SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

APRIL 26, 2019

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

1101

KA 14-01531

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL A. ALBERT, ALSO KNOWN AS GOTTI,
DEFENDANT-APPELLANT.

KIMBERLY J. CZAPRANSKI, FAIRPORT, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered July 30, 2014. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of murder in the second degree (Penal Law § 125.25 [1]) stemming from a homicide that occurred in 2006. Although defendant was not indicted for the crime until 2013, we reject his contention that he was entitled to a *Singer* hearing to explore the reasons for the People's delay in procuring the indictment inasmuch as "the record provided County Court with a sufficient basis to determine whether the delay was justified" (*People v Rogers*, 103 AD3d 1150, 1151 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]; *see People v Smith*, 60 AD3d 706, 707 [2d Dept 2009], *lv denied* 12 NY3d 859 [2009]).

Defendant further contends that the court erred in denying that part of his omnibus motion seeking to preclude statements that he made to a private citizen who was surreptitiously recording the statements for law enforcement agents. It is undisputed that the People failed to provide defendant with a CPL 710.30 notice with respect to those statements, and we reject the People's contention that no notice was required because the citizen was not a public servant at the time defendant made his statements to her. Although the statute does not require notice of "admissions made to private parties *who were not police agents*" (*People v Mirenda*, 23 NY2d 439, 448 [1969] [emphasis added]; *see People v Bryant*, 144 AD3d 1523, 1524 [4th Dept 2016], *lv denied* 28 NY3d 1143 [2017]; *cf. People v Stern*, 226 AD2d 238, 239 [1st Dept 1996], *lv denied* 88 NY2d 969, 1072 [1996]), we agree with our

dissenting colleagues that the citizen in this case was acting as a police agent at the time she recorded the statements inasmuch as she was acting "at the instigation of the police . . . to further a police objective" (*People v Ray*, 65 NY2d 282, 286 [1985]; *see People v Eberle*, 265 AD2d 881, 882-883 [4th Dept 1999]; *cf. People v Smith*, 262 AD2d 1063, 1063 [4th Dept 1999], *lv denied* 93 NY2d 1027 [1999]).

We respectfully disagree with our dissenting colleagues, however, on the issue whether the failure to provide the CPL 710.30 notice warrants preclusion of those statements. We conclude that it does not. Where, as here, there is "no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion" (*People v Clark*, 198 AD2d 46, 47 [1st Dept 1993], *lv denied* 83 NY2d 870 [1994]; *see People v Rockefeller*, 89 AD3d 1151, 1152-1153 [3d Dept 2011], *lv denied* 20 NY3d 1064 [2013]; *see also People v Garcia-Lopez*, 308 AD2d 366, 366 [1st Dept 2003], *lv denied* 1 NY3d 572 [2003], *cert denied* 541 US 1078 [2004]; *see generally People v Greer*, 42 NY2d 170, 178-179 [1977]). In our view, there is no colorable basis for suppression of defendant's statements to the private citizen. There is no dispute that defendant voluntarily went to the citizen's home and that he was interested in pursuing a romantic relationship with her. During the entire conversation, wherein defendant admitted committing the homicide, the private citizen made no explicit or implicit promises that she would engage in sexual relations with defendant. Rather, it was defendant who offered to tell her anything she wanted to know after she expressed that she was afraid of him, and then provided her with all of the details concerning the homicide. We thus conclude that the private citizen did not make any statement or engage in any conduct that "create[d] a substantial risk that . . . defendant might falsely incriminate himself" (CPL 60.45 [2] [b] [i]; *see People v Bradberry*, 131 AD3d 800, 802 [4th Dept 2015], *lv denied* 26 NY3d 1086 [2015]). If anything, the citizen's expressed fear of defendant would have had a higher likelihood of inducing defendant to *deny* participation in the homicide. Although the private citizen ultimately engaged in sexual relations with defendant later that night, the recording establishes that she made no explicit or implicit promises that she would do so (*cf. Commonwealth v Lester*, 392 Pa Super 66, 67-73, 572 A2d 694, 695-698 [1990], *appeal denied* 527 Pa 609, 590 A2d 296 [1991]). The fact that defendant hoped his confession would endear him to the citizen and convince her that he was worthy of her sexual favors does not provide any arguable basis to believe that his statements were anything but " 'spontaneous and uncontestably voluntary' " (*People v Smith*, 118 AD3d 920, 921 [2d Dept 2014], *lv denied* 24 NY3d 1089 [2014], *reconsideration denied* 25 NY3d 992 [2015]). We thus further conclude that the court did not err in refusing to instruct the jury regarding the voluntariness of his statements to that private citizen; there was no evidence at trial "presenting a genuine issue of fact concerning the voluntariness of [those] statements" (*People v Clyburn-Dawson*, 128 AD3d 1350, 1352 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *see People v Nelson*, 133 AD3d 1228, 1228 [4th Dept 2015], *lv denied* 27 NY3d 1003 [2016]; *see generally People v Cefaro*, 23 NY2d 283, 288-289 [1968]).

We reject defendant's contention that the court erred in refusing to suppress statements that he made to law enforcement personnel without the benefit of *Miranda* warnings. Although defendant was incarcerated on an unrelated offense, he was not subjected to custodial interrogation inasmuch as "[t]here was no 'added constraint' that would have led defendant to believe that some other restriction had been placed on him 'over and above that of ordinary confinement in a correctional facility' " (*People v Boyd*, 159 AD3d 1358, 1362 [4th Dept 2018], *lv denied* 31 NY3d 1145 [2018]; *see People v Ayala*, 27 AD3d 1087, 1088 [4th Dept 2006], *lv denied* 6 NY3d 892 [2006]; *see generally People v Alls*, 83 NY2d 94, 100 [1993], *cert denied* 511 US 1090 [1994]). We thus conclude that *Miranda* warnings were not required (*see Ayala*, 27 AD3d at 1088; *see generally People v Huffman*, 41 NY2d 29, 33 [1976]). Defendant further contends that the court erred in failing to instruct the jury on the voluntariness of his statements to law enforcement personnel. That contention is not preserved for our review inasmuch as he did not seek such an instruction for those statements (*see People v Thomas*, 96 AD3d 1670, 1673 [4th Dept 2012], *lv denied* 19 NY3d 1002 [2012]). In any event, the contention lacks merit where, as here, there was no evidence in the trial record that would raise a factual issue concerning the voluntariness of those statements (*see Clyburn-Dawson*, 128 AD3d at 1351-1352; *see generally Cefaro*, 23 NY2d at 288-289).

During jury selection, defendant raised *Batson* challenges with respect to two prospective jurors. We agree with the People that they provided race-neutral reasons to support striking those jurors. The first juror's disclosure that her father and brother had criminal convictions was offered by the People as the basis for their challenge and constitutes a race-neutral reason to strike a juror (*see e.g. People v Garcia*, 143 AD3d 1283, 1284 [4th Dept 2016], *lv denied* 28 NY3d 1184 [2017]; *People v Ball*, 11 AD3d 904, 905 [4th Dept 2004], *lv denied* 3 NY3d 755 [2004], *lv denied* 4 NY3d 741 [2004]). The second prospective juror disclosed that he had recently read two books by a writer the prosecutor described as "a black revolutionary-type writer," who had "very antigovernment [sic], anti-law-and-order type views." Contrary to defendant's contention, the prospective juror's "expos[ure] . . . to 'anti-police' and 'anti-establishment' sentiments" was a race-neutral reason for the exclusion of that prospective juror (*People v Funches*, 4 AD3d 206, 207 [1st Dept 2004], *lv denied* 3 NY3d 640 [2004]).

Defendant's remaining contentions lack merit. We conclude that defendant's right of confrontation was not violated "when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]; *see People v Chelley*, 121 AD3d 1505, 1506-1507 [4th Dept 2014], *lv denied* 24 NY3d 1218 [2015], *reconsideration denied* 25 NY3d 1070 [2015]; *see generally People v Freycinet*, 11 NY3d 38, 42 [2008]). Further, the court did not err in denying defendant's request for an accomplice charge inasmuch as there was no reasonable view of the evidence that the particular witness "participated in the planning or

execution of the crime[]" (*People v Jones*, 73 NY2d 902, 903 [1989], *rearg denied* 74 NY2d 651 [1989]; *see People v Young*, 225 AD2d 1066, 1067 [4th Dept 1996], *lv denied* 88 NY2d 1026 [1996]). Addressing both the preserved and unpreserved contentions concerning alleged prosecutorial misconduct (*see* CPL 470.15 [6] [a]), we conclude that the prosecutor did not impermissibly change the theory of the People's case (*see generally People v Mateo*, 2 NY3d 383, 402 [2004], *cert denied* 542 US 946 [2004]) and that the remaining instances of alleged impropriety on the part of the prosecutor "were either fair comment on the evidence . . . or appropriate response to arguments made in defendant's summation" (*People v Speaks*, 28 NY3d 990, 992 [2016]). We conclude that the conviction is supported by legally sufficient evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except CENTRA, J.P., and DEJOSEPH, J., who dissent and vote to reverse in accordance with the following memorandum: We respectfully dissent because we disagree with the majority's conclusion that the failure of the People to provide a CPL 710.30 notice with respect to statements defendant made to a private citizen who was acting as an agent of the police does not warrant preclusion of those statements.

CPL 710.30 requires, inter alia, that the People serve a defendant with notice, within 15 days after arraignment and before trial, if they intend to offer at a trial "evidence of a statement made by [the] defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible" (CPL 710.30 [1] [a]). "[T]he purpose of CPL 710.30 is to inform a defendant that the People intend to offer evidence of a statement to a public officer at trial so that a timely motion to suppress the evidence may be made" (*People v Rodney*, 85 NY2d 289, 291-292 [1995]). Our colleagues in the majority conclude that, because there is " 'no colorable basis for suppression of the statement, the failure to give notice [constitutes] a mere irregularity not warranting preclusion.' " The cases relied on by the majority involve circumstances where there was "no question as to the voluntariness of" the statements (*People v Rockefeller*, 89 AD3d 1151, 1153 [3d Dept 2011], *lv denied* 20 NY3d 1064 [2013]; *see People v Garcia-Lopez*, 308 AD2d 366, 366 [1st Dept 2003], *lv denied* 1 NY3d 572 [2003], *cert denied* 541 US 1078 [2004]). The same cannot be said in this case.

"It is for the court and not the parties to determine whether a statement is truly voluntary" (*People v Chase*, 85 NY2d 493, 500 [1995]), and here we conclude that there is "[a] colorable basis for suppression of the statement[s]" (*People v Clark*, 198 AD2d 46, 47 [1st Dept 1993]; *see generally Commonwealth v Lester*, 392 Pa Super 66, 67-73, 572 A2d 694, 695-698 [1990], *appeal denied* 527 Pa 609, 590 A2d 296 [1991]), i.e., that the statements were involuntary because they were

made in exchange for the promise of sexual relations. While we acknowledge that the recorded conversation between defendant and the police agent does not contain an express offer of sexual relations, we conclude that County Court could have inferred from the conversation and the police agent's testimony that defendant made the statements in exchange for an implicit promise of sexual relations. It is our position that, in cases where it is at least arguable that a defendant would "be entitled to a pretrial hearing, the statutory notice must be supplied regardless of the District Attorney's personal opinion that the defendant['s statements were voluntary] and regardless of the fact that, following a hearing, the trial court might reach the same conclusion" (*People v Brown*, 140 AD2d 266, 270 [1st Dept 1988], *lv denied* 72 NY2d 955 [1988]). In our view, that position is supported by *Chase* and *People v Greer* (42 NY2d 170 [1977]). Indeed, the Court of Appeals recognized that, in *Greer*, even though it "found that the statement in question was completely voluntary (when discovered by the police in the midst of sexual intercourse, defendant claimed the act was consensual rather than rape but, in response to the officer's question, did not know the victim's name), it precluded the statement for failure of the People to give the required notice" (*Chase*, 85 NY2d at 500).

Thus, because there is a question here whether defendant's statements to the police agent were voluntary, defendant " 'had the right to have a court review the circumstances under which the statement[s were] given and to determine [their] voluntariness' " (*People v Boone*, 98 AD3d 629, 629 [2d Dept 2012], *lv denied* 20 NY3d 931 [2012], quoting *Chase*, 85 NY2d at 500). Consequently, we conclude that defendant was entitled to notice of the statements made to the police agent pursuant to CPL 710.30 and that "the People's failure to provide such notice should have served to preclude the admission of [those] statement[s] at . . . defendant's trial" (*Boone*, 98 AD3d at 629). That error was not harmless, and therefore we would reverse the judgment, grant that part of the omnibus motion seeking to preclude the People from introducing at trial the recorded conversation between defendant and the police agent, and grant defendant a new trial on count one of the indictment (*see People v O'Doherty*, 70 NY2d 479, 489 [1987]; *People v Scott*, 222 AD2d 1004, 1004 [4th Dept 1995], *lv denied* 87 NY2d 1025 [1996]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1248

CA 18-00897

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

NICHOLAS J. HOULE, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

SEVENTWOTEN, LLC, DOING BUSINESS AS HELL BARBELL, DEFENDANT-APPELLANT.

SEVENTWOTEN, LLC, DOING BUSINESS AS HELL BARBELL,
THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT,

V

G.S. 2 HEALTH & FITNESS MGT., INC., DOING BUSINESS AS GEORGE'S GYM EQUIPMENT, AND GEORGE'S GYM EQUIPMENT, LLC,
THIRD-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS.

SANTACROSE & FRARY, ALBANY (DUSTIN C. SANTACROSE OF COUNSEL), FOR DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF-APPELLANT-RESPONDENT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR THIRD-PARTY DEFENDANTS-RESPONDENTS-APPELLANTS.

LAW OFFICE OF WILLIAM M. BORRILL, NEW HARTFORD (JOSEPH V. MCBRIDE OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Oneida County (Norman I. Siegel, J.), entered August 2, 2017. The order denied the motion of defendant-third-party plaintiff for summary judgment and denied the motion of third-party defendants for summary judgment and for sanctions for spoliation of evidence.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting the motion of defendant-third-party plaintiff in part and dismissing the cause of action for breach of implied warranty, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action against defendant-third-party plaintiff (Hell Barbell) to recover damages for injuries he allegedly sustained while he was using a leg press machine at a gym operated by Hell Barbell. There is no dispute that, prior to the incident, the leg press machine had been positioned on casters and

plaintiff had modified it by adding a bar and additional weight. According to plaintiff, he was injured when the machine shifted while he was performing a leg press. After the incident, plaintiff noticed that one of the casters had broken off the machine.

After being sued by plaintiff, Hell Barbell commenced a third-party action against third-party defendants (GGE defendants), seeking contribution or indemnification based on the allegation that they had supplied and installed the casters on the leg press machine prior to the accident and had advised Hell Barbell that the casters could remain on the leg press machine during its use. Hell Barbell and the GGE defendants moved for summary judgment dismissing the amended complaint, and the GGE defendants also moved for summary judgment dismissing the third-party complaint and for dismissal of that complaint as a sanction for Hell Barbell's purported spoliation of evidence. Supreme Court denied the motions, and both Hell Barbell and the GGE defendants appeal.

Hell Barbell and the GGE defendants each contend that they established their entitlement to judgment as a matter of law dismissing the amended complaint on the ground that plaintiff assumed the risk of using the leg press machine. We reject those contentions. "The assumption of [the] risk doctrine applies as a bar to liability where a consenting participant in sporting or recreational activities is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks" (*Ulin v Hobart & William Smith Colls.*, 158 AD3d 1298, 1298 [4th Dept 2018] [internal quotation marks omitted]). "The doctrine has been applied in cases involving injuries sustained in gyms and fitness centers" (*DiBenedetto v Town Sports Intl., LLC*, 118 AD3d 663, 663 [2d Dept 2014]). " 'However, the doctrine of primary assumption of [the] risk will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased' " (*Ulin*, 158 AD3d at 1298). Here, Hell Barbell and the GGE defendants each established their prima facie entitlement to judgment as a matter of law by submitting evidence that plaintiff had extensive experience with powerlifting and weightlifting in general, including the use of a leg press machine, and that plaintiff, who had modified the leg press machine to hold additional weight and was attempting to press approximately 1,500 pounds, was well aware that he was using the machine in a manner inconsistent with its design. Their evidence further established that, by adding the bar and extra weight, plaintiff exceeded the amount of weight the leg press machine was designed to hold.

In opposition, however, plaintiff raised triable issues of fact whether Hell Barbell or the GGE defendants unreasonably increased the risk associated with the use of the leg press machine by installing and maintaining casters on it (*see Zelkowitz v Country Group, Inc.*, 142 AD3d 424, 427-428 [1st Dept 2016]; *Harting v Community Refm. Church of Colonie*, 198 AD2d 621, 622 [3d Dept 1993]; *see generally Jones v Smoke Tree Farm*, 161 AD3d 1590, 1590 [4th Dept 2018]; *Alqurashi v Party of Four, Inc.*, 89 AD3d 1047, 1048 [2d Dept 2011]). Plaintiff submitted evidence establishing that the leg press machine did not have casters when Hell Barbell purchased it. In his

deposition testimony, the owner of Hell Barbell stated that the owner of the GGE defendants put the casters on the leg press machine to make it easier to move the machine while the owner of the GGE defendants was installing rubber flooring at Hell Barbell. Plaintiff's expert concluded that one of the casters failed during plaintiff's use of the leg press machine and that the resulting movement of the weight effectively increased the load on plaintiff's legs, thereby causing injury to plaintiff. The expert further opined that casters of the size used on the leg press machine, which are typically designed for relatively light loads of 300 pounds or less per wheel, should have been removed prior to its use. Because there are issues of fact whether the risk plaintiff encountered was unreasonably increased by the installation and subsequent failure of a caster on the leg press machine and whether plaintiff should have been aware of that increased risk, Hell Barbell and the GGE defendants were not entitled to summary judgment dismissing the amended complaint on the ground of assumption of the risk (*see Zelkowitz*, 142 AD3d at 429).

We agree with Hell Barbell, however, that because it "had no role in the manufacture, sale, or distribution of the injury-producing product, it cannot be held liable for breach of . . . implied warranty" (*Mussara v Mega Funworks, Inc.*, 100 AD3d 185, 191 [2d Dept 2012]; *see Dann v Family Sports Complex, Inc.*, 123 AD3d 1177, 1179 [3d Dept 2014]). We therefore modify the order by granting Hell Barbell's motion in part and dismissing the cause of action for breach of implied warranty.

With respect to the appeal of the GGE defendants, we reject their contention that plaintiff's decision to modify the leg press machine by adding a bar and additional weight constituted the sole proximate cause of the accident (*cf. Crawford v Windmere Corp.*, 262 AD2d 268, 269 [2d Dept 1999]). Here, the cause of the accident is disputed by the parties, with plaintiff blaming the casters, and Hell Barbell and the GGE defendants blaming plaintiff's decision to modify the equipment and his attempt to lift an excessive amount of weight. Because there is evidence to support both theories, we conclude that the GGE defendants were not entitled to summary judgment dismissing the amended complaint on the ground that plaintiff was the sole proximate cause of the accident (*see Laboy v Wallkill Cent. Sch. Dist.*, 201 AD2d 780, 781 [3d Dept 1994]; *see generally Hartsuff v Michaels*, 139 AD3d 1005, 1006 [2d Dept 2016]).

We further conclude that the court properly denied the motion of the GGE defendants insofar as it sought summary judgment dismissing the third-party complaint. Although the GGE defendants presented evidence that they were not involved in ordering or installing the rubber flooring at Hell Barbell, that they did not provide Hell Barbell with casters for the leg press machine, and that they did not advise Hell Barbell that it could keep any equipment on casters, Hell Barbell presented conflicting evidence on those factual issues. We thus conclude that there are triable issues of fact sufficient to defeat that part of the motion of the GGE defendants (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Contrary to the further contention of the GGE defendants, the court did not abuse its discretion in denying that part of their motion seeking dismissal of the third-party complaint as a spoliation sanction based on Hell Barbell's decision to discard the broken caster (*see generally Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc.*, 22 NY3d 877, 880 [2013]). Under the circumstances of this case, the requested sanction is not "commensurate with the particular disobedience it is designed to punish" (*id.* [internal quotation marks omitted]; *see Roberts v Corwin*, 118 AD3d 571, 573 [1st Dept 2014]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1275/18

CA 18-00239

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

IN THE MATTER OF NATIONAL FUEL GAS SUPPLY CORPORATION, PETITIONER-RESPONDENT,

V ORDER

DUFFIELD CAMP AND RETREAT CENTER INC., RESPONDENT-APPELLANT, ET AL., RESPONDENTS.

COOLIGAN LAW LLP, BUFFALO (KEVIN T. O'BRIEN OF COUNSEL), FOR RESPONDENT-APPELLANT.

PHILLIPS LYTLE LLP, BUFFALO (JOANNE DICKINSON OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Cattaraugus County (Jeremiah J. Moriarty, III, J.), entered October 2, 2017. The order, among other things, granted the petition.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 21 and 25, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1293

KA 18-00993

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT,

V MEMORANDUM AND ORDER

THOMAS BEEBE, DEFENDANT-RESPONDENT.

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

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ERIN A. KULESUS OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an amended order of the Erie County Court (Sheila A. DiTullio, J.), dated December 20, 2017. The amended order granted the motion of defendant to dismiss the indictment.

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

Memorandum: The People appeal from an amended order granting defendant's motion to dismiss the indictment on statutory and constitutional speedy trial grounds (*see* CPL 30.20, 30.30 [1] [a]). We affirm.

Contrary to the People's contention, County Court properly granted the motion on the ground that defendant's statutory speedy trial rights were violated. Defendant established that he was extradited to Pennsylvania days after the commencement of this criminal action and was not returned to this jurisdiction for either a felony hearing on the initial charges against him or an arraignment on the subsequently issued indictment prior to the time, more than six months later, that the court granted defendant's motion and dismissed the indictment. Defendant therefore met his initial burden of establishing that his statutory speedy trial rights were violated (*see People v Walter*, 8 AD3d 1109, 1110 [4th Dept 2004], *lv denied* 3 NY3d 682 [2004]).

We reject the People's contention that they may rely on CPL 30.30 (4) (c) (i) or 30.30 (4) (e) to exclude any portion of that time based on defendant's absence or unavailability (*see Walter*, 8 AD3d at 1110). "It is the People's responsibility . . . to schedule the arraignment, so as to bring the case to the stage where it may be tried. Because a delay in arraigning a defendant 'constitutes a direct impediment to commencement of the trial' . . . , prosecutorial laxity in this

respect, 'even if inadvertent', is chargeable to the People as postreadiness delay" (*People v McGrath*, 223 AD2d 759, 760 [3d Dept 1996], quoting *People v England*, 84 NY2d 1, 5 [1994], *rearg denied* 84 NY2d 846 [1994]). Here, it is undisputed that defendant's departure from the jurisdiction and his inability to appear for either the rescheduled felony hearing or his arraignment on the subsequently issued indictment were caused by the People's actions. The People failed to hold a felony hearing as originally scheduled, which resulted in defendant's release on the initial charges without a detainer (*see* CPL 180.80). Thereafter, the People acted affirmatively to secure defendant's waiver of extradition to Pennsylvania. At the time of the extradition proceeding, the People were aware of the pending New York felony complaint against defendant but failed to raise the issue of the New York charges during the extradition hearing. Further, the conclusory and vague statements of the prosecutor in the record do not support the People's contention that diligent efforts were made to facilitate the return of defendant from Pennsylvania following his extradition (*see People v Devino*, 110 AD3d 1146, 1149 [3d Dept 2013]).

Additionally, we agree with defendant that the People failed to preserve their contention that the court erred in granting defendant's motion on constitutional speedy trial grounds under CPL 30.20 (*see* CPL 470.05 [2]). In any event, that issue is academic in light of our determination that the court properly granted defendant's motion on statutory speedy trial grounds.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1294

KA 15-01095

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BRADFORD M. CLARK, JR., DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Thomas E. Moran, J.), rendered June 8, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, a new trial is granted on count two of the indictment, and the matter is remitted to Supreme Court, Monroe County, for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon a jury verdict of assault in the first degree (Penal Law § 120.10 [1]) arising from a stabbing incident that resulted in, among other things, serious physical injury to one of the victims, defendant contends that Supreme Court abused its discretion in denying his challenges for cause to two prospective jurors. We agree. We therefore reverse the judgment and grant a new trial on count two of the indictment.

"It is well settled that 'a prospective juror whose statements raise a serious doubt regarding the ability to be impartial must be excused unless the [prospective] juror states unequivocally on the record that he or she can be fair and impartial' " (*People v Odum*, 67 AD3d 1465, 1465 [4th Dept 2009], *lv denied* 14 NY3d 804 [2010], *reconsideration denied* 15 NY3d 755 [2010], *cert denied* 562 US 931 [2010], quoting *People v Chambers*, 97 NY2d 417, 419 [2002]). Although CPL 270.20 (1) (b) "does not require any particular expurgatory oath or 'talismanic' words . . . , [a prospective] juror[] must clearly express that any prior experiences or opinions that reveal the potential for bias will not prevent [him or her] from reaching an impartial verdict" (*People v Arnold*, 96 NY2d 358, 362 [2001]; *see People v Harris*, 19 NY3d 679, 685 [2012]).

Here, viewing the statements of the first prospective juror "in totality and in context" (*People v Warrington*, 28 NY3d 1116, 1120

[2016]; *see People v Johnson*, 94 NY2d 600, 615-616 [2000]), we conclude that those statements cast serious doubt on her ability to render an impartial verdict because, during a discussion about defendant's fundamental right to the presumption of innocence and immediately after another prospective juror stated that no judgment could be made from defendant's mere presence in the courtroom, the first prospective juror expressed the opinion that defendant's presence meant that something had happened in which defendant was involved (*see People v Betances*, 147 AD3d 1352, 1353-1354 [4th Dept 2017]; *People v Williams*, 107 AD3d 746, 747 [2d Dept 2013], *lv denied* 21 NY3d 1047 [2013]). The first prospective juror thereafter did not provide the requisite "unequivocal assurance of impartiality" (*Arnold*, 96 NY2d at 364; *see Betances*, 147 AD3d at 1354) and instead represented that she would retain that opinion even if the court instructed the jury not to presume or conclude anything from the accusation against defendant.

We also conclude that the second prospective juror evinced "a state of mind that [was] likely to preclude [her] from rendering an impartial verdict based upon the evidence adduced at the trial" (CPL 270.20 [1] [b]). Although the second prospective juror initially said that she thought she could separate the fact that a close friend had been stabbed and murdered from her consideration of this case, she later retreated from that statement by explaining that she would probably contemplate the circumstances of the crime against her friend while hearing evidence of the stabbing in this case (*see People v Malloy*, 137 AD3d 1304, 1305 [2d Dept 2016], *lv dismissed* 27 NY3d 1135 [2016]; *People v Payne*, 49 AD3d 1154, 1154 [4th Dept 2008]; *People v McFadden*, 244 AD2d 887, 887 [4th Dept 1997]). "[N]othing less than a personal, unequivocal assurance of impartiality can cure a [prospective] juror's prior indication that [he or]she is predisposed against a particular defendant or particular type of case" (*Arnold*, 96 NY2d at 364), and our review of the record here establishes that the second juror did not " 'g[i]ve the requisite unequivocal assurances that her prior state of mind would not influence her verdict and that she could be fair and impartial' " (*Payne*, 49 AD3d at 1155).

Because defendant "exhausted all of his peremptory challenges before the completion of jury selection, the denial of defendant's challenges for cause constitutes reversible error" (*People v Strassner*, 126 AD3d 1395, 1396 [4th Dept 2015]; *see* CPL 270.20 [2]).

Inasmuch as we are granting a new trial, we note in the interest of judicial economy that the court, in denying that part of defendant's omnibus motion seeking to suppress his cell phone, erred in determining that the police lawfully seized that property from defendant's vehicle incident to arrest in order to protect evidence within defendant's "grabbable area" from destruction or concealment (*see generally People v Jimenez*, 22 NY3d 717, 721-722 [2014]; *People v Gokey*, 60 NY2d 309, 312 [1983]). "We have no power to ' "review issues either decided in an appellant's favor, or not ruled upon, by the trial court" ' " (*People v Coles*, 105 AD3d 1360, 1363 [4th Dept 2013], quoting *People v Concepcion*, 17 NY3d 192, 195 [2011]; *see* CPL 470.15 [1]), and thus we cannot address the alternative ground

asserted by the People but not ruled upon by the court, i.e., that the police lawfully seized the cell phone pursuant to the automobile exception to the warrant requirement (*see People v Ingram*, 18 NY3d 948, 949 [2012]; *see generally People v Blasich*, 73 NY2d 673, 678 [1989]). We therefore further direct that the matter be remitted to Supreme Court to rule on that alternative ground prior to trial (*see People v Pritchard*, 149 AD3d 1479, 1481 [4th Dept 2017]).

