaying a dangerous instrument, to wit, a metal pipe.

- Count two charged defendant with criminal contempt in the first degree (§ 215.51 [b] [vi]) and alleged that he, by physical menace and in violation of a "duly served order of protection, or such order of which he has actual knowledge because he was present in court when such order was issued," intentionally placed or attempted to place his wife in reasonable fear of imminent serious physical injury.

- Count three charged defendant with criminal possession of a weapon in the third degree (§ 265.02 [1]) and alleged that he, after having been previously convicted of a crime, possessed a dangerous or deadly instrument, to wit, a metal pipe, with intent to use it unlawfully against his wife.

- Count four charged defendant with criminal mischief in the third degree (§ 145.05 [2]) and alleged that he intentionally damaged his wife's property in an amount exceeding $250.

- Count five charged defendant with reckless endangerment in the second degree (§ 120.20) and alleged that he recklessly engaged in conduct which created a substantial risk of serious physical injury to his wife.

- Count six charged defendant with menacing in the second degree (§ 120.14 [1]) and alleged that he intentionally placed or attempted to place his wife in reasonable fear of physical injury, serious physical injury, or death by displaying a dangerous instrument, to wit, a metal pipe.

At trial, a Family Court clerk testified about the underlying order of protection. The clerk, who personally prepared the order, testified that it was in effect in December 2013, and that it required defendant to refrain from, inter alia, criminal acts of assault, harassment, menacing, reckless endangerment, or any other criminal offense against his wife. The clerk testified that the order was labeled "Justin Nichols- PS in ct," which meant that it was "personally served in court" upon defendant; a box was also checked stating "Order personally served in Court upon party against whom order was issued." Although it was not signed by defendant, the order further stated, in multiple places, that both parties were present in court on the date of its issuance. The order of protection itself was admitted as an exhibit, and our review thereof confirms that the Family Court clerk accurately described the various notations and entries on the document.

Defendant's wife then testified about the altercation at issue. Despite the protective order, the wife explained that she and

defendant got together at his residence to try and work things out. According to the wife, they did meth all night, and, in the morning, defendant asked to use her car to go to court on an unrelated incident; the wife refused. The wife testified that defendant then got angry, took "something long and metal," and threatened to smash either her head or the windows of her car. The wife then got into her car, but before she could drive away, defendant came out of the house and smashed the car's front windshield, its two driver-side windows, and its back windshield "with that long metal object." The wife then drove away. In short, the wife testified that defendant threatened her with a "long metal object" and that he used that object to knock out the windows of her car.

The jury ultimately convicted defendant on count two (criminal contempt/first for violating the order of protection by physical menace) and count five (reckless endangerment/second), but it acquitted him on the remaining counts. Defendant did not object to any factual inconsistency or repugnancy in the verdict before the jury was discharged.

County Court thereafter sentenced defendant, as a second felony offender, to an indeterminate term of 2 to 4 years' imprisonment on count two, and to a definite, one-year term of incarceration on count five. The sentences ran concurrently by operation of law (*see* Penal Law § 70.35). In addition, the court issued a final order of protection in the wife's favor, and it fixed the expiration date thereof at May 18, 2026. The court did not articulate, on the record, its reasons for issuing a final order of protection. Defendant did not object to the final order of protection on any ground.

Defendant now appeals.

DISCUSSION

I

Defendant lodges multiple challenges to the legal sufficiency and weight of the evidence underlying his two convictions (*see generally People v Delamota*, 18 NY3d 107, 113, 116-117 [2011]; *People v Romero*, 7 NY3d 633, 636-644 [2006]). Insofar as relevant here, a person is guilty of first-degree criminal contempt when, "in violation of a duly served order of protection, or such order of which [he or she] has actual knowledge because he or she was present in court when such order was issued, . . . [he or she] . . . by physical menace, intentionally places or attempts to place a person for whose protection such order was issued in reasonable fear of death, imminent serious physical injury or physical injury" (Penal Law § 215.51 [b] [vi]). Moreover, a "person is guilty of reckless endangerment in the second degree when he [or she] recklessly engages in conduct which creates a substantial risk of serious physical injury to another person" (§ 120.20). The jury was instructed consistently with these statutory provisions.

A

Defendant first argues that the criminal contempt conviction is "legally insufficient on the [element] of physical menace" and that the reckless endangerment conviction is "legally insufficient on the [element of] conduct which created a substantial risk of serious physical injury." Critically, however, defendant does not claim that the *trial evidence*, viewed in the light most favorable to the People, failed to establish the challenged elements beyond reasonable doubt, or, more precisely, that no reasonable juror could have so found (*see generally Jackson v Virginia*, 443 US 307, 313-324 [1979]; *People v Danielson*, 9 NY3d 342, 349 [2007]). Quite the opposite; defendant all but concedes the legal sufficiency of the trial proof underlying the challenged elements by acknowledging that "there may have been proof in the record to support the convictions generally." Defendant's effective concession is well taken; viewing his wife's testimony in the light most favorable to the People, a rational juror could easily find that the People established the challenged elements (physical menace and substantial risk of serious physical injury) beyond reasonable doubt.

Instead, defendant argues only that the convictions on counts two and five are legally insufficient *due to the jury's acquittals on the remaining counts*. According to defendant, "when the conduct that was plainly rejected by the jury is removed from consideration, there is nothing left to support the physical menace conviction [count two] or the conviction for engaging in conduct that created a substantial risk of serious physical injury [count five]." Put differently, "the only conduct upon which defendant could be found guilty of the crimes for which he was convicted was smashing [his wife's] car windows with a metal pipe while she was inside it. Because the jury was unwilling to find that defendant engaged in that conduct," defendant continues, "the convictions must be reversed as unsupported by legally sufficient evidence." We are unpersuaded.

Preliminarily, defendant's claim of legal insufficiency due to inconsistent verdicts "was not raised at a time when it could have been cured by resubmission to the jury, and it is thus unpreserved" (*People v Diaz*, 152 AD3d 471, 472 [1st Dept 2017], *lv denied* 30 NY3d 1019 [2017]; *see generally People v Ramos*, 19 NY3d 133, 137 [2012]; *People v Carncross*, 14 NY3d 319, 324-325 [2010]). Contrary to defendant's contention, his post-trial CPL article 330 motion — however construed — was not, by itself, adequate to preserve his current argument for appellate review (*see People v Padro*, 75 NY2d 820, 821 [1990], *rearg denied* 75 NY2d 1005 [1990], *rearg dismissed* 81 NY2d 989 [1993]).

Preservation aside, the mixed verdicts provide no basis to question the legal sufficiency of the convictions (*see Diaz*, 152 AD3d at 472). In fact, defendant's argument is a classic "masked repugnancy" argument (*People v Rodriguez*, 179 AD2d 554, 554 [1st Dept 1992]), and it suffers from the same premise error that dooms all "masked repugnancy" arguments: it assumes that a jury's verdict on one count can be weaponized to attack the legal or factual sufficiency of its verdict on another count. But that is not the law. To the

contrary, the Court of Appeals has repeatedly held that "[f]actual inconsistency [in a verdict]—'which can be attributed to mistake, confusion, compromise or mercy—does ***not*** provide a reviewing court with the power to overturn a verdict' " on legal sufficiency grounds (*People v Abraham*, 22 NY3d 140, 146 [2013] [emphasis added], quoting *People v Muhammad*, 17 NY3d 532, 545 [2011]; *see also People v Rayam*, 94 NY2d 557, 561-563 [2000] [same rule, with respect to factual sufficiency review]).[1] *Abraham* flatly rejected the very argument put forward by defendant here, i.e., that "factual inconsistency in the verdict renders the record evidence legally insufficient to support the conviction" (22 NY3d at 147). "Put another way," the *Abraham* Court continued, "an acquittal is not a preclusive finding of any fact, in the same trial, that could have underlain the jury's determination . . . Therefore, even assuming, as submitted by defendant, that the jury's verdict in this case presented a factual inconsistency, it does not affect the propriety of his conviction" (*id.*).[2]

It is true, as defendant points out, that the *Abraham* opinion features the following caveat: "in some instances, a reviewing court may consider a jury's acquittal on one count in reviewing the record to determine if a factually inconsistent conviction on another count is supported by legally sufficient evidence" (22 NY3d at 146-147, citing, inter alia, *People v Yarrell*, 75 NY2d 828, 829 [1990], *revg on dissent below* 146 AD2d 819, 821-822 [2d Dept 1989] [Brown, J., dissenting]). *Rayam*, also citing *Yarrell*, has a similar caveat: "we

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[1] An *inconsistent* verdict is to be distinguished, of course, from a *repugnant* verdict, which does provide a basis for reversal (*see Muhammad*, 17 NY3d at 538-545). Defendant's brief does not advance a repugnancy argument, however. To be clear, we have analyzed defendant's argument as an unpreserved legal sufficiency claim, and we have rejected it on those terms; we are not improperly treating defendant's legal sufficiency argument as a repugnancy claim (*compare People v Mason*, 101 AD3d 1659, 1660-1661 [4th Dept 2012], *revd* 21 NY3d 962 [2013]).

[2] The rule of *Abraham*, *Muhammad*, and *Rayam* is not some newfangled development. Over 35 years ago, the Court of Appeals wrote that, "[w]hen the jury has decided to show lenity to the defendant, an accepted power of the jury . . . , the [appellate] court should not then undermine the jury's role and participation by setting aside the verdict" (*People v Tucker*, 55 NY2d 1, 7 [1981], *rearg denied* 55 NY2d 1039 [1982]). The Supreme Court made a similar point in *Jackson*: "The question [of] whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the [legal sufficiency] standard . . . does not permit a court to make its own subjective determination of guilt or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known" (443 US at 319 n 13).

do not mean to imply that, under no circumstances may an intermediate appellate court consider jury acquittals in performing weight of the evidence review. Nor should our ruling here be deemed to cast in doubt the propriety of consideration of such acquittals in some instances on legal issues such as the sufficiency of the evidence" (94 NY2d at 563 n). At first glance, these caveats appear to be in tension with the clear holdings of both *Abraham* and *Rayam*. After all, if — as both *Abraham* and *Rayam* repeatedly hold — factual inconsistency across multiple verdicts "does not provide a reviewing court with the power to overturn a verdict," then how could such inconsistency ever be relevant to the calculus of legal and factual sufficiency? It would seem to be a pointless exercise to even analyze alleged factual inconsistencies across multiple verdicts if the outcome of that analysis was a foregone conclusion.

The seemingly irreconcilable language in *Abraham* and *Rayam* can be explained in either (or both) of two ways, however. First, it could be understood simply to approve cases like *People v Fagiolo* (146 AD3d 724, 725 [1st Dept 2017]), *People v Samuels* (130 AD3d 757, 758-759 [2d Dept 2015]), and *People v O'Neil* (66 AD3d 1131, 1133-1135 [3d Dept 2009]), where the Appellate Division merely noted the jury's acquittals on other related counts to bolster its own independent conclusion that the evidence underlying the convicted counts was factually insufficient. In that scenario, the convictions fell because the jury wrongly weighed the evidence that underlay them, not because the jury acquitted on the other counts. The fact that the convictions were against the weight of the evidence served to fortify the factual correctness of the jury's acquittals, and the Appellate Division was simply highlighting that truism as further support for its independent conclusion that the convictions were against the weight of the trial evidence. The caveats in *Abraham* and *Rayam* make perfect sense in that context.

Alternatively, the caveats in *Abraham* and *Rayam* could be understood by reference to their citations of *Yarrell*. In *Yarrell*, Justice Richard A. Brown's dissenting opinion at the Appellate Division, which was adopted by the Court of Appeals, used the jury's acquittal on one count as a means of identifying the *legal theory* underlying its conviction on a separate count (specifically, whether the conviction was based on principal or accomplice liability) (*see* 146 AD2d at 821). Justice Brown then proceeded to analyze whether the jury's conviction under that theory was supported by legally sufficient evidence at trial (*see id.* at 821-822). *Yarrell* did not — as defendant urges here — use the jury's acquittal on one count as a means of determining whether its conviction on a separate count was itself supported by legally sufficient evidence. Viewed in that light, the seemingly contradictory lines in *Abraham* and *Rayam* can be reconciled as a mere reiteration of *Yarrell*, which does not undercut the general rule (amply expressed in *Abraham* and *Rayam*) that inconsistent verdicts are not inherently incorrect verdicts.[3]

[3] To the extent that the Third Department read *Yarrell* more expansively in *People v Wallender* (27 AD3d 955, 956-958 [3d Dept

Importantly, the *Yarrell* look-through does not apply here inasmuch as only one legal theory of guilt was submitted to the jury (principal liability). And without the *Yarrell* look-through, defendant is stuck with the general rule: "even assuming, as submitted by defendant, that the jury's verdict in this case presented a factual inconsistency, it does not affect the propriety of his conviction[s]" (*Abraham*, 22 NY3d at 147). Defendant's legal sufficiency challenge based on allegedly inconsistent verdicts thus fails (*see id.*; *Diaz*, 152 AD3d at 472; *People v Ramirez*, 140 AD3d 545, 545 [1st Dept 2016], *lv denied* 28 NY3d 973 [2016]; *People v Ekwegbalu*, 131 AD3d 982, 983 [2d Dept 2015], *lv denied* 26 NY3d 1108 [2016]; *People v Alcindor*, 118 AD3d 621, 621 [1st Dept 2014], *lv denied* 24 NY3d 1000 [2014]; *People v Johnson*, 73 AD3d 578, 580 [1st Dept 2010], *lv denied* 15 NY3d 893 [2010]; *Rodriguez*, 179 AD2d at 554-555).

B

Defendant next advances an alternative challenge to the legal and factual sufficiency of his conviction for first-degree criminal contempt under count two. Specifically, defendant says that the People failed to prove the so-called "service element" of that crime, i.e., that the underlying protective order was "duly served" upon him or that he had "actual knowledge [thereof] because he . . . was present in court when [it] was issued" (Penal Law § 215.51 [b]). Because the service element is phrased disjunctively — i.e., it is satisfied if the defendant violates *either* a "duly served" protective order *or* a protective order of which he or she has "actual knowledge" because of his or her presence in court (*see People v Heiserman*, 127 AD3d 1422, 1423 [3d Dept 2015]) — the People need prove only one of the statutory alternatives beyond reasonable doubt (*see People v Becoats*, 17 NY3d 643, 654 [2011], *cert denied* 566 US 964 [2012]; *People v Giordano*, 87 NY2d 441, 451 [1995]).[4] As the First Department wrote in *People v Conroy* (53 AD3d 438 [1st Dept 2008], *lv denied* 11 NY3d 735 [2008], *cert denied* 555 US 1013 [2008]), "when disjunctive theories of criminality are submitted to the jury and a general verdict of guilt is rendered, a challenge based on evidentiary insufficiency will be rejected as long as there was sufficient evidence to support any of the theories submitted" (*id.* at 441 [internal quotation marks omitted]; *accord Griffin v United States*,

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2006]), we decline to follow it. *Wallender* is an outlier case whose core rationale has never been applied in subsequent years. Moreover, any dispute about *Wallender*'s continuing viability was laid to rest, in our view, by the later decision of the Court of Appeals in *Abraham*.

[4] To the extent that *People v Soler* (52 AD3d 938, 939 [3d Dept 2008], *lv denied* 11 NY3d 741 [2008]) suggests that the statute requires *both* proof of the order's due service *and* independent proof that the defendant had actual knowledge of the order's contents from a source other than its text, we decline to follow it. Indeed, in *Heiserman*, the Third Department appears to have implicitly retreated from this aspect of *Soler*.

502 US 46, 56 [1991], *reh denied* 502 US 1125 [1992]).

Here, the People satisfactorily proved that the protective order was "duly served" upon defendant. As the Family Court clerk testified, the protective order itself recites — multiple times, without contradiction — that it was "personally served" upon defendant in court, and it is black letter law that "personal service" constitutes "due service" (*see Demarest v Darg*, 32 NY 281, 283 [1865]; *Matter of Loughrey*, 37 AD2d 187, 189 [3d Dept 1971]; *People v Blake*, 23 AD2d 581, 581 [2d Dept 1965]; *Threat v City of New York*, 159 Misc 868, 872 [Manhattan Mun Ct 1936]). Contrary to defendant's contention, the Family Court clerk did not testify that she was "unsure" if he was personally served with the protective order. Thus, sitting as a second jury and viewing the evidence in a neutral light (*see generally People v Kancharla*, 23 NY3d 294, 303 [2014]; *Delamota*, 18 NY3d at 116-117), we are satisfied beyond reasonable doubt that the protective order was "duly served" upon defendant within the meaning of Penal Law § 215.51 (b) (*see e.g. People v Pham*, 118 AD3d 1159, 1160 [3d Dept 2014], *lv denied* 24 NY3d 1087 [2014]; *People v Perser*, 67 AD3d 1048, 1050 [3d Dept 2009], *lv denied* 13 NY3d 941 [2010]; *People v Wilmore*, 305 AD2d 117, 118 [1st Dept 2003], *lv denied* 100 NY2d 589 [2003]). Accordingly, the verdict is not against the weight of the evidence as to the service element. And because the verdict is consistent with the weight of the evidence, it is necessarily founded upon legally sufficient evidence.[5]

Finally, it is true, as defendant highlights in his brief, that the record is unclear about whether he was advised of the issuance and contents of the order in open court. But these inconsistencies raise, at most, a reasonable doubt as to whether defendant had "actual knowledge [of the protective order] because he . . . was present in court when such order was issued" (Penal Law § 215.51 [b]) — the *alternative* means of satisfying the service element of criminal contempt in the first degree. The inconsistent notations regarding advisement do not raise a reasonable doubt as to whether defendant was "duly served" with the protective order.[6] Thus, the gaps in the proof upon which defendant relies furnish no ground for questioning either the legal or factual sufficiency of the service element (*see Conroy*,

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[5] Defendant does not argue that the protective order was improperly admitted for the truth of the matters asserted therein. Nor does he argue that the markings on the order, standing alone, are inadequate to establish that it was "duly served." Nor does defendant challenge the legal or factual sufficiency of either conviction on any other ground, i.e., with respect to any other element or defense.

[6] In fact, one can easily envision a scenario in which a person is duly served with a protective order but is not advised of its issuance and contents. In that scenario, the order has been duly served, but it cannot be said that the targeted party had actual knowledge of the order *because* of his presence in court when the order was issued.

53 AD3d at 441; *cf. People v Burch*, 97 AD3d 987, 990 n 3 [3d Dept 2012], *lv denied* 19 NY3d 1101 [2012]; *see generally Becoats*, 17 NY3d at 654; *Giordano*, 87 NY2d at 451).

II

Defendant's remaining points relate to the effectiveness of his trial lawyer and to the final order of protection. These assignments of error can be addressed summarily.

A

Defendant argues that his attorney rendered ineffective assistance by: (1) failing to preserve a legal sufficiency challenge to count two; (2) inadequately cross-examining his wife; and (3) delivering a summation that unnecessarily denigrated his character. We disagree. As we explained above, counsel had no viable avenue to challenge the legal sufficiency of count two, and "[t]here can be no denial of effective assistance . . . arising from counsel's failure to make a motion or argument that has little or no chance of success" (*People v Caban*, 5 NY3d 143, 152 [2005] [internal quotation marks omitted]). The balance of defendant's complaints reflect "simple disagreement with [trial counsel's] strategies, tactics or the scope of possible cross-examination," and that, of course, "does not suffice" to establish ineffective assistance (*People v Benevento*, 91 NY2d 708, 713 [1998] [internal quotation marks omitted]). It is worth pointing out that counsel secured defendant's acquittal on four of the six counts, including the most serious (i.e., count three, the only class D felony in the indictment).

B

We turn now to defendant's challenges to the final order of protection issued at sentencing. On that score, defendant initially claims that County Court violated CPL 530.12 (5) by issuing the order without stating its reasons on the record. Defendant's claim is concededly unpreserved for appellate review, however, and we decline to reach it as a matter of discretion in the interest of justice (*see People v Ludwig*, 104 AD3d 1162, 1164 [4th Dept 2013], *affd* 24 NY3d 221 [2014]; *People v St. Laurent*, 70 AD3d 1417, 1418 [4th Dept 2010], *lv denied* 15 NY3d 756 [2010]). To the extent that defendant fears that he will violate the protective order and thereby incur additional contempt charges by serving his wife with divorce papers in the future, he can always move in County Court to amend the protective order to permit necessary legal communications.

Lastly, defendant argues that the final protective order contains an improper expiration date of May 18, 2026. Although this particular argument is also unpreserved for appellate review, we will nevertheless consider it in the interest of justice and grant relief (*see* CPL 470.15 [3] [c]; *People v Richardson*, 143 AD3d 1252, 1255 [4th Dept 2016], *lv denied* 28 NY3d 1150 [2017]; *People v DeFazio*, 105 AD3d 1438, 1439 [4th Dept 2013], *lv denied* 21 NY3d 1015 [2013]; *People v Goins*, 45 AD3d 1371, 1372 [4th Dept 2007]). The "duration of an order

of protection . . . 'shall not exceed the greater of: (i) eight years from the date of . . . sentencing, or (ii) eight years from the date of the expiration of the maximum term of an indeterminate . . . sentence of imprisonment actually imposed' " (*People v Hopper*, 123 AD3d 1234, 1235 [3d Dept 2014], quoting CPL 530.12 [5] [A]). Here, defendant was sentenced on October 31, 2014, and his indeterminate prison term expired on April 15, 2018. The protective order's expiration date of May 18, 2026 is therefore improper, for it is more than eight years from both the sentencing date and the maximum expiration date of defendant's custodial term. The matter must thus be remitted for re-calculation of the expiration date of the final protective order (*see People v Nicholson*, 118 AD3d 1423, 1426 [4th Dept 2014], *affd* 26 NY3d 813 [2016]; *DeFazio*, 105 AD3d at 1439; *see generally* CPL 470.45).

CONCLUSION

Accordingly, the judgment of the Steuben County Court should be modified and the matter remitted in accordance with the foregoing, and, as so modified, the judgment should be affirmed.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 15-00100

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V OPINION AND ORDER

ANDREW J. GRAVES, DEFENDANT-APPELLANT.

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO, FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered October 6, 2014. The judgment convicted defendant, upon a jury verdict, of criminal mischief in the second degree and conspiracy in the fifth degree.

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

Opinion by NeMoyer, J.:

Defendant Andrew J. Graves challenges his convictions for vandalizing cars at an auto dealership. We reject his challenges to the legal sufficiency and weight of the evidence underlying those convictions, and we decline to review his unpreserved challenges to the restitution award as a matter of discretion in the interest of justice. We therefore affirm.

FACTS

In March 2013, a group of young people took an ill-advised nocturnal trek to Bill Cram Chevrolet, a car dealership in the Town of Seneca Falls, Seneca County. Once there, the group keyed 57 cars. Police investigated, and defendant was identified as one of the vandals. Although he initially denied any involvement, defendant eventually confessed to participating in the vandalism spree. According to defendant's written confession, he personally damaged approximately four to six cars.

Defendant was thereafter indicted on charges of criminal mischief in the second degree (Penal Law § 145.10) and conspiracy in the fifth degree (§ 105.05 [1]). The victim of these crimes, according to the indictment, was "Bill Cram Chevrolet."

At trial, one of the admitted vandals testified and implicated defendant as a perpetrator. Another eyewitness also testified against defendant and identified him as one of the vandals. A police officer relayed defendant's confession to the jury. Several employees of Bill Cram Chevrolet testified about the structure of the auto dealership and the damages it suffered as a result of the vandalism. Although the amount of damage personally attributable to defendant remains hotly contested, it is undisputed that, in the aggregate, the group caused approximately $40,000 worth of damages to Bill Cram Chevrolet.

Defendant testified at trial, retracted his confession, and denied any involvement in the crimes. Defendant's mother and his therapist testified about his various autism-related developmental disabilities, presumably to cast doubt on his confession. Finally, defendant's friend — a convicted sex offender — offered alibi testimony on defendant's behalf, although the purported alibi was very weak and is barely mentioned on appeal.