Additionally, pursuant to both the declaration against penal interest exception to the hearsay rule (*see People v Shabazz*, 22 NY3d 896, 898 [2013]) and defendant's constitutional rights to present a defense and to due process (*see People v Burns*, 6 NY3d 793, 794-795 [2006]; *People v McArthur*, 113 AD3d 1088, 1089-1090 [4th Dept 2014]), defendant repeatedly sought the admission in evidence of the hearsay statement of an eyewitness who provided the police with a statement shortly after the incident but was unavailable to testify at trial. We agree with defendant that the court ultimately determined that the statement was inadmissible because it did not qualify as a declaration against penal interest and that the court failed to address the separate constitutional ground. Given that we have no power to review issues not ruled upon by the trial court (*see* CPL 470.15 [1]; *Concepcion*, 17 NY3d at 195; *Coles*, 105 AD3d at 1363), we may not consider whether the hearsay statement of the unavailable eyewitness was admissible pursuant to defendant's constitutional rights to present a defense and to due process (*see Ingram*, 18 NY3d at 949).

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1304

CA 18-01339

PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ.

NASIR MUZAID OMAR, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

MICHAEL MOORE, II, DEFENDANT,
NU-ERA HOME IMPROVEMENT AND SADEQ AHMED, ALSO
KNOWN AS SADEQ AHMED ALSHAMARI,
DEFENDANTS-APPELLANTS.

PHILLIPS LYTLE LLP, BUFFALO (ANDREW P. DEVINE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

VANDETTE PENBERTHY LLP, BUFFALO (BRITTANY L. PENBERTHY OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Emilio L. Colaiacovo, J.), entered March 29, 2018. The order, insofar as appealed from, denied in part the motion of defendants Nu-Era Home Improvement and Sadeq Ahmed, also known as Sadeq Ahmed Alshamari, to dismiss the amended complaint against them.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking to dismiss the first and second causes of action against defendants Nu-Era Home Improvement and Sadeq Ahmed, also known as Sadeq Ahmed Alshamari, and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to recover damages for, inter alia, breach of contract, negligence, and unjust enrichment arising from defendants' allegedly unsatisfactory performance of construction work on his residence. Nu-Era Home Improvement and Sadeq Ahmed, also known as Sadeq Ahmed Alshamari, (collectively, defendants) filed a pre-answer motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint against them in its entirety. Supreme Court, inter alia, denied the motion insofar as it sought dismissal of the breach of contract, negligence, and unjust enrichment causes of action.

We agree with defendants that the court erred in denying their motion with respect to the first cause of action, for breach of contract, and we therefore modify the order accordingly. In the amended complaint, plaintiff alleged that defendants breached the contract appended to that complaint, which was executed only by

plaintiff and defendant Michael Moore, II. Defendants are not parties to that contract, and thus they " 'indisputably' demonstrated 'through evidentiary material' that plaintiff's allegation that [they were] part[ies] to the [contract at issue] was 'not a fact at all' " (*Woss, LLC v 218 Eckford, LLC*, 102 AD3d 860, 862 [2d Dept 2013]; *see generally Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Liberty Affordable Hous., Inc. v Maple Ct. Apts.*, 125 AD3d 85, 89-90 [4th Dept 2015]). Furthermore, plaintiff's affidavit submitted in opposition to the motion "did not remedy a defect in pleading but advanced [an] entirely new cause[] of action premised on [the alleged existence of a different] agreement without seeking leave to replead or [further] amend the complaint" (*Woss, LLC*, 102 AD3d at 862).

We also agree with defendants that the court erred in denying their motion with respect to the second cause of action, for negligence, and we therefore further modify the order accordingly. Plaintiff's causes of action sound in contract and not tort because no "legal duty independent of the contract itself has [allegedly] been violated" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *see 621 Payne Ave., LLC v Union Free Sch. Dist. No. 1 of N. Tonawanda*, 114 AD3d 1145, 1145 [4th Dept 2014]; *County of Chautauqua v Pacos Constr. Co.*, 195 AD2d 1021, 1022 [4th Dept 1993]).

We reject defendants' contention that the court erred in denying their motion with respect to the cause of action for unjust enrichment premised on defendants' alleged acceptance of payments for the construction work. Where, as here, the existence of a controlling contract between the parties has not been conceded by the parties or determined by the motion court, the assertion of a cause of action for breach of contract does not preclude a plaintiff from asserting in the alternative a cause of action for unjust enrichment (*see American Tel. & Util. Consultants v Beth Israel Med. Ctr.*, 307 AD2d 834, 835 [1st Dept 2003]; *Fisher v A.W. Miller Tech. Sales*, 306 AD2d 829, 831-832 [4th Dept 2003]; *ME Corp. S.A. v Cohen Bros.*, 292 AD2d 183, 185-186 [1st Dept 2002]). Contrary to defendants' further contention, we conclude that dismissal of the unjust enrichment cause of action is not warranted based on documentary evidence inasmuch as the receipts in question do not "conclusively establish[ ]" that defendants did not receive payments from plaintiff (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see generally Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Moreover, defendants' contention that plaintiff's unjust enrichment claim is barred under the doctrine of unclean hands involves an issue of fact " 'that cannot be resolved on [a pre-answer] motion to dismiss' " (*Cohen & Lombardo, P.C. v Connors*, 169 AD3d 1399, 1401 [4th Dept 2019]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1316

KA 16-02167

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN HUNTER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered December 17, 2015. The judgment convicted defendant, upon a jury verdict, of murder in the second degree and criminal possession of a weapon in the second degree (two counts).

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

Memorandum: On appeal from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]) and two counts of criminal possession of a weapon in the second degree (§ 265.03 [1] [b]; [3]), defendant contends that County Court deprived him of his right to counsel of his own choosing when the court compelled his retained attorney to continue representing him even after the attorney informed the court, four days before trial, that defendant "fired" the attorney. Defendant further contends that the issue concerning counsel is a " 'structural error' " that does not require preservation. We need not resolve defendant's latter contention inasmuch as we conclude that defendant preserved his substantive contention for our review even though he did not personally request any substitution of counsel (*cf. People v Harris*, 151 AD3d 1720, 1720 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Youngblood*, 294 AD2d 954, 955 [4th Dept 2002], *lv denied* 98 NY2d 704 [2002]). With respect to the merits of defendant's substantive contention, we conclude that defendant's constitutional rights were not violated. "Although a defendant has the constitutionally guaranteed right to be defended by counsel of his [or her] own choosing, this right is qualified in the sense that a defendant may not employ such right as a means to delay judicial proceedings" (*People v Arroyave*, 49 NY2d 264, 271 [1980]). Here, "defendant had ample opportunity to retain [other] counsel . . . , and he failed to demonstrate that [substitution of counsel on the eve of

trial] was necessitated by forces beyond his control and was not a dilatory tactic" (*People v Allison*, 69 AD3d 740, 741 [2d Dept 2010], *lv denied* 14 NY3d 885 [2010]). Moreover, we conclude that the court properly determined "that the reasons cited by counsel did not warrant his withdrawal from representation and that the court, in denying [counsel's] request, properly 'balance[d] the need for the expeditious and orderly administration of justice against the legitimate concerns of counsel' " (*Harris*, 151 AD3d at 1721).

Defendant further contends that the court erred in denying his pretrial request to admit in evidence at trial a recording of an interview conducted by police officers with an individual who had passed away before trial. We reject that contention. The statements made by the individual constituted hearsay and did not fall within any exception (*see generally People v Brensic*, 70 NY2d 9, 14 [1987]). Contrary to defendant's contention, the statements do not fall within an exception to the hearsay rule as statements against penal interest inasmuch as the individual was not aware, at the time he made his statements, that they were "contrary to his penal interest" (*id.* at 15). In his interview with police investigators, the individual repeatedly denied any knowledge of or involvement in the crimes committed by defendant. The investigators, who had obtained contradictory information from other witnesses, informed the individual that, if he continued with his denials, the investigators could charge him with hindering prosecution. The individual maintained his ignorance of the crimes and, ultimately, was so charged. It is that threat and the resultant criminal charge that defendant contends transformed the individual's denials into statements against penal interest. We do not agree. A person who denies knowledge of or participation in a crime is not "reveal[ing] facts that are contrary to his [or her] own interest" (*People v Maerling*, 46 NY2d 289, 295 [1978]). In any event, we further conclude that there is insufficient "competent evidence independent of [the statements] to assure [their] trustworthiness and reliability" (*Brensic*, 70 NY2d at 15), which is the " 'most important' aspect of the exception" for statements against penal interest (*People v Shabazz*, 22 NY3d 896, 898 [2013]).

Defendant contends in the alternative that, even if the individual's statements do not fall within any recognized hearsay exception, they nevertheless should have been admitted in evidence because they were critical to his defense (*see generally Chambers v Mississippi*, 410 US 284, 302 [1973]). Despite the "more lenient admissibility standard" applied to evidence that is exculpatory to a defendant (*People v Conway*, 148 AD3d 1739, 1743 [4th Dept 2017], *lv denied* 29 NY3d 1077 [2017]), we conclude that the statements do not " '[bear] persuasive assurances of trustworthiness' that would render them admissible despite their hearsay nature" (*People v Thibodeau*, 151 AD3d 1548, 1554 [4th Dept 2017], *affd* 31 NY3d 1155 [2018], quoting *Chambers*, 410 US at 302).

Contrary to defendant's further contention, the court properly denied his request to instruct the jury on the defense of justification. Although the court erred when it initially concluded

that the justification charge was not available to defendant because he was also asserting an alibi defense (*see People v Steele*, 26 NY2d 526, 529 [1970]; *see generally People v Padgett*, 60 NY2d 142, 144-145 [1983]), the court later recognized that error and denied the instruction on the ground that there was no reasonable view of the evidence that defendant had a reasonable belief that deadly physical force was about to be used against him. We agree with the court's latter reasoning. The evidence at trial established that the victim was shot in the back from a distance of 10 to 15 feet and that the victim was crouching and on the phone at the time the shots were fired. Although it was undisputed that the victim held a knife in his hand at the time he was shot, it was also undisputed that he "never made any movement toward anyone nor threatened anyone, including defendant" (*People v Moss*, 163 AD2d 198, 199 [1st Dept 1990], *lv denied* 76 NY2d 895 [1990]; *see generally People v Watts*, 57 NY2d 299, 302 [1982]).

Defendant failed to preserve for our review his contentions that he was denied a fair trial by various courtroom security measures inasmuch as he " 'neither formally objected nor requested any relief' with respect to th[ose] issue[s]" (*People v Goossens*, 92 AD3d 1281, 1282 [4th Dept 2012], *lv denied* 19 NY3d 960 [2012]; *see also People v Johnston*, 43 AD3d 1273, 1274 [4th Dept 2007], *lv denied* 9 NY3d 1007 [2007]). We decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

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 People v Bleakley*, 69 NY2d 490, 495 [1987]). Finally, the sentence is not unduly harsh or severe, and defendant's further challenge to the sentence lacks merit.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1365

CA 18-01256

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

THOMAS L. YOUNG, PLAINTIFF-RESPONDENT,

V ORDER

ERICA M. DAINOTTO, DEFENDANT-APPELLANT.

LAW OFFICE OF VICTOR M. WRIGHT, ORCHARD PARK (VICTOR M. WRIGHT OF COUNSEL), FOR DEFENDANT-APPELLANT.

BROWN CHIARI, LLP, BUFFALO (DAVID W. OLSON OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.), dated April 26, 2018. The order granted the motion of plaintiff for leave to amend the complaint and to compel the production of defendant's toxicology records.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on January 7, 2019, and filed in the Erie County Clerk's Office on February 13, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1368

CA 18-01156

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

CHARLES M. MORANO, PLAINTIFF-RESPONDENT,

V ORDER

VICTORIA KAY RONEY, STEVEN K. RONEY AND SUSAN C. RONEY, DEFENDANTS-APPELLANTS.

BURGIO, CURVIN & BANKER, BUFFALO (STEVEN P. CURVIN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (RICHARD A. NICOTRA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Paul Wojtaszek, J.), entered April 12, 2018. The order, insofar as appealed from, denied the cross motion of defendants for summary judgment dismissing the complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 26, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1372.1

CAF 18-01161

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

IN THE MATTER OF JACLYN H. NEMES,
PETITIONER-RESPONDENT,

V OPINION AND ORDER

MARK C. TUTINO, II, RESPONDENT-APPELLANT.

IN THE MATTER OF MARK C. TUTINO, II,
PETITIONER-APPELLANT,

V

JACLYN H. NEMES, RESPONDENT-RESPONDENT.

BETZJITOMIR LAW OFFICE, BATH (SUSAN BETZJITOMIR OF COUNSEL), FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

CHAFFEE & LINDER, PLLC, BATH (RUTH A. CHAFFEE OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

LORENZO NAPOLITANO, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Steuben County (Mathew K. McCarthy, A.J.), entered November 15, 2017 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent-petitioner to vacate a prior court order.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the motion is granted, the order entered February 8, 2017 is vacated, and the petition and cross petition are dismissed.

Opinion by NEMOYER, J.:

Absent an emergency, the New York courts may exercise subject matter jurisdiction in child custody cases only as permitted by Domestic Relations Law § 76 (1). Because Family Court had no such jurisdiction in this case, we reverse.

FACTS

The parties are the biological parents of a male child born in New Jersey on February 18, 2015. Following his birth, the child lived in New Jersey with both petitioner-respondent mother and respondent-

petitioner father. The mother thereafter relocated with the child to Steuben County, New York, and she commenced this proceeding against the father on January 8, 2016 in the Family Court of that county (hereafter, court). In her petition, which sought sole custody of the child, the mother averred that the child was moved from New Jersey to New York on July 15, 2015. Thus, the mother argued, the New York courts had subject matter jurisdiction over this matter because "this state is the home state of the child on the date of the filing of the petition." The father, who still resided in New Jersey, thereafter cross-petitioned under the same index number for shared custody. In his cross petition, the father averred that the child was moved from New Jersey to New York on an unspecified date in August 2015.

The parties appeared before the court on six occasions between February and November of 2016. Throughout the hearings, the father expressed his frustration at, inter alia, the pace of the proceeding and the court's reluctance to fashion a visitation schedule that took account of the distances involved. When the case was called for the seventh time on January 19, 2017, the father did not appear and could not be reached telephonically. The court then dismissed the father's cross petition and granted the mother's petition from the bench. Notably, however, the court took no testimony on the mother's petition.

In its final written order of February 8, 2017, the court, in relevant part, dismissed the father's cross petition "based on his failure to appear"; granted the mother "sole legal custody and physical placement of the minor child"; and granted the father "visitation in New York as the parties agree, not to include overnight visitation." The father's appeal from that order was subsequently dismissed "on the ground that no appeal lies from an order entered upon default" (*Matter of Nemes v Tutino*, 2017 NY Slip Op 93913[U], *1 [4th Dept 2017]).

The father then moved to vacate the foregoing order, arguing principally that the court lacked subject matter jurisdiction over this proceeding because, at the time of its commencement on January 8, 2016, New York was not the child's "home state" for purposes of the Domestic Relations Law (*see* CPLR 5015 [a] [4] [authorizing a motion to vacate a judgment or order "upon the ground of . . . lack of jurisdiction"]; *see generally* Domestic Relations Law § 76 [1]). The balance of the father's motion consisted of complaints about the fairness of the underlying proceedings that are not cognizable grounds for vacatur under CPLR 5015 (a).

The mother opposed the motion to vacate and argued, insofar as relevant to this appeal, that the court had subject matter jurisdiction over this proceeding because:

> "[the father's] own facts indicate that, at most, the child was present in the State of New Jersey for five and a half months. Subsequent to that, the child was then present in the State of New York for five and a half months. Based on those facts, it is undisputed that either state could assume

> jurisdiction as the child, in fact, did not have a 'home state.' "

The court denied the father's motion to vacate and held, insofar as relevant here, as follows:

> "[the father's] claim that the court lacked jurisdiction is raised for the first time in this motion. The subject child had resided in Steuben County[, New York] for approximately half of his young life and [thus New York] was the home state of the child on the date of commencement of the proceeding . . . [The father] failed to raise any jurisdictional issues throughout the numerous appearances prior to the scheduled hearing date and in fact filed his own [custody] application in Steuben County."

The father appeals, and we now reverse.

DISCUSSION

A

Historically, jurisdiction in custody matters depended upon the physical presence of the child, and courts tended not to credit the custody determinations of other states (*see* Merril Sobie, Practice Commentaries, Introductory Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law art 5-A at 401-402 [2010 ed] [hereafter Sobie, Practice Commentaries]). Consequently, a parent who was unhappy with a custody determination in one state could retry the case from the beginning by bringing the child to another state (*see id.*). That created "jurisdictional anarchy" and encouraged parents to adopt a " 'seize and run' " strategy in custody disputes (*id.* at 402; *see Vernon v Vernon*, 100 NY2d 960, 967 [2003] [noting the tendency for " 'a disgruntled parent . . . to relitigate an adverse custodial decree in a more hospitable state' "]).

In 1968, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Child Custody Jurisdiction Act (UCCJA). The Conference's primary motivation was to "avoid jurisdictional competition and conflict with courts of other states in matters of child custody" (Domestic Relations Law former § 75-b [1] [a]). To this end, the Conference proposed a simple framework for determining jurisdiction in custody matters (*see* former § 75-d [1]). A state would have jurisdiction if, among other bases, it was the "home state" of the child at the commencement of the proceeding or in the preceding months (former § 75-d [1] [a]; *see Vanneck v Vanneck*, 49 NY2d 602, 609 [1980]). "Home state," in turn, was defined as the state where the child had lived for six months before the proceeding, or, if the child was less than six months old, where he or she had lived since birth (*see* former § 75-c [5]).

By the early 1980s, each state had adopted the UCCJA (*see* Sobie, Practice Commentaries at 402). New York adopted the uniform legislation in 1977, in a form "substantially identical" to that

proposed by the Conference (*id.*). The UCCJA framework worked well at first, but its simplicity and comprehensiveness was eroded over the ensuing decades by the Hague Convention on the Civil Aspects of International Child Abduction and a patchwork of preemptive federal legislation addressing custodial interference and child-support enforcement (*see* Sobie, Practice Commentaries at 403-404). Consequently, in the late 1990s, the Conference proposed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (*see* Sobie, Practice Commentaries at 404). The UCCJEA has since been enacted in every state except Massachusetts.[1]

"While the 'home state' provision was [already] a basis for establishing jurisdiction in custody proceedings . . . , the newly-enacted UCCJEA elevate[d] the 'home state' to paramount importance" (*Matter of Michael McC. v Manuela A.*, 48 AD3d 91, 95 [1st Dept 2007], *lv dismissed* 10 NY3d 836 [2008]). Consistent with that new paradigm, the legislature rewrote Domestic Relations Law § 76 to create one primary and three alternative categories of jurisdiction in custody cases. Each category is keyed to the child's "home state," which is now defined as either "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of [the] proceeding" or, "[i]n the case of a child less than six months of age, . . . the state in which the child lived from birth with any [parent]" (§ 75-a [7]). Section 76, together with the defined terms in section 75-a, "forms the foundation of the UCCJEA and governs virtually every custody proceeding" (*Michael McC.*, 48 AD3d at 95).

The primary jurisdictional category of section 76, which is colloquially known as "home state jurisdiction," applies when New York "is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent . . . continues to live in this state" (Domestic Relations Law § 76 [1] [a]). When read in conjunction with the statutory definition of "home state" (§ 75-a [7]), jurisdiction under section 76 (1) (a) attaches when the subject child has resided with a parent in New York either since birth or for the six consecutive months immediately preceding the commencement date of a custody proceeding.

Importantly, once home state jurisdiction has attached in New York under section 76 (1) (a), it continues for six months after the child's permanent departure from New York so long as a parent continues to reside here (*see e.g. Matter of Campbell v Campbell*, 12 AD3d 669, 669-670 [2d Dept 2004] ["Since New York was the children's 'home state' within the six months immediately preceding the

---

[1] The applicable sections of the Domestic Relations Law were renumbered slightly as part of New York's transition from the UCCJA to the UCCJEA. That slight but significant numbering variation magnifies the difficulty of tracking the evolution of the various statutory provisions in the uniform statutory codes.

commencement of this proceeding . . . , and since the father has continued to live in this State, the [New York] Family Court properly exercised 'home state' jurisdiction"]; *compare Matter of Destiny EE. [Karen FF.]*, 90 AD3d 1437, 1440 [3d Dept 2011], *lv dismissed* 19 NY3d 856 [2012] ["Although Wisconsin had been the children's home state within the previous six months, it did not have jurisdiction when the . . . application was filed because 'no parent . . .' was residing there"]). The six-month period of residual continuing jurisdiction preserves the child's last home state as the exclusive judicial forum until a new home state is established, thereby "afford[ing] a resident parent who has been victimized by the removal of a child from the state an opportunity to commence an action in his or her home town. Since the passage of six months is required before any other state may qualify as the new or superceding home state, that parent has a reasonable time to file suit" (Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law § 76 at 458 [2010 ed] [hereafter Sobie, Practice Commentaries, Domestic Relations Law § 76]).[2]

In contrast to the primary jurisdictional category (home state), the three alternative jurisdictional categories are rarely invoked. Their successful invocation is even rarer (*see e.g. McDaniel v McDaniel*, 262 AD2d 1066, 1067 [4th Dept 1999]; *Warshawsky v Warshawsky*, 226 AD2d 708, 709 [2d Dept 1996]; *see also Matter of Consford v Consford*, 271 AD2d 106, 112 [3d Dept 2000]). Indeed, the three alternative jurisdictional predicates come into play *only* when another state lacks or waives home state jurisdiction under the uniform criteria established by the UCCJEA and codified in New York as Domestic Relations Law § 76 (1) (a).

The first alternative jurisdictional category applies if "a court of another state does not have jurisdiction under [section 76 (1) (a)], or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum," so long as the child and at least one parent have a "significant connection" to New York and there is "substantial evidence [in New York] concerning the child's care, protection, training, and personal relationships" (Domestic Relations Law § 76 [1] [b]). The second alternative category applies if "all courts having jurisdiction under [section 76 (1) (a) or (b)] have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum" (§ 76 [1] [c]). And the third alternative jurisdictional category applies if "no court of any other state would have jurisdiction under the criteria specified in [section 76 (1) (a), (b), or (c)]" (§ 76 [1] [d]).

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[2] Professor Sobie explains that the "six-month residential time period was chosen . . . [because m]ost American children are integrated into an American community after living there six months; consequently, the period of residence would seem to provide a reasonable criterion for identifying the established home" (*id.* [internal quotation marks omitted]).

The collective provisions of Domestic Relations Law § 76 (1) are limitations on the subject matter jurisdiction of the New York courts in custody matters (*see Vernon*, 100 NY2d at 962-963; *Matter of Mott v Patricia Ann R.*, 91 NY2d 856, 859 [1997]). In the absence of an emergency situation (*see* § 76-c), a New York court "has jurisdiction to make an initial child custody determination *only* if" one of its enumerated jurisdictional predicates exists (§ 76 [1] [emphasis added]). Further underscoring the jurisdictional primacy of section 76 (1) in the custody realm, the legislature has decreed that its provisions are "the *exclusive* jurisdictional basis for making a child custody determination by a court of this state" (§ 76 [2] [emphasis added]). Thus, a court that makes a custody determination in derogation of section 76 (1) has exceeded its subject matter jurisdiction (*see Matter of Baker v Spurgeon*, 85 AD3d 1494, 1495-1496 [3d Dept 2011], *lv dismissed* 17 NY3d 897 [2011]), and the corresponding order is properly vacated under CPLR 5015 (a) (4) (*see Matter of DeNoto v DeNoto*, 96 AD3d 1646, 1647 [4th Dept 2012]).

B

The court relied on two theories to support its subject matter jurisdiction in this case. First, the court held that the father waived his right to challenge its subject matter jurisdiction by filing his own cross petition and by failing to move against the mother's petition on jurisdictional grounds. Second, the court found that it had home state jurisdiction under Domestic Relations Law § 76 (1) (a). The mother endorses the court's waiver analysis, and she advances two additional arguments of her own, namely, that the court had safety net jurisdiction pursuant to section 76 (1) (d) and that it could exercise subject matter jurisdiction because "New York was the state in which the child was present at the commencement of the proceedings." We will examine these four jurisdictional theories in turn.

1. Waiver

Initially, we reject the notion that the father waived any objection to the court's subject matter jurisdiction. As the Second Department recently explained in *Caffrey v North Arrow Abstract & Settlement Servs., Inc.* (160 AD3d 121 [2d Dept 2018]), it is black letter law that a "defect in subject matter jurisdiction may be raised at any time by any party or by the court itself, and subject matter jurisdiction cannot be created through waiver, estoppel, laches, or consent" (*id.* at 133; *see Lacks v Lacks*, 41 NY2d 71, 74-75 [1976], *rearg denied* 41 NY2d 862, 901 [1977]). It is therefore well established that an objection to subject matter jurisdiction may be raised for the first time in a motion to vacate pursuant to CPLR 5015 (a) (4) (*see Nash v Port Auth. of N.Y. & N.J.*, 22 NY3d 220, 224 [2013] ["objections made pursuant to CPLR 5015 (a) (4) survive a final judgment"]; *see e.g. Wells Fargo Bank NA v Podeswik*, 115 AD3d 207, 214 [4th Dept 2014]; *DeNoto*, 96 AD3d at 1647).

Because the father did not – indeed, could not – waive his challenge to the court's subject matter jurisdiction, we turn now to

the heart of the matter: did the court have subject matter jurisdiction over this custody proceeding on the date of its commencement (January 8, 2016)? For the reasons that follow, we hold that it did not.

2. Home State Jurisdiction

According to the court, it had home state jurisdiction over this proceeding as of the commencement date.[3] We disagree. As noted above, the Domestic Relations Law defines the term "home state" as "the state in which a child lived with a parent . . . for at least six consecutive months immediately before the commencement of [the] proceeding" or, "[i]n the case of a child less than six months of age, . . . the state in which the child lived from birth with any [parent]" (§ 75-a [7]). Here, the mother averred in her petition that the child was born in New Jersey and moved to New York on July 15, 2015, and the father averred in his cross petition that the child was born in New Jersey and moved to New York in August 2015. Under either party's proffered time line, the child had not lived in New York either since birth or for six months as of January 8, 2016. New York therefore was not the child's "home state" on January 8, 2016 and, as the mother now concedes, the court simply did not have home state jurisdiction over this proceeding under section 76 (1) (a) (*see Matter of Slade v White*, 133 AD3d 767, 768 [2d Dept 2015]; *Matter of Agueda v Rodriguez*, 103 AD3d 716, 717 [2d Dept 2013], *lv denied* 21 NY3d 854 [2013]; *Matter of Malik v Fhara*, 97 AD3d 583, 584 [2d Dept 2012]).[4]

3. Safety Net Jurisdiction

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[3] This proceeding was deemed commenced upon the filing of the mother's petition, and the commencement date is not affected by the father's subsequent filing of a cross petition under the same index number within the same proceeding (*see* Domestic Relations Law § 75-a [5] [" 'Commencement' means the filing of the *first pleading* in a proceeding" (emphasis added)]; *see e.g. Matter of Marrero v Centeno*, 71 AD3d 771, 772 [2d Dept 2010]). Moreover, because section 76 (1) (a) explicitly ties a court's subject matter jurisdiction to the circumstances existing on the "date of the commencement of the proceeding" (*id.*), any post-commencement developments – such as the filing of a cross petition – cannot "retroactively vest Family Court with subject matter jurisdiction" over the proceeding (*Matter of Milani X. [Katie Y.]*, 149 AD3d 1225, 1226 n [3d Dept 2017]; *see Gomez v Gomez*, 86 AD2d 594, 595 [2d Dept 1982], *affd* 56 NY2d 746 [1982]).

[4] The fact that the child has now lived in New York for several years is irrelevant to our jurisdictional analysis. As the Court of Appeals wrote in *Gomez* (56 NY2d at 748), since "our courts [were] without jurisdiction when the proceeding was begun, the sojourn of the child in New York as a result of orders made without jurisdiction cannot result in the acquisition of jurisdiction."

Instead of claiming home state jurisdiction under Domestic Relations Law § 76 (1) (a), the mother essentially argues that the court had subject matter jurisdiction over this proceeding under the safety net provision of section 76 (1) (d), which confers jurisdiction to make custody determinations when, insofar as relevant here, "no court of any other state would have jurisdiction under the criteria specified in [section 76 (1)] (a)."[5]

We reject the mother's reliance on section 76 (1) (d). Under the special UCCJEA definition of "home state" applicable to infants under six months old (Domestic Relations Law § 75-a [7]; NJ Stat Ann § 2A:34-54), New Jersey was the child's "home state" between the date of his birth (February 18, 2015) and the alleged date of his move to New York (July 15, 2015).[6] Because the UCCJEA confers continuing jurisdiction on the state that "was the home state of the child within six months before the commencement of the proceeding" if a parent lives in that state without the child (Domestic Relations Law § 76 [1] [a]; NJ Stat Ann § 2A:34-65 [a] [1]), it follows that New Jersey retained continuing jurisdiction of this matter until January 15, 2016, i.e., six months after the child's alleged move to New York on July 15, 2015 and one week after the instant proceeding was commenced on January 8, 2016 (*see Campbell*, 12 AD3d at 669-670; *compare Destiny EE.*, 90 AD3d at 1440). Thus, New York lacked jurisdiction under section 76 (1) (d) because New Jersey could have exercised jurisdiction under the criteria of section 76 (1) (a) on the date of this proceeding's commencement (*see* NJ Stat Ann § 2A:34-65 [a] [1] [identical New Jersey provision to Domestic Relations Law § 76 (1) (a)]). After all, section 76 (1) (d) applies only when no state could have exercised jurisdiction under the criteria of section 76 (1) (a) at the commencement of the proceeding, and that is simply not the situation here.

Although this case reflects a fact pattern of first impression in New York (*see B.B. v A.B.*, 31 Misc 3d 608, 612 [Sup Ct, Orange County 2011] [so noting]), our interpretation of the interplay between sections 76 (1) (a) and 76 (1) (d) is consistent with the Washington

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[5] The mother's current assertion that no state had jurisdiction under the criteria of section 76 (1) (a) on January 8, 2016 directly contravenes her sworn assertion in the petition that New York had such jurisdiction on that very date. For purposes of this appeal we will assume, without deciding, that the mother is not judicially estopped from opposing the father's motion to vacate with an alternative theory of subject matter jurisdiction that contradicts the theory successfully asserted in her petition.

[6] For ease of discussion, we will assume, arguendo, that the child moved to New York on the date alleged by the mother, i.e., July 15, 2015. The analysis, however, would be no different if, as the father claims, the child actually moved to New York in August 2015.

State Court of Appeals' decision in *In re McGlynn* (154 Wash App 1020 [Ct App 2010]). As far as we can discern, *McGlynn* is the only foreign case to squarely address the precise fact pattern at bar.

In *McGlynn*, the subject child was born in Washington State. After living in Washington with his parents for approximately 3½ months, however, the child was moved to Poland by his mother. The father, who still resided in Washington, then filed a custody application in Washington approximately 5½ months after the child's departure (*id.* at *1). Reversing the trial court's dismissal of the father's custody application on subject matter jurisdiction grounds, the Washington Court of Appeals held that Washington (which occupied the same position as New Jersey in our case) had jurisdiction under its UCCJEA equivalent of section 76 (1) (a) because Washington had been the child's home state within six months of the proceeding's commencement date. In arriving at that conclusion, the *McGlynn* court recognized that Washington was the child's home state by virtue of the special definition of "home state" applicable to infants under the age of six months, not because he had lived in Washington for the six consecutive months immediately prior to the filing of the custody application (*id.* at *4-5). The import of *McGlynn* – correct in our view – is that a home state retains continuing jurisdiction irrespective of whether it acquired home state status by virtue of the child's residence since birth or by virtue of his or her residence for six months.[7]

4. Physical Presence Jurisdiction

Finally, the mother argues that the court had subject matter jurisdiction because "New York was the state in which the child was present at the commencement of the proceedings." But that contention is interdicted by Domestic Relations Law § 76 (3), which says that the subject child's "[p]hysical presence . . . is not necessary or sufficient to make a child custody determination." Indeed, by examining the court's jurisdiction through the lens of the child's physical presence instead of his "home state," the mother would have us resurrect a jurisdictional modality that has been defunct for over 40 years.

C

The parties' remaining points can be quickly dispatched. The arguments pressed by the mother and the AFC concerning the father's purported entitlement to vacatur under CPLR 5015 (a) (1) are of no moment because the father never sought to vacate the underlying order on that ground. Indeed, the court's discussion of that issue in its

[7] Like *McGlynn*, we decline to follow the Nebraska Supreme Court's view that the special definition of "home state" for infants under six months old "applies only to a child custody case involving a child under the age of 6 months of age *at the time of the commencement of the proceedings*" (*Carter v Carter*, 276 Neb 840, 847, 758 NW2d 1, 7 [2008] [emphasis added]).

written decision was improperly advisory (*see Gilberti v Town of Spafford*, 117 AD3d 1547, 1550 [4th Dept 2014]; *Sunrise Nursing Home, Inc. v Ferris*, 111 AD3d 1441, 1442 [4th Dept 2013]). The father's remaining contentions are academic and, in any event, are not cognizable grounds for vacatur under CPLR 5015 (a) (*see generally Lacks*, 41 NY2d at 72-77).

CONCLUSION

The court had no subject matter jurisdiction to adjudicate the parties' competing custody petitions. Accordingly, the order appealed from should be reversed, the father's motion to vacate granted, the order entered February 8, 2017 vacated, and the petition and cross petition dismissed.

Mark W. Bennett

Entered: April 26, 2019

Clerk of the Court

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

1375

KA 16-00643

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

HERBERT FARRINGTON, DEFENDANT-APPELLANT.

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

HERBERT FARRINGTON, DEFENDANT-APPELLANT PRO SE.

MICHAEL J. FLAHERTY, JR., SPECIAL DISTRICT ATTORNEY, WARSAW, FOR RESPONDENT.

Appeal from a judgment of the Wyoming County Court (Michael M. Mohun, J.), rendered January 25, 2016. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [7]). At the time of the crime, defendant was incarcerated at Attica Correctional Facility, serving a term of incarceration for manslaughter in the first degree (*People v Farrington*, 295 AD2d 1022 [1st Dept 2002], *lv denied* 99 NY2d 535 [2002]), as well as a consecutive term of incarceration upon a conviction of attempted promoting prison contraband in the first degree (*People v Farrington*, 51 AD3d 1221 [3d Dept 2008], *lv denied* 11 NY3d 736 [2008]). At trial, several correction officers testified that they observed defendant and the victim fighting, and one correction officer testified that, after the men separated, the victim's "right ear was cut through and cut clear to the back of his neck at the base of his skull." Medical testimony established that the victim's "right ear was cut right through" and that he had "a six inch long laceration, very deep requiring sutures" on the right side of his neck. The victim, however, did not testify at trial.

Defendant contends in his main brief that County Court erred in permitting a prosecution witness to testify that the victim told him that "the man he was fighting with was the one that cut him" because that statement did not fall under the excited utterance exception to the rule against hearsay. We reject that contention. The victim made the statement approximately 12 to 15 minutes after the assault and

while he was being treated in the prison's infirmary. Testimony at trial established that, at the time of the statement, the victim appeared to be "emotional," "mad," "angry," and "very agitated." The statement qualified as an excited utterance inasmuch as that statement was "made shortly after the [assault and] . . . while [the victim] was under the extraordinary stress of [his] injuries" (*People v Jones*, 66 AD3d 1442, 1443 [4th Dept 2009], *lv denied* 13 NY3d 939 [2010]; *see People v Lewis*, 93 AD3d 1264, 1267 [4th Dept 2012], *lv denied* 19 NY3d 963 [2012]; *cf. People v Johnson*, 1 NY3d 302, 307 [2003]).

With respect to that same statement, defendant further contends in his main brief that the statement was speculative and, therefore, inadmissible inasmuch as it was established at trial that the victim did not actually see the person who cut him. Defendant, however, "failed to object to the admission of the [statement] on that ground" and, as a result, we conclude that the contention has not been preserved for our review (*People v Jones*, 175 AD2d 662, 662 [4th Dept 1991], *lv denied* 78 NY2d 1128 [1991], *reconsideration denied* 79 NY2d 828 [1991]; *see also People v Blackman*, 13 AD3d 640, 641 [2d Dept 2004], *lv denied* 4 NY3d 796 [2005]). We decline to exercise our power to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Although defendant further contends in his main brief that he was denied a fair trial by prosecutorial misconduct on summation, he correctly concedes that his contention is not preserved for our review (*see People v Smith*, 32 AD3d 1291, 1292 [4th Dept 2006], *lv denied* 8 NY3d 849 [2007]). Exercising our discretion to address that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]), we conclude that defendant's contention lacks merit.

In his summation, defense counsel informed the jurors that the trial had taken them "into a very strange environment, an environment that's foreign to all of us. State prison is a violent, unpredictable place." After noting the absence of the victim from the trial, defense counsel invited the jurors to "speculate about why [the victim] was not [t]here." In response, the prosecutor asked the jurors to use their "common sense" to determine the reasons that the victim may not have wanted to cooperate with the trial, noting that testimony had established that the victim was still incarcerated on the same cell block in the same prison, i.e., an environment that defense counsel had described as strange, foreign and violent. Contrary to defendant's contentions, we conclude that the prosecutor's "comment[s] concerning the failure of [the victim] to testify [were] a fair response to the summation of defense counsel" (*People v Gozdalski*, 239 AD2d 896, 897 [4th Dept 1997], *lv denied* 90 NY2d 858 [1997]; *see People v Rowe*, 105 AD3d 1088, 1091 [3d Dept 2013], *lv denied* 21 NY3d 1019 [2013]; *People v Green*, 43 AD3d 1279, 1281-1282 [4th Dept 2007], *lv denied* 9 NY3d 1034 [2008]), and that the prosecutor did not improperly suggest that any uncharged crimes had been committed by defendant (*see Rowe*, 105 AD3d at 1091; *Green*, 43 AD3d at 1281-1282). We further conclude that the prosecutor did not

act as an unsworn witness inasmuch as the prosecutor did not "present[] [his] opinion as to why [the victim] did not appear in court to testify" (*People v Bonaparte*, 98 AD2d 778, 778 [2d Dept 1983]; *cf. People v Flowers*, 151 AD3d 1843, 1843-1844 [4th Dept 2017], *lv denied* 30 NY3d 1104 [2018]).

Defendant contends in his pro se supplemental brief that he was denied effective assistance of counsel based on defense counsel's failure to object to the prosecutor's comments on summation as well as certain questions posed by the prosecutor to prospective jurors. We reject that contention. In order to establish ineffective assistance of counsel, " 'it is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations' for counsel's alleged shortcomings" (*People v Benevento*, 91 NY2d 708, 712 [1998]), and "[i]t is well settled that the failure to make an objection that has 'little or no chance of success' does not constitute ineffective assistance of counsel" (*People v Reed*, 151 AD3d 1821, 1822 [4th Dept 2017], *lv denied* 30 NY3d 952 [2017], quoting *People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]). Here, the objections that defendant contends should have been made to the prosecutor's comments on summation had little or no chance of success.

With respect to defense counsel's failure to object to certain questions the prosecutor posed to prospective jurors, we conclude that "[t]he prosecutor merely engaged in 'the standard trial tactic of giving the panel [of prospective jurors] a preview of the weaknesses in [his] case and gauging the reaction' " (*People v Evans*, 242 AD2d 948, 949 [4th Dept 1997], *lv denied* 91 NY2d 834 [1997]), and that defense counsel was thus not ineffective in failing to object to the prosecutor's questions (*see generally Stultz*, 2 NY3d at 287). Viewing the evidence, the law and the circumstances of this case in totality and as of the time of the representation, we further conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant additionally contends in his pro se supplemental brief that the conviction is not supported by legally sufficient evidence and that the verdict is against the weight of the evidence based primarily upon his contention that there is no direct evidence that he was the person who cut the victim. "It is well settled that, even in circumstantial evidence cases, the standard for appellate review of legal sufficiency issues is 'whether any valid line of reasoning and permissible inferences could lead a rational person to the conclusion reached by the [factfinder] on the basis of the evidence at trial, viewed in the light most favorable to the People' " (*People v Hines*, 97 NY2d 56, 62 [2001], *rearg denied* 97 NY2d 678 [2001]; *see People v Pichardo*, 34 AD3d 1223, 1224 [4th Dept 2006], *lv denied* 8 NY3d 926 [2007]; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). Although no one observed defendant with a weapon and no weapon was ever recovered from him, all of the eyewitnesses testified that there were only two people involved in the altercation. After the altercation, the victim had severe lacerations to his ear and neck. One eyewitness testified that defendant was "making wide X type punching slashing motions" at the victim, and the victim told officers

that he was fighting with the man he thought cut him from behind. Thus, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), and according them the benefit of every favorable inference (*see People v Ford*, 66 NY2d 428, 437 [1985]), we conclude that the evidence is legally sufficient to support the conviction (*see generally Bleakley*, 69 NY2d at 495).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a defense witness testified that the victim was the initial aggressor, such testimony presented the jury with a credibility determination and, "[w]here, as here, witness credibility is of paramount importance to the determination of guilt or innocence, we must give great deference to the jury, given its opportunity to view the witnesses and observe their demeanor" (*People v Streeter*, 118 AD3d 1287, 1288 [4th Dept 2014], *lv denied* 23 NY3d 1068 [2014], *reconsideration denied* 24 NY3d 1047 [2014] [internal quotation marks omitted]; *see People v Burroughs*, 57 AD3d 1459, 1460 [4th Dept 2008], *lv denied* 12 NY3d 756 [2009]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1380

KA 15-02037

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT GARROW, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered October 8, 2015. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child and rape in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting him following a jury trial of rape in the first degree (Penal Law § 130.35 [3]) and predatory sexual assault against a child (§ 130.96). Defendant's conviction stems from his rape of a four-year-old girl. Defendant's first trial ended in a hung jury, and he was convicted after a second jury trial. On appeal from that judgment, we reversed on the basis of an *O'Rama* violation and granted a new trial (*People v Garrow*, 126 AD3d 1362 [4th Dept 2015]). Defendant did not challenge the weight of the evidence on that appeal. The third trial then proceeded, and a jury again convicted defendant.

The victim, who was 11 years old at the time of this third trial, testified that she was very familiar with defendant. She testified that defendant did a "bad touch" to her by putting his "front private part" inside her "front private part," and that it hurt. Shortly after the incident, the victim disclosed to her mother that her vagina hurt. When asked why, the victim told her that defendant "did something bad" to her. After having her recollection refreshed, the victim more specifically testified that she told her mother that defendant did it "[w]ith his penis." The victim's mother gave similar testimony regarding the victim's disclosure, and explained that she taught the victim terminology for body parts at a young age because the mother was sexually molested as a child.

The victim testified that her cousin did the "same thing" to her as defendant and that it happened more than once. She testified that this occurred at her aunt's house. After the victim disclosed defendant's abuse to her mother, the mother immediately confronted defendant and asked why the victim was making the allegation against him. Defendant was non-responsive at first, but eventually stated, "I don't know. She said something about [her cousin] earlier." When the mother asked the victim if the cousin had done anything to her, the victim responded in the affirmative. The mother testified that the last time she recalled the victim spending the night at the cousin's house was more than a month prior to the disclosure she made regarding defendant. The cousin admitted that he had sexually abused the victim; he was 11 years old at the time. The victim testified that she was not confused about the incident with defendant or the incident with her cousin.

The mother took the victim to the hospital the same day she made the disclosure regarding defendant. The victim was examined by medical personnel and diagnosed with possible sexual abuse and diaper rash, but the victim was not wearing diapers at the time. She was prescribed a cream that treated yeast infections, of which the victim had a history. The victim was taken to the police station where she was questioned by a detective, and she testified that she told the detective that defendant had raped her. The detective testified that the victim disclosed that she had been sexually abused by both defendant and her cousin.

The following day, as instructed by the police and medical personnel, the mother brought the victim to a medical facility where a sexual assault examination was performed. Due to the victim's age, the gynecological examination was performed externally only and showed some redness to the external part of the victim's genitals, but no damage to the hymen. Testimony was given that most female rape victims do not exhibit injury to their genital area. A nurse testified that, although she would expect to see some damage in a four year old who had been raped by an adult male with full penetration and no lubrication, there may be no injury if the penetration was slight or there was lubrication. The nurse practitioner who examined the victim did not observe symptoms indicative of a yeast infection. She could neither confirm nor deny that sexual abuse had occurred to the victim.

The underwear that the victim was wearing the day she went to the hospital was secured and examined. In addition, dried secretion swabs were taken from three areas on the victim's thighs and buttocks that showed areas of fluorescence under a black light. A forensic scientist who examined the evidence testified that semen was not detected on any of the vaginal, anal, oral, or dried secretion swabs from the sexual assault examination kit. Using an alternate light source, she saw areas of fluorescence on the underwear, indicating potential bodily fluids in areas where drainage from the vaginal or anal cavity were most likely to be found. She took three very small cuttings of those areas to view under a microscope and identified sperm on those three locations, which were in the front interior

crotch area, the middle crotch area, and on the back of the underwear near where there would be a tag. The forensic scientist testified that the presence of sperm indicated the presence of semen at those locations inasmuch as sperm is a component of semen. She further testified that she conducted another "presumptive" test for the presence of semen, the acid phosphatase (AP) test, and those tests on 20 different sections of the underwear were negative. Another forensic scientist conducted DNA testing of the sperm fraction from the middle crotch area of the inside of the underwear and testified that it matched that of defendant.

The forensic scientists admitted that they were aware of the concept of secondary sperm cell transfer from one item of clothing to another in the washing machine. The mother testified that she would launder defendant's clothing and the victim's clothing together. The second forensic scientist testified that, where the AP test was negative for the presence of semen but sperm were present on clothing, transfer of sperm through the washing machine was a possibility. She further testified, however, that she did not believe that was the most probable explanation for the sperm being present in the underwear based on the number of sperm that she observed and the amount of DNA that was extracted.

In his summation, defense counsel argued that the victim had a yeast infection, which caused the victim's statement to her mother that her vagina hurt; that the mother, who had been sexually abused as a child, turned the victim's innocent comment that "[defendant] did it" into an accusation that defendant raped the victim, which the mother repeated in front of the victim numerous times; that the victim had been abused by her cousin, and the mother steered the investigation towards defendant instead of the cousin; that the victim's testimony showed that she easily remembered the abuse by her cousin but was confused about the alleged abuse by defendant; that physical evidence of injury would be expected in this case but the victim did not sustain such injury; and that the presence of sperm on the victim's underwear was explained by secondary transfer through the washing machine. The prosecutor urged the jury to consider the victim's demeanor when she talked about the abuse and argued that she was worthy of belief. The prosecutor further argued that it was not a simple coincidence that defendant's "semen" was found in the crotch of the victim's underwear the same day she made her complaint.

In this appeal, defendant's primary contention is that he was denied a fair trial by prosecutorial misconduct. Defendant failed to object to the alleged instances of misconduct and therefore failed to preserve his contention for our review (*see People v Black*, 137 AD3d 1679, 1680 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]). In any event, we conclude that defendant's contention is without merit. First, defendant contends that the prosecutor and witnesses erroneously and repeatedly stated that semen was found in the victim's underwear. The first forensic scientist testified that semen was present in the underwear by virtue of the presence of sperm, even though the AP tests had been negative. We disagree with defendant that the prosecutor

elicited false testimony or misled the jury on this point (*see generally People v Mulligan*, 118 AD3d 1372, 1374 [4th Dept 2014], *lv denied* 25 NY3d 1075 [2015]). The defense theory was that the sperm could have transferred to the victim's underwear in the wash, but that was only a theory. The other possibility was that the sperm cells were deposited on the underwear through semen. As the first forensic scientist testified, while the AP test is a specific screening test for semen, the actual observation of sperm on an item of clothing is an even more specific test for the presence of semen. The prosecutor's comment on summation regarding the presence of semen in the underwear was fair comment on the evidence (*see People v Jackson*, 141 AD3d 1095, 1096 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]).

Second, defendant contends that the testimony of the second forensic scientist that secondary sperm transfer probably did not take place in the washing machine was based on a factor, i.e., the large amount of sperm and DNA on the underwear, that was shown not to be the case in the two prior trials. Any alleged inconsistency between the witness's testimony at this trial and the previous trials should have been developed during cross-examination (*see generally People v Hurd*, 71 AD2d 925, 925 [2d Dept 1979]). We reject defendant's contention that the prosecutor elicited knowingly false testimony from the witness (*see generally People v Colon*, 13 NY3d 343, 349 [2009], *rearg denied* 14 NY3d 750 [2010]).

Third, defendant contends that the prosecutor's opening and closing statements improperly appealed to the emotions of the jury. We conclude, however, that most of the prosecutor's statements were fair response to defense counsel's statements (*see Jackson*, 141 AD3d at 1096). " 'Faced with defense counsel's focused attack on [the victim's] credibility, the prosecutor was clearly entitled to respond by arguing that the witness[ ] had, in fact, been credible' " (*People v Roman*, 85 AD3d 1630, 1632 [4th Dept 2011], *lv denied* 17 NY3d 821 [2011]). To the extent that any comments exceeded the bounds of proper comment, we conclude that they were not so pervasive or egregious as to deprive defendant of a fair trial (*see People v Pendergraph*, 150 AD3d 1703, 1703-1704 [4th Dept 2017], *lv denied* 29 NY3d 1132 [2017]).

Fourth, defendant contends that the People improperly suggested that there had been more than one incident of abuse. The two prosecutors at the third trial, who were not the same ones from the prior trials, were under the mistaken impression that the two rape counts in the indictment were based on two separate incidents, when in fact it was two theories of rape based on only one incident. Defense counsel, who did not represent defendant at the prior trials, agreed with the prosecutors that the charges in the indictment were based on two incidents of rape. During the victim's testimony, the prosecutor asked her about a possible second incident. The victim initially testified that she could not remember, but then testified that it did occur. The victim admitted, however, that she was confused about whether there was a second incident, and testified that she did not think defendant did it a second time. Later during the trial, and after the victim's testimony, County Court reviewed the grand jury

minutes and concluded that the charges had stemmed from just one incident. The court therefore struck the victim's testimony regarding the second alleged incident and instructed the jury that there was no evidence of more than one incident of rape. The court also dismissed the second count of rape charged in the indictment to avoid any possible confusion. The court found that the prosecutor's suggestion of a second incident was an honest mistake, and we conclude that the court's instructions were sufficient to alleviate any prejudice resulting from the testimony (*see People v Spears*, 140 AD3d 1629, 1630 [4th Dept 2016], *lv denied* 28 NY3d 974 [2016]). In any event, we conclude that defendant was not denied a fair trial by the prosecutor's erroneous elicitation of that testimony inasmuch as the testimony regarding the second incident was equivocal, at best.

Fifth, defendant contends that the prosecutor engaged in misconduct when she refreshed the victim's recollection regarding her disclosure to her mother. The victim testified that she told her mother that defendant "did something bad" to her, but she could not remember specifically what she told her mother that defendant did. The court allowed the prosecutor to refresh the victim's recollection using a transcript from the mother's testimony at the second trial. Her recollection having been refreshed, the victim testified that she told her mother that defendant did it "with his penis." Contrary to defendant's contention, a witness's testimony may be refreshed using any writing, whether or not made by the witness (*see People v Betts*, 272 App Div 737, 741 [1st Dept 1947], *affd* 297 NY 1000 [1948]; *People v Goldfeld*, 60 AD2d 1, 11 [4th Dept 1977], *lv denied* 43 NY2d 928 [1978]). There was therefore no misconduct by the prosecutor in refreshing the victim's recollection.

Defendant's next contention is that he was denied effective assistance of counsel based on counsel's failure to object to the above instances of alleged prosecutorial misconduct. Inasmuch as we conclude that the prosecutor either did not engage in misconduct, or that any error did not deny defendant a fair trial, we conclude that defendant was not denied effective assistance of counsel based on counsel's failure to object (*see People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]; *People v Lyon*, 77 AD3d 1338, 1339 [4th Dept 2010], *lv denied* 15 NY3d 954 [2010]). Defendant's further contention that counsel was ineffective in failing to call an expert witness to testify regarding the washing machine theory is without merit (*see People v Loret*, 56 AD3d 1283, 1283 [4th Dept 2008], *lv denied* 11 NY3d 927 [2009]). Defendant failed to establish the absence of any strategic or other legitimate explanation for the failure to call such an expert (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

We now turn to defendant's contention on which we part ways with our dissenting colleague, i.e., the weight of the evidence. It is well settled that, in reviewing the weight of the evidence, we must first determine whether, "based on all the credible evidence[,] a different finding would not have been unreasonable" (*People v Bleakley*, 69 NY2d 490, 495 [1987]; *see People v Danielson*, 9 NY3d 342, 348 [2007]). We all agree that a different finding here would not

have been unreasonable; the jury could have accepted the defense theory as set forth above and rejected the testimony of the victim. Our next step is to "weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions" (*Danielson*, 9 NY3d at 348; *see Bleakley*, 69 NY2d at 495). In undertaking such an analysis, "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (*Bleakley*, 69 NY2d at 495).

There was no conflicting testimony here, only conflicting inferences that could be drawn from the evidence. We conclude that, viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), the verdict is supported by the weight of the evidence. The victim testified that defendant placed his penis inside her vagina and that it hurt when he did so. The victim made a prompt disclosure of the abuse to her mother and then to the police detective, and both of those witnesses testified consistently with the victim regarding the disclosure. After the victim's disclosure, her mother immediately confronted defendant, who was sleeping in a bedroom, and asked him why the victim was saying that he hurt her vagina with his penis. The mother repeated that three times before defendant said, "[h]uh, what?" The mother testified that she was "very agitated because [she] knew that he heard me the first time," and upon shouting it for a fourth time, defendant responded, "I don't know. She said something about [her cousin] earlier." Defendant never denied the accusation, and we agree with the prosecutor's statement in summation that defendant's response does not seem to be that of a man who has been wrongfully accused of sexually assaulting someone he is close with. The victim's sexual assault examination revealed that the victim had redness to the external part of the genital area. Testing of the underwear that the victim was wearing at the time she made the disclosure to her mother showed that sperm later identified as matching defendant's DNA were on three locations of the underwear where drainage from the vaginal or anal cavity was most likely to be found.

The jury's determination to reject the defense theory was in accord with the weight of the evidence. The defense theory was that the victim's vagina hurt because she had a yeast infection, but the evidence was not clear on that issue. A yeast infection did not appear to be the diagnosis of the hospital, which appeared to diagnose the victim with possible sexual abuse and diaper rash, even though she no longer wore diapers. Although medical personnel at the hospital prescribed a cream that treated yeast infections, and the victim's mother testified that the victim had a history of yeast infections, the examining nurse who conducted the sexual assault examination testified that she did not observe symptoms that were indicative of a yeast infection and thus the victim was not tested for that condition. The defense theory was also that the victim made an innocent comment to her mother that "[defendant] did it" after stating that her vagina hurt, and the mother jumped to conclusions that defendant had raped the victim. The victim's actual statement to her mother, however, was not so innocent or innocuous. Even disregarding the victim's statement after having her memory refreshed, she testified that she

remembered telling her mother that "[her] vagina hurt and that [defendant] did something bad to [her]."