Defendant was convicted as charged, and he was subsequently sentenced to a state prison term of 1½ to 4½ years. Defendant was also ordered to pay restitution (to an undefined entity) in the amount of $40,743.19. Critically, defendant offered no objection to the restitution order on any ground. Defendant now appeals.

DISCUSSION

I

Defendant first challenges the legal sufficiency and weight of the evidence underlying his criminal mischief conviction (*see generally People v Delamota*, 18 NY3d 107, 113, 116-117 [2011]; *People v Romero*, 7 NY3d 633, 636-644 [2006]).[1] "A person is guilty of criminal mischief in the second degree when with intent to damage property of another person, and having no right to do so nor any reasonable ground to believe that he has such right, he damages property of another person in an amount exceeding [$1,500]" (Penal Law § 145.10). Defendant argues that this conviction is against the weight of the evidence on three elements: the victim's personhood, the value of the damage, and his identity as a perpetrator. We will address each claim in turn.

A. Personhood

Defendant first contends that the People did not adequately prove that the identified victim in this case — "Bill Cram Chevrolet" — qualifies as a "person" for purposes of the criminal mischief statute.

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[1] Defendant's challenge to his conspiracy conviction is entirely derivative of his challenge to the criminal mischief conviction. In other words, defendant's challenge to the conspiracy conviction assumes the invalidity of his criminal mischief conviction. As such, the conspiracy conviction stands or falls alongside the criminal mischief conviction.

We disagree. In accordance with Penal Law § 145.10, the jury was instructed that, in order to convict defendant of criminal mischief in the second degree, the People must prove beyond reasonable doubt that he damaged the property of "another person." For these purposes, " '[p]erson' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality" (§ 10.00 [7]). Given the background testimony offered by the employees regarding Bill Cram Chevrolet and its operations, and crediting the jurors' common sense and life experience, the jury had ample basis to infer that Bill Cram Chevrolet was either a "private corporation" or a "partnership." Under the circumstances, either structure would qualify as an "appropriate" nonhuman "person" within the meaning of section 10.00 (7) (*see People v Assi*, 14 NY3d 335, 340-341 [2010]; *People ex rel. Shaffer v Kuhlmann*, 173 AD2d 1034, 1035 [3d Dept 1991], *lv denied* 78 NY2d 856 [1991]).

We acknowledge that the People never definitively established Bill Cram Chevrolet's precise corporate form. In light of the description of the enterprise offered by the employees, however, formal corporate documentation was not strictly necessary to prove, beyond reasonable doubt, that Bill Cram Chevrolet qualified as an "appropriate" nonhuman person for purposes of section 10.00 (7). Indeed, the Court of Appeals in *Assi* found that a synagogue was a nonhuman "person" under section 10.00 (7) because it was *either* a "religious corporation" *or* an unincorporated association (14 NY3d at 340-341), and the high Court did not seem bothered by the lack of precision on the point.[2]

Defendant does not argue otherwise (i.e., he does not claim that, by failing to adduce Bill Cram Chevrolet's precise corporate form, the People failed to satisfactorily establish any of the potential nonhuman personhood categories). In fact, defendant's brief concedes that Bill Cram Chevrolet *is* a nonhuman person under section 10.00 (7). Rather, invoking the familiar rule that factual sufficiency is measured against the elements as charged to the jury without objection (*see People v Noble*, 86 NY2d 814, 815 [1995]), defendant argues that County Court's failure to read the Penal Law's definition of a "person" to the jury means that the People "were required to prove that property of another *human being* was damaged" (emphasis added).

We are unpersuaded by defendant's logic. The court told the jury that defendant must have damaged the property of "another person" — not "another human being" — and it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals (*see e.g. Citizens United v Federal Election Commn.*, 558 US 310, 343 [2010]; *Palila v Hawaii Dept. of Land & Natural Resources*, 852 F2d 1106, 1107 [9th Cir 1988]; *State v Fessenden*, 258 Or App 639,

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[2] That said, the People would be well advised in future cases involving corporate victims to take a few additional minutes and actually prove the precise corporate form of the "person" allegedly victimized.

640, 310 P3d 1163, 1164 [2013], *affd* 355 Or 759, 333 P3d 278 [2014]; *see also Matter of Nonhuman Rights Project, Inc. v Presti*, 124 AD3d 1334, 1335 [4th Dept 2015], *lv denied* 26 NY3d 901 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v New York City Health & Hosps. Corp.*, 31 NY2d 194, 201 [1972], *appeal dismissed* 410 US 949 [1973], *reh denied* 411 US 940 [1973]), and we can "presume[]" that the jurors had " 'sufficient intelligence' to make [the] elementary logical inferences presupposed by the language of [the court's] charge" (*People v Samuels*, 99 NY2d 20, 25 [2002], quoting *People v Radcliffe*, 232 NY 249, 254 [1921]). In short, defendant's personhood argument effectively transforms an *undefined* but commonly understood term into an *incorrectly defined* term, and we decline to follow him down that path.[3]

B. Value

Next, defendant argues that the criminal mischief conviction is against the weight of the evidence on the element of value because the People failed to prove that he *personally* caused over $1,500 in damage to the vehicles. Defendant relies on Penal Law § 20.15 for this argument, which says that when "two or more persons are criminally liable for an offense which is divided into degrees, each person is guilty of such degree as is compatible with . . . his own accountability for an aggravating fact or circumstance."

For purposes of this analysis, we will assume, arguendo, that the People did not satisfactorily prove that defendant *personally* caused over $1,500 in damage. It remains, however, that the jury was instructed — without objection — that "[i]f it is proven . . . that the defendant acted in concert with others, he is thus criminally liable for their conduct. *The extent or degree of the defendant's participation in the crime does not matter*" (emphasis added). Perhaps this instruction was inconsistent with section 20.15 (*see People v Castro*, 55 NY2d 972, 973 [1982]),[4] but it still forecloses defendant's

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[3] Contrary to defendant's assertion, nothing in *People v Saporita* (132 AD2d 713 [2d Dept 1987], *lv denied* 70 NY2d 937 [1987]) supports his personhood argument. In *Saporita*, certain convictions were quashed as against the weight of the evidence because they had no victim at all — be it human, nonhuman, corporation, animal, government agency, or other assorted entity (*see id.* at 715). As such, the Second Department had no occasion to consider whether a particular victim qualified as an "appropriate" nonhuman person under section 10.00 (7), for there was no such victim to analyze.

[4] Or perhaps it wasn't (*see People v Fingall*, 136 AD3d 622, 623 [2d Dept 2016], *lv denied* 27 NY3d 1132 [2016]; *People v Cruz*, 309 AD2d 564, 564-565 [1st Dept 2003], *lv denied* 1 NY3d 570 [2003]). The case law regarding Penal Law § 20.15 is murky at best, and the "[a]pplication of [the statute] has been further

claim of factual insufficiency as to value. After all, it is extraordinarily well established that "the Appellate Division is constrained to weigh the evidence in light of the elements of the crime as charged without objection" (*Noble*, 86 NY2d at 815), and the jury in this case was told that the "extent or degree" of defendant's personal participation in the vandalism "does not matter" to his guilt. Accordingly, since it is undisputed that the group as a whole did well over $1,500 in damage, it simply "does not matter" whether the People proved that defendant *personally* caused damage to such an "extent or degree." As the saying goes, "in for a penny, in for a pound" (Edward Ravenscroft, The Canterbury Guests; Or, A Bargain Broken, act v, scene 1 [1695]).

C. Identity

Finally, defendant challenges the weight of the evidence on the element of identity, contending that the People failed to prove that he had anything to do with the vandalism, or even that he was present when it happened. We summarily reject defendant's contention on this score. Defendant confessed to police, and two eyewitnesses (including an accomplice) definitively identified defendant as one of the vandals. Under these circumstances, we harbor no reasonable doubt that defendant was actively involved in the vandalism and thereby qualifies for accessorial liability under Penal Law § 20.00. The countervailing evidence upon which defendant relies — i.e., his own trial testimony, the (very weak) alibi offered by his (convicted sex offender) friend, the fact that he is developmentally disabled to some extent, and the assorted marginalia of inconsequential discrepancies in the eyewitnesses' testimony — merely created a credibility contest that the jury reasonably and justifiably resolved in the People's favor (*see e.g. People v Sommerville*, 159 AD3d 1515, 1515-1516 [4th Dept 2018]; *see generally Romero*, 7 NY3d at 642-646).

* * *

Accordingly, the criminal mischief conviction is not against the weight of the evidence on any of the three challenged elements (*see generally People v Danielson*, 9 NY3d 342, 348-349 [2007]). It follows that defendant's identical (and unpreserved) legal sufficiency challenges on those elements are necessarily meritless, as well (*see People v Nichols*, — AD3d —, — [June 15, 2018] [4th Dept 2018]).[5]

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complicated by the failure of some courts to explicitly rely on it in circumstances in which it was obviously relevant, and by the confusing references made by other courts who have explicitly applied its provisions" (Hon. Martin Marcus, NY Crim Law, Accessorial liability—Liability for different degrees of offense § 1:15 at 56 [4th ed West's NY Prac Series 2016] [Richard A. Greenberg, Principal Author]). Interestingly, defendant does not seek a new trial in the interest of justice to remediate what he calls "County Court's [unpreserved] error in failing to charge the jury on Penal Law § 20.15."

[5] Nor was defense counsel ineffective in failing to preserve these losing legal sufficiency claims (*see Nichols*, — AD3d at —).

Finally, because there is no basis to upset the criminal mischief conviction, there is likewise no reason to upset the conspiracy conviction (*see People v McLaurin*, 260 AD2d 944, 945 [3d Dept 1999], *lv denied* 93 NY2d 1022 [1999]; *accord* n 1, *supra*).

II

Turning to the sentencing phase of the trial, defendant offers three grounds for vacating or reducing the $40,743.19 restitution award. *First*, defendant argues that the award impermissibly exceeded the $15,000 statutory cap on restitution awards (*see generally* Penal Law § 60.27 [5] [imposing $15,000 cap on felony restitution awards, subject to five identified exceptions]). *Second*, defendant argues that the restitution award was improper because Bill Cram Chevrolet was reimbursed for its losses by its insurer. *Third*, given his purportedly limited personal culpability and likely inability to pay, defendant argues that County Court abused its discretion in saddling him with the full value of the damage caused by the entire group.

We see no basis for upsetting the restitution award.

The threshold issue is preservation, which defendant concedes is lacking on all three of his arguments. Defendant contends, however, that his *first* and *second* arguments implicate the illegal sentence exception to the preservation requirement, and thus must be adjudicated notwithstanding his failure to raise them below. An illegal sentence within the meaning of the exception is one to which a defendant may not consent (*see People v Lopez*, 28 NY2d 148, 152 [1971]) and which does not depend on the "resolution of evidentiary disputes" (*People v Samms*, 95 NY2d 52, 57 [2000]). Put differently, the illegality must be plain "from the face of the appellate record" in order to dispense with the preservation requirement (*id.*).

The face of the appellate record reveals nothing plainly illegal about this restitution order, however. With respect to defendant's *first* argument, the Legislature has explicitly authorized a defendant to consent to a restitution award above $15,000 (*see* Penal Law § 60.27 [5] [a]) — presumably to facilitate plea bargaining. As such, a restitution directive that exceeds the $15,000 statutory cap is not facially illegal in the sense that it could *never* be lawfully imposed, even with the defendant's consent.[6] Rather, such an award is only potentially illegal (i.e., contingently illegal depending on the adequacy of the People's showing on a cap exception), and it is well established that potential illegality does not trigger the illegal sentence exception to the preservation rule (*see Samms*, 95 NY2d at 57, citing *People v Smith*, 73 NY2d 961, 962-963 [1989]). Our conclusion on this score is consistent with *People v Ford* (77 AD3d 1176, 1177 [3d Dept 2010], *lv denied* 17 NY3d 816 [2011]) and *People v Rivera* (70 AD3d

[6] Indeed, a "defendant's failure at the time of sentencing to object to the amount of restitution might be deemed to constitute an implied consent" to an above-cap restitution order (*People v Barnes*, 135 AD2d 825, 827 [2d Dept 1987]).

1484, 1485 [4th Dept 2010], *lv denied* 15 NY3d 756 [2010]); in both cases, the Appellate Division required preservation when the defendant claimed that the restitution award exceeded the statutory cap.

With respect to defendant's *second* argument, it is well established that an insurer can be a proper restitutionee in certain instances (*see People v Kim*, 91 NY2d 407, 411-412 [1998]), and defendant's failure to object below means that the People were never called upon to show that restitution was being directed to a proper recipient in this instance (be it Bill Cram Chevrolet, the insurer, or someone else). Thus, defendant's *second* challenge to the restitution award depends on the resolution of at least one evidentiary dispute, and it therefore does not implicate the illegal sentence exception to the preservation rule (*see Samms*, 95 NY2d at 57). Our conclusion on this score is consistent with *People v Roberites* (153 AD3d 1650, 1651 [4th Dept 2017], *lv denied* 30 NY3d 1108 [2018], *reconsideration denied* 31 NY3d 986 [2018]) and *People v Daniels* (75 AD3d 1169, 1171 [4th Dept 2010], *lv denied* 15 NY3d 892 [2010]); in both cases, we required preservation when, as here, the defendant claimed that the sentencing court erroneously directed restitution to a person or entity that was not a victim of the crime.

We decline to review either defendant's *first* argument or his *second* argument as a matter of discretion in the interest of justice, if only because intelligent appellate review of either point is significantly hindered by his failure to make a record below. Indeed, the merits of defendant's *first* argument (which relate to the scope of the statutory cap exception for out-of-pocket losses under Penal Law § 60.27 [5] [b]) are novel and complicated, and we hesitate to venture into those waters without a full record.

We turn finally to defendant's *third* challenge to the restitution order (abuse of discretion). Defendant does not attempt to shoehorn this particular argument into the illegal sentence exception, and the conceptual genesis of the argument is unclear. Is it really a harsh and excessive sentence claim? Or is it some sort of claim unique to the restitution context?

But no matter, for the Court of Appeals previously upheld a restitution award that imposed the full value of the victim's loss on a single perpetrator, instead of apportioning the loss among the defendant and his accomplices (*see Kim*, 91 NY2d at 412) — as defendant appears to seek here. As the *Kim* Court explained:

> "While the statute is silent on the issue, imposing joint and several liability on all perpetrators for the entire loss of the victim caused by their concerted action is more consistent with, and better promotes, the dual purposes of the restitution statute. Those goals are to insure, to the maximum extent possible, that victims will be made whole and offenders will be rehabilitated and deterred, by requiring ***all*** defendants to confront concretely, and take responsibility for, the entire harm resulting from their

acts" (*id.*).

In short, whatever the true nature of defendant's *third* argument, *Kim* effectively disposes of it.[7]

CONCLUSION

Accordingly, the judgment of the Seneca County Court should be affirmed.

[7] If defendant's *third* argument is construed as a bid to reduce or reallocate the restitution award in the interest of justice, we would decline to exercise whatever discretionary powers we might have to do so.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01122

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

ELDRED JAY MARTIN, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

NIAGARA FALLS BRIDGE COMMISSION,
DEFENDANT-RESPONDENT.

NIAGARA FALLS BRIDGE COMMISSION,
THIRD-PARTY PLAINTIFF,

V

LIBERTY MAINTENANCE, INC., THIRD-PARTY
DEFENDANT-RESPONDENT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (JOHN A. COLLINS OF COUNSEL), AND THE LAW OFFICE OF CHRISTOPHER C. KERR, ORCHARD PARK, FOR PLAINTIFF-APPELLANT.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, NEW YORK CITY (PATRICK J. LAWLESS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

WALSH, ROBERTS & GRACE, BUFFALO (MARK P. DELLA POSTA OF COUNSEL), FOR THIRD-PARTY DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered August 24, 2016. The order, among other things, granted the motions of defendant and third-party defendant for summary judgment dismissing the complaint.

It is hereby ORDERED that the order so appealed from is modified on the law by denying in part the motions of defendant and third-party defendant and reinstating the Labor Law § 240 (1) claim, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages under, inter alia, Labor Law §§ 240 (1) and 241 (6) for injuries that he sustained when the bridge scaffolding sheet that he was detaching from underlying support cables tipped, causing him to fall approximately 25 to 30 feet before landing on a steel box beam. Plaintiff appeals from an order that granted the motion of third-party defendant, plaintiff's employer, for summary judgment dismissing the Labor Law §§ 240 (1) and 241 (6) claims and the motion of defendant, the property owner (defendants), for, as relevant to this appeal,

summary judgment dismissing the complaint. We agree with plaintiff that Supreme Court erred in granting the motions with respect to the Labor Law § 240 (1) claim, and we therefore modify the order accordingly.

Labor Law § 240 (1) "is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed," i.e., the protection of workers by placing the ultimate responsibility for safety practices at building construction sites on the owner and general contractor (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991] [internal quotation marks omitted]). "A violation occurs where a scaffold or elevated platform is inadequate in and of itself to protect workers against the elevation-related hazards encountered while assembling or dismantling that device, and it is the only safety device supplied or any additional safety device is also inadequate" (*Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]; *see Calderon v Walgreen Co.*, 72 AD3d 1532, 1533 [4th Dept 2010], *appeal dismissed* 15 NY3d 900 [2010]).

We conclude that defendants' own submissions raised triable issues of fact with respect to the Labor Law § 240 (1) claim. In support of their contentions that plaintiff's conduct was the sole proximate cause of his injuries, defendants submitted plaintiff's deposition testimony in which he testified that he chose to unhook his safety lanyard and detach the bridge scaffolding sheet without the benefit of the lanyard or other safety device. The six-foot lanyard given to him was not an adequate safety device, however, because plaintiff also testified that it was too short to permit plaintiff to reach the final clip anchoring the bridge scaffolding sheet, even if he had moved the fall arrest system cable to a location closer to that clip. Furthermore, although defendants submitted evidence that other safety devices were generally available on the work site, they failed to establish as a matter of law that an *adequate* safety device was present that would have prevented plaintiff "from harm directly flowing from the application of the force of gravity to . . . [his] person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993] [emphasis omitted]). For example, defendants failed to establish as a matter of law that a 20- or 25-foot lanyard, which appears to have been the next length available on the work site, would have prevented plaintiff's fall by virtue of the fact that it was retractable. It therefore cannot be concluded on this record that plaintiff's use of that alternative lanyard would have made any substantial difference in plaintiff's injuries (*see generally Kyle v City of New York*, 268 AD2d 192, 198 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Moreover, contrary to the dissent's characterization of the facts of this case, plaintiff further testified that his on-site supervisor pushed him to hurry and, although there was purportedly a rule that the workers on the bridge scaffolding platform were required to be tied off 100 percent of the time, "[n]obody follow[ed] it." Thus, although we agree with defendants that the opinions of plaintiff's expert are speculative (*see Robinson v Barone*, 48 AD3d 1179, 1180 [4th Dept 2008]), there is nonetheless a triable issue of fact whether adequate safety devices were readily available that plaintiff knew that he was

expected to use "but for no good reason chose not to do so, causing an accident" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 555 [2006]).

We reject plaintiff's further contention that the court erred in granting defendants' motions with respect to the Labor Law § 241 (6) claim. Plaintiff contends that there is a question of fact whether there was a violation of 12 NYCRR 23-5.1 (c) (2), which states that "[e]very scaffold shall be provided with adequate horizontal and diagonal bracing to prevent any lateral movement." Although we agree with plaintiff that he could rely on that provision for the first time in opposition to defendants' motions because his "reliance thereon 'raises no new factual allegations or theories of liability and results in no discernable prejudice to [defendants]' " (*Smith v Nestle Purina Petcare Co.*, 105 AD3d 1384, 1386 [4th Dept 2013]), we nonetheless conclude that the court properly determined that it would be "impractical and contrary to the very work at hand" to apply that regulation to a scaffold that is in the process of being dismantled (*Salazar v Novalex Contr. Corp.*, 18 NY3d 134, 140 [2011]).

All concur except NEMOYER and WINSLOW, JJ., who dissent and vote to dissent in part and vote to affirm in the following memorandum: We dissent in part and would affirm the order in its entirety, inasmuch as we respectfully disagree with the majority's determination that Supreme Court erred in granting those parts of the motions of defendant and third-party defendant, Liberty Maintenance, Inc. (Liberty) (collectively, defendants), for summary judgment dismissing plaintiff's claim under Labor Law § 240 (1). There can be no liability under that section where a plaintiff's actions are the sole proximate cause of his or her injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290 [2003]; *see also Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]; *Montgomery v Federal Express Corp.*, 4 NY3d 805, 806 [2005]), and we conclude that defendants established as a matter of law that "plaintiff had adequate safety devices available; that he knew both that they were available and that he was expected to use them; that he chose for no good reason not to do so; and that had he not made that choice he would not have been injured" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]).

Plaintiff was dismantling an access platform below a bridge deck when he disconnected his safety lanyard from the fall arrest system to remove a deck clip that was beyond his reach, and then fell 25 to 30 feet onto a steel box beam. The platform that plaintiff was disassembling was made up of rows of corrugated metal sheets that were lying on wire cables. Each 3-foot by 10-foot metal sheet overlapped with its neighboring sheets, and was clipped to the cables below through six pre-drilled holes. The metal sheets that made up the platform necessarily became unstable as the platform was being disassembled, and Liberty, plaintiff's employer, had a policy that the workers on the platform were required to be tied off 100 percent of the time. To that end, Liberty provided a variety of safety devices for plaintiff's use, including harnesses, lanyards, retractable

lanyards, ropes, rope grabs, "choker[s]" and fall arrest cables. The safety equipment was kept in a trailer on the work site and was available to the workers and, as the foreperson, plaintiff was responsible for the safety of all workers.

The evidence submitted by defendants in support of their respective motions established that, prior to plaintiff's fall, he had intentionally disconnected himself from the fall arrest system by unhooking a six-foot "bungee cord lanyard" from his safety harness so that he could move into the opening between a 45-degree beam and a 90-degree beam and remove a deck clip that was "a couple feet" beyond his reach. Plaintiff testified at his deposition that, although he could have moved the fall arrest cable closer to the opening, the six-foot lanyard was still too short to permit him to reach the last deck clip. Plaintiff further testified, however, that he could have performed that task while connected to the fall arrest system by placing a choker around the 45-degree beam right next to where he was working and then attaching the six-foot lanyard to the choker, but he did not do so because he was "[a]lways in a hurry." Plaintiff also testified that, in the alternative, he could have obtained from the trailer a retractable lanyard that had a maximum extension of 20 feet or 90 feet in order to complete his task, but he did not do so because he was in a hurry. Thus, plaintiff's deposition testimony established that he knew that there were retractable lanyards and choker cables available for his use and that he chose for no good reason not to use them. We therefore disagree with the majority's determination that there is a question of fact whether adequate safety devices were available.

Furthermore, when plaintiff unclipped his lanyard, he had already removed the overlapping metal sheet that was on the other side of the beam, and the vertical "tie ups," which had previously provided "some stability to the platform" by preventing the metal sheets from "sagging," had also been removed. Notwithstanding plaintiff's awareness that there would be nothing holding the metal sheet onto the cables once the last deck clip was removed, and despite the fact that Liberty had provided 20-foot retractable lanyards and chokers for plaintiff's use, either of which would have enabled him to reach the deck clip while remaining tied off, plaintiff "chose for no good reason not to" use the adequate safety devices that were available for his protection (*Cahill*, 4 NY3d at 40; *see Piotrowski v McGuire Manor, Inc.*, 117 AD3d 1390, 1390-1391 [4th Dept 2014]), because he was in a hurry and wanted to complete his task more quickly (*see generally Christiano v Random House, Inc.*, 51 AD3d 579, 580 [1st Dept 2008]). We again note that plaintiff testified at his deposition that, as the foreman on the job site, it was his responsibility to ensure that the workers were "safe while they were up there" and were wearing safety harnesses and lanyards.