The defense theory was also that the victim was confused by her cousin's abuse of her and the alleged abuse by defendant. The victim testified, however, that, although her cousin had done the same thing to her, she was not confusing the abuse by her cousin with the incident involving defendant. We note that the victim was only 4 years old at the time of this incident, the cousin was 11 years old, and defendant was 32 years old. We find it unlikely that the victim would confuse the abuse of her by another child with that by a grown man. Defense counsel also argued to the jury that physical evidence of injury would be expected in this case. Indeed, a nurse testified that she would expect to see some injury in a four year old who had been raped by an adult male with full penetration. That nurse, however, further testified that there may be no injury if the penetration was slight or there was lubrication. The jury heard that it was not uncommon for female rape victims not to exhibit injury to their genital area.

Lastly, the defense theory was that the sperm on the victim's underwear was explained by the washing machine theory, i.e., that defendant's sperm had transferred from an item of clothing in the washing machine to the victim's underwear. The jury heard testimony that this was certainly a possibility, but the other possibility was that the sperm had been deposited on the victim's underwear through defendant's semen. The second forensic scientist testified that the defense theory was not the most probable explanation, and the jury apparently agreed.

In sum, in a case such as this where the credibility of a witness is crucial to the determination of the defendant's guilt, we must be cognizant that we did not see or hear the victim testify. "[T]hose who see and hear the witnesses can assess their credibility and reliability in a manner that is far superior to that of reviewing judges who must rely on the printed record" (*People v Lane*, 7 NY3d 888, 890 [2006]). "The memory, motive, mental capacity, accuracy of observation and statement, truthfulness and other tests of the reliability of witnesses can be passed upon with greater safety by those who see and hear than by those who simply read the printed narrative" (*People v Gaimari*, 176 NY 84, 94 [1903]). The prosecutor urged the jury during her opening statement to pay careful attention to the victim when she testified: "watch her eyes, watch her demeanor, watch her as she tells you about those memories." In the prosecutor's summation, she again urged the jury to consider the victim's demeanor as she testified. It appears from the jury notes that the jury was focused on the victim's testimony, asking to have it read back to them and also asking to hear a readback from that part of the police detective's testimony where the victim disclosed the abuse to him. We see "no reason to disturb the jury's clear resolution of the issue of credibility in favor of the victim" (*People v Beauharnois*, 64 AD3d 996, 999 [3d Dept 2009], *lv denied* 13 NY3d 834 [2009]), and we are "convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 117

[2011]).

Finally, we conclude that the sentence is not unduly harsh or severe.

All concur except LINDLEY, J., who dissents and votes to reverse in accordance with the following memorandum: I respectfully dissent. In my view, the People failed to prove defendant's guilt beyond a reasonable doubt, necessitating reversal of the judgment and dismissal of the indictment. The four-year-old complainant was examined at the hospital within a day of when she alleged that defendant had raped her. Defendant had no criminal record and had never been accused of inappropriate sexual conduct by the victim or anyone else. The examination of the victim revealed a rash in the genital area but no damage to her hymenal tissue and no trauma to her vagina. As one of the nurses who examined the complainant acknowledged at trial, it is not typical for such a young girl who has been raped by a grown man to have no damage to her hymen. Although rape does not require penetration, the People's theory in this case was that defendant ejaculated inside the victim and that the sperm later drained onto her underwear, meaning that there must have been significant penetration.

In an attempt to explain away the lack of physical injury, the People called as an expert witness a pediatric nurse practitioner who has examined approximately 5,000 children for suspected sexual abuse. According to the expert, only 5-10% of the female child victims displayed an injury in the genital area. On cross-examination, however, the expert clarified that the 5-10% figure includes female victims up to age 21, and that most of the 5,000 victims she examined were not "acute" patients, i.e., they were not, unlike the complainant herein, examined immediately after the alleged sexual abuse occurred. Thus, the expert's testimony with respect to the lack of physical injury is close to meaningless in this case.

I note that the expert acknowledged that studies show that between 50 and 90% of female rape victims sustain physical injury to the genital area. The People assert that the complainant had pain and redness in her genital region, and that this therefore corroborates her testimony. But the complainant also had a yeast infection, which could just as plausibly explain the pain and redness, and, again, it is undisputed that there was no damage to the hymenal tissue notwithstanding the People's theory that the four-year-old complainant had been forcibly raped by an adult who ejaculated inside her.

A second problem with the case is that, although defendant's sperm was found on the victim's underwear, the attending nurse performed 20 separate AP tests on the underwear, and all 20 tests were negative for semen. The People's expert testified that the sperm, which is only a small component of semen, was likely the result of "discharge" from the victim's vagina. If there was such discharge, it stands to reason that the non-sperm portions of semen would also be on the underwear, but none were found. The People have no explanation for how defendant's sperm but not semen could be on the underwear.

The only explanation that has been proffered is defendant's theory that the sperm was transferred onto the underwear in the wash from clothes or bedding that contained his semen. The People's experts acknowledged at trial that this is a scientifically valid theory, as the sperm could survive the wash and become embedded in the underwear while the other components of semen would get washed away. Nevertheless, the People's DNA expert testified that she did not believe that the laundry explanation was "the most probable explanation for the sperm being there." Of course, it is not enough for the People to prove that defendant is probably guilty (*see People v Carter*, 158 AD3d 1105, 1106 [4th Dept 2018]); they must prove his guilt beyond a reasonable doubt. I note that none of the People's witnesses testified that the AP test can result in false negatives.

I am also troubled by the complete absence of any semen or sperm on any of the swabs taken from the victim's legs, buttocks, vaginal area and anal area. If the sperm drained onto the underwear, as the People posit, one would think that it would have drained onto the victim's thighs or near her vagina. But no semen or sperm was found in any of those areas, notwithstanding that the victim had not showered or bathed since the attack.

It is true, as the People point out, that we generally afford great deference to credibility determinations made by the trier of fact, who is in a far superior position to assess the veracity of witnesses (*see People v Bleakley*, 69 NY2d 490, 495 [1987]), and here the jury evidently believed the victim's testimony that defendant placed his penis in her vagina. The victim was only four years old when this happened, however, and she repeatedly testified that she could not remember much about the incident, other than it happened on the bed and that she was on top of defendant, which seems at odds with how the rape of a young child would usually occur.

I note that the prosecutor, who was under the misapprehension that defendant had been charged with two separate rapes, asked the victim whether "this" happened another time, and the victim answered "yes." As the court later determined, defendant had been charged with only one rape, and the victim had never previously made any allegations about a second incident. The victim's affirmative response to the question about a second incident that never occurred raises concerns about the reliability of her testimony with respect to the first incident, especially considering that it is undisputed that the victim was raped by her older cousin shortly before she claimed she was raped by defendant.

Concerned "about the incidence of wrongful convictions and the prevalence with which they have been discovered in recent years," the Court of Appeals has stressed the importance of the role of the Appellate Division in serving, "in effect, as a second jury," to "affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is *not convinced* that the jury was justified in finding that guilt was proven

beyond a reasonable doubt" (*People v Delamota*, 18 NY3d 107, 116-117 [2011] [emphasis added]; *see People v Oberlander*, 94 AD3d 1459, 1459 [4th Dept 2012]). Here, I am not convinced that defendant's guilt was proven beyond a reasonable doubt. I therefore vote to reverse the judgment and dismiss the indictment.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1392

CA 18-01078

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

IN THE MATTER OF PROGRESSIVE ADVANCED INSURANCE COMPANY, PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

HOLLY JORDAN, RESPONDENT-RESPONDENT.

LAW OFFICES OF JENNIFER S. ADAMS, YONKERS (MICHAEL A. ZARKOWER OF COUNSEL), FOR PETITIONER-APPELLANT.

WILLIAM MATTAR, P.C., ROCHESTER (MATTHEW J. KAISER OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Supreme Court, Onondaga County (Deborah H. Karalunas, J.), entered September 28, 2017 in a proceeding pursuant to CPLR article 75. The order, among other things, denied the petition insofar as it sought a permanent stay of arbitration.

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

Memorandum: This appeal arises from an automobile collision in which nonparty Donald Edds allegedly rear-ended a vehicle driven by respondent. After respondent learned that Edds was uninsured, she pursued a claim for supplemental uninsured motorist (SUM) benefits pursuant to an insurance policy issued to her by petitioner. Under that policy, SUM disputes are subject to arbitration. Petitioner then filed the instant CPLR article 75 petition, alleging that Edds had available insurance coverage that would prevent respondent from making a claim against her SUM coverage, and seeking a permanent stay of arbitration or, alternatively, inter alia, to set the matter for a framed issue hearing on the issue whether Edds's vehicle had insurance coverage provided by his alleged insurer, American States Insurance Company/Safeco Insurance Company of America (Safeco). Petitioner now appeals from an order that, inter alia, denied the petition insofar as it sought a permanent stay of arbitration or a framed issue hearing. We affirm.

We conclude that petitioner failed to meet its initial burden of establishing that the offending vehicle was in fact insured on the date of the accident, and Supreme Court properly denied its request for a permanent stay of arbitration or a framed issue hearing to resolve issues of fact as to the existence of other applicable coverage. Petitioner had the initial burden of establishing that the

offending vehicle was insured at the time of the accident (*see Matter of American Intl. Ins. Co. v Giovanielli*, 72 AD3d 948, 949 [2d Dept 2010]; *Matter of Eagle Ins. Co. v Tichman*, 185 AD2d 884, 886 [2d Dept 1992]). In support of its petition, petitioner submitted records from the Department of Motor Vehicles (DMV) reflecting a pre-loss cancellation of Edds's insurance coverage for the vehicle, the police accident report reflecting that Edds had been driving the vehicle without insurance, and a pre-loss cancellation notice that Safeco sent to Edds, with an accompanying certificate of mailing. A prima facie showing that there was insurance coverage may be established by submitting a police accident report (*see American Intl. Ins. Co.*, 72 AD3d at 949; *Matter of New York Cent. Mut. Fire Ins. Co. v Licata*, 24 AD3d 450, 451 [2d Dept 2005]) or DMV records (*see Matter of Highlands Ins. Co. v Baez*, 18 AD3d 238, 239 [1st Dept 2005], *lv denied* 5 NY3d 709 [2005]). Here, the materials submitted by petitioner, i.e., the police accident report and the DMV records along with the cancellation notice, indicated that Edds's vehicle was uninsured on the date of loss.

Petitioner contends, however, that the cancellation was improper because the certificate of mailing accompanying the cancellation notice was insufficient pursuant to Vehicle and Traffic Law § 313, and thus Edds's vehicle had insurance coverage at the time of the accident. Respondent does not raise the issue of whether a CPLR article 75 petition is a proper forum to litigate the validity of the cancellation of the offending vehicle's policy. Nevertheless, even assuming, arguendo, that petitioner could satisfy its initial burden in this CPLR article 75 proceeding by establishing that the cancellation was improper, we reject petitioner's contention. Vehicle and Traffic Law § 313 requires that an insurer send cancellation notices "to the named insured at the address shown on the policy . . . by regular mail, with a certificate of mailing, properly endorsed by the postal service" (§ 313 [1] [a]), and that "[e]very insurer shall retain a copy of the notice of termination mailed pursuant to this chapter and shall retain the certificate of mailing obtained from the postal service upon the mailing of the original of said notice. A copy of a notice of termination and the certificate of mailing, when kept in the regular course of the insurer's business, shall constitute conclusive proof of compliance with the mailing requirements of this chapter" (§ 313 [1] [b]). Thus, "[a]n insurer may effectively cancel its policy by mailing a notice of cancellation to the address shown on the policy, provided that it submits sufficient proof of mailing, regardless of whether notice is actually received by the insured" (*Hughson v National Grange Mut. Ins. Co.*, 110 AD2d 1072, 1072 [4th Dept 1985], *appeal dismissed* 67 NY2d 647 [1986]).

We reject petitioner's contention that Safeco's certificate of mailing is insufficient to establish that Safeco sent a cancellation notice to Edds. The certificate of mailing, submitted by respondent in opposition to the petition, provides that Safeco made a bulk mailing on August 26, 2015, and lists Edds's name and address as an addressee of one of the mailed items. The certificate of mailing also bears a postmark from the post office. Contrary to petitioner's contention, there is no requirement in Vehicle and Traffic Law § 313

that the page of the certificate of mailing bearing Edds's name must bear a postmark.

Petitioner further contends that the certificate of mailing is insufficient because it is a certificate of bulk mailing, and a similar certificate of bulk mailing was determined to be insufficient in *Ficarro v AARP, Inc.* (205 AD2d 955, 956 [3d Dept 1994]). We reject that contention because, unlike the certificate of mailing in *Ficarro*, the certificate of mailing here does contain the names and addresses of each addressee (*cf. id.*). Petitioner's remaining contentions are not preserved for our review.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1425

KA 01-01182

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TAJUAN PAUL, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 15, 2001. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), assault in the first degree, robbery in the first degree (eight counts), burglary in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that the appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [3]). On a prior appeal, we modified the judgment with respect to the sentence and otherwise affirmed (*People v Paul*, 298 AD2d 849 [4th Dept 2002], *lv denied* 99 NY2d 562 [2002]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel failed to raise an issue that may have merit — specifically, whether the *Antommarchi* waiver proffered by defendant's trial counsel was valid (*People v Paul [Tajuan]*, 148 AD3d 1723 [4th Dept 2017]), and we vacated our prior order. We now consider the appeal de novo.

We reject defendant's contention that his *Antommarchi* waiver, i.e., his waiver of the right to be present at sidebar conferences during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]), was invalid. At the beginning of jury selection, County Court held a bench conference with counsel for defendant and counsel for the codefendant, at which defendant was not present. The court stated, "The record will reflect that [counsel for the codefendant and counsel for defendant] have indicated [that] they . . . wish to waive their clients' presence at

the bench." In response, defendant's counsel said, "That's correct."

"It is well settled that a defendant's attorney may waive [the *Antommarchi*] right," which is what occurred here (*People v Lewis*, 140 AD3d 1593, 1594 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Contrary to defendant's contention, "a court need not engage in any '*pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel . . . may nevertheless not know what he [or she] is doing' " (*id.*, quoting *People v Francis*, 38 NY2d 150, 154 [1975]). Nor is it necessary for the waiver to occur in defendant's presence inasmuch as "a lawyer may be trusted to explain rights to his or her client, and to report to the court the result of that discussion" (*People v Flinn*, 22 NY3d 599, 602 [2014], *rearg denied* 23 NY3d 940 [2014]). "To the extent defendant argues that his off-the-record conversations with counsel did not sufficiently apprise him of his rights, he relies on matters dehors the record and beyond review by this Court on direct appeal. Such claims are more appropriately considered on a CPL 440.10 motion" (*People v Jackson*, 29 NY3d 18, 24 [2017]; *see People v Shegog*, 32 AD3d 1289, 1290 [4th Dept 2006], *lv denied* 7 NY3d 929 [2006]).

Defendant's additional contention that he was deprived of his right to be present at trial conflates the statutory *Antommarchi* rights with the constitutional rights protected by *Parker* warnings (*see People v Vargas*, 88 NY2d 363, 375-376 [1996]; *People v Sprowal*, 84 NY2d 113, 116-117 [1994]; *see generally People v Parker*, 57 NY2d 136, 140 [1982]), and is without merit because he was not deprived of his right to be present in the courtroom.

We reject defendant's contention that reversal is required based on alleged mode of proceedings errors with respect to the court's handling of certain jury notes. Two of the notes at issue, concerning a juror's request to meet privately with the judge, were ministerial in nature (*see People v Brito*, 135 AD3d 627, 627-628 [1st Dept 2016], *lv denied* 27 NY3d 1066 [2016]). "[T]he *O'Rama* procedure is not implicated [where, as here,] the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). We thus conclude that "there was no *O'Rama* error requiring this Court to reverse the judgment" based on those notes (*People v Hall*, 156 AD3d 1475, 1476 [4th Dept 2017], *lv denied* 11 NY3d 789 [2008]). Moreover, we note that even a ministerial response by the court was obviated by the fact that the second note at issue nullified the request contained in the first note (*see People v Albanese*, 45 AD3d 691, 692 [2d Dept 2007], *lv denied* 10 NY3d 761 [2008]). Because the rest of the jury notes in question were read into the record in the presence of counsel and the jury, the court "complied with its core responsibility to give counsel meaningful notice of the jury's notes . . . [and, t]hus, no mode of proceedings error occurred" (*Nealon*, 26 NY3d at 160). Consequently, defendant was required to object to preserve his contention that the court did not meaningfully respond to the relevant jury notes (*see id.*; *Williams*, 142 AD3d at 1362). Defendant failed to

do so, and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant also contends that he was denied effective assistance of counsel by defense counsel's allegedly confusing presentation of alibi evidence. We reject that contention inasmuch as any possible confusion with respect to the date of the alibi was clarified on redirect examination and in defense counsel's summation (*cf. People v Jarvis*, 113 AD3d 1058, 1060-1061 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). Defendant's remaining allegations of ineffective assistance of counsel lack merit. Defense counsel's alleged shortcomings resulted in little or no prejudice to defendant (*see generally People v Benevento*, 91 NY2d 708, 713-714 [1998]), and the failure to make certain objections did not constitute ineffective assistance inasmuch as any such objection would have had little or no chance of success (*see generally People v Caban*, 5 NY3d 143, 152 [2005]).

Defendant's challenge to the court's alibi charge is unpreserved (*see* CPL 470.05 [2]; *People v Robinson*, 142 AD3d 1302, 1304 [4th Dept 2016], *lv denied* 28 NY3d 1126 [2016]). In any event, the charge, as a whole, was proper because it included numerous warnings that the People had the burden of disproving defendant's alibi beyond a reasonable doubt and that the burden of proof never shifted (*see People v Castrechino*, 24 AD3d 1267, 1267-1268 [4th Dept 2005], *lv denied* 6 NY3d 810 [2006]). Defendant's remaining challenges to the court's jury instructions are unpreserved, and we decline to exercise our power to review them as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Additionally, upon 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The quality of the witnesses and the existence of cooperation agreements "merely raise credibility issues for the jury to resolve" (*People v Barnes*, 158 AD3d 1072, 1072 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Moreover, we are satisfied that the accomplice testimony was sufficiently corroborated (*see People v Smith*, 150 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

Defendant did not preserve his contentions that the jury was influenced by a potential prosecution witness, that certain counts were based on legally insufficient evidence, and that he was prejudiced by improper hearsay or bolstering testimony, and we decline to exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

There is no merit to defendant's contention that the indictment should have been dismissed due to an inadequate grand jury notification. The People were under no obligation to serve a grand

jury notice about charges that were not included in the felony complaint (*see People v Clark*, 128 AD3d 1494, 1496 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]; *People v Thomas*, 27 AD3d 292, 293 [1st Dept 2006], *lv denied* 6 NY3d 898 [2006]).

Finally, given defendant's resentencing, we do not consider defendant's challenge relating to his sentence, and we dismiss the appeal from the judgment to that extent (*see People v Linder*, — AD3d —, —, 2019 NY Slip Op 01965, *4 [4th Dept 2019]; *People v Haywood*, 203 AD2d 966, 966 [4th Dept 1994], *lv denied* 83 NY2d 967 [1994]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1428

KA 16-01794

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 1.)

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

MARCUS GRAHAM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Erie County Court (Michael L. D'Amico, J.), rendered December 15, 2015. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: In appeal Nos. 1 and 2, defendant appeals from judgments convicting him upon his respective pleas of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). Defendant contends in his main brief in appeal No. 1 that his waiver of the right to appeal is invalid. We reject that contention. The record establishes that County Court (D'Amico, J.) engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Rausch*, 126 AD3d 1535, 1535 [4th Dept 2015], *lv denied* 26 NY3d 1149 [2016] [internal quotation marks omitted]) and that "defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*People v Lopez*, 6 NY3d 248, 256 [2006]). Contrary to defendant's contention, "the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341 [2015]; *see People v Nicholson*, 6 NY3d 248, 254-257 [2006]). Contrary to defendant's further contention, his " 'monosyllabic affirmative responses to questioning by [the c]ourt do not render his [waiver] unknowing and involuntary' " (*People v Harris*, 94 AD3d 1484, 1485 [4th Dept 2012], *lv denied* 19 NY3d 961 [2012]).

Defendant's valid waiver of the right to appeal forecloses our review of his challenges in his main and pro se supplemental briefs to the court's adverse suppression rulings in appeal No. 1 (*see Sanders*, 25 NY3d at 342; *People v Kemp*, 94 NY2d 831, 833 [1999]; *People v Kates*, 162 AD3d 1627, 1628 [4th Dept 2018], *lv denied* 32 NY3d 1065 [2018], *reconsideration denied* 32 NY3d 1173 [2019]).

Defendant contends in his pro se supplemental brief in appeal No. 2 that the search of the vehicle in which he was a passenger was illegal and, thus, that the evidence seized as a result thereof, including the firearm, should have been suppressed. That contention is not properly before us. Defendant's contention depends on the establishment of his standing to challenge the search of the vehicle, but he did not have automatic standing inasmuch as the People's theory of possession was not based on the statutory automobile presumption (*cf.* Penal Law § 265.15 [3]), and he otherwise "neither alleged nor established that he had standing to challenge the search of the vehicle" (*People v Ortiz*, 227 AD2d 902, 902 [4th Dept 1996]).

Defendant further contends in his pro se supplemental brief in both appeals that he was denied effective assistance of counsel. Defendant's contention "survives his plea[s] and valid waiver of the right to appeal [in appeal No. 1] only insofar as he demonstrates that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea[s] because of [his] attorney[s'] allegedly poor performance[s]" (*Rausch*, 126 AD3d at 1535 [internal quotation marks omitted]). To the extent that defendant's contention is based upon matters outside the record, including defendant's conversations with his attorneys and the content of off-the-record plea negotiations, it must be raised by way of a motion pursuant to CPL article 440 (*see People v Tyes*, 160 AD3d 1447, 1448 [4th Dept 2018], *lv denied* 31 NY3d 1154 [2018]). To the extent that defendant's contention is reviewable on direct appeal, we conclude that it lacks merit inasmuch as he "received . . . advantageous plea[s], and 'nothing in the record casts doubt on the apparent effectiveness of [his attorneys]' " (*People v Shaw*, 133 AD3d 1312, 1313 [4th Dept 2015], *lv denied* 26 NY3d 1150 [2016], quoting *People v Ford*, 86 NY2d 397, 404 [1995]).

Defendant contends in his main brief in appeal No. 2 that Supreme Court (Boller, A.J.) abused its discretion by directing that the sentence imposed in that appeal run consecutively to the sentence imposed in appeal No. 1. We reject that contention. Because defendant was convicted of a violent felony offense in appeal No. 2 that was committed after he was arraigned and while he was released pending sentencing on the felony charge in appeal No. 1, and because a determinate sentence was imposed in each case, the court was required to impose a consecutive sentence in appeal No. 2 unless it found, in pertinent part, "mitigating circumstances that bear directly upon the manner in which the crime [in appeal No. 2] was committed" (Penal Law § 70.25 [2-b]).

As defendant correctly notes, "lack of injury to others and nondisplay of a weapon [are] qualifying mitigating circumstances under

Penal Law § 70.25 (2-b), because these factors bear directly on [a] defendant's personal conduct in committing the crime" (*People v Garcia*, 84 NY2d 336, 342 [1994]). Contrary to defendant's contention, however, "in exercising its discretion under Penal Law § 70.25 (2-b), the court is not precluded from considering traditional sentencing factors once qualifying mitigatory factors are found to be present" (*id.* at 343), and that is what occurred here. The court agreed with defendant that there were qualifying mitigating circumstances in appeal No. 2 inasmuch as he did not display or fire the weapon. The court nonetheless declined to exercise its discretion to impose a concurrent sentence upon its consideration of the totality of the circumstances, including defendant's criminal history and his conduct underlying the crime in appeal No. 2, i.e., possessing another weapon after absconding following the plea in appeal No. 1. Contrary to defendant's related contention, although the court noted that defendant's sentence in appeal No. 1 was not increased after he absconded and had to be returned on a warrant, we conclude that there is no indication that the court was influenced by any perceived leniency in the sentence in appeal No. 1 when it imposed sentence in appeal No. 2 (*cf. People v Roberts*, 120 AD2d 465, 465 [1st Dept 1986], *lv denied* 68 NY2d 773 [1986]).

Finally, contrary to defendant's contention in his main brief in appeal No. 2, the sentence in that appeal is not unduly harsh or severe, and we decline defendant's request to exercise our power to reduce the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1429

KA 16-01793

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS GRAHAM, DEFENDANT-APPELLANT.
(APPEAL NO. 2.)

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

MARCUS GRAHAM, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Supreme Court, Erie County (M. William Boller, A.J.), rendered September 12, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Same memorandum as in *People v Graham* ([appeal No. 1] — AD3d — [Apr. 26, 2019] [4th Dept 2019]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1430

KA 16-00439

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES B. METALES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Alex R. Renzi, J.), rendered July 22, 2015. The judgment convicted defendant, upon a jury verdict, of assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of assault in the second degree (Penal Law § 120.05 [3]). The charge arose from allegations that he caused physical injury to a police officer with the intent of preventing the officer from performing a lawful duty.

At trial, the officer testified that he was investigating a report of shots fired in the City of Rochester when he encountered defendant, who was walking near a bank where the officer was attempting to secure surveillance video. The officer testified that, for no apparent reason, defendant repeatedly called him a “bitch” and told him to get out of the neighborhood. Displaying his badge and gun, the officer explained that he was conducting an investigation and asked defendant to leave the area. According to the officer, defendant continued his verbal tirade against him, saying, “Bitch, I don’t care if you are the police . . . You need to get the f . . . out of my hood.”

When the officer shined a flashlight on defendant to see if he was armed, defendant, with a clenched fist, approached the officer, who turned to walk away. Defendant nevertheless followed the officer closely and allegedly said, “Bitch, I’ll kill you.” The officer testified that he then turned and punched defendant as a preemptive defensive maneuver. A fight ensued, with defendant and the officer exchanging blows and wrestling for position. The officer eventually

subdued defendant and pinned him to the ground. According to the officer, defendant repeatedly reached for the officer's holstered gun during the struggle, as if defendant intended to use it against him. Other officers soon arrived and placed defendant in handcuffs. The officer testified that he sustained various injuries during the fight, including an aggravation of a preexisting left wrist injury, which continued to cause him pain at the time of trial. The entire encounter was captured on a surveillance video and played at trial for the jury.

Defendant contends that the evidence is legally insufficient to establish that the officer was performing a lawful duty when the officer "instigated" the physical confrontation. That contention is not preserved for our review (*see People v Townsley*, 50 AD3d 1610, 1611 [4th Dept 2008], *lv denied* 11 NY3d 742 [2008]; *see generally* CPL 470.05 [2]). In any event, the trial testimony and surveillance video establish that it was defendant, not the officer, who initiated the confrontation, and we conclude that there is legally sufficient evidence to demonstrate that the officer was performing a lawful duty at the time, i.e., he was investigating a report of shots fired (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, the evidence is legally sufficient to establish that defendant *intended* to prevent the officer from performing a lawful duty. The evidence establishes that, after being informed by the officer that he was conducting an investigation, defendant continued to swear at the officer and told him to leave the neighborhood. While the officer was walking away, defendant approached him from behind and threatened to kill him. A defendant's intent "may be inferred from [his] conduct as well as the surrounding circumstances" (*People v Steinberg*, 79 NY2d 673, 682 [1992]), and "[a] jury is entitled to infer that a defendant intended the natural and probable consequences of his acts" (*People v Bueno*, 18 NY3d 160, 169 [2011]). "Competing inferences to be drawn [regarding a defendant's intent], if not unreasonable, are within the exclusive domain of the finders of fact, not to be disturbed" by us (*People v Barnes*, 50 NY2d 375, 381 [1980]). Here, we conclude that it may reasonably be inferred from defendant's obstreperous conduct that he intended to prevent the officer from conducting his investigation (*see People v Torres*, 130 AD3d 1082, 1085 [2d Dept 2015], *lv denied* 26 NY3d 1093 [2015]; *People v Rayford*, 16 AD3d 1102, 1102 [4th Dept 2005], *lv denied* 5 NY3d 768 [2005]).

We similarly reject defendant's contention that the evidence is legally insufficient to establish that the officer sustained a physical injury within the meaning of Penal Law § 10.00 (9). Viewing the evidence in the light most favorable to the People, as we must (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that there is a valid line of reasoning and permissible inferences to support the jury's finding that the officer sustained a physical injury (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v West*, 129 AD3d 1629, 1631 [4th Dept 2015], *lv denied* 26 NY3d 972 [2015]; *see generally Bleakley*, 69 NY2d at 495).

Viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we further conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495). Although a different verdict would not have been unreasonable, it cannot be said that the jury failed to give the evidence the weight it should be accorded (*see People v Kalinowski*, 118 AD3d 1434, 1436 [4th Dept 2014], *lv denied* 23 NY3d 1064 [2014]).

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1438

CA 18-01306

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

DEBORAH LEGGIO, CLAIMANT-APPELLANT,

V MEMORANDUM AND ORDER

STATE OF NEW YORK, DEFENDANT-RESPONDENT.
(CLAIM NO. 126064.)

EUGENE B. NATHANSON, NEW YORK CITY, FOR CLAIMANT-APPELLANT.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (FRANK BRADY OF COUNSEL), FOR DEFENDANT-RESPONDENT.

Appeal from an order of the Court of Claims (Renee Forgensi Minarik, J.), entered January 12, 2018. The order granted the motion of defendant for summary judgment dismissing the claim and denied the cross motion of claimant for summary judgment.

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

Memorandum: Claimant commenced this action seeking damages for injuries she sustained when she tripped over a tree stump while performing work as an inmate at Albion Correctional Facility. She appeals from an order that granted defendant's motion for summary judgment dismissing the claim and denied her cross motion for summary judgment on the issue of liability. We affirm.

Although defendant, through its correctional authorities, may direct an inmate to participate in a work program during his or her term of incarceration, it nevertheless "owes the inmate a duty to provide a reasonably safe workplace" (*Perez v State of New York*, 9 Misc 3d 1126[A], 2005 NY Slip Op 51802[U], *2 [Ct Cl 2005]; *see also Kandrach v State of New York*, 188 AD2d 910, 913 [3d Dept 1992]). Such a duty, however, "does not extend to hazards which are part of or inherent in the very work" being performed (*Gasper v Ford Motor Co.*, 13 NY2d 104, 110 [1963], *mot to amend remittitur granted* 13 NY2d 893 [1963]; *see Anderson v Bush Indus.*, 280 AD2d 949, 950 [4th Dept 2001]; *see generally* Labor Law § 200; *Maldonado v State of New York*, 255 AD2d 630, 631 [3d Dept 1998]). Further, while the issue whether a hazard is readily observable generally impacts only whether the parties are comparatively negligent, an open and obvious hazard is not actionable where it is inherent in the injury-producing work (*see Parkhurst v Syracuse Regional Airport Auth.*, 165 AD3d 1631, 1632 [4th Dept 2018]; *Landahl v City of Buffalo*, 103 AD3d 1129, 1131 [4th Dept 2013]).

Inasmuch as claimant and her fellow workers were tasked with cleaning up the branches of a felled tree, the existence of the tree stump was an open and obvious hazard inherent in the nature of the work and thus, contrary to claimant's contention, could not "serve as a basis for liability" (*Parkhurst*, 165 AD3d at 1632).

Moreover, claimant admitted that she was aware of the stump before she started working (*see Bombard v Central Hudson Gas & Elec. Co.*, 205 AD2d 1018, 1020 [3d Dept 1994], *lv dismissed* 84 NY2d 923 [1994]). Thus, we conclude that, contrary to claimant's further contentions, defendant did not have any duty to warn her of the existence of the stump or to instruct the inmates to exercise caution around it (*see Cwiklinski v Sears Roebuck & Co., Inc.*, 70 AD3d 1477, 1479 [4th Dept 2010]; *Hurlburt v S.W.B. Constr. Co.*, 20 AD3d 854, 855 [3d Dept 2005]). In light of the foregoing, we also conclude that defendant was not vicariously liable for a fellow inmate's purported failure to warn of the tree stump (*see generally Mattes v Joseph*, 282 AD2d 507, 508 [2d Dept 2001]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1442

CA 18-01019

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

IN THE MATTER OF THE FORECLOSURE OF TAX LIENS BY PROCEEDING IN REM PURSUANT TO ARTICLE 11 OF REAL PROPERTY TAX LAW BY COUNTY OF ERIE.

COUNTY OF ERIE, PETITIONER-RESPONDENT; MEMORANDUM AND ORDER

CHARLES J. SIBLEY, RESPONDENT-APPELLANT.

CHARLES J. SIBLEY, RESPONDENT-APPELLANT PRO SE.

LIPPES MATHIAS WEXLER FRIEDMAN LLP, BUFFALO (MARGARET A. HURLEY OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Erie County Court (James F. Bargnesi, J.), entered August 29, 2017. The order, among other things, granted petitioner's motion for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by striking from the ordering paragraph the language relating to respondent's "counterclaim," and as modified the order is affirmed without costs.

Memorandum: Respondent appeals from an order that, among other things, denied his purported counterclaim asserting civil trespass on the part of a process server retained by petitioner. As a preliminary matter, we note that respondent does not raise any issues with respect to that part of County Court's order granting petitioner's motion for summary judgment on the petition, and he has therefore abandoned any contentions with respect thereto (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 984 [4th Dept 1994]; *see also Bracken v Niagara Frontier Transp. Auth.*, 251 AD2d 1068, 1069 [4th Dept 1998]). Respondent contends that the court erred in construing his statements concerning trespass as a counterclaim, and we agree. Respondent's pro se answer does not contain a counterclaim for trespass, or any other counterclaims. Nor does the answer even contain any averments from which one might construe such a counterclaim (*see generally* CPLR 3019 [d]). Respondent's statements in unsworn letters to petitioner and unsworn documents submitted in support of his purported "motion to strike" do not constitute a counterclaim (*see* CPLR 2214 [b]; 3019 [d]; *see also Villager Constr. v Kozel & Son*, 222 AD2d 1018, 1018-1019 [4th Dept 1995]; *see generally Grasso v Angerami*, 79 NY2d 813, 814 [1991]).

Although it is true, as petitioner points out, that respondent

did not contend until after the order was entered that his answer did not assert a counterclaim for trespass, his failure to do so was entirely understandable in light of the fact that petitioner's motion for summary judgment did not request dismissal of any counterclaims, and respondent thus had no reason to expect that the court would misconstrue his answer as asserting one. We therefore modify the order by striking the language concerning respondent's "counterclaim" from the ordering paragraph.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

1450

KA 17-00608

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHARLES GRAHAM, ALSO KNOWN AS CHUCK GRAHAM,
DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 26, 2016. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault against a child (four counts), sexual abuse in the first degree and endangering the welfare of a child (four counts).

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of, inter alia, four counts of predatory sexual assault against a child (Penal Law § 130.96) and one count of sexual abuse in the first degree (§ 130.65 [3]). We affirm.

Defendant failed to preserve for our review his contention that the evidence is legally insufficient to support the conviction inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' " at the alleged deficiency in the proof raised on appeal (*People v Hawkins*, 11 NY3d 484, 492 [2008], quoting *People v Gray*, 86 NY2d 10, 19 [1995]). Nonetheless, this Court " 'necessarily review[s] the evidence adduced as to each of the elements of the crimes in the context of our review of defendant's challenge regarding the weight of the evidence' " (*People v Stepney*, 93 AD3d 1297, 1298 [4th Dept 2012], *lv denied* 19 NY3d 968 [2012]; *see People v Danielson*, 9 NY3d 342, 349 [2007]). Viewing the evidence in light of the elements of the crimes as charged to the jury (*see Danielson*, 9 NY3d at 349), we reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). "[R]esolution of issues of credibility, as well as the weight to be accorded to the evidence presented, are primarily questions to be determined by the jury"

(*People v Witherspoon*, 66 AD3d 1456, 1457 [4th Dept 2009], *lv denied* 13 NY3d 942 [2010] [internal quotation marks omitted]), and we perceive no basis to disturb the jury's determinations.

We reject defendant's contention that he was deprived of effective assistance of counsel. Defendant contends that defense counsel failed to cross-examine the victim about her history of lying, but "attempting to attack the victim's credibility with . . . specific instance[s] of alleged untruthfulness [is] a tactic that is per se improper" (*People v Drake*, 138 AD3d 1396, 1397 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]), and defense counsel was not ineffective for failing to pursue a line of questioning that would have been prohibited (*see People v Caban*, 5 NY3d 143, 152 [2005]). Moreover, defense counsel elicited testimony from five other witnesses and defendant himself about the victim's reputation in the community for being untruthful (*see People v Pavao*, 59 NY2d 282, 290 [1983]), and defendant failed "to demonstrate the absence of strategic or other legitimate explanations for [defense] counsel's failure" to vigorously cross-examine the victim about collateral matters (*People v Rivera*, 71 NY2d 705, 709 [1988]; *see also People v Carver*, 27 NY3d 418, 420 [2016]). Specifically, the victim's testimony on direct examination was compelling and convincing, and defense counsel may have wanted to avoid the appearance of badgering a seven-year-old and thereby alienating the jury from his client.

Defendant further contends that defense counsel was ineffective for failing to correct on cross-examination the testimony of a detective about the results of DNA testing on items of clothing taken from defendant's trailer. We reject that contention. The People did not elicit any testimony from the detective on direct examination about the results of DNA testing and, on cross-examination, without referencing any particular laboratory report, defense counsel elicited testimony from the detective that the victim's DNA was *not* found on any clothing obtained from defendant's trailer, and that the DNA material that was found on defendant's clothing could have belonged to his new girlfriend. Thus, the detective's testimony regarding the DNA evidence was favorable to defendant and "there is no 'reasonable likelihood that the [alleged] error [by defense counsel] changed the outcome of the case' " (*People v Sinclair*, 90 AD3d 1518, 1518 [4th Dept 2011], *lv denied* 18 NY3d 962 [2012]). Furthermore, inasmuch as the People did not introduce testimony from the detective regarding any out-of-court statement, testimonial in nature, that accused defendant of anything, defendant's constitutional right to confront adverse witnesses was not violated by the detective's testimony (*see generally Melendez-Diaz v Massachusetts*, 557 US 305, 309-311 [2009]; *People v John*, 27 NY3d 294, 303-308 [2016]), and defense counsel was not ineffective for failing to object thereto.

We reject defendant's contention that counsel was ineffective for failing to lay a proper foundation for the admission in evidence of posts from the Facebook page of the victim's mother that contained sexually suggestive images and innuendo. Defense counsel attempted to introduce the Facebook posts under the theory that, *if* the victim had

seen her mother's postings, those postings could have provided a source, other than defendant, for the child's knowledge of sexual matters, and the record establishes that the court excluded the Facebook posts on the ground that they were not relevant to the issues at trial, and not on the ground that the evidence lacked a proper foundation. Moreover, we conclude that the material was properly excluded on the ground that it was not relevant inasmuch as the Facebook posts did not depict or describe genitalia or sexual acts, and defendant's suggestion that they could have provided the victim with a basis of knowledge for her accusations against him is " 'too remote or speculative' " (*People v Johnson*, 109 AD3d 1187, 1188 [4th Dept 2013], *lv denied* 22 NY3d 1041 [2013]; *see generally People v Carroll*, 95 NY2d 375, 385 [2000]; *People v Odom*, 53 AD3d 1084, 1087 [4th Dept 2008], *lv denied* 11 NY3d 792 [2008]). Thus, inasmuch as the evidence was not excluded on the ground that it lacked a proper foundation, defense counsel was not ineffective for failing to lay a proper foundation for that evidence. Viewing the evidence, the law and the circumstances of the case in totality and as of the time of the representation, we conclude that defendant received meaningful representation (*see generally People v Baldi*, 54 NY2d 137, 147 [1981]).

Defendant next contends that he was deprived of a fair trial by several improper evidentiary rulings by the court. We reject that contention. First, he contends that the court should not have allowed the doctor who examined the victim to testify about the elasticity of the vagina while explaining why young girls who have been sexually abused often have normal physical examinations. In response to defense counsel's objections that such testimony was not relevant, the court cautioned the jury that there was no allegation that defendant had penetrated the victim's vagina. We conclude that the court's prompt curative instruction to the jury provided an adequate remedy to alleviate any potential prejudice that was caused by the doctor's testimony (*see People v Dean*, 299 AD2d 892, 893 [4th Dept 2002], *lv denied* 99 NY2d 613 [2003]). Moreover, on summation, the prosecutor reiterated to the jury that there was no allegation that defendant had penetrated the victim's vagina and did not mention the doctor's testimony. Thus, we conclude that any error in allowing that testimony is harmless inasmuch as "the proof of defendant's guilt is overwhelming and there is no significant probability that the jury would have acquitted defendant had the error not occurred" (*People v Williams*, 25 NY3d 185, 194 [2015]; *see People v Smith*, 289 AD2d 960, 961 [4th Dept 2001], *lv denied* 97 NY2d 761 [2002]; *see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

Defendant failed to preserve for our review his contention that the court improperly admitted in evidence the testimony of the People's expert witness concerning child sexual abuse accommodation syndrome (*see People v Ennis*, 107 AD3d 1617, 1618-1619 [4th Dept 2013], *lv denied* 22 NY3d 1040 [2013], *reconsideration denied* 23 NY3d 1036 [2014]). In any event, the court did not abuse its discretion in permitting the expert's testimony "for the purpose of explaining behavior that might be puzzling to a jury" (*People v Spicola*, 16 NY3d

441, 465 [2011], *cert denied* 565 US 942 [2011]) inasmuch as the testimony was "general in nature and [did] not constitute an opinion that [the] particular alleged victim [was] credible or that the charged crimes in fact occurred" (*Drake*, 138 AD3d at 1398; *see People v Diaz*, 20 NY3d 569, 575-576 [2013]; *cf. People v Ruiz*, 159 AD3d 1375, 1376 [4th Dept 2018]).

Contrary to defendant's further contention, the court did not abuse its discretion in allowing the prosecutor to ask leading questions of the child victim in this sexual abuse case (*see People v Boyd*, 50 AD3d 1578, 1578 [4th Dept 2008], *lv denied* 11 NY3d 785 [2008]; *People v Greenhagen*, 78 AD2d 964, 966 [4th Dept 1980], *lv denied* 52 NY2d 833 [1980]). Additionally, even assuming, arguendo, that, as defendant contends, two of the questions asked of the People's expert witness on direct examination were leading questions, "the decision 'whether to permit the use of leading questions on direct examination is a matter within the sound discretion of the trial court and will not be disturbed absent a clear demonstration of an abuse of discretion' " (*People v Martina*, 48 AD3d 1271, 1272 [4th Dept 2008], *lv denied* 10 NY3d 961 [2008]; *see* Jerome Prince, Richardson on Evidence § 6-232 [Farrell 11th ed 1995]), and we perceive no abuse of discretion here.

Defendant next contends that he was deprived of a fair trial by instances of misconduct by the prosecutor. Contrary to defendant's contention, "[i]nasmuch as defendant's testimony during both direct and cross-examination clearly suggested that the People's witnesses had fabricated their testimony, it was not improper for the prosecutor to ask him whether be believed the People's witnesses had lied during their testimony" (*People v Head*, 90 AD3d 1157, 1158 [3d Dept 2011]; *see People v Buel*, 53 AD3d 930, 932 [3d Dept 2008]; *People v Allen*, 13 AD3d 892, 897 [3d Dept 2004], *lv denied* 4 NY3d 833 [2005]).

Defendant did not preserve for our review his contention that the prosecutor made improper comments during summation (*see People v Reyes*, 144 AD3d 1683, 1686 [4th Dept 2016]; *People v Lewis*, 140 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). In any event, evaluating the prosecutor's comments on summation "in light of the defense summation" (*People v Halm*, 81 NY2d 819, 821 [1993]), we conclude that the prosecutor's comments "constituted fair comment on the evidence . . . as well as fair response to the summation of defense counsel" (*People v Jackson*, 141 AD3d 1095, 1096 [4th Dept 2016], *lv denied* 28 NY3d 1146 [2017]).

Defendant also failed to preserve for our review his contention that the prosecutor disregarded a court ruling by questioning the detective about defendant's attempt to commit suicide. At trial, the prosecutor asked the detective to describe defendant's demeanor at the end of the interview, and the detective answered that defendant became violent at the end of the interview and "wanted to harm himself." Defense counsel objected "to anything beyond that line" and the court obliged, prohibiting the prosecutor from asking "anything beyond that." Inasmuch as the court granted the relief requested by

defendant and he did not seek further relief, such as striking from the record the prosecutor's question and the detective's answer or a curative instruction, defendant's contention is unpreserved for our review (*see People v Goley*, 113 AD3d 1083, 1084 [4th Dept 2014]). We note in any event that, although the court ruled at the *Huntley* hearing that the People would not be permitted to play for the jury that portion of a video recording of the interview in which defendant attempted to take his own life, the court indicated that it would not preclude the People from eliciting testimony from the detective regarding her observations of defendant. Thus, the record establishes that the prosecutor did not disregard a prior court ruling and did not exceed the bounds of legitimate advocacy (*cf. People v Rosa*, 108 AD2d 531, 539 [1st Dept 1985]). Defense counsel was therefore not ineffective for failing to object to the alleged instances of prosecutorial misconduct (*see generally People v Lowery*, 158 AD3d 1179, 1180 [4th Dept 2018], *lv denied* 31 NY3d 1119 [2018]; *People v Black*, 137 AD3d 1679, 1681 [4th Dept 2016], *lv denied* 27 NY3d 1128 [2016], *reconsideration denied* 28 NY3d 1026 [2016]).

Finally, the sentence is not unduly harsh or severe.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

19

CA 18-01580

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

DEBORAH A. EAGAN, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

PAGE 1 PROPERTIES, LLC, DEFENDANT-APPELLANT.

BARCLAY DAMON LLP, BUFFALO (THOMAS A. DIGATI OF COUNSEL), FOR DEFENDANT-APPELLANT.

JAMES A. PARTACZ, WEST SENECA, FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered November 2, 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 modified on the law by granting the motion in part and dismissing the complaint to the extent that the complaint, as amplified by the bill of particulars, alleges that defendant created or had actual notice of the allegedly dangerous condition and as modified the order is affirmed without costs.

Memorandum: Plaintiff commenced this action seeking damages for injuries she sustained at her home when a window that she had just opened fell out of its frame and struck her. Plaintiff rented the home from defendant, whose sole member was Patricia DaPolito (Patricia). Plaintiff alleged that the window fell because it was defectively installed. On appeal from an order denying its motion for summary judgment dismissing the complaint, defendant contends that Supreme Court erred in denying the motion with respect to the claims that defendant created or had actual notice of the allegedly dangerous condition. We agree, and we therefore modify the order accordingly. It is well established that "[a] landowner is liable for a dangerous or defective condition on his or her property when the landowner 'created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it' " (*Anderson v Weinberg*, 70 AD3d 1438, 1439 [4th Dept 2010]; *see Miller v Kendall*, 164 AD3d 1610, 1610-1611 [4th Dept 2018]). Defendant met its initial burden of establishing that it did not create the allegedly dangerous condition or have actual notice of the condition by submitting evidence that the window was installed prior to defendant purchasing the home, that no repairs were made to the window prior to the incident, and that it never received any complaints regarding the window (*see Cosgrove v River Oaks Rests., LLC*, 161 AD3d 1575, 1576-1577 [4th Dept 2018];

Navetta v Onondaga Galleries LLC, 106 AD3d 1468, 1469 [4th Dept 2013]). In opposition to the motion, plaintiff failed to raise a triable issue of fact on those claims (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

We reject defendant's contention, however, that the court erred in denying the motion with respect to the claim that defendant had constructive notice of the allegedly dangerous condition. "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Defendant met its initial burden of establishing that it lacked constructive notice by submitting the deposition testimony of Patricia and Steven DaPolito (Steven), who both used the window at issue prior to defendant leasing the property to plaintiff and encountered no difficulty with it. Defendant also submitted the deposition testimony of plaintiff, who also had no problem using the window at issue prior to the accident. Moreover, Steven testified at his deposition that he examined the window after the accident and found no visible defect; it was only when he applied pressure to the framework of the window that he could circumvent the latches and noticed the defect. We therefore agree with defendant that its evidence established that any defect in the window was not visible and apparent prior to the accident, and thus it did not have constructive notice of a dangerous condition (*see Keene v Marketplace*, 114 AD3d 1313, 1314-1315 [4th Dept 2014]).

In opposition to the motion, however, we conclude that plaintiff raised a triable issue of fact whether the allegedly dangerous condition was visible and apparent and existed for a sufficient length of time prior to the accident to permit defendant to correct it (*see id.* at 1315; *Quackenbush v City of Buffalo*, 43 AD3d 1386, 1389 [4th Dept 2007]; *see also Vara v Benderson Dev. Co.*, 258 AD2d 932, 932-933 [4th Dept 1999]). Plaintiff submitted the affidavit and deposition testimony of a witness who saw the window frame immediately after the accident and could see a visible gap between the frame and window. Plaintiff also submitted the affidavits of her experts, who inspected the window after the accident and opined that the window was installed incorrectly.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

30

KA 16-02364

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

QUENTIN SUTTLES, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Christopher J. Burns, J.), rendered October 27, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). The conviction arises from a police encounter during which an officer approached the parked vehicle in which defendant was a passenger and observed that defendant was in possession of a handgun. We agree with defendant that the police lacked reasonable suspicion to justify the initial seizure of the vehicle, and thus Supreme Court erred in refusing to suppress both the tangible property seized, i.e., the weapon, and statements defendant made to the police at the time of his arrest. Here, police officers effectively seized the vehicle in which defendant was riding when their two patrol cars entered the parking lot in such a manner as to prevent the vehicle from being driven away (*see People v Jennings*, 45 NY2d 998, 999 [1978]; *People v Layou*, 71 AD3d 1382, 1383 [4th Dept 2010]; *cf. People v Cintron*, 125 AD3d 1333, 1334 [4th Dept 2015], *lv denied* 25 NY3d 1071 [2015]). The police had, at most, a "founded suspicion that criminal activity [was] afoot," which permitted them to approach the vehicle and make a common-law inquiry of its occupants (*People v Moore*, 6 NY3d 496, 498 [2006]). They did not, however, have "reasonable suspicion that [a] particular individual was involved in a

felony or misdemeanor" to justify the seizure that occurred here (*id.* at 499; *see Layou*, 71 AD3d at 1383-1384), and thus the weapon and defendant's statements should have been suppressed. We therefore vacate defendant's guilty plea and, "because our determination results in the suppression of all evidence in support of the crimes charged, the indictment must be dismissed" (*People v Lee*, 110 AD3d 1482, 1484 [4th Dept 2013] [internal quotation marks omitted]; *see People v Finch*, 137 AD3d 1653, 1655 [4th Dept 2016]).

In light of our determination, we need not address defendant's remaining contention.

Mark W. Bennett

Entered: April 26, 2019

Clerk of the Court

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

33

CA 18-01212

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

DION L. BARNES, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

JOSEPH OCCHINO AND NIAGARA MOHAWK POWER CORPORATION, DEFENDANTS-RESPONDENTS.

ANDRUSCHAT LAW FIRM, BUFFALO (TIMOTHY J. ANDRUSCHAT OF COUNSEL), FOR PLAINTIFF-APPELLANT.

BARCLAY DAMON, LLP, BUFFALO (NICHOLAS J. DICESARE OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.), entered September 6, 2017. The order, insofar as appealed from, granted in part the motion of defendants for summary judgment dismissing the complaint.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the motion is denied in its entirety, and the complaint, as amplified by the bill of particulars, is reinstated with respect to the permanent consequential limitation of use, significant limitation of use, and significant disfigurement categories of serious injury within the meaning of Insurance Law § 5102 (d).

Memorandum: In this action to recover damages for injuries sustained as a result of a motor vehicle accident, plaintiff appeals from an order that, inter alia, granted those parts of defendants' motion for summary judgment dismissing the complaint, as amplified by the bill of particulars, with respect to the permanent consequential limitation of use, significant limitation of use, and significant disfigurement categories of serious injury (*see* Insurance Law § 5102 [d]). We agree with plaintiff that Supreme Court erred in granting the motion to that extent, and we therefore reverse the order insofar as appealed from.

Defendants failed to meet their initial burden of establishing that plaintiff did not sustain a serious injury under the permanent consequential limitation of use and significant limitation of use categories inasmuch as their own submissions raised triable issues of fact with respect to those categories (*see Crane v Glover*, 151 AD3d 1841, 1841-1842 [4th Dept 2017]). Defendants submitted the affirmed report of a physician who conducted an examination of plaintiff on

behalf of defendants. That report contains a review of plaintiff's imaging studies, which showed disc herniations, and plaintiff's medical records, which noted that plaintiff had significant limited range of motion as well as muscle spasms, thus raising a triable issue of fact whether there was objective evidence of an injury (*see id.* at 1842; *Carpenter v Steadman*, 149 AD3d 1599, 1600 [4th Dept 2017]). Defendants' submissions in support of their motion also raised a triable issue of fact whether the motor vehicle accident caused plaintiff's alleged injuries (*see Schaubroeck v Moriarty*, 162 AD3d 1608, 1609 [4th Dept 2018]). In the affirmed report of the same physician, he opined that the imaging studies showed only preexisting degenerative changes, but he " 'fail[ed] to account for evidence that plaintiff had no complaints of pain prior to the accident' " (*Crane*, 151 AD3d at 1842; *see Thomas v Huh*, 115 AD3d 1225, 1226 [4th Dept 2014]).

Defendants also failed to meet their initial burden of establishing that plaintiff did not sustain a serious injury under the significant disfigurement category. Defendants did not submit any evidence showing the severity of plaintiff's surgical scars (*cf. Heller v Jansma*, 103 AD3d 1160, 1161 [4th Dept 2013]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

41

CAF 18-00209

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

IN THE MATTER OF IVAN DELGADO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VANESSA VEGA, RESPONDENT-APPELLANT.
(APPEAL NO. 1.)

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered January 2, 2018 in a proceeding pursuant to Family Court Act article 6. The order denied the application of respondent to vacate an order entered upon her default.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs and the matter is remitted to Family Court, Monroe County, for further proceedings in accordance with the following memorandum: In appeal No. 1, respondent mother appeals from an order that denied her application to vacate an order entered upon her default that, inter alia, awarded petitioner father sole custody of the parties' child. In appeal No. 2, the mother appeals from an order that denied her motion for leave to renew the application to vacate the default order. We conclude that Family Court abused its discretion in denying the mother's application in appeal No. 1.

As a preliminary matter, we agree with the Attorney for the Child that the mother failed to preserve for our review her contention that she was entitled to vacatur of the default order pursuant to CPLR 317 inasmuch as the mother did not seek such relief in her original application (*see Xiao Hong Wang v Chi Kei Li*, 169 AD3d 593, 594 [1st Dept 2019]; *cf. Pena v Mittleman*, 179 AD2d 607, 608 [1st Dept 1992]). Rather, the mother's application sought vacatur of the default order under CPLR 5015 (a) (1) only, and we therefore limit our review accordingly.

"Pursuant to CPLR 5015 (a) (1), a court may vacate a judgment or

order entered upon default if it determines that there is a reasonable excuse for the default and a meritorious defense" (*Matter of Troy D.B. v Jefferson County Dept. of Social Servs.*, 42 AD3d 964, 965 [4th Dept 2007]), and it is well settled that "[t]he determination whether to vacate an order entered upon a default is left to the sound discretion of the court" (*Matter of Shehatou v Louka*, 145 AD3d 1533, 1533-1534 [4th Dept 2016]). Nevertheless, inasmuch as " 'default orders are disfavored in cases involving the custody or support of children, and . . . the rules with respect to vacating default judgments are not to be applied as rigorously in those cases' " (*Matter of Strumpf v Avery*, 134 AD3d 1465, 1465-1466 [4th Dept 2015]), we conclude that the mother, who had physical custody of the child from the child's birth until the father took custody pursuant to the default order, established a meritorious defense to the father's petition and raised an issue of fact whether she was served with the petition, thus warranting a traverse hearing (*see Bank v Hudson Produce, Inc.*, 161 AD3d 573, 574 [1st Dept 2018]; *Kasowitz, Benson, Torres & Friedman, LLP v Cao*, 105 AD3d 521, 521 [1st Dept 2013]). We therefore reverse the order in appeal No. 1 and remit the matter to Family Court to decide the application to vacate following such a hearing. Pending the court's determination upon remittal, the custody and visitation provisions in the order entered May 4, 2017 shall remain in effect (*see Matter of Brown v Orr*, 166 AD3d 1583, 1584 [4th Dept 2018]).

In view of the foregoing, the appeal from the order in appeal No. 2 is dismissed as moot (*see Braitman v Minicucci & Grenga* [appeal No. 1], 272 AD2d 875, 875 [4th Dept 2000]; *see generally 55 Liberty St. Assoc. v Garrick-Aug Assoc. Store Leasing*, 255 AD2d 188, 188 [1st Dept 1998]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

42

CAF 18-01126

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

IN THE MATTER OF IVAN DELGADO,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

VANESSA VEGA, RESPONDENT-APPELLANT.
(APPEAL NO. 2.)

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

MARK D. FUNK, CONFLICT DEFENDER, ROCHESTER (KATHLEEN P. REARDON OF COUNSEL), FOR PETITIONER-RESPONDENT.

TANYA J. CONLEY, ROCHESTER, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Monroe County (Joseph G. Nesser, J.), entered April 30, 2018 in a proceeding pursuant to Family Court Act article 6. The order denied the motion of respondent for leave to renew her application to vacate an order entered upon her default.

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

Same memorandum as in *Matter of Delgado v Vega* ([appeal No. 1] — AD3d — [Apr. 26, 2019] [4th Dept 2019]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

50

KA 14-01877

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DELSHAWN S. JACKSON, DEFENDANT-APPELLANT.

HODGSON RUSS LLP, BUFFALO (REETUPARNA DUTTA OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Monroe County Court (Christopher S. Ciaccio, J.), rendered August 27, 2014. The judgment convicted defendant, upon a jury verdict, of criminal sexual act in the first degree and menacing in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, that part of the omnibus motion seeking to suppress the statements made by defendant at the police station on June 27, 2013 after his initial request for an attorney is granted, and a new trial is granted.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal sexual act in the first degree (Penal Law § 130.50 [1]) and menacing in the third degree (§ 120.15). The jury was unable to reach a verdict on a charge of rape in the first degree (§ 130.35 [1]). 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

We agree with defendant, however, that County Court (Piampiano, J.) erred in denying that part of his omnibus motion seeking to suppress the statements that he made while at the police station after he unequivocally asserted his right to counsel by asking, "May I have an attorney please, a lawyer?" Specifically, we conclude that the court erred in refusing to suppress the statements that defendant made to investigators during his videotaped interrogation on June 27, 2013 after requesting an attorney and the statements that defendant made on the videotape after the investigators left the interview room (*see People v Cunningham*, 49 NY2d 203, 210 [1980]; *People v Rogers*, 48 NY2d 167, 174 [1979]; *People v Carrino*, 134 AD3d 946, 949-950 [2d Dept

2015]).

We further conclude that, contrary to the People's assertion, the court's error is not harmless inasmuch as there is a "reasonable possibility that the error might have contributed to defendant's conviction" (*People v Crimmins*, 36 NY2d 230, 237 [1975]). The defense theory at trial was that defendant had consensual sexual contact with the victim. During the videotaped interrogation viewed by the jury, however, defendant repeatedly denied having had any sexual contact with the victim. He then admitted that he had lied, but nevertheless continued to deny that sexual contact had occurred. In addition, the prosecutor, on redirect examination of one of the investigators, elicited testimony establishing that, after the investigators left the room, defendant was recorded making an additional comment that contradicted his earlier statements. Thus, in our view, there is a reasonable possibility that the court's refusal to suppress the statements made by defendant at the police station after his initial request for an attorney "was an error that contributed to his conviction" (*Carrino*, 134 AD3d at 950). We therefore reverse the judgment, grant that part of the omnibus motion seeking to suppress those statements, and grant a new trial (*see id.* at 950-951).

Given our determination on the suppression issue, we do not address defendant's remaining contentions.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

51

KA 17-00186

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIE SANDERS, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered December 6, 2016. The judgment convicted defendant, upon a jury verdict, of predatory sexual assault and attempted rape in the first degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence imposed on count two of the indictment, and as modified the judgment is affirmed, and the matter is remitted to Supreme Court, Erie County, for resentencing on that count.

Memorandum: On appeal from a judgment convicting him upon a jury verdict of predatory sexual assault (Penal Law § 130.95 [3]) and attempted rape in the first degree (§§ 110.00, 130.35 [1]), defendant contends that Supreme Court erred in refusing to suppress statements that he made to the police. We reject that contention.

Initially, the court properly concluded that the statement that defendant made while being transported to the police station was spontaneous. Although that statement was made while defendant was in custody, it was "in no way the product of an interrogation environment [or] the result of express questioning or its functional equivalent" (*People v Harris*, 57 NY2d 335, 342 [1982], *cert denied* 460 US 1047 [1983] [internal quotation marks omitted]; *see People v Dawson*, 149 AD3d 1569, 1570-1571 [4th Dept 2017], *lv denied* 29 NY3d 1125 [2017]).

Furthermore, the court properly refused to suppress the statements that defendant made at the police station. The evidence presented at the suppression hearing demonstrated that defendant was informed of his *Miranda* rights, that he understood those rights, and that he was not under duress or undue influence when he made those statements (*see People v DeAngelo*, 136 AD3d 1119, 1120 [3d Dept 2016];

see also People v Rodwell, 122 AD3d 1065, 1067 [3d Dept 2014], *lv denied* 25 NY3d 1170 [2015]). In addition, suppression of those statements is not required based on the tactics used by the detective who questioned defendant at the police station. "It is well established that not all deception of a suspect is coercive, but in extreme forms it may be" (*People v Thomas*, 22 NY3d 629, 642 [2014]). Here, we conclude that the tactics in question "did not overbear defendant's will or create a substantial risk that he would falsely incriminate himself" (*People v Tompkins*, 107 AD3d 1037, 1040 [3d Dept 2013], *lv denied* 22 NY3d 1044 [2013]; *see People v Jenkins*, 159 AD3d 1419, 1420 [4th Dept 2018], *lv denied* 31 NY3d 1118 [2018], *reconsideration denied* 32 NY3d 1005 [2018]; *People v Grigoroff*, 131 AD3d 541, 544 [2d Dept 2015]).

Defendant's contention that the evidence is not legally sufficient to support the conviction is not preserved inasmuch as his motion for a trial order of dismissal was not " 'specifically directed' at the error being urged" on appeal (*People v Hawkins*, 11 NY3d 484, 492 [2008]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we conclude that the evidence, viewed in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), provides a "valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury" (*People v Bleakley*, 69 NY2d 490, 495 [1987]). Contrary to defendant's further contention, viewing the evidence in light of the elements of the crimes as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

As defendant contends and the People correctly concede, the court imposed an illegal period of postrelease supervision of five years on defendant's conviction of attempted rape in the first degree, a class C violent felony sex offense (*see* Penal Law §§ 70.02 [1] [b]; 70.80 [1] [b]; 110.00, 110.05 [4]; 130.35 [1]). Because defendant is a second violent felony offender, the applicable period of postrelease supervision is between 7 and 20 years (*see* §§ 70.04 [1] [a]; 70.45 [2-a] [h]). Inasmuch as the record does not indicate whether the court intended to impose the minimum or maximum period of postrelease supervision, we modify the judgment by vacating the sentence on count two of the indictment, and we remit the matter to Supreme Court for resentencing on that count (*see People v Bowden*, 15 AD3d 884, 885 [4th Dept 2005], *lv denied* 4 NY3d 851 [2005], *reconsideration denied* 5 NY3d 786 [2005]; *cf. People v Roman*, 43 AD3d 1282, 1283 [4th Dept 2007], *lv denied* 9 NY3d 1009 [2007]). Contrary to defendant's contention, however, the remainder of the sentence is not unduly harsh or severe.

Finally, we note that the certificate of conviction and the order of protection issued at sentencing contain clerical errors that must be corrected (*see generally People v Young*, 74 AD3d 1864, 1865 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]). The certificate of conviction incorrectly reflects that the order of protection was issued for a duration of 12 years and must therefore be amended to

reflect that the order of protection expires on January 24, 2038, and the order of protection incorrectly recites that defendant was convicted of attempted criminal sexual act in the first degree (Penal Law §§ 110.00, 130.50 [1]) and must therefore be amended to reflect that defendant was instead convicted of attempted rape in the first degree (§§ 110.00, 130.35 [1]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

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CAF 18-01219

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

IN THE MATTER OF MARIA S. BROOKS,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BENJAMIN S. BROOKS, RESPONDENT-RESPONDENT.

VAHEY MULDOON RESTON GETZ LLP, ROCHESTER (MARGARET M. RESTON OF COUNSEL), FOR PETITIONER-APPELLANT.

SUSAN E. GRAY, CANANDAIGUA, FOR RESPONDENT-RESPONDENT.

Appeal from an order of the Family Court, Ontario County (Stephen D. Aronson, A.J.), entered August 23, 2017 in a proceeding pursuant to Family Court Act article 4. The order, insofar as appealed from, denied petitioner's first and second objections to an order issued by the Support Magistrate.

It is hereby ORDERED that the order insofar as appealed from is unanimously reversed on the law without costs, the first two objections are granted, and the matter is remitted to Family Court, Ontario County, for further proceedings in accordance with the following memorandum: In this proceeding pursuant to Family Court Act article 4, petitioner mother appeals, as limited by her brief, from those parts of an order denying her first and second objections to an order of the Support Magistrate that modified a prior New Jersey child support order (support order) issued as part of divorce proceedings that occurred in that state. On appeal, the mother contends that Family Court erred in denying those objections because the Support Magistrate erred in applying the law of New Jersey in calculating the modified child support obligation of respondent father. We agree.

In 2011, a New Jersey court issued a judgment of divorce that incorporated but did not merge the parties' separation agreement, which in pertinent part stated that, "[n]otwithstanding the future residence or domicile of either party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey." In 2016, when the parties and their children were all living in New York, the mother filed a petition in Family Court, Ontario County, seeking modification of the support order. During that proceeding, the mother also registered the support order in that court (*see generally* Family Ct Act § 580-601 *et seq.*). The Support Magistrate agreed with the mother that a modification of the support order was proper under the terms of

the agreement, which permitted the parties to seek modification of the father's child support obligation every two years, and calculated the amount of child support pursuant to New Jersey law. The mother filed objections asserting that New York law should govern that calculation (first objection), that the matter should be remitted for a hearing to recalculate the father's child support obligation (second objection), and that she is entitled to attorney's fees. The court denied the objections, concluding that, pursuant to the choice of law provisions of Family Court Act § 580-604, "the law of the issuing state (in this case, New Jersey) governs the nature, extent, amount and duration of current payments under a . . . support order [that has been registered in New York]."

Initially, we conclude that the court had jurisdiction pursuant to the Uniform Interstate Family Support Act ([UIFSA] Family Ct Act art 5-B) to resolve the issues raised in the mother's petition and objections (*see* § 580-613 [a]; *Saxton v Saxton*, 267 AD2d 688, 689 [3d Dept 1999]). The UIFSA unequivocally provides that where, as here, the parents reside in this state "and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order" (§ 580-613 [a]; *see also* 28 USC § 1738B [e] [1]; [i]). Furthermore, we agree with the mother that New York law must be applied to determine the father's child support obligation here inasmuch as the statute further provides that "[a] tribunal of this state exercising jurisdiction under this section shall apply . . . the procedural and substantive law of this state to the proceeding for enforcement or modification" (Family Ct Act § 580-613 [b]). We also agree with the mother that section 580-604 does not control inasmuch as that section applies to proceedings seeking to enforce prior child support orders or to calculate and collect related arrears and does not apply to proceedings, as here, seeking to modify such an order.

Finally, as the mother correctly contends, the Support Magistrate erred in determining that the choice of law provision in the separation agreement controls over the statute. Although courts will generally enforce a choice of law clause " 'so long as the chosen law bears a reasonable relationship to the parties or the transaction' " (*Friedman v Roman*, 65 AD3d 1187, 1188 [2d Dept 2009], quoting *Welsbach Elec. Corp. v MasTec N. Am., Inc.*, 7 NY3d 624, 629 [2006]), courts will not enforce such clauses where the chosen law violates " 'some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal' " (*Cooney v Osgood Mach.*, 81 NY2d 66, 78 [1993], quoting *Loucks v Standard Oil Co. of N.Y.*, 224 NY 99, 111 [1918]). It is long settled that New York has a "strong public policy that obligates a parent to support his or her child" (*Matter of Vicki B. v David H.*, 57 NY2d 427, 430 [1982]; *see Schaschlo v Taishoff*, 2 NY2d 408, 411 [1957]). Under New York law, child support obligations are required to be calculated pursuant to the Child Support Standards Act ([CSSA] Family Ct Act § 413), and " '[t]he duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement' " (*Keller-Goldman v Goldman*, 149 AD3d 422, 424 [1st Dept 2017], *affd* 31

NY3d 1123 [2018]). In addition, whereas New Jersey law provides that child support obligations generally end when a child reaches the age of 19 (*see* NJ Stat Ann § 2A:17-56.67), in New York, "[a] parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy" (*Sanders v Sanders*, 150 AD3d 781, 784 [2d Dept 2017]). Under the circumstances, and given that the parties do not have a valid agreement to opt out of the CSSA (*see generally* Domestic Relations Law § 240 [1-b] [h]), we conclude that enforcement of the parties' choice of law provision would violate those strong New York public policies. We therefore reverse the order insofar as appealed from, grant the mother's first two objections, and remit the matter to Family Court for further proceedings, including a hearing if necessary, to recalculate the father's child support obligation pursuant to New York law.

Entered: April 26, 2019

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 16-00157

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER HICKEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRITTNEY CLARK 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 October 23, 2015. The judgment convicted defendant, upon a jury verdict, of grand larceny in the fourth degree and unauthorized use of a vehicle in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reversing that part convicting defendant of unauthorized use of a vehicle in the third degree and dismissing count three of the indictment and as modified the judgment is affirmed.

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of grand larceny in the fourth degree (Penal Law § 155.30 [8]) and unauthorized use of a vehicle in the third degree (§ 165.05 [1]). As defendant correctly concedes, "[b]y making only a general motion to dismiss the charges . . . after the People rested their case . . . , and by failing to renew . . . the motion at the close of his case," defendant failed to preserve his contention that the conviction of grand larceny in the fourth degree is not supported by legally sufficient evidence (*People v Morris*, 126 AD3d 1370, 1371 [4th Dept 2015], *lv denied* 26 NY3d 932 [2015]; *see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, contrary to defendant's contention, there is a "valid line of reasoning and permissible inferences" that could lead a rational person to conclude, beyond a reasonable doubt (*People v Delamota*, 18 NY3d 107, 113 [2011]), that when defendant took the vehicle from the victim, he "did so with the intent to deprive the [victim] of [her] vehicle within the meaning of Penal Law § 155.00 (3)" (*People v Rolle*, 41 AD3d 320, 320 [1st Dept 2007], *lv denied* 9 NY3d 964 [2007]; *see People v Brightly*, 148 AD2d 623, 624 [2d Dept 1989], *lv denied* 74 NY2d 737 [1989]). Here, there was ample evidence in the record that defendant never received permission to take the vehicle and, even after he was contacted by the

victim and a police officer and informed the police officer that he would return the vehicle within 20 minutes, he did not do so. Rather, the vehicle was recovered only after defendant was arrested when the police spotted the vehicle at a convenience store. For the same reasons, viewing the evidence in light of the elements of the crime of grand larceny in the fourth degree as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict convicting defendant of that crime is not against the weight of the evidence (*see People v Bleakley*, 69 NY2d 490, 495 [1987]).

We reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to make a specific motion for a trial order of dismissal on the ground that the conviction of grand larceny in the fourth degree is not supported by legally sufficient evidence. It is well settled that "[a] defendant is not denied effective assistance of trial counsel merely because counsel does not make a motion or argument that has little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004], *rearg denied* 3 NY3d 702 [2004]; *see People v Bakerx*, 114 AD3d 1244, 1245 [4th Dept 2014], *lv denied* 22 NY3d 1196 [2014]), and here "there was no chance that such a motion would have succeeded" (*People v Heary*, 104 AD3d 1208, 1209 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013], *reconsideration denied* 21 NY3d 1016 [2013]; *see Bakerx*, 114 AD3d at 1245). With respect to defendant's claim that defense counsel was ineffective for failing to consult with him when he was removed from the courtroom during trial, we conclude that defendant "failed to sustain his burden to establish that his attorney 'failed to provide meaningful representation' that compromised his 'right to a fair trial' " (*People v Pavone*, 26 NY3d 629, 647 [2015], quoting *People v Caban*, 5 NY3d 143, 152 [2005]; *see People v Huddleston*, 160 AD3d 1359, 1361 [4th Dept 2018], *lv denied* 31 NY3d 1149 [2018]).

Contrary to defendant's further contention, we conclude that Supreme Court did not abuse its discretion by denying his request for substitution of counsel (*see generally People v Sides*, 75 NY2d 822, 824 [1990]). After making the requisite "minimal inquiry" into defendant's objections with respect to defense counsel (*id.* at 825), the court "properly determined that there was no basis for substitution of counsel or for further inquiry" (*People v Williams*, 163 AD3d 1422, 1423-1424 [4th Dept 2018] [internal quotation marks omitted]; *see People v Harris*, 151 AD3d 1720, 1721 [4th Dept 2017], *lv denied* 30 NY3d 950 [2017]; *People v Benson*, 203 AD2d 966, 966 [4th Dept 1994], *lv denied* 83 NY2d 964 [1994]).

Finally, "because it is impossible to commit the crime of grand larceny in the fourth degree under Penal Law § 155.30 (8) without concomitantly committing the crime of unauthorized use of a vehicle in the third degree under section 165.05 (1)" (*People v Swick*, 158 AD3d 1131, 1132 [4th Dept 2018], *lv denied* 31 NY3d 1153 [2018]), we agree with defendant and the People that count three of the indictment, charging the latter crime, must be dismissed because it is a lesser inclusory concurrent count of count two, charging the former crime (*see generally People v Miller*, 6 NY3d 295, 300 [2006]). We therefore

modify the judgment accordingly.

Entered: April 26, 2019

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 01-01982

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHONDELL J. PAUL, DEFENDANT-APPELLANT.

THOMAS THEOPHILOS, BUFFALO, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Onondaga County Court (Joseph E. Fahey, J.), rendered May 15, 2001. The judgment convicted defendant, upon a jury verdict, of murder in the second degree (two counts), assault in the first degree, robbery in the first degree (eight counts), burglary in the second degree (two counts), criminal possession of a weapon in the second degree and criminal possession of a weapon in the third degree.

It is hereby ORDERED that said appeal from the judgment insofar as it imposed sentence is unanimously dismissed and the judgment is affirmed.

Memorandum: Defendant was convicted upon a jury verdict of, inter alia, two counts of murder in the second degree (Penal Law § 125.25 [3]). On a prior appeal, we modified the judgment with respect to the sentence and otherwise affirmed (*People v Paul*, 298 AD2d 854 [4th Dept 2002]). We subsequently granted defendant's motion for a writ of error coram nobis on the ground that appellate counsel failed to raise an issue that may have merit — specifically, whether the *Antommarchi* waiver proffered by defendant's trial counsel was valid (*People v Paul [Shondell]*, 148 AD3d 1723 [4th Dept 2017]), and we vacated our prior order. We now consider the appeal de novo.

We reject defendant's contention that his *Antommarchi* waiver, i.e., his waiver of the right to be present at sidebar conferences during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]), was invalid (*see People v Paul [Tajuan]*, — AD3d —, — [Apr. 26, 2019] [4th Dept 2019]). Defense counsel "may waive [the *Antommarchi*] right," which is what occurred here (*People v Lewis*, 140 AD3d 1593, 1594 [4th Dept 2016], *lv denied* 28 NY3d 1029 [2016]). Contrary to defendant's contention, "a court need not engage in any '*pro forma* inquisition in each case on the off-chance that a defendant who is adequately represented by counsel .

. . may nevertheless not know what he [or she] is doing' " (*id.*, quoting *People v Francis*, 38 NY2d 150, 154 [1975]). It was unnecessary for the waiver to occur in defendant's presence because "a lawyer may be trusted to explain rights to his or her client, and to report to the court the result of that discussion" (*People v Flinn*, 22 NY3d 599, 602 [2014], *rearg denied* 23 NY3d 940 [2014]). "To the extent defendant argues that his off-the-record conversations with counsel did not sufficiently apprise him of his rights, he relies on matters dehors the record and beyond review by this Court on direct appeal. Such claims are more appropriately considered on a CPL 440.10 motion" (*People v Jackson*, 29 NY3d 18, 24 [2017]; *see People v Shegog*, 32 AD3d 1289, 1290 [4th Dept 2006], *lv denied* 7 NY3d 929 [2006]).

Defendant's additional contention that he was deprived of his right to be present at trial conflates the statutory *Antommarchi* rights with the constitutional rights protected by *Parker* warnings (*see People v Vargas*, 88 NY2d 363, 375-376 [1996]; *People v Sprowal*, 84 NY2d 113, 116-117 [1994]; *see generally People v Parker*, 57 NY2d 136, 140 [1982]), and is without merit because he was not deprived of his right to be present in the courtroom.

We reject defendant's contention that reversal is required based on mode of proceedings errors with respect to County Court's handling of certain jury notes. Two of the notes at issue, concerning a juror's request to meet privately with the judge, were ministerial in nature (*see People v Brito*, 135 AD3d 627, 627-628 [1st Dept 2016], *lv denied* 27 NY3d 1066 [2016]). "[T]he *O'Rama* procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response" (*People v Nealon*, 26 NY3d 152, 161 [2015]; *see People v Williams*, 142 AD3d 1360, 1362 [4th Dept 2016], *lv denied* 28 NY3d 1128 [2016]). We thus conclude that "there was no *O'Rama* error requiring this Court to reverse the judgment" based on the two notes (*People v Hall*, 156 AD3d 1475, 1476 [4th Dept 2017]). Moreover, we note that even a ministerial response by the court was obviated by the fact that the second note at issue nullified the request made in the first note (*see People v Albanese*, 45 AD3d 691, 692 [2d Dept 2007], *lv denied* 10 NY3d 761 [2008]). Because the remainder of the jury notes in question were read into the record in the presence of counsel and the jury, the court "complied with its core responsibility to give counsel meaningful notice of the jury's notes . . . [and, t]hus, no mode of proceedings error occurred" (*Nealon*, 26 NY3d at 160). As a result, defendant was required to object in order to preserve his contention that the court did not meaningfully respond to the relevant jury notes (*see id.*; *Williams*, 142 AD3d at 1362). Defendant failed to do so, and we decline to exercise our power to review his contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's contention, the admission of hearsay testimony implicating him in the crimes does not require reversal because defendant opened the door to the challenged testimony (*see People v Reid*, 19 NY3d 382, 387-388 [2012]). Inasmuch as defendant's cross-examination of a witness may have created a misimpression, the

People were entitled to correct that misimpression on redirect examination (*see People v Taylor*, 134 AD3d 1165, 1169 [3d Dept 2015], *lv denied* 26 NY3d 1150 [2016]). Furthermore, we reject defendant's contention that defense counsel was ineffective for opening the door to that testimony. Defendant failed to demonstrate the absence of strategic or other legitimate explanations for that alleged deficiency (*see generally People v Howie*, 149 AD3d 1497, 1499-1500 [4th Dept 2017], *lv denied* 29 NY3d 1128 [2017]). There also is no merit to defendant's remaining allegations of ineffective assistance of counsel (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Benevento*, 91 NY2d 708, 713-714 [1998]).

Upon 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 reject defendant's contention that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). The quality of the witnesses and the existence of cooperation agreements "merely raise credibility issues for the jury to resolve" (*People v Barnes*, 158 AD3d 1072, 1072 [4th Dept 2018], *lv denied* 31 NY3d 1011 [2018]). Moreover, we are satisfied that the accomplice testimony was sufficiently corroborated (*see People v Smith*, 150 AD3d 1664, 1665 [4th Dept 2017], *lv denied* 30 NY3d 953 [2017]; *People v Highsmith*, 124 AD3d 1363, 1364 [4th Dept 2015], *lv denied* 25 NY3d 1202 [2015]).

There is also no merit to defendant's contention that the indictment should have been dismissed due to an inadequate grand jury notification. The People were under no obligation to serve a grand jury notice about charges that were not included in the felony complaint (*see People v Clark*, 128 AD3d 1494, 1496 [4th Dept 2015], *lv denied* 26 NY3d 966 [2015]).

Contrary to defendant's additional contention, he was not prejudiced by his codefendant's introduction of allegedly confusing alibi evidence because codefendant's counsel clarified any possible confusion concerning that evidence on redirect examination and in summation (*see Paul*, — AD3d at —; *cf. People v Jarvis*, 113 AD3d 1058, 1060-1061 [4th Dept 2014], *affd* 25 NY3d 968 [2015]). Defendant also suffered no prejudice from the court's alibi charge because the charge, as a whole, was proper; indeed, it included numerous warnings that the People had the burden of disproving the codefendant's alibi beyond a reasonable doubt (*see People v Castrechino*, 24 AD3d 1267, 1267-1268 [4th Dept 2005], *lv denied* 6 NY3d 810 [2006]).

Given defendant's resentencing, we do not consider his challenge relating to his sentence, and we dismiss the appeal from the judgment to that extent (*see People v Linder*, — AD3d —, —, 2019 NY Slip Op 01965, *4 [4th Dept 2019]; *People v Haywood*, 203 AD2d 966, 966 [4th Dept 1994], *lv denied* 83 NY2d 967 [1994]).

Finally, we have considered defendant's remaining contentions and

conclude that none warrants reversal or modification of the judgment.

Entered: April 26, 2019

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 14-00855

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSEPH DIXON, DEFENDANT-APPELLANT.

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

JOSEPH DIXON, DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered March 24, 2014. The judgment convicted defendant, upon a jury verdict, of manslaughter 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 manslaughter in the first degree (Penal Law § 125.20 [1]). On the evening of November 22, 2011, defendant was observed arguing with the victim, his girlfriend, at her home. The next morning, November 23, a friend picked defendant up on the road outside the victim's home. That, the friend would testify, was unusual. On a typical morning, he picked defendant up at the victim's home and saw the victim. Sometimes, the friend had coffee with defendant and the victim. Later on November 23, defendant told the friend that he was moving to Tennessee. The following day, November 24, the victim was found beaten and strangled to death in her home. The police located defendant in Pennsylvania. In an interview with the police, defendant admitted that, on the evening of November 22, he and the victim had been drinking heavily, and he pummeled her repeatedly with his fists. "It always ended up in a fight every time we drank together." Defendant told the police that he did not recall most of what happened because he was black-out drunk. He insisted, however, that he knew the victim was alive when he left her house because he heard her moaning.

Defendant contends that County Court abused its discretion in allowing testimony about prior acts of domestic violence that defendant committed against the victim. We reject that contention.

It is well settled that, " '[i]n a domestic violence homicide, . . . it is highly probative—quite often far outweighing any prejudice—that a couple's [relationship] was strife-ridden and that defendant previously struck and/or threatened the [ ]victim . . . . Indeed, it has also been held that such evidence in like contexts is highly probative of the defendant's motive and [i]s either directly related to or inextricably interwoven . . . with the issue of his [or her] identity as the killer' " (*People v Parsons*, 30 AD3d 1071, 1073 [4th Dept 2006], *lv denied* 7 NY3d 816 [2006]; *see People v Rogers*, 103 AD3d 1150, 1152 [4th Dept 2013], *lv denied* 21 NY3d 946 [2013]). Here, the victim's sister testified that, over the duration of the relationship, the victim suffered frequent black eyes and bruises that got worse as the relationship progressed. She also heard defendant leave threatening messages on the victim's answering machine. Another witness, an acquaintance, was around defendant and the victim only twice, and both times heard arguing and swearing. One of those times, defendant displayed physical rage, albeit towards an inanimate object. We conclude that the testimony of the sister and the acquaintance was probative of intent, motive, and identity in this domestic violence homicide, and its probative value was not outweighed by its prejudicial impact (*see Rogers*, 103 AD3d at 1152-1153).