We thus conclude that plaintiff's action in unclipping his lanyard so that he could disassemble an unsecured metal sheet in violation of Liberty's 100 percent tie-off policy was the sole proximate cause of his fall, and the court therefore properly granted those parts of defendants' motions for summary judgment dismissing

plaintiff’s Labor Law § 240 (1) claim.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01279

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

BRUCE A. SCHAUBROECK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

COLIN P. MORIARTY, DEFENDANT-APPELLANT.

LAW OFFICE OF DANIEL R. ARCHILLA, BUFFALO (JEFFREY SENDZIAK OF COUNSEL), FOR DEFENDANT-APPELLANT.

CELLINO & BARNES, P.C., BUFFALO (ELLEN B. STURM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered January 26, 2017. The order, insofar as appealed from, denied in part the motion of defendant for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting that part of the motion with respect to the permanent consequential limitation of use category of serious injury within the meaning of Insurance Law § 5102 (d) and dismissing the complaint, as amplified by the bill of particulars to that extent, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries that he allegedly sustained when the vehicle that he was driving was rear-ended by a vehicle operated by defendant. In his bill of particulars, plaintiff alleged that he sustained a serious injury within the meaning of Insurance Law § 5102 (d) under four categories, i.e., the permanent loss of use, permanent consequential limitation of use, significant limitation of use, and 90/180-day categories. Defendant moved for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury, and Supreme Court granted those parts of the motion with respect to two of those categories, i.e., the permanent loss of use and 90/180-day categories. Defendant contends on appeal that the court should have granted the motion in its entirety.

Contrary to defendant's contention, his own submissions in support of his motion raise triable issues of fact with respect to whether the motor vehicle accident caused plaintiff's alleged injuries (*see Crane v Glover*, 151 AD3d 1841, 1841-1842 [4th Dept 2017]). The report of defendant's expert physician "does not establish that plaintiff's condition is the result of a preexisting degenerative

[condition] inasmuch as it 'fails to account for evidence that plaintiff had no complaints of pain prior to the accident' " (*id*. at 1842; *see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]). Inasmuch as defendant failed to meet his initial burden on the motion with respect to causation, there is no need to consider the sufficiency of plaintiff's opposing papers on that issue (*see Sobieraj v Summers*, 137 AD3d 1738, 1739 [4th Dept 2016]).

We agree with defendant, however, that he established his entitlement to judgment as a matter of law with respect to the permanent consequential limitation of use category, and we therefore modify the order accordingly. We conclude that defendant met his initial burden on the motion by submitting evidence establishing as a matter of law that plaintiff did not sustain a serious injury under that category (*see Cook v Peterson*, 137 AD3d 1594, 1596 [4th Dept 2016]). Defendant submitted the affidavit of his expert physician who, after examining plaintiff, noted plaintiff had no difficulty walking and had full flexion and extension in both knees. In opposition to the motion, plaintiff "failed to submit objective proof of a permanent injury" (*McKeon v McLane Co., Inc.*, 145 AD3d 1459, 1461 [4th Dept 2016]).

Contrary to defendant's further contention, we conclude that the court properly denied that part of the motion with respect to the significant limitation of use category. Even assuming, arguendo, that defendant made a "prima facie showing that plaintiff's alleged injuries did not satisfy [the] serious injury threshold" with respect to that category (*Pommells v Perez*, 4 NY3d 566, 574 [2005]), we conclude that plaintiff's submissions in opposition to the motion raised an issue of fact. Those submissions included the affirmation of plaintiff's treating physician, who, after reviewing plaintiff's medical records and imaging studies, opined within a reasonable degree of medical certainty that plaintiff sustained a folded flap tear at the junction of the mid-body and posterior horn of the meniscus of his right knee, and lateral and medial meniscus tears of both knees that required surgery and were causally related to the accident. He further opined that, consistent with what he observed on the MRI and his observations during plaintiff's surgery, the meniscus tears limited plaintiff's ability to walk, sit for long periods, turn, twist, drive for long periods, climb stairs, and walk on uneven surfaces (*see Lopez v Senatore*, 65 NY2d 1017, 1020 [1985]; *LoGrasso v City of Tonawanda*, 87 AD3d 1390, 1391 [4th Dept 2011]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

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CA 17-01759

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

IN THE MATTER OF SETH M. OLNEY, DOING BUSINESS AS THE OLNEY PLACE, PETITIONER-PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

TOWN OF BARRINGTON, TOWN OF BARRINGTON ZONING BOARD OF APPEALS, RESPONDENTS-DEFENDANTS-APPELLANTS, DONALD BANZHAF AND JANE C. BANZHAF, INTERVENORS-RESPONDENTS-DEFENDANTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (CHARLES W. MALCOMB OF COUNSEL), FOR RESPONDENTS-DEFENDANTS-APPELLANTS.

KNAUF SHAW LLP, ROCHESTER (JONATHAN R. TANTILLO OF COUNSEL), FOR INTERVENORS-RESPONDENTS-DEFENDANTS-APPELLANTS.

JESSICA L. BRYANT, GENEVA, AND THOMAS G. SMITH, ROCHESTER, FOR PETITIONER-PLAINTIFF-RESPONDENT.

Appeals from a judgment of the Supreme Court, Yates County (Dennis F. Bender, A.J.), entered May 18, 2017. The judgment, inter alia, declared that the New York State Liquor Authority has exclusive jurisdiction to grant a liquor license.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated and the appeals are dismissed without costs.

Memorandum: Respondents-defendants and intervenors-respondents-defendants (collectively, defendants) appeal from a judgment that purports to declare the rights of the parties in a longstanding zoning dispute regarding the right of petitioner-plaintiff (plaintiff) to serve alcohol in his store. Defendants' appeals appear to be premised upon their misconception that the judgment declared that respondent-defendant Town of Barrington (Town) "could not seek to enforce the use restrictions in the 2013 Special Use Permit in a way that prohibited [plaintiff] from serving food or beverages on the enclosed porch" and "that the [Alcoholic Beverage Control] Law wholly preempted local zoning laws and precluded the Town from enforcing the terms and conditions of [plaintiff's] 2013 Special Use Permit." The judgment made no such declarations, however. Rather, the judgment declared, inter alia, that the New York State Liquor Authority has exclusive jurisdiction to "grant" liquor licenses, a power that defendants have conceded throughout this litigation is not possessed by the Town. The remaining declarations in the judgment are entirely favorable to

defendants.

Thus, we conclude that defendants are not aggrieved by the judgment, and their appeals must be dismissed (*see* CPLR 5511; *Insurance Co. of State of Pa. v Adessie Imports, Ltd.*, 24 AD3d 230, 231 [1st Dept 2005]; *308 W. 30th St. v Cogan*, 289 AD2d 93, 93 [1st Dept 2001]; *see generally Matter of Freck v Town of Porter*, 158 AD3d 1163, 1164 [4th Dept 2018]). The fact that the judgment " 'may remotely or contingently affect interests which [defendants] represent[] does not give [them] a right to appeal' " (*Matter of DeLong*, 89 AD2d 368, 370 [4th Dept 1982], *lv denied* 58 NY2d 606 [1983], quoting *Ross v Wigg*, 100 NY 243, 246 [1885]). Likewise, the fact that the judgment "may contain language or reasoning which [defendants] deem adverse to their interests does not furnish them with a basis . . . to take an appeal" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 472-473 [1986]).

Finally, we note that the justiciable components of the underlying petition/complaint were fully adjudicated by a prior order from which no appeal was taken. The judgment on appeal is thus an "inappropriately rendered advisory opinion" (*Cohen v Anne C.*, 301 AD2d 446, 447 [1st Dept 2003]; *see Sunrise Nursing Home, Inc. v Ferris*, 111 AD3d 1441, 1442 [4th Dept 2013]; *Cheng v Oxford Health Plans, Inc.*, 15 AD3d 207, 208 [1st Dept 2005]; *County of Oneida v Estate of Kennedy*, 300 AD2d 1091, 1092 [4th Dept 2002]; *see generally Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]). We therefore vacate the judgment in order to prevent it from " 'spawning any legal consequences or precedent' " (*Matter of Thrall v CNY Centro, Inc.*, 89 AD3d 1449, 1451 [4th Dept 2011], *lv dismissed* 19 NY3d 898 [2012], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 718 [1980]; *see Cheng*, 15 AD3d at 208; *Cohen*, 301 AD2d at 447; *see generally Funderburke v New York State Dept. of Civ. Serv.,* 49 AD3d 809, 811 [2d Dept 2008]; *Matter of Ruskin v Safir*, 257 AD2d 268, 271 [1st Dept 1999]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

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KA 14-01137

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES R. MCINTOSH, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (JAMES A. HOBBS 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 (Vincent M. Dinolfo, J.), rendered June 19, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of murder in the second degree (Penal Law § 125.25 [1]) and manslaughter in the first degree (§ 125.20 [1]), arising from an altercation that occurred between defendant and one of his roommates (hereafter, victim) in their apartment. Both defendant and the victim had consumed alcohol earlier in the evening, and during the altercation defendant possessed a knife and caused one non-lethal and one fatal stab wound to the victim. Defendant and the victim shared the apartment with a third man who heard the altercation from inside his bedroom but did not see it. Although we agree with defendant that County Court erred in refusing to charge the jury with two lesser included charges requested by defendant, we conclude that the error is harmless under the circumstances of this case.

To establish entitlement to a charge on a lesser included offense, "a defendant must show both that the greater crime cannot be committed without having concomitantly committed the lesser by the same conduct, and that a reasonable view of the evidence supports a finding that he or she committed the lesser, but not the greater, offense" (*People v James*, 11 NY3d 886, 888 [2008]; *see People v Van Norstrand*, 85 NY2d 131, 135 [1995]; *People v Glover*, 57 NY2d 61, 63 [1982]; *see also* CPL 1.20 [37]; 300.50 [1]). With respect to the

first prong, it is undisputed that the requested charges of manslaughter in the second degree (Penal Law § 125.15 [1]) and criminally negligent homicide (§ 125.10) are each lesser included offenses of murder in the second degree (§ 125.25 [1]; *see People v Rivera*, 23 NY3d 112, 120 [2014]; *People v Morris*, 138 AD3d 1408, 1410 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]) and manslaughter in the first degree (§ 125.20 [1]; *see People v Helliger*, 96 NY2d 462, 467 [2001]; *People v Johnson*, 160 AD2d 1024, 1025 [2d Dept 1990]; *People v Hoy*, 122 AD2d 618, 618-619 [4th Dept 1986]).

The issue whether the court erred in refusing to charge the requested lesser included offenses thus turns on the second prong, i.e., " 'whether on *any* reasonable view of the evidence it is possible for the trier of the facts to acquit the defendant on the higher count[s] and still find him guilty on the lesser one[s]' " (*People v Hull*, 27 NY3d 1056, 1058 [2016]). "In assessing whether there is a 'reasonable view of the evidence,' the proof must be looked at 'in the light most favorable to [the] defendant' " (*Rivera*, 23 NY3d at 120-121, quoting *People v Martin*, 59 NY2d 704, 705 [1983]). The "inquiry is not directed at whether persuasive evidence of guilt of the greater crime exists . . . but [instead is directed at] whether, under any reasonable view of the evidence, it is possible for the trier of fact[] to acquit defendant on the higher count[s] and still find him guilty of the lesser one[s]" (*Van Norstrand*, 85 NY2d at 136).

Viewing the evidence in the light most favorable to defendant, we conclude that there is a reasonable view of the evidence that defendant acted either recklessly or with criminal negligence, but not with intent to cause death (Penal Law § 125.25 [1]) or with intent to cause serious physical injury (§ 125.20 [1]). According to his testimony, defendant was confronted at his bedroom door by the victim, who was apparently angry about defendant's contact with a certain woman and repeatedly threatened defendant with physical harm. Defendant was afraid and feared that the victim was going to kill him. The victim attempted to force his way into defendant's bedroom and eventually grabbed defendant by the shoulder. Defendant testified that he then picked up the knife and "[p]oked it . . . towards [the victim's] leg," but he did not know at that point if he had struck the victim. The Medical Examiner, who testified during the People's case-in-chief, characterized the resulting stab wound to the victim's leg as "superficial and non-lethal." Defendant's action further enraged the victim, prompting him to come forward toward defendant, at which point defendant raised the knife up to about his own chest level. Defendant testified that he "raised the knife up and poked again, jabbed again, and then [the victim] stopped and . . . backed off." Defendant testified that he did not know it at the time, but he apparently struck the victim in the chest with the knife. The victim stopped at that point, took about three steps backward, and then fell against the wall and to the floor with—as later determined by the Medical Examiner—a fatal, four-inch-deep stab wound that had penetrated his heart. Defendant immediately called 911.

Defendant denied that he intended to kill the victim or to inflict serious physical injury. Defendant "was just hoping that [the

victim] would back off and he would get scared, back off and get out of there, get away from [the bedroom] door, and get out of . . . [defendant's] room so [defendant] could close [his] door and lock it." According to defendant, he did not perceive that his actions would result in the victim's death. Although defendant acknowledged on cross-examination that he intended to "poke" the victim the second time, defendant maintained that he was merely trying to hold off the victim to stop him from attacking and "just intended to protect [him]self," but did not intend to hurt the victim or put the knife into him. Defendant stood his ground and put the knife out and poked the victim, who came forward into the knife. The Medical Examiner's testimony that it took "some force" for the knife to penetrate four inches into the victim's chest does not render defendant's account unreasonable, particularly inasmuch as the Medical Examiner conceded on cross-examination that some of the force necessary to stab the victim could have been provided by the victim himself moving into the knife, which is consistent with defendant's testimony. Likewise, the Medical Examiner's testimony that the victim was stabbed in a downward direction, which she opined was inconsistent with a "poke," was based upon the victim standing upright, but defendant testified that the victim was hunched forward, like a "linebacker."

Contrary to the People's contention and the court's determination, the evidence that defendant's underlying physical act of "poking" the victim with the knife was deliberate does not preclude a finding that, with respect to defendant's culpable mental state relative to the result of causing the victim's death (*see* Penal Law §§ 125.15 [1]; 125.10), defendant acted recklessly in that he was "aware of and consciously disregard[ed] a substantial and unjustifiable risk that such result [would] occur" (§ 15.05 [3]) or acted with criminal negligence in that he "fail[ed] to perceive a substantial and unjustifiable risk that such result [would] occur" (§ 15.05 [4]; *see People v Heide*, 84 NY2d 943, 944 [1994]; *People v Usher*, 39 AD2d 459, 460-461 [4th Dept 1972], *affd* 34 NY2d 600 [1974]). Moreover, given the number and nature of the stab wounds here—the first of which resulted in a superficial and non-lethal wound to the victim's leg, which was consistent with defendant's testimony that he was simply attempting to get the victim to back away, and the second of which may have been caused, at least in part, by the victim moving forward into the knife—we conclude that this case is distinguishable from those in which the number, depth, and severity of the wounds are such that there is no reasonable view of the evidence to support a finding other than an intent to cause death or serious physical injury (*cf. e.g. People v Stanford*, 87 AD3d 1367, 1368 [4th Dept 2011], *lv denied* 18 NY3d 886 [2012]; *People v Collins*, 290 AD2d 457, 458 [2d Dept 2002], *lv denied* 97 NY2d 752 [2002]). Similarly, we conclude that there is a reasonable view of the evidence that defendant, although admittedly acting to protect himself with the knife, did not intend to make contact with the victim at all or that, if he did intend to make contact by "poking" the victim, defendant intended only to get the victim to back off and did not intend to harm him (*cf. People v Henley*, 145 AD3d 1578, 1579 [4th Dept 2016], *lv denied* 29 NY3d 998 [2017], *reconsideration denied* 29 NY3d 1080 [2017]). Based upon the foregoing, we conclude that the court erred in refusing to

charge the jury on the requested lesser included charges of manslaughter in the second degree and criminally negligent homicide.

We further conclude, however, that the error is harmless under the circumstances of this case. As set forth by the Court of Appeals, "where a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge lesser degrees than that, . . . the defendant's conviction of the crime alleged in the indictment forecloses a challenge to the court's refusal to charge the remote lesser included offenses" (*People v Boettcher*, 69 NY2d 174, 180 [1987]). The premise underlying a determination of harmless error is that, when a jury convicts the defendant of the top (i.e., highest) charged offense and thereby excludes from the case the next lesser (i.e., intermediate) included offense, the verdict dispels any significant probability that the jury, had it been given the option, would have acquitted the defendant of both the highest and intermediate charged offenses and instead convicted the defendant of the even lesser (i.e., remote) included offense that was erroneously not charged (*see id.*; *People v Richette*, 33 NY2d 42, 45-46 [1973]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). Thus, cases applying the analysis set forth in *Boettcher* hold that where the trial court charges the jury with the highest offense of murder in the second degree and the intermediate offense of manslaughter in the first degree, and the jury convicts the defendant of murder in the second degree, the defendant's challenge on appeal to the court's denial of a request to charge the remote offenses of manslaughter in the second degree and/or criminally negligent homicide is foreclosed, i.e., any error is harmless (*see People v Pinero*, 143 AD3d 428, 429 [1st Dept 2016], *lv denied* 29 NY3d 1000 [2017]; *People v Burkett*, 101 AD3d 1468, 1472-1473 [3d Dept 2012], *lv denied* 20 NY3d 1096 [2013]; *People v Hira*, 100 AD3d 922, 923 [2d Dept 2012], *lv denied* 21 NY3d 943 [2013]; *People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]; *People v Vega*, 155 AD2d 632, 633 [2d Dept 1989], *lv denied* 75 NY2d 819 [1990]).

Here, the court charged the jury with the highest indicted offense of murder in the second degree and the intermediate indicted offense of manslaughter in the first degree, but improperly refused to charge the jury on the remote lesser included offenses of manslaughter in the second degree and criminally negligent homicide. The court also erred in failing to instruct the jury to consider the charged offenses in the alternative by deliberating thereon in decreasing order of culpability and proceeding to consider manslaughter in the first degree only if it first unanimously acquitted defendant of the more serious offense of murder in the second degree (*see* CPL 300.50; *Helliger*, 96 NY2d at 464-466; *Boettcher*, 69 NY2d at 181-183; *see generally Matter of Suarez v Byrne*, 10 NY3d 523, 534 [2008], *rearg denied* 11 NY3d 753 [2008]). The jury found defendant guilty of murder in the second degree *and* manslaughter in the first degree. Contrary to the dissent's assertion, had the jury acquitted defendant of the highest offense of murder in the second degree *and* convicted him of the intermediate offense of manslaughter in the first degree only, the court's error in refusing to charge the remote lesser included offenses would have constituted reversible error (*see People v*

Brockett, 74 AD3d 1218, 1220 [2d Dept 2010]), inasmuch as such a verdict would fail to dispel any significant probability that the jury, had it been given the option, would have instead convicted defendant of a remote lesser included offense (*see Richette*, 33 NY2d at 45-46; *People v Ivisic*, 95 AD2d 307, 312-313 [2d Dept 1983]). By contrast, a determination of harmless error is warranted where, as here, the jury convicts the defendant of the highest charged offense, thereby foreclosing the defendant's contention that there was a significant probability that, had the jury been given the option, it would have rejected *both* the highest charged offense and the intermediate lesser included offense in favor of conviction of a remote lesser included offense (*see Boettcher*, 69 NY2d at 180).

Contrary to defendant's contention and the dissent's assertion, *People v Green* (56 NY2d 427, 435-436 [1982], *rearg denied* 57 NY2d 775 [1982]) does not compel reversal. There, the defendant was convicted of attempted murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]), and the Court of Appeals determined that the trial court committed reversible error by failing to charge assault in the second degree (§ 120.05 [4]) as a lesser included charge of assault in the first degree. The assault charges in *Green* were not, in fact, lesser included offenses of attempted murder in the second degree (*see e.g. People v Littlejohn*, 141 AD2d 850, 850-851 [2d Dept 1988]; *People v Lord*, 103 AD2d 1032, 1033 [4th Dept 1984]). Thus, the requested charge of assault in the second degree was not a *remote* lesser included offense; rather, it was the *next* lesser included offense of assault in the first degree. Inasmuch as the defendant stood properly convicted of assault in the first degree, which was not a lesser included offense of attempted murder in the second degree (*see Littlejohn*, 141 AD2d at 850-851), the error in failing to charge assault in the second degree was not harmless because the verdict did not reveal that there was no significant probability that the jury would have instead convicted the defendant of assault in the second degree if given that option. The situation in *Green* is thus distinguishable from the case before us because, here, defendant stands properly convicted of the highest charged offense and the error purportedly requiring reversal is the court's failure to charge the jury on remote lesser included offenses.

Contrary to the dissent's further suggestion, where, as here, the jury returns a verdict comprised of inclusory concurrent counts (*see* CPL 300.30 [4]) after not being instructed to consider such counts in the alternative, we are compelled to credit the jury's finding of guilt beyond a reasonable doubt on the greater count, which is deemed a dismissal of every lesser count (*see* CPL 300.40 [3] [b]; *People v Lee*, 39 NY2d 388, 390 [1976]; *People v Grier*, 37 NY2d 847, 848 [1975]; *People v Fort*, 292 AD2d 821, 821 [4th Dept 2002], *lv denied* 98 NY2d 710 [2002]). For the reasons stated above, the jury's verdict here demonstrates that the court's error in refusing to charge the requested lesser included charges is harmless. As the People correctly concede, the charge of manslaughter in the first degree must be dismissed as a lesser inclusory concurrent count of murder in the second degree (*see* CPL 300.30 [4]; *People v Bank*, 129 AD3d 1445, 1448-

1449 [4th Dept 2015], *affd* 28 NY3d 131 [2016]; *see also Hull*, 27 NY3d at 1058). We therefore modify the judgment accordingly.

All concur except LINDLEY and CURRAN, JJ., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent. We agree with the majority that, given the evidence at trial that defendant did not act with the intent to cause death or serious physical injury to the victim, County Court erred in refusing defendant's request to charge manslaughter in the second degree (Penal Law § 125.15 [1]) and criminally negligent homicide (§ 125.10) as lesser included offenses of murder in the second degree (§ 125.25 [1]) and manslaughter in the first degree (§ 125.20 [1]; *see generally People v Green*, 56 NY2d 427, 432-434 [1982], *rearg denied* 57 NY2d 775 [1982]). In our view, however, the error is not harmless under the circumstances of this case. Instead, the error was compounded when the court erred in failing to instruct the jurors to consider the charged offenses in the alternative. As a result of that second error, the jury convicted defendant of both murder in the second degree and manslaughter in the first degree, a lesser inclusory concurrent count of murder in the second degree. We would therefore reverse the judgment and grant defendant a new trial.

As the majority correctly notes, the Court of Appeals and this Court have held that "where a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge lesser degrees than that, . . . the defendant's conviction of the crime alleged in the indictment forecloses a challenge to the court's refusal to charge the remote lesser included offenses" (*People v Boettcher*, 69 NY2d 174, 180 [1987]; *see People v Williams*, 273 AD2d 824, 826 [4th Dept 2000], *lv denied* 95 NY2d 893 [2000]). The rationale of those cases is that, because the jury convicted defendant of the greatest offense, thereby implicitly rejecting the next lesser included offense, the failure to charge even remoter lesser included offenses could not have impacted the jury's verdict (*see Boettcher*, 69 NY2d at 180). Indeed, as the majority correctly notes, "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted" (CPL 300.40 [3] [b]).

Here, however, there was also a verdict of guilty on the lesser count due to the court's additional error in failing to charge the two counts in the alternative (*see* CPL 300.40 [3] [b]; 300.50 [4]), and it is well settled that "[a] verdict of guilty upon a lesser count is deemed an acquittal upon every greater count submitted" (CPL 300.40 [3] [b]). Due to the fact that the jury convicted defendant of both the greater count *and* the lesser count, defendant correctly contends that we "cannot know with certainty how the jury's deliberations would have been impacted if [it] had been instructed that [it] could convict [on] only one of the two counts." We are thus unable to determine whether we should deem the lesser count dismissed or deem there to be an acquittal on the greater count. Contrary to the *Boettcher* line of cases, the jury, by its verdict, did not "exclude[] from the case" or " 'necessarily eliminate[]' " all other lower degrees (*People v Richette*, 33 NY2d 42, 45-46 [1973]; *cf. Boettcher*, 69 NY2d at 180), and the verdict cannot be deemed an "implicit rejection" of the lesser

included offense that was charged (*People v Gorham*, 72 AD3d 1108, 1109 [2d Dept 2010], *lv denied* 15 NY3d 773 [2010]; *cf. People v Cephas*, 91 AD3d 668, 669 [2d Dept 2012], *lv denied* 19 NY3d 958 [2012]).

As the Court of Appeals has written, "[t]he fact that defendant was convicted of both offenses . . . does not establish that there was no significant probability the jury would have acquitted him of those charges and convicted him of [the remote lesser included offenses] if that option were available to it" (*Green*, 56 NY2d at 435-436). We note that the Court in *Boettcher* recognized that where, as here, the jury convicts the defendant of the lesser offense charged, there would be a basis for that defendant to claim that he or she "was prejudiced by the court's refusal to charge" the more remote lesser included offenses (*id.* at 180).

Finally, inasmuch as both murder in the second degree under Penal Law § 125.25 (1) and manslaughter in the first degree under section 125.20 (1) require either an intent to cause death or an intent to cause serious physical injury and the defense submitted evidence that defendant did not act with such intent, the failure to charge manslaughter in the second degree and criminally negligent homicide, which require lesser culpable mental states, cannot be deemed harmless because "the jury was not given a charge for an offense which would permit it to determine that the defendant [acted with a lesser culpable mental state]" (*People v Gilmore*, 243 AD2d 726, 727 [2d Dept 1997]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

521

CA 17-02093

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

ANDREW G. VANDEE, JERRY PHALEN, JAMES LYNCH, ROGER SLATER, RICHARD THOMAS, ELIJAH CLOSSON, WILLIAM PRINDLE AND SHAWN KIRK, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS-RESPONDENTS,

V MEMORANDUM AND ORDER

SUIT-KOTE CORPORATION, DEFENDANT-RESPONDENT-APPELLANT.

E. STEWART JONES HACKER MURPHY, LLP, TROY (RYAN M. FINN OF COUNSEL), FOR PLAINTIFFS-APPELLANTS-RESPONDENTS.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (BRIAN J. BUTLER OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered February 10, 2017. The order, among other things, denied the motion of plaintiffs for class certification.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by vacating the first and second ordering paragraphs and granting the motion and as modified the order is affirmed without costs.

Memorandum: Plaintiffs are members of a putative class of employees who allege that defendant, Suit-Kote Corporation, failed to pay them the prevailing wages required by article I, § 17 of the New York Constitution and section 220 (3) of the Labor Law. Plaintiffs appeal and defendant cross-appeals from an order that denied plaintiffs' motion for class certification pursuant to CPLR article 9 and that denied defendant's cross motion for, in effect, summary judgment dismissing the amended complaint.

We agree with plaintiffs on their appeal that Supreme Court erred in denying their motion, and we therefore modify the order accordingly. CPLR 901 (a) sets forth five prerequisites to class certification. Class certification "is appropriate only if all five of the requirements are met" (*Ferrari v Natl. Football League*, 153 AD3d 1589, 1591 [4th Dept 2017]), and the party seeking certification has the burden of establishing each requirement (*see Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481, 482-483 [1st Dept 2009]). "Once

the [CPLR 901] prerequisites are satisfied, the court must consider the [non-exclusive] factors set out in CPLR 902" in order to determine whether class certification should be granted (*Rife v Barnes Firm, P.C.*, 48 AD3d 1228, 1229 [4th Dept 2008], *lv dismissed in part and denied in part* 10 NY3d 910 [2008]).

Here, the court erred in determining that plaintiffs failed to establish the first and second CPLR 901 prerequisites, numerosity and commonality. Plaintiffs established the numerosity prerequisite by submitting evidence of approximately 350 class members at a minimum (*see Dabrowski v Abax Inc.*, 84 AD3d 633, 634 [1st Dept 2011]; *Kudinov*, 65 AD3d at 481). Plaintiffs established the commonality prerequisite because one common legal issue dominates the claims of all putative class members, i.e., whether similarly situated employees who worked on public projects were deprived of the prevailing wages to which they were entitled (*see City of New York v Maul*, 14 NY3d 499, 514 [2010]; *Cherry v Resource Am., Inc.*, 15 AD3d 1013, 1013 [4th Dept 2005]). Contrary to defendant's contention, the fact that the amount of damages will vary among the putative class members does not prevent this lawsuit from going forward as a class action (*see Borden v 400 E. 55th St. Assoc., L.P.*, 24 NY3d 382, 399 [2014]; *DeLuca v Tonawanda Coke Corp.*, 134 AD3d 1534, 1536 [4th Dept 2015]).

We reject defendant's alternative ground for denying the motion for class certification, namely, that plaintiffs failed to establish the remaining CPLR 901 prerequisites (*see generally Weinberg v Hertz Corp.*, 116 AD2d 1, 5-6 [1st Dept 1986], *affd* 69 NY2d 979 [1987]; *Ferrari*, 153 AD3d at 1592; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 144 [2d Dept 2008]). Contrary to defendant's further contention, the non-exclusive CPLR 902 factors weigh in favor of class certification.

We reject defendant's contention on its cross appeal that the court erred in denying its cross motion inasmuch as triable issues of fact exist with respect to whether defendant's payroll practices complied with Labor Law § 220 (3) and the corresponding regulations. Contrary to defendant's contention, its alleged failure to comply with 12 NYCRR 220.2 (d) is relevant to whether its payroll practices complied with section 220 (3). Finally, contrary to defendant's further contention, the amended complaint is not preempted by the federal Employee Retirement Income Security Act (*see HMI Mech. Sys., Inc. v McGowan*, 266 F3d 142, 145 [2d Cir 2001]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

566

CA 17-01943

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

DOUGLAS SOCHAN AND KIMBERLY SOCHAN,
PLAINTIFFS-RESPONDENTS,

V MEMORANDUM AND ORDER

STEVE MUELLER AND ELITE AUTO REPAIR OF
AUBURN, INC., DEFENDANTS-APPELLANTS.

SUGARMAN LAW FIRM, LLP, SYRACUSE (STEPHEN A. DAVOLI OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

FINE OLIN & ANDERMAN, LLP, NEWBURGH (VICTORIA LIGHTCAP OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered July 7, 2017. The order denied defendants' motion for summary judgment dismissing plaintiffs' complaint and granted plaintiffs' cross motion for partial summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying plaintiffs' cross motion and granting defendants' motion in part and dismissing the Labor Law § 241 (6) cause of action insofar as that cause of action is based upon the alleged violation of 12 NYCRR 23-1.21 (a), (b) (1), (2), (3) (ii), (iii); (4) (i), (iii-v); (5)-(10); (d), (e) and (f), and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this Labor Law and common-law negligence action seeking damages for injuries that Douglas Sochan (plaintiff) allegedly sustained while working for Verizon New York, Inc. on property owned by defendant Steve Mueller and on which Mueller operated his business, defendant Elite Auto Repair of Auburn, Inc. (Elite Auto). According to plaintiff, he fell and was injured when the ladder that he used to access a loft storage area "kick[ed] out" from under him. It is undisputed that the ladder used by plaintiff was the top half of an extension ladder that lacked any rubber feet and belonged to defendants. It is also undisputed that plaintiff's employer prohibited its employees from using customers' ladders or ladders without rubber feet, and that plaintiff had a stepladder and an extension ladder in his work truck, which he had driven to defendants' property. Plaintiffs alleged in the complaint that defendants were negligent and violated Labor Law §§ 240 (1) and 241 (6) inasmuch as they provided plaintiff with a defective ladder. With respect to the section 241 (6) cause of action, plaintiffs alleged

that defendants violated regulations 12 NYCRR 23-1.7 (f) and 23-1.21.

Defendants moved for summary judgment dismissing the complaint, and plaintiffs cross-moved for summary judgment on liability on the Labor Law § 240 (1) cause of action. Supreme Court denied defendants' motion and granted plaintiffs' cross motion. With respect to the Labor Law § 241 (6) cause of action, the court denied defendants' motion insofar as that cause of action was predicated on the alleged violations of 12 NYCRR 23-1.7 (f) and 23-1.21 (a), (b) (3), (4); (c) and (d). We note at the outset that the parties acknowledge that the court failed to address all of the alleged violations of 12 NYCRR 23-1.21. Generally, the failure to rule is deemed a denial of the motion (*see generally Brown v U.S. Vanadium Corp.*, 198 AD2d 863, 864 [4th Dept 1993]), but plaintiffs in their brief consent to the dismissal of their section 241 (6) cause of action insofar as it is based on the subdivisions of 23-1.21 that were not specifically addressed by the court, i.e., 12 NYCRR 23-1.21 (b) (1), (2), (5)-(10); (e) and (f). Plaintiffs also consent in their brief to the dismissal of that cause of action insofar as it is based on subdivisions of 23-1.21 (b) (3) and (4) upon which they do not rely, to wit: 12 NYCRR 23-1.21 (b) (3) (ii), (iii) and (4) (i), (iii-v). We therefore modify the order by granting that part of defendants' motion for summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based upon those claims that were specifically withdrawn by plaintiffs.

We agree with defendants that the court erred in granting plaintiffs' cross motion, and we therefore further modify the order accordingly, but we reject defendants' contention that the court erred in denying that part of their motion seeking summary judgment dismissing the Labor Law § 240 (1) cause of action. Defendants' own submissions, upon which plaintiffs relied in support of their cross motion, raised triable issues of fact whether plaintiff's "own conduct . . . was the sole proximate cause of his accident" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 40 [2004]; *see Gallagher v New York Post*, 14 NY3d 83, 88 [2010]; *Fazekas v Time Warner Cable, Inc.*, 132 AD3d 1401, 1404 [4th Dept 2015]).

We reject defendants' remaining contentions concerning the Labor Law § 240 (1) cause of action. Contrary to defendants' contention, we conclude that they failed to establish as a matter of law that plaintiff was neither " 'permitted or suffered to work on a building,' " nor hired by someone to do that work (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50-51 [2004]). We further conclude that defendants failed to establish as a matter of law that plaintiff was not engaged in an enumerated activity, i.e., altering a building or structure (*see e.g. Weininger v Hagedorn & Co.*, 91 NY2d 958, 959-960 [1998], *rearg denied* 92 NY2d 875 [1998]; *Schick v 200 Blydenburgh, LLC*, 88 AD3d 684, 686 [2d Dept 2011], *lv dismissed* 19 NY3d 876 [2012]), or repairing a building or structure (*see Cullen v AT&T, Inc.*, 140 AD3d 1588, 1589-1590 [4th Dept 2016]). It is of no moment that the injury occurred when plaintiff was doing his "pre-job survey" to determine the best way to perform his work inasmuch as " 'it is neither pragmatic nor consistent with the spirit of the

statute to isolate the moment of injury and ignore the general context of the work' " (*Saint v Syracuse Supply Co.*, 25 NY3d 117, 124 [2015], quoting *Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]). This is not a situation where the inspection and work fell into two separate and distinct phases of a larger project (*cf. Martinez v City of New York*, 93 NY2d 322, 326 [1999]).

Contrary to defendants' contention with respect to the Labor Law § 241 (6) cause of action, they failed to establish as a matter of law that they did not violate 12 NYCRR 23-1.7 (f), which concerns vertical passages. That regulation is sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Baker v City of Buffalo*, 90 AD3d 1684, 1685 [4th Dept 2011]), and plaintiff was "injured in the process of accessing" the elevated loft area (*Smith v Woods Constr. Co.*, 309 AD2d 1155, 1156 [4th Dept 2003]; *cf. Gielow v Coplon Home*, 251 AD2d 970, 972 [4th Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 1042 [1999], *rearg denied* 93 NY2d 889 [1999]). Contrary to defendants' further contention, the loft area constitutes a working level above ground even if it was generally used for only storage (*cf. Harrison v State of New York*, 88 AD3d 951, 953 [2d Dept 2011]; *Farrell v Blue Circle Cement, Inc.*, 13 AD3d 1178, 1179-1180 [4th Dept 2004], *lv denied* 4 NY3d 708 [2005]).

We agree with defendants, however, that they are entitled to summary judgment dismissing the Labor Law § 241 (6) cause of action insofar as it is based on an alleged violation of 12 NYCRR 23-1.21 (a). That regulation is not sufficiently specific to support a Labor Law § 241 (6) cause of action (*see Kin v State of New York*, 101 AD3d 1606, 1608 [4th Dept 2012]), and we therefore further modify the order accordingly.

To the extent that plaintiffs alleged that defendants violated 12 NYCRR 23-1.21 (b) (3) (i), (iv) and (4) (ii), we conclude that defendants failed to establish as a matter of law that those regulations were not violated or that any violation of those regulations was not a proximate cause of the accident (*see Estrella v GIT Indus., Inc.*, 105 AD3d 555, 555-556 [1st Dept 2013]; *De Oliveira v Little John's Moving*, 289 AD2d 108, 109 [1st Dept 2001]; *cf. Kozlowski v Ripin*, 60 AD3d 638, 639 [2d Dept 2009]).

Contrary to defendants' contention, 12 NYCRR 23-1.21 (c), which concerns single ladders, applies to this case inasmuch as the ladder being used by defendant was being used as a single ladder (*see* 12 NYCRR 23-1.4 [b] [50]). Moreover, defendants' reliance on *Partridge v Waterloo Cent. Sch. Dist.* (12 AD3d 1054 [4th Dept 2004]) is misplaced. In that case, we held that regulations concerning the exact specifications of a safety device were not applicable where the safety device was never actually provided to the injured plaintiff. Here, the safety device, i.e., the ladder, was used by plaintiff and, therefore, the regulations concerning the required specifications for that device are applicable.

Inasmuch as the ladder, which comprised only the top half of an

extension ladder, was being used as a single ladder, we agree with defendants that the regulation concerning extension ladders, i.e., 12 NYCRR 23-1.21 (d), is inapplicable to this case, and we therefore further modify the order accordingly.

Finally, we reject defendants' contention that the court erred in denying that part of their motion with respect to the common-law negligence cause of action. Where the injured worker's *employer* provides the allegedly defective equipment, the analysis turns on whether the defendant owner had the authority to supervise or control the work (*see Ortega v Puccia*, 57 AD3d 54, 61-62 [2d Dept 2008]). Where, however, the defendant *owner* provides the allegedly defective equipment, the legal standard "is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof" (*Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]; *see Ciesielski v Buffalo Indus. Park*, 299 AD2d 817, 819 [4th Dept 2002]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 224-225 [1st Dept 1999]), because in that situation the defendant property owner "is possessed of the authority, as owner, to remedy the condition" of the defective equipment (*Chowdhury*, 57 AD3d at 130). Contrary to defendants' contention, they failed to establish as a matter of law that they did not create the dangerous condition of the ladder or have either actual or constructive notice of it (*see id.*, 57 AD3d at 132; *cf. Dougherty v O'Connor*, 85 AD3d 1090, 1090 [2d Dept 2011]). Moreover, "the absence of rubber shoes on a ladder is a 'visible and apparent defect,' evidence of which may be sufficient to raise a triable issue of fact on the issue of constructive notice" (*Patrikis v Arniotis*, 129 AD3d 928, 929 [2d Dept 2015]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

573

KA 16-01087

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSE JUARBE, DEFENDANT-APPELLANT.

FRANK J. NEBUSH, JR., PUBLIC DEFENDER, UTICA (DAVID A. COOKE OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Oneida County Court (Barry M. Donalty, J.), rendered April 11, 2016. 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: On appeal from a judgment convicting him upon his plea of guilty of assault in the second degree (Penal Law § 120.05 [3]), defendant contends that his waiver of the right to appeal was not valid, and that his plea was not knowing, voluntary, and intelligent. Regardless of whether defendant's waiver of the right to appeal is valid, it does not preclude our review of his challenge to the validity of the plea because defendant's contention implicates the voluntariness of the plea (*see People v Copes*, 145 AD3d 1639, 1639 [4th Dept 2016], *lv denied* 28 NY3d 1182 [2017]). We further conclude that defendant's challenge to the voluntariness of his plea is not preserved for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction (*see People v Rosado*, 70 AD3d 1315, 1315-1316 [4th Dept 2010], *lv denied* 14 NY3d 892 [2010]). In any event, defendant's contention lacks merit. "Although it is well settled that '[a] defendant may not be induced to plead guilty by the threat of a heavier sentence if he [or she] decides to proceed to trial' . . . , the statements of the court at issue . . . 'amount to a description of the range of the potential sentences' rather than impermissible coercion . . . 'The fact that defendant may have pleaded guilty to avoid receiving a harsher sentence does not render his plea coerced' " (*People v Boyde*, 71 AD3d 1442, 1443 [4th Dept 2010], *lv denied* 15 NY3d 747 [2010]; *see People v Obbagy*, 147 AD3d 1296, 1297

[4th Dept 2017], *lv denied* 29 NY3d 1035 [2017]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

630

CA 17-01005

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

W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT,

V ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 1.)

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered July 29, 2016. The order denied defendants' motion to preclude plaintiff from offering certain evidence at trial.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Heyward v Shanne*, 114 AD3d 1212, 1213 [4th Dept 2013]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

631

CA 17-01006

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

W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT,

V ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 2.)

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 9, 2016. The order granted plaintiff's motion seeking summary judgment on the issue of liability and to dismiss defendants' affirmative defenses and counterclaims.

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: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

632

CA 17-01007

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

W. JAMES CAMPERLINO, PLAINTIFF-RESPONDENT,

V ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES, DEFENDANTS-APPELLANTS. (APPEAL NO. 3.)

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered August 24, 2016, upon a jury verdict. The judgment adjudged that plaintiff recover the sum of $287,222.83 from defendants.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Matter of Eric D.* [appeal No. 1], 162 AD2d 1051, 1051 [4th Dept 1990]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

633

CA 17-01008

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

W. JAMES CAMPERLINO,
PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC., DOING BUSINESS AS HERITAGE HOMES,
DEFENDANTS-APPELLANTS-RESPONDENTS.
(APPEAL NO. 4.)

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an amended judgment of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered February 2, 2017. The amended judgment adjudged that plaintiff recover the sum of $253,890.80 from defendants.

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

634

CA 17-01837

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

W. JAMES CAMPERLINO,
PLAINTIFF-APPELLANT,

V ORDER

DAN E. BARGABOS AND KENWOOD HOMES, INC.,
DOING BUSINESS AS HERITAGE HOMES,
DEFENDANTS-RESPONDENTS.
(APPEAL NO. 5.)

LONGSTREET & BERRY, LLP, FAYETTEVILLE (MICHAEL LONGSTREET OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PAPPAS, COX, KIMPEL, DODD & LEVINE, P.C., SYRACUSE, D.J. & J.A. CIRANDO, ESQS. (JOHN A. CIRANDO OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered January 25, 2017. The order, among other things, granted defendants' posttrial motion to correct the prejudgment interest rate.

It is hereby ORDERED that said appeal is unanimously dismissed without costs (*see Smith v Catholic Med. Ctr. of Brooklyn & Queens*, 155 AD2d 435, 435 [2d Dept 1989]; *see also* CPLR 5501 [a] [1]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

638

KA 15-01174

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER KATES, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

ALEXANDER KATES, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Monroe County Court (Douglas A. Randall, J.), rendered June 2, 2015. The judgment convicted defendant, upon his plea of guilty, of kidnapping in the second degree.

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

Memorandum: In appeal No. 1, defendant appeals from a judgment convicting him upon his plea of guilty of kidnapping in the second degree (Penal Law § 135.20). The plea satisfied several charges arising from an incident in which defendant, in concert with two other men, among other things, bound and threatened three family members inside their own apartment, obtained keys and the alarm code to the victims' jewelry store, and then stole jewelry from the store. In appeal No. 2, defendant appeals by permission of this Court from an order that, inter alia, denied his motion pursuant to CPL 440.10 seeking to vacate the judgment of conviction. We affirm in both appeals.

Addressing first the judgment in appeal No. 1, although defendant contends in his pro se supplemental brief that the felony complaints were jurisdictionally defective, "[t]he felony complaint[s were] superseded by the indictment to which defendant pleaded guilty, and he therefore may not challenge the felony complaint[s]" on appeal (*People v Anderson*, 90 AD3d 1475, 1477 [4th Dept 2011], *lv denied* 18 NY3d 991 [2012]; *see People v Mitchell*, 132 AD3d 1413, 1416 [4th Dept 2015], *lv denied* 27 NY3d 1072 [2016]).

Contrary to defendant's contention in his pro se supplemental

brief, the record establishes that his waiver of the right to appeal was knowing, intelligent, and voluntary (*see People v Joubert*, 158 AD3d 1314, 1315 [4th Dept 2018], *lv denied* — NY3d — [Apr. 26, 2018] [2018]; *People v Smith*, 138 AD3d 1497, 1497 [4th Dept 2016], *lv denied* 27 NY3d 1139 [2016]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). We conclude that the valid waiver of the right to appeal forecloses our review of defendant's challenges in his main brief to County Court's adverse suppression ruling (*see People v Sanders*, 25 NY3d 337, 342 [2015]; *People v Kemp*, 94 NY2d 831, 833 [1999]). Defendant further contends in his pro se supplemental brief that he was arrested without probable cause and thus that the court should have granted that part of his motion seeking suppression of all evidence obtained as a result of his arrest. That contention is also encompassed by his valid waiver of the right to appeal (*see Sanders*, 25 NY3d at 342; *Kemp*, 94 NY2d at 833) and, moreover, defendant forfeited the right to raise that suppression issue on appeal inasmuch as he pleaded guilty before the court issued a ruling thereon (*see People v Fernandez*, 67 NY2d 686, 688 [1986]; *People v Russell*, 128 AD3d 1383, 1384 [4th Dept 2015], *lv denied* 25 NY3d 1207 [2015]).

We reject defendant's contention in his main brief that the court failed to make an appropriate inquiry into his request for substitution of his assigned counsel, which he made during an appearance prior to the plea proceeding. Defendant's contention " 'is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea' " (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012]; *see People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]). Defendant nonetheless "abandoned his request for new counsel when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*Guantero*, 100 AD3d at 1387; *see Morris*, 94 AD3d at 1451). In any event, defendant's contention lacks merit inasmuch as the record establishes that "the court made a sufficient inquiry into defendant's complaints concerning the alleged [breakdown in] communication between defendant and defense counsel. The court repeatedly allowed defendant to air his concerns about defense counsel, and after listening to them reasonably concluded that defendant's vague and generic objections had no merit or substance . . . , and thus defendant's objections were insufficient to demonstrate good cause for substitution of counsel" (*People v Larkins*, 128 AD3d 1436, 1441 [4th Dept 2015], *lv denied* 27 NY3d 1001 [2016] [internal quotation marks omitted]; *see People v Linares*, 2 NY3d 507, 510-511 [2004]). " '[A]t most, defendant's allegations evinced disagreements with counsel over strategy . . . , which were not sufficient grounds for substitution' " (*Larkins*, 128 AD3d at 1440; *see Linares*, 2 NY3d at 511).