Defendant's further contention that some of the foregoing testimony constituted inadmissible hearsay is not preserved for our review (*see People v Pendarvis*, 143 AD3d 1275, 1276 [4th Dept 2016], *lv denied* 28 NY3d 1149 [2017]; *cf. People v Cotton*, 120 AD3d 1564, 1566 [4th Dept 2014], *lv denied* 27 NY3d 963 [2016]). In any event, we conclude that any error in admitting the testimony is harmless (*see generally People v Crimmins*, 36 NY2d 230, 241-242 [1975]). We likewise conclude that, viewing the evidence in the light most favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), the evidence is legally sufficient to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]) and, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), the verdict is not against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

Defendant next contends that the court abused its discretion in precluding evidence of the victim's prior conviction of a drug crime. More particularly, defendant contends that the conviction is relevant to whether the victim was killed by an unknown third party. Defendant failed to preserve his contention for our review because he sought to introduce evidence of the conviction solely to impeach the victim's credibility (*see generally People v Lane*, 7 NY3d 888, 889 [2006]). In any event, that contention lacks merit. To the extent that the court precluded defendant from presenting a third-party culpability defense, its ruling was proper because such a defense would have been based " 'on mere suspicion, surmise, or speculation' " (*People v Devaughn*, 84 AD3d 1394, 1395 [2d Dept 2011], *lv denied* 18 NY3d 993 [2012]; *cf. People v Primo*, 96 NY2d 351, 357 [2001]).

We reject defendant's contention that the court abused its discretion in permitting the jury to view "horrifying and grisly"

photographs of the victim's dead body. " '[P]hotographs are admissible if they tend to prove or disprove a disputed or material issue . . . [and] should be excluded only if [their] *sole purpose* is to arouse the emotions of the jury and to prejudice the defendant' " (*People v Smalls*, 70 AD3d 1328, 1330 [4th Dept 2010], *lv denied* 14 NY3d 844 [2010], *reconsideration denied* 15 NY3d 778 [2010], quoting *People v Wood*, 79 NY2d 958, 960 [1992]). We note that the People sought to introduce 37 photographs of the victim's body, each purportedly depicting a separate injury. Defendant objected to all of them. The court reviewed the photographs, precluded two of them as redundant, and allowed the People to introduce the remaining 35 photographs. On appeal, defendant challenges the admission in evidence of only five of those photographs, effectively conceding that the rest were properly admitted. He does not contend, however, that the challenged photographs are any more "horrifying and grisly" than the properly admitted ones. To the contrary, he contends that they are redundant. Because the jury was allowed to view 30 images of the victim's corpse, defendant cannot be said to have suffered prejudice due to the admission of five additional, similar images. We thus conclude that the admission of those five photographs was not an abuse of discretion (*see People v White*, 153 AD3d 1565, 1566 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017]; *People v Morris*, 138 AD3d 1408, 1409 [4th Dept 2016], *lv denied* 27 NY3d 1136 [2016]).

The remaining contentions in defendant's main and pro se supplemental briefs do not require reversal or modification of the judgment. To the extent that defendant's remaining contentions concern matters outside the record, he may raise them on a motion pursuant to CPL article 440 (*see People v Johnson*, 88 AD3d 1293, 1294 [4th Dept 2011]).

Entered: April 26, 2019

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 14-00199

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ALEXANDER LATHROP, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Monroe County (Francis A. Affronti, J.), rendered October 1, 2013. The judgment convicted defendant, upon a jury verdict, of rape in the third degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon a jury verdict, of rape in the third degree (Penal Law § 130.25 [2]). Defendant contends that he was denied a fair trial because certain portions of the testimony of an expert witness concerning child sexual abuse accommodation syndrome (CSAAS) exceeded permissible bounds of admissible evidence. It is well settled that expert testimony concerning CSAAS "is admissible to explain the behavior of child sex abuse victims as long as it is general in nature and does not constitute an opinion that a particular alleged victim is credible or that the charged crimes in fact occurred" (*People v Drake*, 138 AD3d 1396, 1398 [4th Dept 2016], *lv denied* 28 NY3d 929 [2016]; *see People v Diaz*, 20 NY3d 569, 575-576 [2013]; *People v Williams*, 20 NY3d 579, 583-584 [2013]). Contrary to defendant's contention, we conclude that the expert's generalized testimony regarding the prevalence of father-daughter relationships in the child sexual abuse cases that he had worked, which provided further context and support for his explanation of CSAAS that child victims may exhibit secrecy and delayed disclosure behaviors when the perpetrator is an adult family member such as a parent, did not exceed permissible bounds (*see Diaz*, 20 NY3d at 575-576; *People v Spicola*, 16 NY3d 441, 458, 466 [2011], *cert denied* 565 US 942 [2011]; *People v LoMaglio*, 124 AD3d 1414, 1416 [4th Dept 2015], *lv denied* 25 NY3d 1203 [2015]).

Defendant failed to preserve for our review his contention that Supreme Court erred in allowing the expert to testify about the

frequency with which perpetrators used physical force in the child sexual abuse cases that he had worked (*see Spicola*, 16 NY3d at 465-466; *People v Duell*, 124 AD3d 1225, 1229 [4th Dept 2015], *lv denied* 26 NY3d 967 [2015]). In any event, that contention lacks merit. The expert explained that it was rare for a perpetrator to use physical force against a child victim because doing so would discourage continued access to the child; instead, a perpetrator might lie to the child to encourage the child to return and a child might not resist because some of the abuse might be "disguised" to the child, e.g., a shoulder rub or massage that is sexually gratifying for the perpetrator but not perceived as abuse by the child, which causes further delay in disclosure. That testimony was admissible inasmuch as it "assisted in explaining victims' subsequent behavior that the factfinder might not understand, such as why victims may accommodate [perpetrators] and why they wait before disclosing the abuse" (*Williams*, 20 NY3d at 584; *see Diaz*, 20 NY3d at 575; *People v Gopaul*, 112 AD3d 966, 967 [2d Dept 2013]).

Contrary to defendant's contention, our holding in *People v Ruiz* (159 AD3d 1375 [4th Dept 2018]) does not require a different result. Consistent with Court of Appeals precedent on this issue, *Ruiz* stands for the proposition that a court's admission in evidence of expert testimony regarding the behavior of perpetrators constitutes an abuse of discretion where such testimony is not admitted to assist the factfinder in understanding victims' unusual behavior, such as accommodation of perpetrators and delay in disclosure of the abuse, and exceeds permissible bounds by reference to behavior in specific terms that mirrors the abuse that occurred in that particular case (*id.* at 1376-1377; *see Diaz*, 20 NY3d at 575-576; *Williams*, 20 NY3d at 584). Here, the expert's testimony does not suffer from those deficiencies. "Although some of the testimony discussed behavior similar to that alleged by the [victim] in this case, the expert spoke of such behavior in general terms" (*Diaz*, 20 NY3d at 575; *see LoMaglio*, 124 AD3d at 1416; *cf. Ruiz*, 159 AD3d at 1376-1377).

Defendant's remaining challenge to the expert's testimony is not preserved for our review (*see Spicola*, 16 NY3d at 465-466; *Duell*, 124 AD3d at 1229), and we decline to exercise our power to review that challenge as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Contrary to defendant's further contention, the court did not err in permitting a police investigator to testify that she investigated allegations in a Child Protective Services report that the victim had been raped and the suspect was her father. The court properly admitted that evidence inasmuch as " 'nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, nonhearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest' " (*People v Ludwig*, 24 NY3d 221, 231 [2014]). Defendant's remaining challenges to the investigator's testimony are not preserved for our review (*see* CPL 470.05 [2]; *People v Yelle*, 303 AD2d 1043, 1044 [4th Dept 2003], *lv*

denied 100 NY2d 626 [2003]), and we decline to exercise our power to review those challenges as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Defendant failed to preserve for our review his contention that he was denied a fair trial by prosecutorial misconduct on summation (*see* CPL 470.05 [2]; *Drake*, 138 AD3d at 1398), and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We have reviewed defendant's claims of ineffective assistance of counsel and conclude that they are without merit (*see generally People v Caban*, 5 NY3d 143, 152 [2005]; *People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, defendant contends that he was denied a fair trial by the cumulative effect of the errors alleged herein. We reject defendant's contention with respect to the preserved alleged errors previously reviewed, and we decline to exercise our power to review his contention with respect to the unpreserved alleged errors as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]; *People v Terborg*, 156 AD3d 1320, 1322 [4th Dept 2017], *lv denied* 31 NY3d 1018 [2018]).

Entered: April 26, 2019

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 18-00050

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KENNETH R. CALKINS, JR., DEFENDANT-APPELLANT.

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

KENNETH R. CALKINS, JR., DEFENDANT-APPELLANT PRO SE.

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

Appeal from a judgment of the Steuben County Court (Peter C. Bradstreet, J.), rendered June 28, 2017. The judgment convicted defendant, after a nonjury trial, of criminal sexual act in the first degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified as a matter of discretion in the interest of justice and on the law by reducing the mandatory surcharge to $250 and the crime victim assistance fee to $20, and as modified the judgment is affirmed.

Memorandum: On appeal from a judgment convicting him upon a nonjury verdict of two counts of criminal sexual act in the first degree (Penal Law § 130.50 [3]), defendant contends in his main brief that reversal is required because the record does not establish that he knowingly, intelligently, and voluntarily waived his right to testify in his own defense at trial. We reject that contention. Generally, the trial court is not obligated to ascertain whether a defendant's failure to testify was the result of a knowing, intelligent, and voluntary waiver (*see People v Pilato*, 145 AD3d 1593, 1595 [4th Dept 2016], *lv denied* 29 NY3d 951 [2017]; *see also People v Morgan*, 149 AD3d 1148, 1152 [3d Dept 2017]). Although there are "exceptional, narrowly defined circumstances[in which] judicial interjection through a direct colloquy with the defendant may be required to ensure that the defendant's right to testify is protected" (*United States v Pennycooke*, 65 F3d 9, 12 [3d Cir 1995]; *see Brown v Artuz*, 124 F3d 73, 79 n 2 [2d Cir 1997]), such circumstances are not present here (*see Pilato*, 145 AD3d at 1595).

Viewing the evidence in light of the elements of the crime in

this nonjury trial (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's contentions in his main and pro se supplemental briefs that the verdict is against the weight of the evidence (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Further, contrary to defendant's contention in his main brief, the sentence is not unduly harsh or severe. We agree with defendant, however, that County Court erred in directing him to pay a mandatory surcharge of $300 and a crime victim assistance fee of $25. Those amounts are in an amendment to Penal Law § 60.35 (1) (a) that became effective after the instant offense was committed, and the court therefore erred in applying them to this conviction (*cf. People v Caggiano*, 46 AD3d 1405, 1406 [4th Dept 2007]). Although defendant failed to preserve his contention for our review (*see People v Arnold*, 107 AD3d 1526, 1528 [4th Dept 2013], *lv denied* 22 NY3d 953 [2013]), we exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]). We therefore modify the judgment by reducing the mandatory surcharge to $250 and the crime victim assistance fee to $20. We have considered the remaining contentions in defendant's pro se supplemental brief and conclude that none warrants reversal or further modification of the judgment.

Entered: April 26, 2019

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 18-01136

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

MICHAEL P. CICCO, PLAINTIFF-APPELLANT,

V MEMORANDUM AND ORDER

FRED S. DUROLEK AND ELAINE A. DUROLEK,
DEFENDANTS-RESPONDENTS.

GOMEZ & BECKER LLP, BUFFALO (BRETT D. TOKARCZYK OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JUSTIN L. HENDRICKS OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order and judgment (one paper) of the Supreme Court, Niagara County (Frank Caruso, J.), entered September 25, 2017. The order and judgment dismissed plaintiff's complaint and awarded defendants costs and disbursements.

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

Memorandum: In this action to recover damages for injuries he allegedly sustained in an automobile accident, plaintiff appeals from an order and judgment that, inter alia, dismissed the complaint upon a jury verdict in defendants' favor. We affirm.

We reject plaintiff's contention that Supreme Court erred in admitting photographs from plaintiff's social media accounts that allegedly depicted his post-accident condition. The photographs were timely disclosed (*see generally Krute v Mosca*, 234 AD2d 622, 624 [3d Dept 1996]) and properly authenticated (*see generally Corsi v Town of Bedford*, 58 AD3d 225, 228 [2d Dept 2008], *lv denied* 12 NY3d 714 [2009]). The alleged discrepancies between the date of the photos and the date of the accident went to the weight of the evidence, not its admissibility (*see People v Costello*, 128 AD3d 848, 848 [2d Dept 2015], *lv denied* 26 NY3d 927, 1007 [2015], *reconsideration denied* 26 NY3d 1007 [2015]). In any event, any error in admitting the photographs was harmless (*see* CPLR 2002; *Matter of Edick v Gagnon*, 139 AD3d 1126, 1128 [3d Dept 2016]).

Furthermore, under the circumstances of this case, the court properly precluded plaintiff from introducing various medical records and testimony pertaining to the opinions of certain nontestifying doctors (*see Meneses v Riggs*, 138 AD3d 700, 701 [2d Dept 2016]; *see*

generally Tornatore v Cohen, 162 AD3d 1503, 1505 [4th Dept 2018]). Contrary to plaintiff's contention, the medical records at issue were not automatically admissible pursuant to CPLR 3122-a (c) simply because defendants did not challenge their admissibility within 10 days of trial (*see Siemucha v Garrison*, 111 AD3d 1398, 1400 [4th Dept 2013]). In any event, any error in precluding the foregoing evidence was harmless (*see* CPLR 2002; *Geary v Church of St. Thomas Aquinas*, 98 AD3d 646, 647 [2d Dept 2012], *lv denied* 20 NY3d 860 [2013]).

Finally, the court properly denied plaintiff's request for a missing witness instruction because he failed to meet his initial burden of establishing the availability of the uncalled witness, who was elderly, infirm, and living in Florida (*see Matter of Chi-Chuan Wang*, 162 AD3d 447, 449 [1st Dept 2018], *lv denied* 32 NY3d 904 [2018]; *see generally DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013]; *People v Brown*, 183 AD2d 569, 570 [1st Dept 1992], *lv denied* 80 NY2d 901 [1992]). In any event, any error in denying the missing witness instruction was harmless (*see* CPLR 2002; *Mahoney v NAMCO Cybertainment*, 282 AD2d 949, 950 [3d Dept 2001]).

All concur except CARNI, J., who concurs in the result in the following memorandum: I join the majority's disposition and its reasoning except with respect to its analysis of plaintiff's contention that Supreme Court erred in admitting in evidence photographs from plaintiff's social media accounts for the purpose of establishing plaintiff's post-accident condition. Defendants established that the photographs were posted on social media after the date of the accident. Defendants failed to establish, however, that the photographs were actually taken after plaintiff's accident and thus failed to establish that they depicted plaintiff's post-accident condition. Defendants therefore failed to authenticate the photographs as accurately representing plaintiff's post-accident condition, and the court erred in admitting them (*see Davidow v CSC Holdings, Inc.*, 156 AD3d 682, 682 [2d Dept 2017]; *Rivera v New York City Tr. Auth.*, 22 AD3d 554, 555 [2d Dept 2005]; *Truesdell v Rite Aid of N.Y.*, 228 AD2d 922, 923 [3d Dept 1996]). I agree with the majority, however, that the error in admitting the photographs was harmless (*see* CPLR 2002; *Matter of Edick v Gagnon*, 139 AD3d 1126, 1128 [3d Dept 2016]).

Entered: April 26, 2019

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 18-01434

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

MARY M. FANELLI, ADMINISTRATRIX ON BEHALF OF
THE ESTATE OF MONICA URTZ, DECEASED,
PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

UPSTATE CEREBRAL PALSY, INC., KAYLA TAFT,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, SYRACUSE (HEATHER K. ZIMMERMAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

JOHN J. RASPANTE, UTICA, FOR PLAINTIFF-RESPONDENT.

Appeal from an amended order of the Supreme Court, Oneida County (Erin P. Gall, J.), entered June 6, 2018. The amended order granted plaintiff's motion for leave to amend the complaint.

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

Memorandum: Plaintiff commenced this action seeking damages for decedent's wrongful death and conscious pain and suffering. Because decedent, who suffered from developmental disabilities, was unable to chew and swallow normally, specific protocols were in place to prevent her from choking on her food. Despite those protocols, decedent died after choking on a doughnut while in defendants' care. In her complaint, plaintiff alleged that defendants were negligent in failing to employ the required protocols. Plaintiff later moved for leave to amend the complaint to add a cause of action for gross negligence and a demand for punitive damages. We agree with defendants-appellants that Supreme Court abused its discretion in granting the motion (*see Wojtalewski v Central Sq. Cent. Sch. Dist.*, 161 AD3d 1560, 1561 [4th Dept 2018]). Although leave to amend a pleading, as a general rule, should be freely granted (*see* CPLR 3025; *Baker v County of Oswego*, 77 AD3d 1348, 1350 [4th Dept 2010]), here we conclude that the proposed amendment is patently meritless because plaintiff's allegations sound only in ordinary negligence (*see Carthon v Buffalo Gen. Hosp. Deaconess Skilled Nursing Facility Div.*, 83 AD3d 1404, 1405 [4th Dept 2011]; *see generally Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993]). We therefore reverse the amended order and

deny the motion.

Entered: April 26, 2019

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 12-01363

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MATTHEW A. TOWNSEND, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Monroe County Court (Vincent M. Dinolfo, J.), rendered April 5, 2012. The judgment convicted defendant, upon a jury verdict, of murder in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree (Penal Law § 125.25 [1]). We reject defendant's contention that County Court erred in refusing to suppress statements that he made to the police during the execution of a search warrant at his residence and thereafter at the police station. Defendant contends that he was entitled to suppression of his statements because the police should have obtained an arrest warrant before obtaining the search warrant, and thus his statements were obtained as a result of illegal police conduct. Inasmuch as " '[t]here is no constitutional right to be arrested' " (*People v McCray*, 96 AD3d 1480, 1480 [4th Dept 2012], *lv denied* 19 NY3d 1104 [2012]), however, that contention is without merit. We reject defendant's further contention that the statement that he made at his residence in response to a police sergeant's question should be suppressed because the sergeant's inquiry was the equivalent of an interrogation. The sergeant testified at the suppression hearing that she noticed that defendant was not wearing footwear and that she asked him if he had a pair of boots or something to wear to the police station because it was cold and icy outside. We conclude that her question to defendant was not reasonably likely to elicit an incriminating response (*see People v Roberts*, 121 AD3d 1530, 1531 [4th Dept 2014], *lv denied* 24 NY3d 1122 [2015]; *People v Youngblood*, 294 AD2d 954, 954 [4th Dept 2002], *lv denied* 98 NY2d 704 [2002]). Defendant's contention that the statements that he made at the police station were obtained in violation of his right to counsel is also without merit. Defendant was not in custody in connection with an

unrelated pending charge in the State of Florida, and thus he had no derivative right to counsel with respect to the murder charge at issue here (*see People v Mantor*, 96 AD3d 1645, 1646 [4th Dept 2012], *lv denied* 19 NY3d 1103 [2012]; *see generally People v Lopez*, 16 NY3d 375, 377 [2011]). Additionally, the record supports the court's determination that defendant knowingly and intelligently waived his *Miranda* rights (*see People v Spoor*, 148 AD3d 1795, 1796-1797 [4th Dept 2017], *lv denied* 29 NY3d 1134 [2017]).

Defendant next contends that he was denied a fair trial by prosecutorial misconduct during voir dire and on summation. We note that most of the alleged improprieties are not preserved for our review (*see People v Machado*, 144 AD3d 1633, 1635 [4th Dept 2016], *lv denied* 29 NY3d 950 [2017]; *People v Rumph*, 93 AD3d 1346, 1347 [4th Dept 2012], *lv denied* 19 NY3d 967 [2012]). In any event, we conclude that defendant's contention is without merit. The prosecutor's remarks during voir dire did not diminish the People's burden of proof (*see generally People v Williams*, 43 AD3d 1336, 1337 [4th Dept 2007]). Furthermore, the prosecutor's remarks on summation "were either a fair response to defense counsel's summation or fair comment on the evidence" (*People v McEathron*, 86 AD3d 915, 916 [4th Dept 2011], *lv denied* 19 NY3d 975 [2012] [internal quotation marks omitted]; *see People v Goupil*, 104 AD3d 1215, 1216 [4th Dept 2013], *lv denied* 21 NY3d 943 [2013]). Inasmuch as we conclude that there was no prosecutorial misconduct, we reject defendant's further contention that he was denied effective assistance of counsel based on defense counsel's failure to object to the alleged improprieties (*see People v Inman*, 134 AD3d 1434, 1435 [4th Dept 2015], *lv denied* 27 NY3d 999 [2016]; *Williams*, 43 AD3d at 1337).

We reject defendant's contention that the court abused its discretion in precluding certain evidence of third-party culpability (*see generally People v Powell*, 27 NY3d 523, 531 [2016]; *People v Schulz*, 4 NY3d 521, 529 [2005]). The relevance of that evidence was outweighed by its potential for "undue prejudice, delay, and confusion" (*Powell*, 27 NY3d at 526; *see People v Maynard*, 143 AD3d 1249, 1251 [4th Dept 2016], *lv denied* 28 NY3d 1148 [2017]). Finally, the sentence is not unduly harsh or severe.

Entered: April 26, 2019

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 17-02232

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SID S. HARRISON, DEFENDANT-APPELLANT.

DAVID P. ELKOVITCH, AUBURN, FOR DEFENDANT-APPELLANT.

JON E. BUDELMANN, DISTRICT ATTORNEY, AUBURN (BRITTANY GROME ANTONACCI OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Cayuga County Court (Thomas G. Leone, J.), rendered November 16, 2017. The judgment convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the seventh degree, obstructing governmental administration in the second degree, aggravated unlicensed operation of a motor vehicle in the second degree and failure to stop at a stop sign.

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the motion is granted, the indictment is dismissed, and the matter is remitted to Cayuga County Court for proceedings pursuant to CPL 470.45.

Memorandum: On appeal from a judgment convicting him following a jury trial of, inter alia, criminal possession of a controlled substance in the seventh degree (Penal Law § 220.03), defendant contends that County Court erred in denying his motion to dismiss the indictment on statutory speedy trial grounds (*see* CPL 30.30). We agree.

The criminal action was commenced on September 30, 2016, when the felony complaint was filed (*see* CPL 1.20 [17]; *People v Osgood*, 52 NY2d 37, 43 [1980]). Where, as here, a defendant is originally charged with a felony, the People must announce readiness for trial within six months or, in this case, 182 days of the commencement of the action (*see* CPL 30.30 [1] [a]; *People v Cortes*, 80 NY2d 201, 207 n 3 [1992]). The day the accusatory instrument is filed is excluded from time calculations (*see People v Stiles*, 70 NY2d 765, 767 [1987]). The People filed the indictment and announced their readiness for trial on April 18, 2017, which was 17 days beyond the 182-day time period.

Contrary to defendant’s contention, we conclude that, after

taking into consideration excludable periods of time, the People announced readiness for trial within the statutory time frame. In his motion, defendant conceded that the time period from October 1, 2016 through October 5, 2016 was not chargeable to the People. Defendant has thus waived his contention, raised for the first time on appeal, that such period of time should be charged to the People (*see People v Muhanimac*, 181 AD2d 464, 465 [1st Dept 1992], *lv denied* 79 NY2d 1052 [1992]). In any event, defendant's contention lacks merit. Defendant was arraigned on the felony complaint on September 30, 2016, and the matter was adjourned until October 5, 2016 for the assignment of counsel and a preliminary hearing. We thus agree with the People that the time period is excludable as time that defendant was without counsel through no fault of the court (*see* CPL 30.30 [4] [f]; *People v Rickard*, 71 AD3d 1420, 1421 [4th Dept 2010], *lv denied* 15 NY3d 809 [2010]; *People v Reinhardt*, 206 AD2d 913, 914 [4th Dept 1994]).

We further conclude that the seven-day time period following October 5, 2016 is also excludable. The prosecutor had scheduled a grand jury presentation for October 5, but defense counsel had another trial at that time and was unable to appear. Defense counsel thus requested that the prosecutor "**not** proceed forward with Grand Jury presentment" as scheduled. It is well settled that a defendant who opts to testify at grand jury is entitled to have counsel present (*see People v Chapman*, 69 NY2d 497, 500 [1987]). As a result, "[t]o require the People to proceed in the face of [defendant's] request would [have been] highly impractical. The People could not have obtained an indictment without affording defendant . . . an opportunity to testify" as well as his right to counsel (*Muhanimac*, 181 AD2d at 465). Inasmuch as the grand jury sat only once a week, we conclude that a seven-day time period is excludable due to counsel's unavailability (*see* CPL 30.30 [4] [f]; *People v Reed*, 19 AD3d 312, 318 [1st Dept 2005], *lv denied* 5 NY3d 832 [2005]; *see also People v Brown*, 23 AD3d 703, 705 [3d Dept 2005], *lv denied* 6 NY3d 810 [2006]).

Defendant does not challenge the exclusion of the seven-day period from March 29, 2017 until April 5, 2017, when defense counsel, who was on vacation, failed to appear at the scheduled grand jury presentation (*see Brown*, 23 AD3d at 705; *Reed*, 19 AD3d at 318).

Adding together the periods of excludable time before the People announced readiness for trial on April 18, 2017, we conclude that the People are charged with 180 days of delay, rendering their initial announcement of readiness timely.

We nevertheless conclude that the People should be charged with a period of postreadiness delay and, as a result, the time chargeable to them exceeds the statutory 182-day time period (*see generally Cortes*, 80 NY2d at 210). Trial was scheduled to begin on September 5, 2017. By letter dated August 11, 2017, the People requested an adjournment of the trial because "one of [their] critical witnesses" was scheduled to be "on a pre-paid vacation." In the alternative, the People contended that they "may need to seek a continuance of [their] case in chief into the following week in order to get this witness's

testimony." The court adjourned the start of the trial to September 18, 2017.

It is well established that "[t]he unavailability of a prosecution witness may be a sufficient justification for delay . . . , provided that the People attempted with due diligence to make the witness available" (*People v Zirpola*, 57 NY2d 706, 708 [1982]). Additionally, the reason for the witness's unavailability is relevant to determining whether a delay is justified. Where a witness is unavailable because of medical reasons or military deployment, courts generally have held that the delay is not chargeable to the People (*see e.g. People v Goodman*, 41 NY2d 888, 889-890 [1977]; *People v Thompson*, 118 AD3d 922, 923 [2d Dept 2014]; *People v Rivera*, 212 AD2d 1040, 1041 [4th Dept 1995], *lv denied* 85 NY2d 979 [1995]). Where the witness is unavailable because he or she has taken a vacation, however, many courts have charged the time to the People (*see e.g. People v Brewer*, 63 AD3d 402, 403 [1st Dept 2009]; *People v Thomas*, 210 AD2d 736, 737-738 [3d Dept 1994]; *People v Boyd*, 189 AD2d 433, 437 [1st Dept 1993], *lv denied* 82 NY2d 714 [1993]). That is because "the mere fact that a necessary witness plans to go on a vacation does not relieve [the People] of their speedy trial obligation" (*People v Ricart*, 153 AD3d 421, 422 [1st Dept 2017], *appeal dismissed* 31 NY3d 1074 [2018]). Here, the People did not establish that they exercised due diligence to secure the witness's presence on the scheduled trial date, and we conclude that the delay arising from the witness's unavailability during his vacation is chargeable to the People. Although the People contended for the first time at oral argument of the motion that the witness "was not a critical witness" and that his absence did not affect their readiness, their contention is belied by the letter in which they requested an adjournment or, in the alternative, a continuance of the trial in order to procure that witness's testimony.

Inasmuch as "any period of an adjournment in excess of that actually requested by the People is excluded" (*People v Nielsen*, 306 AD2d 500, 501 [2d Dept 2003], *lv denied* 1 NY3d 599 [2004]) and the witness would have been available the week following the scheduled trial date, we conclude that the People are chargeable with the six-day period from September 5, 2017 until the following Monday, September 11, 2017.

Once that period of six days of postreadiness delay is added to the period of prereadiness delay chargeable to the People, the time chargeable to the People totals 186 days, which establishes that defendant was denied his statutory right to a speedy trial (*see* CPL 30.30 [1] [a]).

For the first time on appeal, the People contend that the court could have imposed a lesser sanction than dismissal. That contention was not raised before the trial court and, as a result, we have "no power to review [it]" (*People v Williams*, 137 AD3d 1709, 1710 [4th Dept 2016]; *see* CPL 470.15 [1]; *see generally People v Concepcion*, 17 NY3d 192, 195 [2011]). We therefore reverse the judgment, grant

defendant’s motion, and dismiss the indictment.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

201

KA 16-01600

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS MICOLO, DEFENDANT-APPELLANT.