Defendant further contends in his main brief that his plea was not voluntarily entered because he was not informed of its direct consequences prior to pleading guilty. We reject that contention. "It is well settled that, in order for a plea to be knowingly, voluntarily and intelligently entered, a defendant must be advised of

the direct consequences of that plea" (*People v Jones*, 118 AD3d 1360, 1361 [4th Dept 2014]; *see People v Harnett*, 16 NY3d 200, 205 [2011]; *People v Catu*, 4 NY3d 242, 244 [2005]). "The direct consequences of a plea—those whose omission from a plea colloquy makes the plea per se invalid—are essentially the core components of a defendant's sentence: a term of probation or imprisonment, a term of postrelease supervision, a fine" (*Harnett*, 16 NY3d at 205). Here, although defendant's contention concerning the voluntariness of the plea survives his valid waiver of the right to appeal (*see People v Neal*, 148 AD3d 1699, 1699-1700 [4th Dept 2017], *lv denied* 29 NY3d 1084 [2017]), preservation was required inasmuch as defendant was advised of the sentence, including its period of postrelease supervision, during the plea proceeding, and defendant failed to preserve his contention for our review because he did not move to withdraw the plea on that ground or otherwise object to the imposition of the sentence (*see People v Williams*, 27 NY3d 212, 219-223 [2016]; *People v Crowder*, 24 NY3d 1134, 1136-1137 [2015]; *People v Murray*, 15 NY3d 725, 726-727 [2010]; *cf. People v Louree*, 8 NY3d 541, 545-546 [2007]). In any event, we conclude that defendant's challenge to the voluntariness of the plea is without merit inasmuch as the record establishes that he was advised during the plea proceeding of the direct consequences of his plea, including the term of imprisonment and period of postrelease supervision (*see People v Munn*, 105 AD3d 1456, 1456 [4th Dept 2013], *lv denied* 21 NY3d 1007 [2013], *reconsideration denied* 22 NY3d 1042 [2013]; *People v Ivey*, 98 AD3d 1230, 1231 [4th Dept 2012], *lv denied* 20 NY3d 1012 [2013]; *People v McPherson*, 60 AD3d 872, 872 [2d Dept 2009]).

To the extent that defendant challenges the factual sufficiency of his plea allocution in his pro se supplemental brief, that challenge is encompassed by the valid waiver of the right to appeal (*see People v Busch*, 60 AD3d 1393, 1394 [4th Dept 2009], *lv denied* 12 NY3d 913 [2009]). Although defendant's further contention in his pro se supplemental brief that his plea was involuntary survives his waiver of the right to appeal (*see People v Seaberg*, 74 NY2d 1, 10 [1989]), defendant failed to preserve that contention for our review inasmuch as he did not move to withdraw his plea or to vacate the judgment of conviction on the grounds now raised on appeal (*see People v VanDeViver*, 56 AD3d 1118, 1118 [4th Dept 2008], *lv denied* 11 NY3d 931 [2009], *reconsideration denied* 12 NY3d 788 [2009]), and this case does not fall within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 666 [1988]).

With respect to the judgment in appeal No. 1, defendant contends in his pro se supplemental brief that the record establishes that he was denied effective assistance of counsel. With respect to the order in appeal No. 2, defendant contends in his main and pro se supplemental briefs that the court should have granted his motion pursuant to CPL 440.10 to vacate the judgment because the plea was infected by ineffective assistance of counsel and was otherwise involuntary or, at minimum, that he is entitled to a hearing thereon. We reject those contentions.

"Where, as here, a defendant contends that he or she was denied the right to effective assistance of counsel guaranteed by both the Federal and New York State Constitutions, we evaluate the claim using the state standard, which affords greater protection than its federal counterpart" (*People v Conway*, 148 AD3d 1739, 1741 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]; *see People v Stultz*, 2 NY3d 277, 282 [2004], *rearg denied* 3 NY3d 702 [2004]). Under the state standard, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the constitutional requirement will have been met" (*People v Baldi*, 54 NY2d 137, 147 [1981]; *see People v Benevento*, 91 NY2d 708, 712 [1998]). "In the context of a guilty plea, a defendant has been afforded meaningful representation when he or she receives an advantageous plea and nothing in the record casts doubt on the apparent effectiveness of counsel" (*People v Ford*, 86 NY2d 397, 404 [1995]; *see People v Hoyer*, 119 AD3d 1457, 1458 [4th Dept 2014]). Inasmuch as defendant "bears the burden of establishing his [or her] claim that counsel's performance is constitutionally deficient[,] . . . defendant must demonstrate the absence of strategic or other legitimate explanations for counsel's alleged failure[s]" (*People v Pavone*, 26 NY3d 629, 646 [2015]; *see People v Satterfield*, 66 NY2d 796, 799-800 [1985]).

Here, to the extent that defendant's contention in appeal No. 1 in his pro se supplemental brief that he was denied effective assistance of counsel survives the plea and his valid waiver of the right to appeal (*see People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016]), we conclude that his contention lacks merit (*see generally Ford*, 86 NY2d at 404).

Addressing the order in appeal No. 2, we conclude that the court properly determined that defendant received meaningful representation. Defense counsel, among other things, successfully sought suppression of significant evidence against defendant and negotiated an advantageous plea bargain that greatly reduced defendant's maximum sentencing exposure of 25 years to life imprisonment had he been convicted of the top count of kidnapping in the first degree (Penal Law § 135.25 [2] [b]; *see* § 70.00 [2] [a]; [3] [a] [i]), and nothing in the record casts doubt on the apparent effectiveness of defense counsel (*see People v Lewis*, 138 AD3d 1346, 1348-1349 [3d Dept 2016], *lv denied* 28 NY3d 1073 [2016]; *People v Loomis*, 256 AD2d 808, 808 [3d Dept 1998], *lv denied* 93 NY2d 854 [1999]).

The court also properly denied defendant's motion pursuant to CPL 440.10 without a hearing because, "given the nature of the claimed ineffective assistance, the motion could be determined on the trial record and defendant's submissions on the motion" (*Satterfield*, 66 NY2d at 799; *see People v Witkop*, 114 AD3d 1242, 1243 [4th Dept 2014], *lv denied* 23 NY3d 1069 [2014]). Defendant asserted in his supporting affidavit that defense counsel was ineffective because, despite defendant's requests, defense counsel failed to investigate certain items of allegedly exculpatory evidence. Although it is well settled that a "defendant's right to representation . . . entitle[s] him [or

her] to have counsel 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself [or herself] time for reflection and preparation for trial' " (*People v Bennett*, 29 NY2d 462, 466 [1972]; *see People v Oliveras*, 21 NY3d 339, 346-347 [2013]), it is also well settled that a claim of ineffective assistance "requires proof of less than meaningful representation, rather than simple disagreement with strategies and tactics" (*People v Rivera*, 71 NY2d 705, 708-709 [1988]). Defendant's supporting affidavit demonstrated that defense counsel addressed with defendant the issue whether an investigation into the allegedly exculpatory evidence would be fruitful and expressed his opinion that such evidence was not relevant or could be used by the prosecution against defendant. Inasmuch as the record established that defense counsel, as a matter of strategy and tactics, exercised professional judgment in declining to pursue evidence that he considered unhelpful and potentially harmful to the defense (*see People v Schramm*, 172 AD2d 1048, 1048 [4th Dept 1991], *lv denied* 78 NY2d 974 [1991]), the court properly determined that defendant failed to demonstrate the absence of a strategic or other legitimate explanation for defense counsel's alleged failure to investigate, and that defendant's mere disagreement with the investigation strategy was insufficient to establish that defense counsel was ineffective (*see People v McCullough*, 144 AD3d 1526, 1527 [4th Dept 2016], *lv denied* 29 NY3d 999 [2017]).

Defendant further contends in his pro se supplemental brief that, as alleged in his motion, defense counsel failed to advise him at the time of the plea that he would be required to sign a document at sentencing admitting his status as a predicate felon. The court properly concluded, however, that defendant conceded in his supporting affidavit that he was aware that the plea bargain required that he acknowledge being previously convicted of a felony, and that any failure by defense counsel to explain that defendant would also have to sign a document to that effect does not constitute ineffective assistance.

Contrary to defendant's further contention in his pro se supplemental brief, the court properly determined that documentary proof submitted by defendant conclusively refuted defendant's claim that the plea was involuntary because it was induced by an unfulfilled promise (*see* CPL 440.30 [4] [c]).

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

639

KA 16-02022

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER KATES, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

ALEXANDER KATES, DEFENDANT-APPELLANT PRO SE.

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

Appeal, by permission of a Justice of the Appellate Division of the Supreme Court in the Fourth Judicial Department, from an order of the Monroe County Court (Douglas A. Randall, J.), entered August 19, 2016. The order, inter alia, denied defendant's motion pursuant to CPL 440.10 to vacate the judgment convicting him of kidnapping in the second degree.

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

Same memorandum as in *People v Kates* ([appeal No. 1] — AD3d — [June 15, 2018] [4th Dept 2018]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

642

KA 15-02168

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRUCE SEARIGHT, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KAITLYN M. GUPTILL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered September 21, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree (two counts).

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

Memorandum: On appeal from a judgment convicting him, upon his plea of guilty, of two counts of criminal possession of a controlled substance in the third degree (Penal Law § 220.16 [1], [12]), defendant contends that Supreme Court erred in denying that part of his omnibus motion seeking suppression of evidence seized as the result of his allegedly illegal arrest. In his omnibus motion defendant anticipated that the People would claim that his stop, detention and ultimately his arrest were "based upon some bulletin or electronic communication received by the arresting officer," and he "specifically challenge[d] the reliability of any such communication to the arresting officer, including anything conveyed from a police data base." Defendant requested "a hearing on the issue of probable cause to stop or arrest, as well as the reliability and sufficiency of any radio transmission or other direction to investigate [him] or his vehicle."

At the suppression hearing, the People called two Syracuse police officers who testified concerning their stop of the vehicle driven by defendant based upon two traffic infractions, i.e., operating a motor vehicle without a license (Vehicle and Traffic Law § 509 [1]) and

failing to signal his intention to turn the requisite distance before turning right at an intersection (§ 1163 [b]). After the stop, the officers obtained information through the New York State Police Information Network (NYSPIN) that a warrant had been issued for defendant in the City of Cortland for felony drug charges. One of the officers communicated with the 911 Center to obtain further information concerning the warrant. The 911 Center reported to him that the Cortland Police Department had confirmed that there was an active warrant and had requested that defendant be held until an officer of that department could take him into custody. The officers placed defendant under arrest based upon the warrant and transported him to the Criminal Investigation Division (CID). At CID one of the arresting officers asked defendant if he had anything illegal on his person and defendant produced two baggies containing cocaine, resulting in the present charges.

We agree with defendant that the court erred in refusing to suppress defendant's statements and tangible property, including the cocaine, seized as the result of his arrest, inasmuch as the People failed to meet their burden of showing the legality of the police conduct in arresting defendant in the first instance (*see People v Lopez*, 206 AD2d 894, 894 [4th Dept 1994], *lv denied* 84 NY2d 937 [1994]). "Under the 'fellow officer' rule, '[a] police officer is entitled to act on the strength of a radio bulletin or a telephone or teletype alert from a fellow officer or department and to assume its reliability' " (*People v Rosario*, 78 NY2d 583, 588 [1991], *cert denied* 502 US 1109 [1992], quoting *People v Lypka*, 36 NY2d 210, 213 [1975]). Under those circumstances, the agency or officer transmitting the information presumptively possesses the requisite probable cause to arrest (*see id.*). However, where, as here, defendant challenges the reliability of the information transmitted to the arresting officers, "the presumption of probable cause disappears and it becomes incumbent upon the People to establish that the officer or agency imparting the information[] in fact possessed the probable cause to act" (*id.*; *see Lypka*, 36 NY2d at 214).

The People failed to meet that burden. Despite defendant's explicit challenge to the reliability of the information justifying his arrest (*see Rosario*, 78 NY2d at 588; *People v Ynoa*, 223 AD2d 975, 977 [3d Dept 1996], *lv denied* 87 NY2d 1027 [1996]; *cf. People v Fenner*, 61 NY2d 971, 973 [1984]), the People did not produce the arrest warrant itself prior to the conclusion of the hearing (*see Lopez*, 206 AD2d at 894; *People v McLoyd*, 35 Misc 3d 822, 828 [Sup Ct, NY County 2012]). Instead, the People relied upon the officer's testimony concerning his communications with an unidentified person or persons at the 911 Center and his assumptions about how the 911 Center confirmed the existence of an active and valid warrant. That testimony, however, rested "on a pyramid of hearsay, the information having been passed from" the arresting officer to unidentified persons at the 911 Center and the Cortland Police Department and back to the officer (*People v Havelka*, 45 NY2d 636, 641 [1978]). "In making an arrest, a police officer may rely upon information communicated to him by another police officer that an individual is the subject named in a warrant and should be taken into custody in the execution of the

warrant . . . However, if the warrant turns out to be invalid or vacated . . . [,] or nonexistent . . . , any evidence seized as a result of the arrest will be suppressed notwithstanding the reasonableness of the arresting officer's reliance upon the communication" (*People v Lee*, 126 AD2d 568, 569 [2d Dept 1987]; *see People v Jennings*, 54 NY2d 518, 520 [1981]; *People v Lent*, 92 AD2d 941, 941 [2d Dept 1983]). Here, without producing the arrest warrant itself or reliable evidence that the warrant was active and valid, the People did not meet their burden of establishing that defendant's arrest was based on probable cause (*see Lopez*, 206 AD2d at 894).

We therefore conclude that the court should have granted that part of defendant's omnibus motion seeking to suppress his statements and tangible property obtained as the result of his illegal arrest, and defendant's guilty plea must be vacated (*see People v Stock*, 57 AD3d 1424, 1425 [4th Dept 2008]). Because our determination results in the suppression of all evidence supporting the crimes charged, the indictment must be dismissed (*see id.*).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

647

CA 18-00183

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

COLLEEN M. ZBOCK, AS ADMINISTRATRIX OF THE
ESTATE OF JOHN P. ZBOCK, JR., DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL B. GIETZ, DEFENDANT,
PHILLIP C. FOURNIER, FOURNIER ENTERPRISES, INC.,
AND COPE BESTWAY EXPRESS, INC., DOING BUSINESS
AS BESTWAY DISTRIBUTION SERVICE,
DEFENDANTS-APPELLANTS.

BURDEN, HAFNER & HANSEN, LLC, BUFFALO (PHYLISS A. HAFNER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

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

Appeal from an order of the Supreme Court, Erie County (Mark Montour, J.), entered December 1, 2017. The order denied the motion of defendants Phillip C. Fournier, Fournier Enterprises, Inc., and Cope Bestway Express, Inc., doing business as Bestway Distribution Service, to bifurcate the trial.

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

Memorandum: Plaintiff, as administratrix of decedent's estate, commenced this action seeking damages for decedent's wrongful death and conscious pain and suffering allegedly resulting from a motor vehicle accident. Among the vehicles involved in the accident was a tractor-trailer owned by defendants Fournier Enterprises, Inc. and Cope Bestway Express, Inc., doing business as Bestway Distribution Service, and operated by defendant Phillip C. Fournier (collectively, Fournier defendants). On a prior appeal, we determined that Supreme Court (Drury, J.), inter alia, properly denied those parts of the motion of the Fournier defendants seeking summary judgment on the issues of negligence, proximate cause and the applicability of the emergency doctrine, and seeking dismissal of plaintiff's claim for damages based upon decedent's preimpact terror (*Zbock v Gietz*, 145 AD3d 1521, 1522-1523 [4th Dept 2016]).

Following our decision in the prior appeal, the Fournier defendants moved to bifurcate the liability and damages portions of

the trial. We conclude that Supreme Court (Montour, J.) did not abuse its discretion in denying their motion. "As a general rule, '[i]ssues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately' " (*Wesselenyi v Santiago* [appeal No. 1], 286 AD2d 964, 964 [4th Dept 2001]; *see Piccione v Tri-main Dev.*, 5 AD3d 1086, 1087 [4th Dept 2004]). Here, however, plaintiff established that bifurcation would not assist in clarification or simplification of the issues or a more expeditious resolution of the action (*see Carlson v Porter* [appeal No. 2], 53 AD3d 1129, 1131 [4th Dept 2008], *lv denied* 11 NY3d 708 [2008]; *Mazur v Mazur*, 288 AD2d 945, 945-946 [4th Dept 2001]). Inasmuch as plaintiff seeks damages for decedent's alleged preimpact terror, "the proof of [his] injury would overlap with the proof regarding liability [and thus] the nature of the alleged injuries is intertwined with the question of liability" (*Barron v Terry*, 268 AD2d 760, 762 [3d Dept 2000]; *see Carpenter v County of Essex*, 67 AD3d 1106, 1108 [3d Dept 2009]). In addition, we note that the court was in the best position to evaluate the contentions of the Fournier defendants that a defense verdict on liability "was likely so as to obviate the necessity of a second trial" (*Johnson v Hudson Riv. Constr. Co., Inc.*, 13 AD3d 864, 865 [3d Dept 2004]), and that settlement was likely if they did not prevail at the liability phase of a bifurcated trial (*see Carpenter*, 67 AD3d at 1107 n 2; *Johnson*, 13 AD3d at 865), and we decline to disturb the court's exercise of discretion in declining to bifurcate the trial on those grounds here.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

658

CA 17-01793

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

MARGARET A. LUTTRELL, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JULIO R. VEGA, DEFENDANT-RESPONDENT.

FARACI LANGE, LLP, ROCHESTER (KRISTIN A. MERRICK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

LAW OFFICE OF JENNIFER S. ADAMS, WILLIAMSVILLE (SHAYNA D. GORSKI OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (J. Scott Odorisi, J.), entered May 9, 2017. The order, insofar as appealed from, granted the motion of defendant for summary judgment dismissing the complaint and denied that part of the cross motion of plaintiff for summary judgment on the issue of serious injury.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, defendant's motion is denied, the complaint is reinstated and that part of plaintiff's cross motion for partial summary judgment on the issue of serious injury is granted.

Memorandum: Plaintiff commenced this negligence action seeking damages for injuries that she sustained when a vehicle operated by defendant struck her foot while she was walking her bicycle on the street beneath an overpass. We agree with plaintiff, as limited by her brief, that Supreme Court erred in granting defendant's motion for summary judgment dismissing the complaint and denying that part of plaintiff's cross motion for partial summary judgment on the issue of serious injury.

Viewing the evidence in the light most favorable to plaintiff and affording her the benefit of every reasonable inference (*see Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]), we conclude that defendant failed to meet his initial burden on his motion of establishing as a matter of law that plaintiff's negligence was the sole proximate cause of the accident (*see Chilinski v Maloney*, 158 AD3d 1174, 1175-1176 [4th Dept 2018]). Defendant's own submissions raise triable issues of fact, including whether he violated his " 'common-law duty to see that which he should have seen [as a driver] through the proper use of his senses' " (*Sauter v Calabretta*, 90 AD3d 1702, 1703 [4th Dept 2011]) and his statutory duty to "exercise due

care to avoid colliding with any bicyclist[or] pedestrian" (Vehicle and Traffic Law § 1146 [a]).

Finally, it is uncontested that plaintiff established as a matter of law on her cross motion that she sustained fractures in her foot as a result of the accident and, therefore, she is entitled to partial summary judgment on the issue of serious injury (*see* Insurance Law § 5102 [d]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

667

KA 13-01471

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT COTTON, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Joanne M. Winslow, J.), rendered July 30, 2013. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and 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 murder in the second degree (Penal Law §§ 110.00, 125.25 [1]) and assault in the first degree (§ 120.10 [1]). Contrary to defendant's contention, he was not denied his right to present a defense by the prosecutor's refusal to request that the court confer immunity on a defense witness who would not agree to testify without immunity. It is well settled that the decision of a District Attorney to request immunity for a witness is discretionary " 'and not reviewable unless the District Attorney acts with bad faith to deprive a defendant of his or her right to a fair trial' " (*People v Bolling*, 24 AD3d 1195, 1196 [4th Dept 2005], *affd* 7 NY3d 874 [2006]; *see People v Swank*, 109 AD3d 1089, 1090 [4th Dept 2013], *lv denied* 23 NY3d 968 [2014]; *see generally* CPL 50.30), and here the record is devoid of evidence of bad faith (*see People v Adams*, 53 NY2d 241, 247-248 [1981]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that he was incorrectly sentenced as a second violent felony offender. Defendant's prior conviction of criminal possession of a weapon in the third degree pursuant to former Penal Law § 265.02 (4), which was recodified in 2006 as the crime of criminal possession of a weapon in the second

degree (*see* § 265.03 [3]), was properly considered a predicate violent felony conviction (*see People v Smith*, 27 NY3d 652, 670 [2016]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

676

CA 17-02001

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

TROY L. SHUKNECHT AND LISA SHUKNECHT,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

JOAN SHUKNECHT, DEFENDANT-RESPONDENT.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

LACY KATZEN LLP, ROCHESTER (MICHAEL J. WEGMAN OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Genesee County (Henry J. Nowak, Jr., J.), entered August 2, 2017. The order, inter alia, granted the motion of defendant for summary judgment on her second counterclaim.

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

Memorandum: On a prior appeal involving this property dispute, defendant appealed from an order and judgment that granted plaintiffs' motion for a directed verdict dismissing the counterclaims (*Shuknecht v Shuknecht*, 147 AD3d 1349, 1350 [4th Dept 2017]). This Court reversed the order and judgment, denied the motion, reinstated the counterclaims, and granted a new trial thereon (*id.*). Upon remittal, defendant moved for summary judgment with respect to the second counterclaim. Plaintiffs now appeal from an order that, inter alia, granted that motion, and we affirm.

Plaintiffs failed to preserve for our review their contention that defendant's motion under CPLR 3212 (a) is untimely, and thus that contention is not properly before us (*see Moreira-Brown v City of New York*, 109 AD3d 761, 761 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]; *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). With respect to the merits, we conclude that Supreme Court properly granted the motion. Defendant met her initial burden by submitting plaintiffs' admissions on the prior appeal that defendant owned the property at issue and that plaintiffs were obligated and failed to pay the property taxes and insurance, and plaintiffs failed to raise an issue of fact in opposition (*see generally Zuckerman v City of New*

York, 49 NY2d 557, 562 [1980]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

681

CA 18-00142

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

IN THE MATTER OF HOPE DAY CARE, LLC, THERESA GILES, MANAGER, HOPE DAY CARE, LLC , AND TIARA LOVE, DIRECTOR, HOPE DAY CARE, LLC, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

NEW YORK STATE OFFICE OF CHILDREN & FAMILY SERVICES DIVISION OF CHILD CARE SERVICES, RESPONDENT-RESPONDENT.

COHEN COMPAGNI BECKMAN APPLER & KNOLL, PLLC, SYRACUSE (LAURA L. SPRING OF COUNSEL), FOR PETITIONERS-APPELLANTS.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (PATRICK A. WOODS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Onondaga County (Anthony J. Paris, J.), entered November 28, 2017 in a proceeding pursuant to CPLR article 78. The judgment, among other things, dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determination is confirmed without costs and the petition is dismissed.

Memorandum: Petitioners commenced this CPLR article 78 proceeding seeking to annul respondent's determination revoking their license to operate a daycare center. We note at the outset that Supreme Court should have transferred the entire proceeding to this Court because the petition raises a substantial evidence question and petitioners' remaining contentions do not constitute "objections that could have terminated the proceeding within the meaning of CPLR 7804 (g)" (*Matter of Quintana v City of Buffalo*, 114 AD3d 1222, 1223 [4th Dept 2014], *lv denied* 23 NY3d 902 [2014]). We therefore vacate the judgment (*see Matter of Hoch v New York State Dept. of Health*, 1 AD3d 994, 994-995 [4th Dept 2003]), and "because the record is now before us, we will 'treat the proceeding as if it had been properly transferred here in its entirety' . . . and review [petitioners'] contentions de novo" (*Quintana*, 114 AD3d at 1223).

Contrary to petitioners' contention, the determination is supported by substantial evidence (*see Matter of Briggs v New York State Off. of Children & Family Servs.*, 142 AD3d 1284, 1284-1285 [4th

Dept 2016]; *Matter of Gates of Goodness & Mercy v Johnson*, 49 AD3d 1295, 1295 [4th Dept 2008]). The evidence at the fair hearing established that petitioners allowed their liability insurance to lapse for a year and a half, which is a clear violation of 18 NYCRR 418-1.15 (c) (28). Additionally, the evidence established that petitioners violated regulations by placing a 27-month-old child in the same classroom with infants who were less than 18 months old (*see* 18 NYCRR 418-1.8 [l] [7]), placing children under three years of age in classrooms with children of mixed age groups (*see* 18 NYCRR 418-1.8 [l] [8]), and seating a child in a high chair with a loose safety strap (*see* 18 NYCRR 418-1.5 [ab] [2]).

We further conclude that the penalty is not " 'so disproportionate to the offenses as to be shocking to one's sense of fairness' " (*Matter of Kelly v Safir*, 96 NY2d 31, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of Fundergurg v New York State Off. of Children & Family Servs.*, 148 AD3d 1667, 1668 [4th Dept 2017]). Here, the four regulatory violations, especially the lapse of insurance coverage, "exposed the child[ren] to a significant risk of harm" (*Briggs*, 142 AD3d at 1284), and we perceive no error in respondent also considering petitioners' prior history of approximately 160 regulatory violations inasmuch as those violations were raised in the administrative proceedings (*cf. Matter of Lewis v New York State Off. of Children & Family Servs.*, 114 AD3d 1065, 1067 [3d Dept 2014]).

Finally, we reject petitioners' contention that respondent's failure to conduct follow-up visits after the final inspection renders the determination arbitrary and capricious. While an agency's failure to comply with its own rules and regulations has been determined to be arbitrary and capricious (*see Matter of Church v Wing*, 229 AD2d 1019, 1020 [4th Dept 1996]; *see also St. Joseph's Hosp. Health Ctr. v Department of Health of State of N.Y.*, 247 AD2d 136, 155 [4th Dept 1998], *lv denied* 93 NY2d 803 [1999]), its failure to comply with an informal practice will be deemed arbitrary only if the departure is substantial and without explanation (*see Matter of Brusco v State of New York Div. of Hous. & Community Renewal*, 239 AD2d 210, 212 [1st Dept 1997]). Here, it is undisputed that respondent had no rules or regulations requiring follow-up visits after inspections to determine whether the regulatory violations had been cured. To the extent that it had such an informal policy, it was reasonable for respondent to follow-up by telephone to determine whether petitioners had obtained liability insurance because that determination did not require personal observation. With respect to the remaining regulatory violations, the record establishes that some of those violations were repeat violations, and therefore the fact that they may have been cured was insufficient to establish that petitioners would cease harmful practices. Thus, petitioners failed to demonstrate that respondent acted irrationally in departing from its practice of conducting follow-up visits under the circumstances (*see generally Matter of Staley v New York State Dept. of Corr. & Community*

Supervision, 145 AD3d 1160, 1163 [3d Dept 2016]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

686

KA 16-01320

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

RYAN PERKINS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (DEBORAH K. JESSEY 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 (John L. Michalski, A.J.), entered June 24, 2016. The judgment convicted defendant, upon his plea of guilty, of driving while intoxicated, a class D felony, and aggravated unlicensed operation of a motor vehicle in the second degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence of conditional discharge imposed on count one and the term of incarceration imposed on count two and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing on those parts of the sentences on those counts.

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of driving while intoxicated (DWI) as a class D felony (Vehicle and Traffic Law §§ 1192 [3]; 1193 [1] [c] [ii]), and aggravated unlicensed operation of a motor vehicle in the second degree (§ 511 [2] [a] [ii]), defendant contends that his waiver of the right to appeal is invalid, and he challenges that part of the sentence imposed in his absence, the legality of the term of conditional discharge, and the severity of the sentence.

Addressing first defendant's contention that Supreme Court erred in changing the term of incarceration imposed on the aggravated unlicensed operation of a motor vehicle count after he had left the courtroom, we note that such contention is properly before us regardless of the validity of defendant's waiver of the right to appeal. "[D]efendants have a 'fundamental right to be present at sentencing' in the absence of a waiver" of that right (*People v Estremera*, 30 NY3d 268, 272 [2017], quoting *People v Rossborough*, 27 NY3d 485, 488 [2016]), and here defendant did not waive his right to be present at sentencing. Thus, as the People correctly concede, the

court erred in changing the sentence of incarceration after defendant left the courtroom inasmuch as a resentencing to correct an error in a sentence "must be done in the defendant's presence" (*Matter of Brandon v Doran*, 149 AD3d 1583, 1583 [4th Dept 2017]; *see People v Johnson*, 19 AD3d 1163, 1164 [4th Dept 2005], *lv denied* 5 NY3d 829 [2005]). We therefore modify the judgment by vacating the term of incarceration imposed on count two, and we remit the matter to Supreme Court for resentencing on that count, at which time defendant must be permitted to appear.

We likewise review defendant's challenge to the legality of the conditional discharge imposed regardless of the validity of his waiver of the right to appeal. It is well settled that "several categories of appellate claims . . . may not be waived . . . These include . . . challenges to the legality of court-imposed sentences" (*People v Callahan*, 80 NY2d 273, 280 [1992]). As the People further correctly concede, the court erred in imposing a five-year conditional discharge to monitor the ignition interlock device because the maximum term of a conditional discharge for a felony is three years (*see* Penal Law § 65.05 [3] [a]; *People v Marvin*, 108 AD3d 1109, 1109 [4th Dept 2013]). We therefore further modify the judgment by vacating the conditional discharge imposed on count one, and we direct that defendant, upon remittal, be resentenced on that part of the sentence on that count as well.

Finally, even assuming, arguendo, that defendant's waiver of the right to appeal was not valid (*cf. People v Sanders*, 25 NY3d 337, 338-342 [2015]; *People v Nicholson*, 6 NY3d 248, 254-257 [2006]), we reject defendant's challenge to the severity of the sentence.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

699

CA 17-01917

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

ONDREA CLARK, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM LOFTUS, M.D., AND LOFTUS &
RYU, M.D.'S P.C., DEFENDANTS-APPELLANTS.

MARTIN, GANOTIS, BROWN, MOULD & CURRIE, P.C., DEWITT (CHARLES E. PATTON OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ROBERT E. LAHM, PLLC, SYRACUSE (ROBERT E. LAHM OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered August 22, 2017. The order granted the motion of plaintiff to set aside a jury verdict and ordered a new trial on the issue of negligence.

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

Memorandum: Plaintiff commenced this medical malpractice action seeking damages for injuries she allegedly sustained as the result of complications following a surgical procedure performed by William Loftus, M.D. (defendant). At trial, plaintiff and defendants presented conflicting expert testimony concerning defendant's alleged negligence, and Supreme Court's charge to the jury on negligence included instructions on the doctrine of res ipsa loquitur. The jury returned a verdict finding that defendant was not negligent and plaintiff moved to set aside the verdict as against the weight of the evidence and for a new trial, and in the alternative sought judgment notwithstanding the verdict. The court granted the motion upon determining that the verdict was against the weight of the evidence and directed a new trial on the issue of negligence, including the doctrine of res ipsa loquitur. We reverse the order and reinstate the verdict.

"It is well established that [a] verdict rendered in favor of a defendant may be successfully challenged as against the weight of the evidence only when the evidence so preponderated in favor of the plaintiff that it could not have been reached on any fair interpretation of the evidence" (*McMillian v Burden*, 136 AD3d 1342, 1343 [4th Dept 2016] [internal quotation marks omitted]; *see Lolik v*

Big V Supermarkets, 86 NY2d 744, 746 [1995]). "Where a verdict can be reconciled with a reasonable view of the evidence, the successful party is entitled to the presumption that the jury adopted that view" (*Schreiber v University of Rochester Med. Ctr.*, 88 AD3d 1262, 1263 [4th Dept 2011] [internal quotation marks omitted]).

Here, there was sharply conflicting expert testimony with respect to whether plaintiff's postoperative symptoms could have occurred without negligence on the part of defendant, and the jury was entitled to credit the testimony of defendants' experts and reject the testimony of plaintiff's expert (*see McMillian*, 136 AD3d at 1344). We conclude that the court erred in setting aside the verdict as against the weight of the evidence inasmuch as "the jury had ample basis to conclude that plaintiff's postoperative condition was not attributable to any deviation from accepted community standards of medical practice by defendant" (*Frasier v McIlduff*, 161 AD2d 856, 859 [3d Dept 1990]), and thus the jury's finding that defendant was not negligent was not "palpably irrational or wrong" (*Lesio v Attardi*, 121 AD3d 1527, 1528 [4th Dept 2014] [internal quotation marks omitted]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

702

CA 17-02031

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

RUSSELL J. FINLEY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

ERIE AND NIAGARA INSURANCE ASSOCIATION,
DEFENDANT-RESPONDENT.

DOUGLAS WALTER DRAZEN, BINGHAMTON, FOR PLAINTIFF-APPELLANT.

CABANISS CASEY LLP, ALBANY (BRIAN D. CASEY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered February 6, 2017. The order, inter alia, granted the motion of defendant for summary judgment and dismissed the complaint.

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

Memorandum: In this breach of contract action arising from defendant's denial of a claim made by plaintiff on a fire insurance policy, plaintiff appeals from an order that, inter alia, granted defendant's motion for summary judgment dismissing the complaint. Contrary to plaintiff's contention, Supreme Court properly granted the motion.

Initially, we note that plaintiff failed to preserve for our review his contentions that the court erred in considering sworn statements submitted by plaintiff's first attorney, and that defendant is estopped from asserting the lack of a sworn proof of loss as an affirmative defense because defendant extended a settlement offer prior to litigation. Those contentions may not be raised for the first time on appeal where, as here, they " 'could have been obviated or cured by factual showings or legal countersteps' " in the motion court (*Oram v Capone*, 206 AD2d 839, 840 [4th Dept 1994]). We further note that, at oral argument before the motion court, plaintiff withdrew his cross motion, and he therefore has waived his present contention with respect to the cross motion (*see e.g. Andrew v Hurh*, 34 AD3d 1331, 1331-1332 [4th Dept 2006], *lv denied* 8 NY3d 808 [2007], *rearg denied* 8 NY3d 1017 [2007]; *Grimaldi v Spievogel*, 300 AD2d 200, 200 [1st Dept 2002]).

We reject plaintiff's contention that the court erred in granting

the motion. " 'It is well settled that the failure to file sworn proofs of loss within 60 days of the demand therefor constitutes an absolute defense to an action on an insurance policy absent a waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense' " (*Bailey v Charter Oak Fire Ins. Co.*, 273 AD2d 691, 692 [3d Dept 2000]; *see Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210 [1984]; *Alexander v New York Cent. Mut.*, 96 AD3d 1457, 1457 [4th Dept 2012]). Defendant, as the party seeking summary judgment, met its initial burden on the motion by establishing that plaintiff failed to provide a sworn proof of loss within the requisite time (*see generally Schunk v New York Cent. Mut. Fire Ins. Co.*, 237 AD2d 913, 914 [4th Dept 1997]), and that defendant did not waive the requirement. In response, plaintiff failed to raise a triable issue of fact whether he substantially complied with the proof of loss requirement (*cf. Delaine v Finger Lakes Fire & Cas. Co.*, 23 AD3d 1143, 1144 [4th Dept 2005]).

We reject plaintiff's contention that he raised a triable issue of fact by submitting his deposition testimony in which he averred that he timely submitted the requisite proof of loss to defendant, and that the court made an improper credibility determination in rejecting that testimony and his testimony regarding a lack of knowledge of the cause of the fire. Although "we agree with the general premise that credibility is an issue that should be left to a [factfinder] at trial, 'there are of course instances where credibility is properly determined as a matter of law' " (*Sexstone v Amato*, 8 AD3d 1116, 1116 [4th Dept 2004], *lv denied* 3 NY3d 609 [2004]). Neither this Court nor the motion court is " 'required to shut its eyes to the patent falsity of a defense' " (*id.*, quoting *MRI Broadway Rental v United States Min. Prods. Co.*, 242 AD2d 440, 443 [1st Dept 1997], *affd* 92 NY2d 421 [1998]). Here, we conclude that the court properly determined that plaintiff's deposition testimony was "self-serving and incredible on these points, permitting summary judgment in favor of" defendant (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 439 [3d Dept 2003]; *see Rickert v Travelers Ins. Co.*, 159 AD2d 758, 759-760 [3d Dept 1990], *lv denied* 76 NY2d 701 [1990]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

703

CA 18-00124

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

CYNTHIA L. LONG, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

DANIEL HESS, DEFENDANT-APPELLANT.

LAW OFFICE OF DESTIN C. SANTACROSE, BUFFALO (BARNEY F. BILELLO OF COUNSEL), FOR DEFENDANT-APPELLANT.

LYNN LAW FIRM, LLP, SYRACUSE (KELSEY W. SHANNON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Donald A. Greenwood, J.), entered July 11, 2017. The order denied the motion of defendant for summary judgment.

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

Memorandum: Plaintiff commenced this action seeking to recover damages for injuries she sustained when defendant's dog, Kane, allegedly ran into her while running alongside plaintiff's dog in a fenced-in area behind a school that is used as a dog park. Supreme Court denied defendant's motion for summary judgment dismissing the complaint. We reverse.

Preliminarily, as plaintiff correctly concedes, "a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury" (*Antinore v Ivison*, 133 AD3d 1329, 1329 [4th Dept 2015]; *see Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]). We thus agree with defendant that the court erred in denying that part of his motion with respect to the negligence cause of action.

We further agree with defendant that the court erred in denying that part of his motion with respect to the strict liability cause of action, based upon Kane's alleged vicious propensities. It is well established that "an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier v Zambito*, 1 NY3d 444, 447 [2004]). "A known tendency to attack others, even in playfulness, as in the case of the overly friendly

large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant[] liable for damages resulting from such an act" (*Lewis v Lustan*, 72 AD3d 1486, 1487 [4th Dept 2010] [internal quotation marks omitted]; *see Pollard v United Parcel Serv.*, 302 AD2d 884, 884 [4th Dept 2003]). "In contrast, 'normal canine behavior' such as 'barking and running around' does not amount to vicious propensities" (*Brady v Contangelo*, 148 AD3d 1544, 1546 [4th Dept 2017], quoting *Collier*, 1 NY3d at 447; *see Bloom v Van Lenten*, 106 AD3d 1319, 1321 [3d Dept 2013]; *see generally Bloomer v Shauger*, 21 NY3d 917, 918 [2013]).

Here, defendant met his initial burden of establishing that he lacked knowledge of any vicious propensity on the part of Kane that resulted in the injury, and plaintiff, who relied solely upon defendant's submissions, failed to raise an issue of fact (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The evidence establishes that, on the day of the incident, plaintiff sent a text message to a group of people that included defendant, as she had on previous occasions, to inform them that she would be at the dog park with her dog, who often played with Kane. Immediately prior to the incident, plaintiff threw a ball for her dog, plaintiff's dog retrieved the ball and, as he had frequently done in the past, Kane ran alongside plaintiff's dog back toward plaintiff. Both dogs were running fast in plaintiff's direction and, when it appeared that Kane was not going to veer off to the side, plaintiff turned away, whereupon Kane allegedly struck her leg. Despite evidence that Kane may have clumsily run around the dog park and similarly made contact with another visitor on a prior occasion, we conclude that, unlike situations in which a dog purposefully jumps onto or charges at a person (*see e.g. Lewis*, 72 AD3d at 1486-1487; *Marquardt v Milewski*, 288 AD2d 928, 928 [4th Dept 2001]), "[Kane's alleged] act of running into plaintiff in the course of . . . playfully [running alongside another dog at a dog park] merely consisted of normal canine behavior that does not amount to a vicious propensity" (*Bloom*, 106 AD3d at 1321; *see Brady*, 148 AD3d at 1546; *Hamlin v Sullivan*, 93 AD3d 1013, 1013-1015 [3d Dept 2012]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

708

KA 16-01193

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANTWAN LINDSAY, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered July 1, 2016. The judgment convicted defendant, upon his plea of guilty, of robbery 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 robbery in the third degree (Penal Law § 160.05). Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Mellerson*, 156 AD3d 1488, 1488-1489 [4th Dept 2017], *lv denied* 30 NY3d 1117 [2018]; *People v Hollis*, 147 AD3d 1505, 1505 [4th Dept 2017], *lv denied* 29 NY3d 1033 [2017]). Defendant's reliance on *People v Brown* (296 AD2d 860 [4th Dept 2002], *lv denied* 98 NY2d 767 [2002]) is misplaced inasmuch as County Court "provided defendant with an extensive and detailed description of the proposed waiver of the right to appeal before securing his consent thereto" (*People v Thomas*, 158 AD3d 1191, 1191 [4th Dept 2018]). Defendant's valid waiver of his right to appeal forecloses his challenge to the court's suppression ruling (*see People v Kemp*, 94 NY2d 831, 833 [1999]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

712

CAF 17-00853

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

IN THE MATTER OF DAVID C., YARRISA C.,
AND SAARAH C.

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

LAWRENCE C., RESPONDENT-APPELLANT,
AND STEPHANIE C., RESPONDENT.
(APPEAL NO. 1.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered March 28, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Lawrence C. sexually abused one of the subject children and derivatively neglected the others.

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

Memorandum: In appeal No. 1, Lawrence C. (respondent) appeals from an order determining that he sexually abused a seven-year-old girl (victim) for whom he acted as a parent substitute and derivatively neglected the victim's two siblings who resided in the same household. In appeal No. 2, respondent appeals from an order determining that he derivatively neglected his biological daughter, who was born after the petition in appeal No. 1 was filed.

We reject respondent's contention in appeal No. 1 that petitioner failed to establish by a preponderance of the evidence that he sexually abused the victim (*see* Family Ct Act § 1046 [b] [i]). " 'A child's out-of-court statements may form the basis for a finding of [abuse] as long as they are sufficiently corroborated by [any] other evidence tending to support their reliability' " (*Matter of Nicholas J.R. [Jamie L.R.]*, 83 AD3d 1490, 1490 [4th Dept 2011], *lv denied* 17 NY3d 708 [2011]; *see* § 1046 [a] [vi]). "Courts have 'considerable discretion in determining whether a child's out-of-court statements describing incidents of abuse have been reliably corroborated and

whether the record as a whole supports a finding of abuse' " (*Nicholas J.R.*, 83 AD3d at 1490), and "[t]he Legislature has expressed a clear 'intent that a relatively low degree of corroborative evidence is sufficient in abuse proceedings' " (*Matter of Jessica N.*, 234 AD2d 970, 971 [4th Dept 1996], *appeal dismissed* 90 NY2d 1008 [1997]; *see Matter of Richard SS.*, 29 AD3d 1118, 1121 [3d Dept 2006]).

Here, the victim told two of her teachers about the abuse, as well as her sister and a police investigator. Although there may have been minor inconsistencies in her various statements, the victim did not waver in her description of how respondent sexually abused her, where it happened and when it happened. Notably, the victim's allegation that respondent placed his penis in her anus was corroborated by the medical evidence, which established that the victim had anal bruising and redness. That allegation was also corroborated in part by respondent's statement to the police. Although respondent denied having any sexual contact with the victim, he acknowledged that he was alone in a bedroom with the victim on the date in question, and he said that his hair may have inadvertently come into contact with the victim's vagina. Moreover, because respondent did not testify at the fact-finding hearing, Family Court "was entitled to draw the strongest possible inference" against him (*Matter of Jayla A. [Chelsea K.-Isaac C.]*, 151 AD3d 1791, 1793 [4th Dept 2017], *lv denied* 30 NY3d 902 [2017]; *see Matter of Brian S. [Tanya S.]*, 141 AD3d 1145, 1146 [4th Dept 2016]). Under the circumstances, we perceive no basis in the record for disturbing the court's finding of abuse.

Inasmuch as respondent's only challenge to the finding of derivative neglect in appeal Nos. 1 and 2 is that petitioner failed to prove that he sexually abused the victim, we reject his contention in both appeals that the court erred in finding that he derivatively neglected the other children. "A finding of derivative neglect may be made where the evidence with respect to the child found to be abused or neglected demonstrates such an impaired level of parental judgment as to create a substantial risk of harm for any child in [the parent's] care" (*Matter of Alexia J. [Christopher W.]*, 126 AD3d 1547, 1548 [4th Dept 2015] [internal quotation marks omitted]; *see Matter of Jovon J.*, 51 AD3d 1395, 1396 [4th Dept 2008]). Here, respondent's sexual abuse of the victim establishes that there are "fundamental flaws in [his] understanding of the duties of parenthood . . . , justifying the finding that [he] derivatively neglected the subject child[ren]" (*Matter of Angel L.H. [Melissa H.]*, 85 AD3d 1637, 1637-1638 [4th Dept 2011], *lv denied* 17 NY3d 711 [2011] [internal quotation marks omitted]).

Mark W. Bennett

Entered: June 15, 2018

Clerk of the Court

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

717

CAF 17-01110

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

IN THE MATTER OF JUDITH C.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES,
PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

STEPHANIE C., RESPONDENT,
AND LAWRENCE C., RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

JAMES E. BROWN, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Lisa Bloch Rodwin, J.), entered May 2, 2017 in a proceeding pursuant to Family Court Act article 10. The order, inter alia, determined that respondent Lawrence C. derivatively neglected the subject child.

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

Same memorandum as in *Matter of David C.* ([appeal No. 1] — AD3d — [June 15, 2018] [4th Dept 2018]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

722

CA 17-01437

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

SARAH H. WOODMAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

LEIF WOODMAN, DEFENDANT-APPELLANT.

LEIF WOODMAN, DEFENDANT-APPELLANT PRO SE.

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

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered June 29, 2017 in a divorce action. The order, among other things, awarded plaintiff spousal maintenance and equitably distributed the marital assets.

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

Memorandum: Defendant appeals from an order that, inter alia, awarded plaintiff spousal maintenance and equitably distributed the parties' marital assets. The appeal must be dismissed based on defendant's failure to provide an adequate record to permit meaningful appellate review (*see Mergl v Mergl*, 19 AD3d 1146, 1147 [4th Dept 2005]). " 'It is the obligation of the appellant to assemble a proper record on appeal. The record must contain all of the relevant papers that were before the Supreme Court' " (*id.*). Our rules require that "[t]he complete record on appeal shall include, in the following order: the notice of appeal with proof of service and filing; the order or judgment from which the appeal is taken; the decision, if any, of the court granting the order or judgment; the judgment roll, if any; the pleadings of the action or proceeding; the corrected transcript of the action or proceeding or statement in lieu of transcript, if any; all necessary and relevant motion papers; and, to the extent practicable, all necessary and relevant exhibits" (22 NYCRR 1000.4 [a] [2]; *see* CPLR 5526). Here, defendant contends that plaintiff did not timely respond to his discovery requests, and failed to disclose discovery material and to file a note of issue and certificate of readiness. The record on appeal, however, contains only the notice of appeal, the decision and order of Supreme Court, the pleadings, and excerpts from the transcript of a hearing, and thus the record does not contain the necessary and relevant motion papers and exhibits with respect to the issues raised on appeal. We note that, although defendant has attached some additional documents as

exhibits to his appellant's brief, those documents are not properly part of the record on appeal (*see* CPLR 5526, 5528; *Van Dussen-Storto Motor Inn v Rochester Tel. Corp.*, 63 AD2d 244, 251 [4th Dept 1978]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

737

CAF 16-00308

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

IN THE MATTER OF MICHAEL S. AND GABRIEL S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T., RESPONDENT-APPELLANT,
AND TIMOTHY S., RESPONDENT.
(APPEAL NO. 1.)

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 4, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, determined that respondents had permanently neglected the subject children.

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 determining that the subject children are permanently neglected. With the consent of the parties, Family Court suspended judgment. In appeal No. 2, the mother appeals from an order revoking the suspended judgment and terminating her parental rights with respect to the children. We affirm in each appeal.

Contrary to the mother's contention in appeal No. 1, "[p]etitioner met its burden of establishing by clear and convincing evidence that it made diligent efforts to encourage and strengthen the relationship between the mother and [the children] by providing 'services and other assistance aimed at ameliorating or resolving the problems preventing [the children's] return to [the mother's] care' . . . , and that the mother failed substantially and continuously to plan for the future of the child[ren] although physically and financially able to do so . . . Although the mother participated in [some of] the services offered by petitioner, she did not successfully address or gain insight into the problems that led to the removal of the child[ren] and continued to prevent the child[ren's] safe return"

(*Matter of Giovanni K.*, 62 AD3d 1242, 1243 [4th Dept 2009], *lv denied* 12 NY3d 715 [2009]; *see* Social Services Law § 384-b [7] [a]; *Matter of Michael S. [Timothy S.]*., 159 AD3d 1378, 1379 [4th Dept 2018]; *Matter of Kendalle K. [Corin K.]*., 144 AD3d 1670, 1671-1672 [4th Dept 2016]).

With respect to appeal No. 2, "it is well settled that, [i]f [petitioner] establishes by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights" (*Matter of Savanna G. [Danyelle M.]*, 118 AD3d 1482, 1483 [4th Dept 2014] [internal quotation marks omitted]). Contrary to the mother's contention, the court properly determined that she failed to comply with the terms of the suspended judgment and that it is in the children's best interests to terminate her parental rights (*see Michael S.*, 159 AD3d at 1379-1380).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

738

CAF 16-00309

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

IN THE MATTER OF MICHAEL S. AND GABRIEL S.

CHAUTAUQUA COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

KATHRYNE T., RESPONDENT-APPELLANT,
AND TIMOTHY S., RESPONDENT.
(APPEAL NO. 2.)

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

REBECCA L. DAVISON-MARCH, MAYVILLE, FOR PETITIONER-RESPONDENT.

MARY S. HAJDU, LAKEWOOD, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Chautauqua County (Judith S. Claire, J.), entered February 4, 2016 in a proceeding pursuant to Social Services Law § 384-b. The order, inter alia, revoked a suspended judgment and terminated the parental rights of respondents.

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

Same memorandum as in *Matter of Michael S. (Kathryne T.)* ([appeal No. 1] — AD3d — [June 15, 2018] [4th Dept 2018]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

742

CA 17-01808

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

IN THE MATTER OF JOSEPH SZYMKOWIAK,
CLAIMANT-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK POWER AUTHORITY, RESPONDENT-APPELLANT.

RUPP BAASE PFALZGRAF CUNNINGHAM LLC, BUFFALO (KEVIN J. KRUPPA OF COUNSEL), FOR RESPONDENT-APPELLANT.

COLLINS & COLLINS ATTORNEYS, LLC, BUFFALO (A. PETER SNODGRASS OF COUNSEL), FOR CLAIMANT-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Frank Caruso, J.), entered December 20, 2016. The order granted the application of claimant for leave to serve a late notice of claim.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by denying that part of claimant's application with respect to the September 26, 2015 accident and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order that granted claimant's application for leave to serve a late notice of claim pursuant to General Municipal Law § 50-e (5). Claimant was employed by a nonparty as a laborer on a project pursuant to which the New York State Department of Transportation rehabilitated three bridges that ran over respondent's property. On September 26, 2015, claimant "fell off [his employer's flatbed] trailer" and allegedly injured his left arm and shoulder (first accident). On October 27, 2015, claimant fell from a "crane platform," sustaining a head injury and allegedly re-injuring his left shoulder (second accident). By order to show cause dated November 17, 2016, claimant moved for leave to serve a late notice of claim. Supreme Court granted the application in its entirety. We conclude that the court erred in granting that part of the application with respect to the first accident, and we therefore modify the order accordingly.

Pursuant to General Municipal Law § 50-e (1) (a), a party suing a public corporation must serve a notice of claim "within ninety days after the claim arises." Section 50-e (5) permits a court, in its discretion, to extend the time for a claimant to serve a late notice of claim, provided that the extension does "not exceed the time limited for the commencement of an action by the claimant against the

public corporation." "In determining whether to grant such [relief], the court must consider, inter alia, whether the claimant has shown a reasonable excuse for the delay, whether the [public corporation] had actual knowledge of the facts surrounding the claim within 90 days of its accrual, and whether the delay would cause substantial prejudice to the [public corporation]" (*Matter of Friend v Town of W. Seneca*, 71 AD3d 1406, 1407 [4th Dept 2010]; *see Matter of Turlington v Brockport Cent. Sch. Dist.*, 143 AD3d 1247, 1248 [4th Dept 2016]). "Absent a clear abuse of the court's broad discretion, the determination of an application for leave to serve a late notice of claim will not be disturbed" (*Dalton v Akron Cent. Schs.*, 107 AD3d 1517, 1518 [4th Dept 2013], *affd* 22 NY3d 1000 [2013] [internal quotation marks omitted]).

While we agree with respondent that claimant failed to establish a reasonable excuse for the delay (*see Kennedy v Oswego City Sch. Dist.*, 148 AD3d 1790, 1791 [4th Dept 2017]; *Friend*, 71 AD3d at 1407), "[t]he failure to offer an excuse for the delay is not fatal where . . . actual notice was had and there is no compelling showing of prejudice to [respondent]" (*Terrigino v Village of Brockport*, 88 AD3d 1288, 1288 [4th Dept 2011] [internal quotation marks omitted]; *see Lawton v Town of Orchard Park*, 138 AD3d 1428, 1428 [4th Dept 2016], *lv denied* 27 NY3d 912 [2016]).

Addressing next the issue of prejudice, we agree with claimant that he established that respondent would not be substantially prejudiced by any delay in serving the notice of claim. "[B]ecause the injur[ies] allegedly resulted from . . . fall[s] at a construction site, 'it is highly unlikely that the conditions existing at the time of the accident[s] would [still] have existed' " had the notice of claim been timely filed (*Matter of Gorinshek v City of Johnstown*, 186 AD2d 335, 336 [3d Dept 1992]; *see Matter of Riordan v East Rochester Schs.*, 291 AD2d 922, 924 [4th Dept 2002], *lv denied* 98 NY2d 603 [2002]).

With respect to actual knowledge, we note that, " '[w]hile the presence or absence of any single factor is not determinative, one factor that should be accorded great weight is whether the [public corporation] received actual knowledge of the facts constituting the claim in a timely manner' " (*Turlington*, 143 AD3d at 1248; *see Matter of Ficek v Akron Cent. Sch. Dist.*, 144 AD3d 1601, 1603 [4th Dept 2016]). Moreover, "[i]t is well established that '[k]nowledge of the injuries or damages claimed . . . , rather than mere notice of the underlying occurrence, is necessary to establish actual knowledge of the essential facts of the claim within the meaning of General Municipal Law § 50-e (5)' . . . , and the claimant has the burden of demonstrating that the respondent had actual timely knowledge" (*Turlington*, 143 AD3d at 1248; *see Matter of Candino v Starpoint Cent. Sch. Dist.*, 115 AD3d 1170, 1171 [4th Dept 2014], *affd* 24 NY3d 925 [2014]; *Dalton*, 107 AD3d at 1518-1519).

We agree with respondent that claimant failed to meet his burden of demonstrating that respondent had timely actual knowledge of the first accident. Despite having engaged in pre-action discovery,

claimant is unable to provide any evidence that the incident report related to the first accident was ever transmitted to respondent, and there was no mention of the first accident in the construction closeout report submitted to respondent. Inasmuch as there is no evidence that respondent received timely actual knowledge of the occurrence of the first accident, respondent could not have received timely actual knowledge of " 'the injuries or damages' " resulting therefrom (*Turlington*, 143 AD3d at 1248). We thus conclude that the court abused its discretion in granting that part of claimant's application with respect to the first accident.

Contrary to respondent's further contention, however, claimant established that respondent received timely actual knowledge of the second accident. Claimant established that the incident report related to that accident was submitted to respondent's safety consultant, and the details and nature of the second accident were included in the construction closeout report. Those reports provided respondent with timely "knowledge of the facts that underlie the legal theory or theories on which liability is predicated in the notice of claim" (*Matter of Felice v Eastport/South Manor Cent. Sch. Dist.*, 50 AD3d 138, 148 [2d Dept 2008]). We thus conclude that the court did not abuse its discretion in granting that part of the application with respect to the second accident.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

743

TP 17-02186

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

IN THE MATTER OF STELLAR DENTAL MANAGEMENT LLC,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
RESPONDENT-PETITIONER,
STATE OF NEW YORK EXECUTIVE DEPARTMENT, BETH A. HENDERSON, TAMI MARTEL AND STEPHANIE RUFFINS,
RESPONDENTS.

HODGSON RUSS LLP, BUFFALO (MELANIE J. BEARDSLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

CAROLINE J. DOWNEY, GENERAL COUNSEL, BRONX (TONI ANN HOLLIFIELD OF COUNSEL), FOR RESPONDENT-PETITIONER.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Erie County [Joseph R. Glownia, J.], entered December 15, 2017) to review a determination of respondent-petitioner. The determination, among other things, adjudged that petitioner-respondent had subjected individual respondents to a sexually hostile work environment.

It is hereby ORDERED that the determination is unanimously confirmed without costs, the petition is dismissed, the cross petition is granted, and petitioner-respondent is directed to pay respondent Beth A. Henderson the sum of $35,000 as compensatory damages with interest at the rate of 9% per annum commencing June 8, 2017; to pay respondent Tami Martel the sum of $65,000 as compensatory damages with interest at the rate of 9% per annum commencing June 8, 2017; to pay respondent Stephanie Ruffins the sum of $50,000 as compensatory damages with interest at the rate of 9% per annum commencing June 8, 2017 and $2,880 for lost wages with interest at the rate of 9% per annum commencing August 29, 2014; and to pay the Comptroller of the State of New York the sum of $60,000 for a civil fine and penalty with interest at the rate of 9% per annum commencing June 8, 2017.

Memorandum: Petitioner-respondent (petitioner) commenced this proceeding pursuant to Executive Law § 298 seeking to annul the determination of respondent-petitioner New York State Division of Human Rights (SDHR) that petitioner unlawfully discriminated against respondent complainants (complainants) by subjecting them to a

sexually hostile work environment, and retaliated against complainants by firing two of them and constructively discharging the third complainant. SDHR awarded complainants, inter alia, compensatory damages for mental anguish and humiliation in the amount of $35,000, $65,000, and $50,000, respectively, and imposed civil fines and penalties against petitioner of $20,000 per complainant. SDHR filed a cross petition seeking to confirm and enforce the determination.

Our review of the determination, which adopted the findings of the Administrative Law Judge (ALJ) who conducted the public hearing, "is limited to the issue whether it is supported by substantial evidence" (*Matter of Russo v New York State Div. of Human Rights*, 137 AD3d 1600, 1600 [4th Dept 2016]; *see Rainer N. Mittl, Ophthalmologist, P.C. v New York State Div. of Human Rights*, 100 NY2d 326, 331 [2003]). " 'Although a contrary decision may be reasonable and also sustainable, a reviewing court may not substitute its judgment for that of the Commissioner [of SDHR] if his [or her determination] is supported by substantial evidence' " (*Matter of Scheuneman v New York State Div. of Human Rights*, 147 AD3d 1523, 1524 [4th Dept 2017], quoting *Matter of Consolidated Edison Co. of N.Y. v New York State Div. of Human Rights*, 77 NY2d 411, 417 [1991], *rearg denied* 78 NY2d 909 [1991]).

We conclude that there is substantial evidence to support the determination that petitioner discriminated against each complainant by subjecting her to a sexually hostile work environment (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 51 [4th Dept 1996], *lv denied* 89 NY2d 809 [1997]; *see also Vitale v Rosina Food Prods.*, 283 AD2d 141, 143 [4th Dept 2001]). At the hearing, each complainant testified that she was subjected to severe and pervasive sexualized comments and unwanted touching in the workplace, and that she reported that behavior to management but her complaints were ignored. Although petitioner's witnesses denied receiving reports of harassment, " 'we cannot say that the testimony found credible by [the ALJ] was incredible as a matter of law' " (*Matter of Maye v Dwyer*, 295 AD2d 890, 890 [4th Dept 2002], *appeal dismissed* 98 NY2d 764 [2002]). To the extent that complainants' testimony conflicted with petitioner's proof, such conflict presented issues of credibility that were for the ALJ to resolve (*see Scheuneman*, 147 AD3d at 1524).

We further conclude that substantial evidence supports SDHR's determination that two of the complainants were subjected to unlawful retaliation. The record establishes that those complainants reported sexual harassment to management and were terminated from their employment shortly thereafter, thus supporting the determination that the legitimate reasons proffered for the terminations were pretextual (*see* Executive Law § 296 [7]; *cf. Pace v Ogden Servs. Corp.*, 257 AD2d 101, 104-106 [3d Dept 1999]; *see also La Marca-Pagano v Dr. Steven Phillips, P.C.*, 129 AD3d 918, 921 [2d Dept 2015]; *Matter of Law Offs. of Oliver Zhou, PLLC v New York State Div. of Human Rights*, 128 AD3d 618, 619 [1st Dept 2015]). With respect to the third complainant, we conclude that there is substantial evidence supporting the

determination that petitioner unlawfully retaliated against her by constructively discharging her, because the record establishes that the conditions of her employment had become so intolerable that a reasonable person in her position would have felt compelled to resign (*see generally Thompson v Lamprecht Transp.*, 39 AD3d 846, 848 [2d Dept 2007]; *Matter of Graham v New York City Tr. Auth.*, 242 AD2d 722, 722 [2d Dept 1997], *lv denied* 94 NY2d 759 [2000]).

Petitioner further contends that the ALJ erred in scheduling a consolidated hearing for the three complaints, and in failing to sequester the complainant witnesses. We conclude, however, that petitioner waived such objections by not raising them on the record, despite being provided an opportunity to do so, and by participating fully in the hearing (*see Lebis Contr. v City of Lockport*, 174 AD2d 1012, 1012 [4th Dept 1991]; *Matter of Donnelly's Mobile Home Ct. v Simons*, 142 AD2d 943, 943 [4th Dept 1988]; *see also Matter of Mule v Town of Boston*, 159 AD3d 1370, 1371-1372 [4th Dept 2018]).

We reject petitioner's further contention that the compensatory damages awarded for mental anguish and humiliation are excessive as a matter of law and unsupported by the proof. In reviewing an award for mental anguish and humiliation, we assess whether the award is reasonably related to the wrongdoing, whether it is supported by substantial evidence, and whether it is comparable to awards in similar cases (*see Matter of New York City Tr. Auth. v State Div. of Human Rights*, 78 NY2d 207, 218-219 [1991]; *Matter of Kondracke v Blue*, 277 AD2d 953, 954 [4th Dept 2000]). Each complainant testified that she suffered significant emotional distress and fear as a result of the harassment she endured, and there was sufficient proof of the severity and duration of that distress to sustain the damages awarded (*see Matter of County of Onondaga v Mayock*, 78 AD3d 1632, 1633-1634 [4th Dept 2010]; *Kondracke*, 277 AD2d at 954). Moreover, the awards are well within the range established by similar cases (*see e.g. Matter of New York State Div. of Human Rights v ABS Elecs., Inc.*, 102 AD3d 967, 968-969 [2d Dept 2013], *lv denied* 24 NY3d 901 [2014]; *Matter of Columbia Sussex Corp. v New York State Div. of Human Rights*, 63 AD3d 736, 736 [2d Dept 2009]; *Matter of New York State Div. of Human Rights v Village Plaza Family Rest., Inc.*, 59 AD3d 1038, 1038-1039 [4th Dept 2009]). We thus conclude that the awards for mental anguish and humiliation should not be disturbed (*see Mayock*, 78 AD3d at 1634).

Finally, we reject petitioner's contention that SDHR's imposition of civil fines and penalties was excessive and arbitrary and capricious. It is well settled that "[j]udicial review of an administrative penalty is limited to whether the measure or mode of penalty constitutes an abuse of discretion as a matter of law [and] . . . a penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001], *rearg denied* 96 NY2d 854 [2001]; *see Matter of County of Erie v New York State Div. of Human Rights*, 121 AD3d 1564, 1566 [4th Dept 2014]). SDHR's award of a civil fine and penalty of $20,000 for each complainant is similar to the fines

and penalties imposed in other discrimination cases (*see Matter of AMG Managing Partners, LLC v New York State Div. of Human Rights*, 148 AD3d 1765, 1766 [4th Dept 2017]; *Matter of Noe v Kirkland*, 101 AD3d 1756, 1756-1757 [4th Dept 2012]), and is not shocking to our sense of fairness.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

745

CA 18-00069

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

JULIE L. MURRAY, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

HOWARD S. LIPMAN, ESQ., AND FINE, OLIN & ANDERMAN, LLP, DEFENDANTS-RESPONDENTS.

DEMARIE & SCHOENBORN, P.C., BUFFALO (JOSEPH DEMARIE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

FINE OLIN & ANDERMAN LLP, NEWBURGH (JAMES W. SHUTTLEWORTH, III, OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered June 12, 2017. The order granted the motion of defendants for summary judgment, denied the cross motion of plaintiff for summary judgment and dismissed the complaint.

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

Memorandum: Plaintiff commenced this legal malpractice action seeking damages based on defendants' representation of her in matters involving workers' compensation. Defendants moved for summary judgment dismissing the complaint, and Supreme Court granted the motion. We affirm. In order to establish their entitlement to judgment as a matter of law, defendants had to present evidence in admissible form establishing that plaintiff is "unable to prove at least one necessary element of the legal malpractice action" (*Giardina v Lippes*, 77 AD3d 1290, 1291 [4th Dept 2010], *lv denied* 16 NY3d 702 [2011]), e.g., " 'that the defendant attorney failed to exercise that degree of care, skill, and diligence commonly possessed by a member of the legal community' " (*Phillips v Moran & Kufta, P.C.*, 53 AD3d 1044, 1044-1045 [4th Dept 2008]). Here, defendants met their initial burden on the motion with respect to that element (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To the extent that plaintiff alleged a violation of the Rules of Professional Conduct (22 NYCRR 1200.0) in opposition to defendants' motion, we note that "such an alleged violation does not, without more, support a malpractice claim" (*Cohen v Kachroo*, 115 AD3d 512, 513 [1st Dept 2014]). Inasmuch as plaintiff did not submit an expert's affidavit "delineating the appropriate 'standard of professional care and skill' to which defendants were required to adhere under the circumstances present here," she failed to raise an issue of fact concerning defendants'

compliance with the applicable standard of care (*Zeller v Copps*, 294 AD2d 683, 684 [3d Dept 2002]; *see Merlin Biomed Asset Mgt., LLC v Wolf Block Schorr & Solis-Cohen LLP*, 23 AD3d 243, 243 [1st Dept 2005]; *see also Zeller v Copps*, 294 AD2d 683, 684-685 [3d Dept 2002]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

751

KA 16-02148

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DWIGHT ROGER GRAVES, JR., 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 Supreme Court, Monroe County (Francis A. Affronti, J.), entered September 30, 2016. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq*.). We reject defendant's contention that Supreme Court erred in assessing 15 points under risk factor 11, history of drug or alcohol abuse. Defendant admitted that he had a history of substance abuse, and he was referred to substance abuse rehabilitation programs during two separate periods of incarceration, as well as to an outpatient program when he was released to parole supervision (*see People v Lowery*, 93 AD3d 1269, 1270 [4th Dept 2012], *lv denied* 19 NY3d 807 [2012]).

Contrary to defendant's further contention, we conclude that the court properly assessed 15 points under risk factor 12, acceptance of responsibility, despite defense counsel's explanation at the hearing that defendant was expelled from treatment based upon his refusal to make admissions that he believed would negatively affect his pending appeal. The People presented clear and convincing evidence that defendant was expelled from treatment for poor participation, and the " 'risk assessment guidelines do not contain exceptions with respect to a defendant's reasons for refusing to participate in treatment' " (*People v Thousand*, 109 AD3d 1149, 1150 [4th Dept 2013], *lv denied* 22 NY3d 857 [2013]). Rather, "[r]easons for not participating in sex offender treatment are only relevant in considering a request for a downward departure, and the defendant never made such a request"

(*People v Grigg*, 112 AD3d 802, 803 [2d Dept 2013], *lv denied* 22 NY3d 865 [2014]; *see Thousand*, 109 AD3d at 1150).

We agree with defendant that the court erred in assessing 20 points under risk factor 7 on the ground that the victim and defendant were strangers. There was no direct evidence concerning the relationship between defendant and the victim (*cf. People v Cooper*, 141 AD3d 710, 710 [2d Dept 2016], *lv denied* 28 NY3d 908 [2016]; *People v Lewis*, 45 AD3d 1381, 1381-1382 [4th Dept 2007], *lv denied* 10 NY3d 703 [2008]), and the circumstantial evidence on which the People rely does not constitute clear and convincing evidence that defendant and the victim were strangers. Nevertheless, even after subtracting those 20 points, defendant remains a level three risk (*see People v Loughlin*, 145 AD3d 1426, 1427 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]), and defendant did not request a downward departure from that risk level.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

752

KA 17-00557

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PIERRE MCCULLEN, DEFENDANT-APPELLANT.

KATHRYN FRIEDMAN, BUFFALO, FOR DEFENDANT-APPELLANT.

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (ASHLEY R. LOWRY OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 17, 2017. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [4]). Although defendant's contention that the plea was not knowingly, intelligently and voluntarily entered survives his waiver of the right to appeal (*see People v Gill,* 149 AD3d 1597, 1597 [4th Dept 2017], *lv denied* 29 NY3d 1127 [2017]), defendant failed to move to withdraw his guilty plea or to vacate the judgment of conviction and thus failed to preserve that contention for our review (*see People v Morrison*, 78 AD3d 1615, 1616 [4th Dept 2010], *lv denied* 16 NY3d 834 [2011]). In any event, defendant's contention lacks merit, because his assertion that he did not understand the nature of the plea or its consequences is belied by the record of the plea proceeding (*see People v Manor*, 121 AD3d 1581, 1582 [4th Dept 2014], *affd* 27 NY3d 1012 [2016]).

Defendant further contends that the approximately 18-month delay in sentencing him was unreasonable as a matter of law (*see generally* CPL 380.30 [1]), and that such delay requires vacatur of the judgment of conviction and dismissal of the indictment. Although defendant's contention survives his waiver of the right to appeal (*see People v Campbell*, 97 NY2d 532, 534-535 [2002]), defendant failed to preserve his contention for our review inasmuch as, when defendant appeared for sentencing, he made no objection or challenge to the proceeding (*see People v Kerrick*, 136 AD3d 1099, 1100 [3d Dept 2016]; *People v Washington*, 121 AD3d 1583, 1583 [4th Dept 2014]). In any event, we

conclude that defendant's contention is without merit. The delay in sentencing defendant is excusable because it was attributable to ongoing legal proceedings involving his codefendants, in which defendant was required to cooperate pursuant to the terms of the plea agreement (*see People v Ingvarsdottir*, 118 AD3d 1023, 1024 [2d Dept 2014]; *People v Arroyo*, 22 AD3d 881, 882 [3d Dept 2005], *lv denied* 6 NY3d 773 [2006]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

758

KA 15-02038

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER CHADICK, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (NATHANIEL V. RILEY OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered June 30, 2015. The judgment convicted defendant, upon a nonjury verdict, of grand larceny in the fourth degree (two counts).

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of two counts of grand larceny in the fourth degree (Penal Law § 155.30 [1]). Defendant previously was convicted following a jury trial of scheme to defraud in the first degree (§ 190.65 [1] [b]), scheme to defraud in the second degree (§ 190.60), three counts of grand larceny in the fourth degree (§ 155.30 [1]) and two counts of petit larceny (§ 155.25), but we reversed the judgment, dismissed the count of scheme to defraud in the first degree and granted a new trial with respect to the remaining counts (*People v Chadick*, 122 AD3d 1258 [4th Dept 2014]). Defendant waived his right to a jury trial, and the People and defendant stipulated that the "matter will be handled by way of stipulated facts." Pursuant to the parties' stipulation, County Court reviewed the trial exhibits and transcripts, including the testimony of the codefendant that was erroneously stricken at the jury trial (*see id.* at 1258-1259), and defendant's medical records for the time period covered by the indictment. The court found him guilty of two counts of grand larceny in the fourth degree.

We reject defendant's contention that the evidence of intent is not legally sufficient to support the conviction under the theory of larceny by false promise (*see* Penal Law § 155.05 [2] [d]). At the outset, we conclude that defendant's motion for a trial order of dismissal, made at the close of the People's case and renewed at the

close of the proof, preserved for our review his present challenge to the sufficiency of the evidence. We further conclude that defendant's objections at the jury trial preserved for our review his related contention that the court erred in admitting in evidence Bankruptcy Court documents introduced during the testimony of the Assistant United States Trustee. In light of the parties' stipulation to use the transcript of the jury trial as the equivalent of a retrial, we reject the People's contention that defendant was required to repeat the motion for a trial order of dismissal or his objections to the documents at issue to preserve his present contentions for our review (*see* CPL 470.05 [2]). Nevertheless, based upon the evidence at trial, we conclude that the " 'inference of wrongful intent logically flow[s] from the proven facts,' and there is a 'valid line of reasoning [that] could lead a rational trier of fact, viewing the evidence in the light most favorable to the People, to conclude that the defendant committed the charged crime[s]' " (*People v Barry*, 34 AD3d 1258, 1258 [4th Dept 2006], *lv denied* 8 NY3d 919 [2007], quoting *People v Norman*, 85 NY2d 609, 620 [1995]). We add that, contrary to defendant's contention, moral certainty is not the appropriate standard for reviewing the legal sufficiency of the evidence on appeal (*see Norman*, 85 NY2d at 620). We further conclude that the Bankruptcy Court documents at issue were properly admitted in evidence as public documents (*see People v Casey*, 95 NY2d 354, 361-362 [2000]).

Finally, viewing the evidence in light of the elements of grand larceny in the fourth degree (*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]).

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

776

KA 17-00070

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

GLENN M. HUGGINS, DEFENDANT-APPELLANT.

EFTIHIA BOURTIS, ROCHESTER, FOR DEFENDANT-APPELLANT.

KRISTYNA S. MILLS, DISTRICT ATTORNEY, WATERTOWN (NICOLE L. KYLE OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Jefferson County Court (Kim H. Martusewicz, J.), rendered October 14, 2016. The judgment convicted defendant, upon a nonjury verdict, of petit larceny, criminal possession of stolen property in the fifth degree, welfare fraud in the fifth degree and offering a false instrument for filing in the second degree (seven counts).

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

Memorandum: Defendant appeals from a judgment convicting him following a nonjury trial of, inter alia, petit larceny (Penal Law § 155.25) and criminal possession of stolen property in the fifth degree (§ 165.40). We reject defendant's contention that he was denied effective assistance of counsel. With respect to defendant's claim that defense counsel was ineffective because he failed to make a written request for discovery, defendant concedes that the People turned over all discovery materials, and we thus conclude that any error by defense counsel was not prejudicial to defendant (*see generally People v Caban*, 5 NY3d 143, 152 [2005]). With respect to defendant's claim that defense counsel was ineffective in agreeing to a certain stipulation on the record, defendant failed to establish the absence of a strategic reason for defense counsel's conduct (*see generally People v Benevento*, 91 NY2d 708, 712 [1998]; *People v Alexander*, 109 AD3d 1083, 1085 [4th Dept 2013]). Moreover, the People established the information in the stipulation through the testimony of the witnesses. With respect to defendant's claim that defense counsel was ineffective for failing to serve a notice of a defense of mental disease or defect, defendant failed to establish the absence of a strategic reason for defense counsel's failure to do so (*see generally Benevento*, 91 NY2d at 712).

Viewing the evidence in light of the elements of the crimes in

this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's contention, County Court was justified in inferring his intent to commit the crimes from the testimony at trial (*see People v Williams*, 154 AD3d 1290, 1291 [4th Dept 2017], *lv denied* 30 NY3d 1110 [2018]; *People v Rajczak*, 132 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1091 [2015]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

782

CAF 17-00983

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

IN THE MATTER OF ROBERT M. BIERNBAUM,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

MARY E. BURDICK, RESPONDENT-APPELLANT.

TERESA M. PARE, ESQ., ATTORNEY FOR THE
CHILDREN, APPELLANT.

KELLY WHITE DONOFRIO LLP, ROCHESTER (DONALD A. WHITE OF COUNSEL), FOR RESPONDENT-APPELLANT.

TERESA M. PARE, CANANDAIGUA, ATTORNEY FOR THE CHILDREN, APPELLANT PRO SE.

BARNEY & AFFRONTI, LLP, ROCHESTER (BRIAN J. BARNEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeals from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered April 13, 2017 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, continued joint custody.

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

Memorandum: Respondent mother and the Attorney for the Children (AFC) appeal from an order that continued joint custody of the parties' children and granted the father's amended petition to modify the existing custody and visitation schedule so that each party would have custody of the children for an equal amount of time. We conclude that the mother waived her contention that the father failed to establish a change of circumstances warranting an inquiry into the best interests of the children inasmuch as the mother alleged in her own cross petition that there had been such a change in circumstances (*see Panaro v Panaro*, 133 AD3d 1306, 1307 [4th Dept 2015]). In any event, we agree with the father that he established the requisite change of circumstances based on the increasing animus between the parties, the deterioration of the father's relationship with the children and the psychological issues that had arisen with one of the children (*see Fermon v Fermon*, 135 AD3d 1045, 1046 [3d Dept 2016]; *Matter of O'Loughlin v Sweetland*, 98 AD3d 983, 984 [2d Dept 2012]; *Matter of Stilson v Stilson*, 93 AD3d 1222, 1223 [4th Dept 2012]*).*

Contrary to the contention of the mother and the AFC, we conclude that Family Court did not err in modifying the parties' prior agreement with respect to the custody and visitation schedule. The record establishes that the court's determination resulted from a "careful weighing of [the] appropriate factors . . . , and . . . has a sound and substantial basis in the record" (*Matter of Talbot v Edick*, 159 AD3d 1406, 1407 [4th Dept 2018] [internal quotation marks omitted]; *see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]).

We reject the AFC's contention that the court erred in failing to consider the preferences of the children. Although the express wishes of the children are entitled to great weight, the " '[c]ourt is . . . not required to abide by the wishes of a child to the exclusion of other factors in the best interests analysis' " (*Matter of Marino v Marino*, 90 AD3d 1694, 1696 [4th Dept 2011]). Here, the court did not err in failing to abide by the wishes of the children inasmuch as there is evidence in the record that the mother's animus toward the father had negatively affected the children's relationship with him, and the court-appointed psychologist opined that the children's interests would be best served by an equal split in time between the parties (*see Sheridan v Sheridan*, 129 AD3d 1567, 1568-1569 [4th Dept 2015]; *Marino*, 90 AD3d at 1696).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

785

CA 18-00113

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

TINA M. JAQUES, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

BREZ PROPERTIES, LLC, DEFENDANT-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (BRENT C. SEYMOUR OF COUNSEL), FOR DEFENDANT-APPELLANT.

JOSEPH E. DIETRICH, III, WILLIAMSVILLE, MAGAVERN MAGAVERN GRIMM LLP, BUFFALO (EDWARD J. MARKARIAN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered September 14, 2017. 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 negligence action seeking damages for injuries that she allegedly sustained when she slipped on loose concrete and then caught her foot in a crack or groove in the pavement on property owned by defendant. Supreme Court denied defendant's motion for summary judgment dismissing the complaint, and we affirm.

We reject defendant's contention that the crack or groove that allegedly caused plaintiff's injuries is too trivial to be actionable. It is well settled that "the trivial defect doctrine is best understood with our well-established summary judgment standards in mind. In a summary judgment motion, the movant must make a prima facie showing of entitlement to judgment as a matter of law before the burden shifts to the party opposing the motion to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A defendant seeking dismissal of a complaint on the basis that the alleged defect is trivial must make a prima facie showing that the defect is, under the circumstances, physically insignificant and that the characteristics of the defect or the surrounding circumstances do not increase the risks it poses. Only then does the burden shift to the plaintiff to establish an issue of fact" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 79 [2015]). In support of its motion, defendant submitted, inter alia, plaintiff's deposition testimony, and photographs of the pavement on

which plaintiff allegedly fell, which depict cracked and spalled concrete. Defendant, however, failed to address that part of plaintiff's testimony in which she averred that she slipped on loose pieces of spalled concrete. Thus, based on the evidence of "the width, depth, elevation, irregularity and appearance of the defect along with the 'time, place and circumstance' of the injury" (*Trincere v County of Suffolk*, 90 NY2d 976, 978 [1997]), we conclude that defendant failed to meet its burden of establishing as a matter of law that the defect was trivial.

We also reject defendant's contention that it is entitled to summary judgment dismissing the complaint because the defect was open and obvious. "The fact that a dangerous condition is open and obvious does not negate the duty to maintain premises in a reasonably safe condition, but, rather, bears only on the injured person's comparative fault" (*Bax v Allstate Health Care, Inc.*, 26 AD3d 861, 863 [4th Dept 2006]; *see Custodi v Town of Amherst*, 81 AD3d 1344, 1346-1347 [4th Dept 2011], *affd* 20 NY3d 83 [2012]; *Ahern v City of Syracuse*, 150 AD3d 1670, 1671 [4th Dept 2017]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

792

CA 17-02013

PRESENT: SMITH, J.P., CENTRA, LINDLEY, CURRAN, AND WINSLOW, JJ.

LOUIS YOURDON, JAMES R. BELTER,
PLAINTIFFS-RESPONDENTS,
ET AL., PLAINTIFFS,

V MEMORANDUM AND ORDER

JUDY CURTIS, CERTIFIED REGISTERED COUNSELOR
MID-ERIE COUNSELING TREATMENT CENTER, MID-ERIE
COUNSELING TREATMENT CENTER, DR. ARVIND
SAMANT, M.D., DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

BARCLAY DAMON LLP, BUFFALO (ARIANNA KWIATKOWSKI OF COUNSEL), FOR DEFENDANTS-APPELLANTS JUDY CURTIS, CERTIFIED REGISTERED COUNSELOR MID-ERIE COUNSELING TREATMENT CENTER, AND MID-ERIE COUNSELING TREATMENT CENTER.

GIBSON, MCASKILL & CROSBY, LLP, BUFFALO (PAULETTE E. ROSS OF COUNSEL), FOR DEFENDANT-APPELLANT DR. ARVIND SAMANT, M.D.

LOUIS ROSADO, BUFFALO, FOR PLAINTIFFS-RESPONDENTS.

Appeals from an order of the Supreme Court, Erie County (Tracey A. Bannister, J.), entered July 6, 2017. The order denied the motions of defendants Judy Curtis, Mid-Erie Counseling Treatment Center and Dr. Arvind Samant, M.D., to dismiss the complaint of plaintiffs Louis Yourdon and James R. Belter.

It is hereby ORDERED that said appeals are unanimously dismissed without costs.

Memorandum: Plaintiffs-respondents (plaintiffs) commenced this negligence and malpractice action seeking compensatory and punitive damages arising from mental health services they received from defendants-appellants (defendants). Defendants appeal from an order that, inter alia, denied their motions pursuant to CPLR 3211 to dismiss the complaint against them. Subsequently, Supreme Court granted defendants' motions pursuant to CPLR 3126 to dismiss plaintiffs' complaint against them, and plaintiffs failed to appeal from that order or to move for leave to reargue with respect to that order, and the time to do so has expired. These appeals are therefore moot, and the exception to the mootness doctrine does not apply (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715

[1980]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

795

KA 16-01086

PRESENT: WHALEN, P.J., SMITH, CARNI, NEMOYER, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

NEWNON FLAX, 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 (Penny M. Wolfgang, J.), entered May 18, 2016. The order, insofar as appealed from, denied that part of the motion of defendant pursuant to CPL 440.30 (1-a) for DNA testing.

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

Memorandum: Defendant was convicted in 1988 of, inter alia, rape in the first degree (Penal Law § 130.35 [1]). On a prior appeal, we reversed that part of an order denying defendant's postjudgment motion pursuant to CPL 440.30 (1-a) for DNA testing because " 'the evidence of defendant's guilt was not so overwhelming that a different verdict would not have resulted if . . . DNA testing excluded him' as the source of the semen" on an item of the complainant's clothing, i.e., a jumpsuit, secured in connection with the underlying criminal investigation (*People v Flax*, 117 AD3d 1582, 1584 [4th Dept 2014]). We therefore remitted the matter to Supreme Court for a hearing to determine whether that jumpsuit still existed and, if so, whether there was sufficient DNA material on it for testing (*id*.).

Defendant now appeals from an order denying his motion for DNA testing after the hearing. Contrary to defendant's contention, the court properly determined that the People satisfied their burden of establishing that the jumpsuit could not be located by producing reliable information concerning their efforts to determine the whereabouts of that item of clothing (*see generally People v Pitts*, 4 NY3d 303, 312 [2005]). At the hearing, the People called a police department property clerk, a crime scene unit detective, the forensic chemist who conducted the original testing of the jumpsuit, and a District Attorney's Office investigator, each of whom testified in detail regarding their unsuccessful efforts to locate the jumpsuit

(*see People v Williams*, 128 AD3d 569, 569 [1st Dept 2015], *lv denied* 26 NY3d 937 [2015]; *People v Garcia*, 65 AD3d 932, 933 [1st Dept 2009], *lv denied* 13 NY3d 907 [2009]). Contrary to defendant's further contention, CPL 440.30 (1-a) (b) expressly precludes the court from drawing an adverse inference based on a purported failure to preserve evidence where, as here, the People established that, despite their efforts, "the physical location of [the] specified evidence is unknown."

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

813

KA 16-02265

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

TYLER L.E., DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

WENDY S. SISSON, GENESEO, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (J. THOMAS FUOCO OF COUNSEL), FOR RESPONDENT.

Appeal from an adjudication of the Allegany County Court (Terrence M. Parker, J.), rendered June 14, 2016. Defendant was adjudicated a youthful offender upon his plea of guilty to attempted forgery in the second degree.

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

814

KA 17-01494

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

STEVEN D. CLARK, DEFENDANT-APPELLANT.

CHARLES A. MARANGOLA, MORAVIA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Cayuga County Court (Mark H. Fandrich, A.J.), rendered June 13, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary in the second degree (three counts).

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

816

KA 17-00269

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT D. HOLLEY, DEFENDANT-APPELLANT.

DANIEL M. GRIEBEL, TONAWANDA, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Erie County Court (Michael M. Mohun, A.J.), rendered November 21, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted assault in the second degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of attempted assault in the second degree (Penal Law §§ 110.00, 120.05 [1]), defendant contends that his waiver of the right to appeal was not knowingly, intelligently, and voluntarily entered. We reject that contention. "County Court expressly ascertained from defendant that, as a condition of the plea, he was agreeing to waive his right to appeal, and the court did not conflate that right with those automatically forfeited by a guilty plea" (*People v McCrea*, 140 AD3d 1655, 1655 [4th Dept 2016], *lv denied* 28 NY3d 933 [2016] [internal quotation marks omitted]; *see generally People v Lopez*, 6 NY3d 248, 256 [2006]). Defendant's further contention that the court failed to make an appropriate inquiry into his request for substitution of counsel "is encompassed by the plea and the waiver of the right to appeal except to the extent that the contention implicates the voluntariness of the plea" (*People v Morris*, 94 AD3d 1450, 1451 [4th Dept 2012], *lv denied* 19 NY3d 976 [2012] [internal quotation marks omitted]). In any event, "defendant abandoned that request when he 'decid[ed] . . . to plead guilty while still being represented by the same attorney' " (*id.*; *see People v Guantero*, 100 AD3d 1386, 1387 [4th Dept 2012], *lv denied* 21 NY3d 1004 [2013]). To the extent that defendant contends that he was denied effective assistance of counsel, such contention "does not survive his plea or the valid waiver of the right to appeal 'inasmuch as defendant failed to demonstrate that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the

plea because of [defense counsel's] allegedly poor performance' " (*People v Brinson*, 151 AD3d 1726, 1726 [4th Dept 2017], *lv denied* 29 NY3d 1124 [2017]; *see Morris*, 94 AD3d at 1451).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

817

KA 15-00163

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ANDRE CHEESEBORO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered October 14, 2014. The judgment convicted defendant, upon a jury verdict, of robbery in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of robbery in the second degree (Penal Law § 160.10 [2] [b]), arising from an incident in which he stole cash from a taxi driver while displaying what appeared to be a gun. We reject defendant's contention that Supreme Court erred in precluding him from impeaching the victim with evidence that the victim did not tell the first police officer to whom he spoke after the robbery that defendant said that he would kill the victim and take his vehicle. In the absence of evidence that the victim signed, prepared, or verified the accuracy of the first officer's police report, any statements in that report that were attributed to the victim were not admissible in evidence as prior inconsistent statements made by the victim (*see People v Bernardez*, 85 AD3d 936, 937 [2d Dept 2011], *lv denied* 17 NY3d 857 [2011]; *see also People v White*, 272 AD2d 239, 240 [1st Dept 2000], *lv denied* 95 NY2d 940 [2000]). We note that defendant did not attempt to introduce in evidence the victim's signed statement or to present testimony about prior inconsistent statements or omissions of fact by the victim from the officer who interviewed the victim after the robbery and took the victim's signed statement.

Defendant's further contention that the court's determination to preclude that impeachment evidence combined with the prosecutor's comments during summation denied him a fair trial is unpreserved for our review (*see People v Carrasquillo*, 142 AD3d 1359, 1359 [4th Dept

2016], *lv denied* 28 NY3d 1143 [2017]), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Smith*, 129 AD3d 1549, 1549-1550 [4th Dept 2015], *lv denied* 26 NY3d 971 [2015]). Finally, the sentence is not unduly harsh or severe.

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

818

KA 16-02263

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TYLER L.E., DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

WENDY S. SISSON, GENESEO, FOR DEFENDANT-APPELLANT.

KEITH A. SLEP, DISTRICT ATTORNEY, BELMONT (J. THOMAS FUOCO OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Allegany County Court (Terrence M. Parker, J.), rendered June 14, 2016. The judgment convicted defendant, upon a jury verdict, of robbery in the third degree and criminal possession of a weapon 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 Allegany County Court for resentencing.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of robbery in the third degree (Penal Law § 160.05) and criminal possession of a weapon in the fourth degree (§ 265.01 [1]). Contrary to defendant's contention, the sentence imposed on the count of robbery in the third degree is not unduly harsh or severe. Nevertheless, County Court erred in failing to impose a sentence for each count of which defendant was convicted (*see* CPL 380.20). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court for resentencing (*see People v Sturgis*, 69 NY2d 816, 817-818 [1987]; *People v Bradley*, 52 AD3d 1261, 1262 [4th Dept 2008], *lv denied* 11 NY3d 734 [2008]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

820

CAF 17-01424

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

IN THE MATTER OF DARLENE REID,
PETITIONER-RESPONDENT,

V ORDER

DEBRA REID-YANCEY, RESPONDENT-APPELLANT.

IN THE MATTER OF JENNIFER L. JOHNSON,
PETITIONER-RESPONDENT,

V

DEBRA REID-YANCEY, RESPONDENT-APPELLANT,
AND DARLENE REID, RESPONDENT-RESPONDENT.

MARY M. WHITESIDE, NORTH HOLLYWOOD, CALIFORNIA, FOR RESPONDENT-APPELLANT.

CHRISTINE F. REDFIELD, ROCHESTER, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Wayne County (Richard M. Healy, J.), entered June 21, 2017 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded joint legal custody of the subject children to respondent Debra Reid-Yancey and petitioner Jennifer L. Johnson.

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

821

CAF 17-01172

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

IN THE MATTER OF ZANDER L.

ERIE COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

ATHENA L., RESPONDENT-APPELLANT.

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

KATHERINE E. MEIER-DAVIS, BUFFALO, FOR PETITIONER-RESPONDENT.

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

Appeal from an order of the Family Court, Erie County (Sharon M. LoVallo, J.), entered June 19, 2017 in a proceeding pursuant to Social Services Law § 384-b. The order, among other things, revoked a suspended judgment and terminated respondent's parental rights with respect to the subject child.

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

Memorandum: In a proceeding pursuant to Social Services Law § 384-b, respondent mother appeals from an order that revoked a suspended judgment and terminated her parental rights with respect to the subject child. We affirm.

It is well established that, if Family Court " 'determines by a preponderance of the evidence that there has been noncompliance with any of the terms of the suspended judgment, the court may revoke the suspended judgment and terminate parental rights' " (*Matter of Kh'Niayah D. [Niani J.]*, 155 AD3d 1649, 1650 [4th Dept 2017], *lv denied* 31 NY3d 901 [2018]; *see Matter of Ireisha P. [Shonita M.]*, 154 AD3d 1340, 1340-1341 [4th Dept 2017], *lv denied* 30 NY3d 910 [2018]). Contrary to the mother's contention, petitioner established by a preponderance of the evidence that she failed to comply with the terms of the suspended judgment. Indeed, the record establishes that the mother violated numerous terms of the suspended judgment, including requirements that she demonstrate safe and developmentally appropriate parenting practices, maintain adequate housing, and not have anyone else present during visits with the child. During her hearing testimony, the mother acknowledged that she had been evicted from her apartment because her friends were causing problems, including causing

damage to the apartment. In one incident the mother's friend, who was addicted to drugs, suffered a seizure and got blood "everywhere," resulting in the involvement of the police. Although the mother has obtained a new apartment, her new roommate, who was occasionally present during the mother's visits with the child, has a history of drug abuse and involvement with Child Protective Services. Furthermore, the terms of the mother's housing arrangement do not allow her to have children living in her new apartment, and she has made no additional efforts to obtain child-friendly housing.

Contrary to the mother's further contention, upon determining that the mother did not comply with the terms of the suspended judgment, the court properly revoked it and determined that it was in the child's best interests to terminate the mother's parental rights (*see Kh'Niayah D.*, 155 AD3d at 1650). We note that the "failure to obtain appropriate housing as required [by a suspended judgment] can, alone, constitute grounds for the revocation of a suspended judgment" (*Matter of Frederick MM.*, 23 AD3d 951, 953 [3d Dept 2005]; *see Matter of Gianna W. [Jessica S.]*, 96 AD3d 545, 545 [1st Dept 2012]).

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

823

CA 18-00136

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

IN THE MATTER OF ARBITRATION BETWEEN COUNTY
OF MONROE, PETITIONER-APPELLANT,

AND ORDER

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 828, UNIT 7423, RESPONDENT-RESPONDENT.

HARRIS BEACH PLLC, PITTSFORD (KARLEE S. BOLANOS OF COUNSEL), FOR PETITIONER-APPELLANT.

DAREN J. RYLEWICZ, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ALBANY (JENNIFER C. ZEGARELLI OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Thomas A. Stander, J.), entered March 20, 2017 in a proceeding pursuant to CPLR article 75. The order and judgment, among other things, granted respondent's cross motion to compel arbitration.

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court

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

825

CA 16-01183

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE
OF SHANNON S., CONSECUTIVE NO. 445041, FROM
CENTRAL NEW YORK PSYCHIATRIC CENTER PURSUANT
TO MENTAL HYGIENE LAW SECTION 10.09,
PETITIONER-APPELLANT,

V ORDER

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

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

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oneida County (Louis P. Gigliotti, A.J.), entered May 23, 2016 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, adjudged that petitioner is subject to Strict and Intensive Supervision and Treatment.

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

Entered: June 15, 2018

Mark W. Bennett
Clerk of the Court