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

BARRY L. PORSCH, DISTRICT ATTORNEY, WATERLOO (CHRISTOPHER W. FOLK OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Seneca County Court (Dennis F. Bender, J.), rendered August 15, 2016. The judgment convicted defendant, upon a jury verdict, of aggravated harassment of an employee by an inmate.

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 aggravated harassment of an employee by an inmate (Penal Law § 240.32). Defendant's conviction stems from his throwing a cup of urine at a correction officer, striking him in his ear, mouth, and upper torso. The incident was recorded on surveillance cameras. A forensic scientist testified that the correction officer's uniform shirt tested positive for the presence of urea and creatine, both substances found in urine. Defendant represented himself at the trial and did not dispute that he threw a cup of liquid at the correction officer, but rather testified that the liquid was water, not urine.

Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for an adjournment to review *Rosario* material. "The decision whether to grant an adjournment lies in the sound discretion of the trial court . . . and the court's exercise of that discretion 'in denying a request for an adjournment will not be overturned absent a showing of prejudice' " (*People v Adair*, 84 AD3d 1752, 1754 [4th Dept 2011], *lv denied* 17 NY3d 812 [2011]; *see People v Resto*, 147 AD3d 1331, 1332 [4th Dept 2017], *lv denied* 29 NY3d 1000 [2017], *reconsideration denied* 29 NY3d 1094 [2017]). Defendant has made no showing that he was prejudiced by the court's ruling. We reject defendant's further contention that the court's *Sandoval* determination was an abuse of discretion, and we

conclude that the parties' arguments before the trial court and the court's subsequent determination show that it weighed the probative value of defendant's prior conviction against its potential for undue prejudice (*see People v Flowers*, 166 AD3d 1492, 1494 [4th Dept 2018], *lv denied* 32 NY3d 1125 [2018]; *People v Wertman*, 114 AD3d 1279, 1280-1281 [4th Dept 2014], *lv denied* 23 NY3d 969 [2014]; *see generally People v Walker*, 83 NY2d 455, 459 [1994]).

Defendant next contends that the court erred in denying his pretrial motion for expert fees for various experts in support of his defense that urine was not on the uniform shirt of the correction officer. The court granted defendant's request for an expert to test the clothing and conduct DNA testing, up to the statutory cap, but otherwise denied defendant's motions that sought experts to investigate and to test the water at the correctional facility; a medical expert to testify regarding the side effects of medication that defendant was taking; and an audiologist to examine the recording of the incident. Pursuant to County Law § 722-c, upon a finding of necessity, a court shall authorize expert services on behalf of a defendant, and only in extraordinary circumstances may a court provide for compensation in excess of $1,000 per expert (*see People v Clarke*, 110 AD3d 1341, 1342 [3d Dept 2013], *lv denied* 22 NY3d 1197 [2014]; *People v Koberstein*, 262 AD2d 1032, 1033 [4th Dept 1999], *lv denied* 94 NY2d 798 [1999]). Here, the court did not abuse its discretion inasmuch as defendant did not make the requisite showing of necessity (*see People v Brown*, 67 AD3d 1369, 1370 [4th Dept 2009], *lv denied* 14 NY3d 886 [2010]; *People v Drumgoole*, 234 AD2d 888, 889-890 [4th Dept 1996], *lv denied* 89 NY2d 1011 [1997]).

Defendant contends that he and the court were absent at the start of jury selection, requiring reversal. It is well settled that "[a] defendant has the right to be present at all material stages of trial" (*People v Stewart*, 28 NY3d 1091, 1092 [2016]), including during jury selection (*see People v Antommarchi*, 80 NY2d 247, 250 [1992], *rearg denied* 81 NY2d 759 [1992]). In addition, "once formal voir dire is commenced, the defendant has a fundamental right to have it overseen by a judge" (*People v King*, 27 NY3d 147, 156 [2016]). Here, prospective jurors were randomly selected by having their name drawn out of a box and then were given the pre-voir dire oath, presumably by the Commissioner of Jurors, before they entered the courtroom for voir dire. The court then directed the clerk to draw the names of 21 members of the panel to take seats in the jury box, and reminded them that they had been sworn. Inasmuch as voir dire did not commence until the prospective jurors were called to the jury box, and both the court and defendant were present at that time, we conclude that defendant's contentions are without merit (*see generally King*, 27 NY3d at 156; *People v Brown*, 38 AD3d 795, 796 [2d Dept 2007], *lv denied* 9 NY3d 863 [2007]).

Defendant contends that the conviction is not based on legally sufficient evidence because of the lack of DNA evidence, inconsistencies in the testimony, and possible other explanations for urine being present on the uniform shirt. We reject that contention. Viewing the evidence in the light most favorable to the People (*see*

People v Reed, 22 NY3d 530, 534 [2014], *rearg denied* 23 NY3d 1009 [2014]), we conclude that there is legally sufficient evidence to support the conviction (*see generally People v Bleakley*, 69 NY2d 490, 495 [1987]). In addition, viewing the evidence in light of the elements of the crime as charged to the jury (*see People v Danielson*, 9 NY3d 342, 349 [2007]), we reject defendant's further contention that the verdict is against the weight of the evidence (*see generally Bleakley*, 69 NY2d at 495).

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

207

KA 16-02360

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ELI CASILLAS, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered November 28, 2016. The judgment convicted defendant, upon his plea of guilty, of strangulation in the second degree and assault in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of strangulation in the second degree (Penal Law § 121.12) and assault in the second degree (§ 120.05 [2]). Contrary to the contention of defendant, we conclude that he validly waived his right to appeal (*see People v Slishevsky*, 149 AD3d 1488, 1488-1489 [4th Dept 2017], *lv denied* 29 NY3d 1086 [2017]; *People v Braxton*, 129 AD3d 1674, 1675 [4th Dept 2015], *lv denied* 26 NY3d 965 [2015]), and that valid waiver forecloses review of his challenge to the severity of the sentence (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]).

The People correctly concede that the certificate of conviction and the court clerk's notes should be amended to omit any reference to community service, which Supreme Court did not impose as a condition of the sentence (*see People v Armendariz*, 156 AD3d 1383, 1384 [4th Dept 2017], *lv denied* 31 NY3d 981 [2018]; *People v Oberdorf*, 136 AD3d 1291, 1292-1293 [4th Dept 2016], *lv denied* 27 NY3d 1073 [2016]; *see also People v Harrington*, 21 NY2d 61, 65 [1967]; *see generally* Penal Law § 65.10 [1], [2] [h]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

255

KA 18-01822

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROBERT RYDZEWSKI, DEFENDANT-APPELLANT.

LIPSITZ GREEN SCIME CAMBRIA LLP, BUFFALO (ERIN E. MCCAMPBELL OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Deborah A. Haendiges, J.), rendered December 21, 2017. The judgment revoked defendant's sentence of probation and imposed a sentence of incarceration.

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

Memorandum: Defendant appeals from a judgment revoking the sentence of probation imposed upon his conviction, following his plea of guilty, of attempted burglary in the second degree (Penal Law §§ 110.00, 140.25 [2]) and sentencing him to a determinate term of two years of incarceration with three years of postrelease supervision. Defendant had agreed to waive a hearing and admit to violating a condition of his probation in exchange for the sentence that was ultimately imposed.

We reject defendant's contention that Supreme Court failed to exercise its discretion in revoking the sentence of probation based upon defendant's admission that he violated a condition of his probation. "[T]he sentencing decision is a matter committed to the exercise of the court's discretion . . . made only after careful consideration of all facts available at the time of sentencing" (*People v Farrar*, 52 NY2d 302, 305 [1981] [emphasis omitted]; *see People v Dowdell*, 35 AD3d 1278, 1280 [4th Dept 2006], *lv denied* 8 NY3d 921 [2007]). Based on our review of the entire sentencing transcript, we conclude that the court understood that it had the authority, upon finding that defendant violated a condition of his probation, to "revoke, continue or modify the sentence of probation" (CPL 410.70 [5]; *see People v Clause*, 167 AD3d 1532, 1532-1533 [4th Dept 2018]), and the court exercised its discretion in imposing a sentence of incarceration after considering, among other things, "the crime

charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence" (*Farrar*, 52 NY2d at 305).

Finally, we reject defendant's contention that the bargained-for sentence is unduly harsh and severe (*see People v Regan*, 162 AD3d 1414, 1415 [3d Dept 2018]; *People v Stachnik*, 101 AD3d 1590, 1593 [4th Dept 2012], *lv denied* 20 NY3d 1104 [2013]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

282

CAF 17-01178

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

IN THE MATTER OF CARMELA H.

ONONDAGA COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, PETITIONER-RESPONDENT;

MEMORANDUM AND ORDER

DANIELLE F., RESPONDENT-APPELLANT.

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

ROBERT A. DURR, COUNTY ATTORNEY, SYRACUSE (MAGGIE SEIKALY OF COUNSEL), FOR PETITIONER-RESPONDENT.

SUSAN B. MARRIS, MANLIUS, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Onondaga County (Michael L. Hanuszczak, J.), entered June 13, 2017 in a proceeding pursuant to Family Court Act article 10. The order granted the motion of petitioner determining that reasonable efforts are not required to be made to reunite respondent with the subject child.

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

Memorandum: Respondent mother appeals from an order that granted petitioner's motion pursuant to Family Court Act § 1039-b (a) seeking, inter alia, a determination that reasonable efforts to reunite the mother with the subject child were no longer required. We affirm.

After filing a neglect petition, the petitioner "may file a motion upon notice requesting a finding that reasonable efforts to return the child to his or her home are no longer required" (*id.*). If Family Court determines that "the parental rights of the parent to a sibling of such child have been involuntarily terminated" (Family Ct Act § 1039-b [b] [6]) or that another enumerated circumstance is present, then such reasonable efforts "shall not be required . . . unless the court determines that providing reasonable efforts would be in the best interests of the child, not contrary to the health and safety of the child, and would likely result in the reunification of the parent and the child in the foreseeable future" (§ 1039-b [b]). Once the petitioner "establishes the existence of an enumerated circumstance, the burden shifts to the parent to establish the applicability of the exception" (*Matter of Skyler C. [Satima C.]*, 106 AD3d 816, 818 [2d Dept 2013]; *see Matter of Jacob E. [Valerie E.]*, 87

AD3d 1317, 1318 [4th Dept 2011]).

Thus, contrary to the mother's contention, petitioner met its burden by establishing that the mother's parental rights to her older children had been terminated (*see Matter of Dakota H. [Danielle F.]*, 126 AD3d 1313, 1314 [4th Dept 2015], *lv denied* 25 NY3d 909 [2015]).

The burden therefore shifted to the mother to establish that the statutory exception applies (*see Skyler C.*, 106 AD3d at 818), and there is a sound and substantial basis in the record to support the court's determination that she failed to do so (*see generally Matter of Daniel K. [Roger K.]*, 166 AD3d 1560, 1561 [4th Dept 2018], *lv denied* — NY3d — [Mar. 28, 2019]; *Matter of Nevin H. [Stephanie H.]*, 164 AD3d 1090, 1093 [4th Dept 2018]). In particular, the mother's caseworker testified that, as of the date of the petition, the mother continued to live with the child's father, which was a barrier to reunification due to issues with domestic violence. Although the mother moved out of his house during the proceedings, she did not do so of her own accord and had never lived on her own before. One of the mother's own witnesses testified that the mother still required parenting intervention. That witness further testified that she had "to keep repeating the most basic parenting skills" to the mother and that the mother made only "minimal" progress. Indeed, the mother acknowledged in her own testimony that she did not learn anything in prior parenting classes, and the caseworker testified that she believed that the mother could not make any more progress in her parenting than she already had. We therefore see no basis to disturb the court's determination (*see generally Daniel K.*, 166 AD3d at 1561).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

287

CA 18-02135

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

IN THE MATTER OF ROBERT J. LOHMAN,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

THERESA L. EGAN, EXECUTIVE DEPUTY COMMISSIONER,
NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,
RESPONDENT-RESPONDENT.

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JONATHAN D. HITSOUS OF COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Monroe County (John J. Ark, J.), entered April 13, 2018 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

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

Memorandum: In this CPLR article 78 proceeding, petitioner appeals from a judgment that, inter alia, granted respondent's motion to dismiss the petition on the ground that it was untimely. The petition sought to annul a determination of respondent's appeals board (appeals board) affirming the denial of petitioner's application to reinstate his driver's license.

Respondent revoked petitioner's driver's license for a period of one year, effective May 9, 2013, as a result of his refusal to submit to a chemical test. After one year, petitioner applied for relicensing. Respondent denied his application on the ground that petitioner had three alcohol- or drug-related driving convictions or incidents within the 25-year look-back period, and thus petitioner was barred from applying for relicensing until five years after the completion of the one-year period of revocation (*see* 15 NYCRR 136.5 [b] [3]). On July 8, 2015, the appeals board affirmed the denial. In January 2017, petitioner again applied for relicensing. Respondent denied that application as well and, on October 2, 2017, the appeals board affirmed the denial. Thereafter, petitioner commenced this CPLR article 78 proceeding by filing a petition challenging the October 2, 2017 determination.

We reject petitioner's contention that his petition was timely. An application to reconsider the determination of an administrative body does not extend the four-month statutory period within which to seek judicial review of the determination (*see Matter of Riverso v New York State Dept. of Envtl. Conservation*, 125 AD3d 974, 976-977 [2d Dept 2015]; *Matter of Qualey v Shang*, 70 AD2d 619, 621 [2d Dept 1979]; *see generally* CPLR 217 [1]). A second application seeking the same relief is merely an application for reconsideration of the first application and thus does not extend the limitations period (*see Matter of Heysler v Park*, 167 AD2d 837, 838 [4th Dept 1990]; *Qualey*, 70 AD2d at 621). By contrast, where the application is based upon new evidence and " 'the agency conducts a fresh and complete examination of the matter based on [that] evidence,' an aggrieved party may seek review in a CPLR article 78 proceeding commenced within four months of the new determination" (*Riverso*, 125 AD3d at 977; *cf. Heysler*, 167 AD2d at 838).

Here, petitioner's second application for relicensing seeks the same relief as his first application and is not based on new evidence, and thus it is merely an application for reconsideration. Although petitioner relies on purportedly new evidence contained in respondent's response to a request that petitioner made pursuant to the Freedom of Information Law (Public Officers Law art. 6), that response contained information that was known to respondent at the time of the July 8, 2015 determination and thus cannot be considered new evidence. Because the petition was filed more than four months after respondent's determination became final and binding on July 8, 2015, the petition was time-barred (*see* CPLR 217 [1]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

291

KA 17-01782

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JOSHUA A. UERKVITZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (Victoria M. Argento, J.), entered June 6, 2017. 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: In this proceeding pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant appeals from an order, inter alia, classifying him as a level three risk after his conviction of a federal sex offense arising from his possession and attempted possession of child pornography (*see* 18 USC § 2252A [a] [5] [B]; [b] [2]). Contrary to defendant's contention, County Court did not abuse its discretion in denying his request for a downward departure to a level two risk. We conclude that defendant "failed to establish by a preponderance of the evidence the existence of mitigating factors not adequately taken into account by the guidelines" (*People v Lewis*, 156 AD3d 1431, 1432 [4th Dept 2017], *lv denied* 31 NY3d 904 [2018]; *see People v Gillotti*, 23 NY3d 841, 861 [2014]).

Moreover, even assuming, arguendo, that defendant established facts that might warrant a downward departure from his presumptive risk level, we conclude upon examining all of the relevant circumstances, including defendant's previous conviction for sexual abuse in the first degree (Penal Law § 130.65 [3]) and the fact that defendant committed the present offense while under probation supervision for that prior offense, that the court providently exercised its discretion in denying defendant's request for a downward departure (*see People v Villafane*, 168 AD3d 408, 408 [1st Dept 2019]; *People v Iverson*, 90 AD3d 1561, 1562 [4th Dept 2011], *lv denied* 18

NY3d 811 [2012]; *see also People v Smith*, 122 AD3d 1325, 1326 [4th Dept 2014]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

295

KA 17-00195

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHRISTOPHER MCCULLEN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Sheila A. DiTullio, J.), rendered January 23, 2017. The judgment convicted defendant, upon his plea of guilty, of scheme to defraud in the first degree and grand larceny in the fourth degree (seven counts).

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by vacating the sentence and as modified the judgment is affirmed, and the matter is remitted to Erie County Court for further proceedings in accordance with the following memorandum: Defendant appeals from a judgment convicting him upon his plea of guilty of scheme to defraud in the first degree (Penal Law § 190.65 [1] [a]) and seven counts of grand larceny in the fourth degree (§ 155.30 [4]). We reject defendant's contention that his waiver of the right to appeal was invalid (*see generally People v Jirdon*, 159 AD3d 1518, 1519 [4th Dept 2018]; *People v Gast*, 114 AD3d 1270, 1270 [4th Dept 2014], *lv denied* 22 NY3d 1198 [2014]). Defendant's valid waiver of his right to appeal forecloses our review of the denial of defendant's motion pursuant to CPL 210.40 (1) to dismiss the charges against him in furtherance of justice (*see People v Avelar*, 90 AD3d 775, 776 [2d Dept 2011]; *see generally People v Wright*, 66 AD3d 1334, 1334 [4th Dept 2009], *lv denied* 13 NY3d 912 [2009]).

We agree with defendant, however, that his plea was induced by a promise that County Court could not legally fulfill, i.e., that defendant would receive credit against his sentence for time served on the underlying indictment. Initially, we note that defendant's contention survives his valid waiver of the right to appeal (*see People v Tchiyuka*, 169 AD3d 1398, 1398 [4th Dept 2019]; *People v Chaney*, 160 AD3d 1281, 1282-1284 [3d Dept 2018], *lv denied* 31 NY3d 1146 [2018]). Penal Law § 70.30 (3) provides that "the maximum term of an indeterminate sentence imposed on a person shall be credited

with and diminished by the amount of time the person spent in custody prior to the commencement of such sentence as a result of the charge that culminated in the sentence." Penal Law § 70.30 (3) further provides that "[i]n the case of an indeterminate sentence, if the minimum period of imprisonment has been fixed by the court . . . , the credit shall also be applied against the minimum period." That credit, however, "shall not include any time that is credited against the term . . . of any previously imposed sentence . . . to which the person is subject" (*id.*). Thus, "a person is prohibited 'from receiving jail time credit against a subsequent sentence when such credit has already been applied to time served on a previous sentence' " (*Matter of Graham v Walsh*, 108 AD3d 1230, 1230 [4th Dept 2013]; *see Matter of Blake v Dennison*, 57 AD3d 1137, 1138 [3d Dept 2008], *lv denied* 12 NY3d 710 [2009]). Inasmuch as defendant was serving a sentence on a prior conviction throughout the instant proceedings, the court could not legally fulfill its promise to credit defendant's jail time against his sentence in this matter.

It is well established that "[a] guilty plea induced by an unfulfilled promise either must be vacated or the promise honored" (*People v Drake*, 155 AD3d 1584, 1585 [4th Dept 2017] [internal quotation marks omitted]; *see People v Collier*, 22 NY3d 429, 433 [2013], *cert denied* 573 US 908 [2014]). "Where, as here, the originally promised sentence cannot be imposed in strict compliance with the plea agreement, the sentencing court may impose another lawful sentence that comports with the defendant's legitimate expectations" (*Drake*, 155 AD3d at 1585 [internal quotation marks omitted]). We therefore modify the judgment by vacating the sentence, and we remit the matter to County Court to impose a sentence that comports with defendant's legitimate expectations of the negotiated plea agreement or to afford defendant an opportunity to withdraw his plea (*see id.*).

In light of this conclusion, we need not reach defendant's further contention that his sentence is unduly harsh and severe, which in any event is encompassed by his valid waiver of the right to appeal (*see People v Castro*, 162 AD3d 1753, 1753 [4th Dept 2018], *lv denied* 32 NY3d 1002 [2018]).

Mark W. Bennett

Entered: April 26, 2019

Clerk of the Court

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

323

CA 18-00907

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

KEVIN MCINTOSH, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL UNION 118, DEFENDANT-APPELLANT.

TREVETT CRISTO, P.C., ROCHESTER (MICHAEL T. HARREN OF COUNSEL), FOR DEFENDANT-APPELLANT.

KAVINOKY COOK LLP, BUFFALO (R. SCOTT DELUCA OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Monroe County (Evelyn Frazee, J.), entered March 20, 2018. The order, insofar as appealed from, granted in part the motion of plaintiff for summary judgment.

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

Memorandum: Plaintiff commenced this action for, inter alia, breach of contract arising from defendant's failure to provide him with certain benefits, including post-retirement health insurance benefits and accrued vacation pay. Defendant appeals from those parts of an order granting plaintiff's motion insofar as it sought summary judgment on his first and second causes of action. During oral argument of this appeal, plaintiff correctly conceded that Supreme Court's second ordering paragraph regarding the measure of damages should be vacated as premature. We modify the order accordingly and otherwise affirm.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

361

KA 17-00750

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DERRELL AUSTIN, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Erie County Court (Sheila A. DiTullio, J.), entered March 16, 2017. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Memorandum: Defendant appeals from an order determining that he is a level two risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*). Defendant failed to preserve for our review his contention that he was entitled to a downward departure to a level one risk (*see People v Nilsen*, 148 AD3d 1688, 1689 [4th Dept 2017], *lv denied* 29 NY3d 912 [2017]; *People v Brockington*, 94 AD3d 1433, 1434 [4th Dept 2012], *lv denied* 19 NY3d 809 [2012]). In any event, we conclude that "defendant failed to establish his entitlement to a downward departure from his presumptive risk level inasmuch as he failed to establish the existence of a mitigating factor by the requisite preponderance of the evidence" (*People v Phillips*, 162 AD3d 1752, 1753 [4th Dept 2018], *lv denied* 32 NY3d 908 [2018] [internal quotation marks omitted]; *see People v Puff*, 151 AD3d 1965, 1966 [4th Dept 2017], *lv denied* 30 NY3d 904 [2017]; *Nilsen*, 148 AD3d at 1689).

Defendant also failed to preserve for our review his contention that County Court erred in assessing 10 points under risk factor 8 (*see People v Kyle*, 64 AD3d 1177, 1178 [4th Dept 2009], *lv denied* 13 NY3d 709 [2009]). In any event, that contention lacks merit. Correction Law § 168-a provides that kidnapping offenses committed against minors are registerable sex offenses, and the Court of Appeals has held that provision constitutional (*see* § 168-a [1], [2] [a] [i]; *People v Knox*, 12 NY3d 60, 68-69 [2009], *cert denied* 558 US 1011 [2009]). Contrary to defendant's contention, risk factor 8 takes into

account a defendant's "age at the time of commission" of the relevant sex offense (Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 13 [2006]; *see People v Pietarniello*, 53 AD3d 475, 476-477 [2d Dept 2008], *lv denied* 11 NY3d 707 [2008]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

364

CAF 18-01916

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

IN THE MATTER OF MATTHEW J. KINNE,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

AMANDA L. BYRD, RESPONDENT-APPELLANT.

CONBOY, MCKAY, BACHMAN & KENDALL, LLP, WATERTOWN (LAWRENCE D. HASSELER OF COUNSEL), FOR RESPONDENT-APPELLANT.

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

MATTHEW A. GOETTEL, RODMAN, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Jefferson County (Peter A. Schwerzmann, A.J.), entered March 20, 2018 in a proceeding pursuant to Family Court Act article 6. The order, inter alia, awarded primary physical custody of the subject child to petitioner.

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

Memorandum: In this proceeding pursuant to Family Court Act article 6, respondent mother appeals from an order that, inter alia, modified the parties' existing custody arrangement by awarding petitioner father primary physical custody of the subject child. Contrary to the mother's contention, the father met his burden of establishing the requisite change of circumstances to warrant an inquiry into whether modification of the custody arrangement is in the best interests of the child (*see Matter of Greene v Kranock*, 160 AD3d 1476, 1476 [4th Dept 2018]). The testimony established that the mother failed to seek any dental treatment for the child until he was four years old and suffering from a severe toothache (*see Matter of Owens v Garner*, 63 AD3d 1585, 1586 [4th Dept 2009]; *see also Matter of Hurlburt v Behr*, 70 AD3d 1266, 1268 [3d Dept 2010], *lv dismissed* 15 NY3d 943 [2010]). When the child was eventually examined by a dentist in August 2016, it was determined that he was at high risk for tooth decay and needed tooth extractions, crowns, and "pulpal therapy." The mother nonetheless failed to seek any treatment for the child's pressing dental problems during the ensuing months. By the time the father became aware of the child's significant dental needs in May 2017, the child was suffering from a toothache that made it difficult for him to eat. We thus conclude that there was a change in circumstances based on the mother's demonstrated lack of concern for

the child's dental needs and her failure to timely obtain necessary dental treatment (*see Matter of Kvasny v Sherrick*, 155 AD3d 1366, 1366-1367 [3d Dept 2017]).

Contrary to the mother's further contention, we conclude that Family Court properly determined that it is in the best interests of the child to modify the parties' existing custody arrangement by awarding the father primary physical custody of the child. 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 Biernbaum v Burdick*, 162 AD3d 1664, 1665 [4th Dept 2018] [internal quotation marks omitted]; *see generally Fox v Fox*, 177 AD2d 209, 210 [4th Dept 1992]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

367

CA 18-01826

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

RENEE A. WAGGONER TOY AND MICHAEL A. TOY,
PLAINTIFFS-RESPONDENTS,

V ORDER

THE VALLEY COMMUNITY ASSOCIATION, INC.,
DEFENDANT-APPELLANT,
BUFFALO RIVER FEST PARK, LLC,
ET AL., DEFENDANTS.

GOLDBERG SEGALLA LLP, BUFFALO (CHRISTINA G. HOLDSWORTH OF COUNSEL), FOR DEFENDANT-APPELLANT.

ANDREWS, BERNSTEIN, MARANTO & NICOTRA, PLLC, BUFFALO (THOMAS P. KOTRYS OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (John L. Michalski, A.J.), entered March 27, 2018. The order, among other things, denied the motion of defendant Valley Community Association, Inc. for summary judgment.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on March 15, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

373

KA 17-00059

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

WILLIAM MCCULLOUGH, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered June 30, 2016. The judgment convicted defendant, upon a jury verdict, of burglary in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of burglary in the second degree (Penal Law § 140.25 [2]). Contrary to defendant's contention, County Court properly denied his request to charge criminal trespass in the second degree (§ 140.15 [1]) as a lesser included offense of burglary in the second degree. We conclude that " '[t]here is no reasonable view of the evidence that defendant entered the building without the intent to commit a crime therein' " (*People v Carter*, 111 AD3d 1324, 1324 [4th Dept 2013], *lv denied* 22 NY3d 1155 [2014]; *see People v Rickett*, 94 NY2d 929, 930 [2000]; *People v Ferguson*, 154 AD2d 706, 707 [2d Dept 1989], *lv denied* 76 NY2d 788 [1990], *cert denied* 498 US 947 [1990]) and that "the jurors would have had 'to resort to sheer speculation' to so conclude" (*People v Clarke*, 233 AD2d 831, 832 [4th Dept 1996], *lv denied* 89 NY2d 1010 [1997], *reconsideration denied* 90 NY2d 856 [1997]; *see People v Moore*, 60 AD3d 787, 787 [2d Dept 2009], *lv denied* 12 NY3d 918 [2009]).

Contrary to defendant's further contention, we conclude that he received effective assistance of counsel inasmuch as "the evidence, the law, and the circumstances of [this] particular case, viewed in totality and as of the time of the representation, reveal that [his] attorney provided meaningful representation" (*People v Baldi*, 54 NY2d 137, 147 [1981]).

Finally, contrary to defendant's additional contention, we

conclude that "[t]he prosecutor's remarks on summation were within the broad bounds of rhetorical comment permissible during summations and did not shift the burden of proof" (*People v Rivera*, 133 AD3d 1255, 1256 [4th Dept 2015], *lv denied* 27 NY3d 1154 [2016] [internal quotation marks omitted]). The challenged remarks were responsive to defense counsel's opening statement (*see People v Kennedy*, 69 AD3d 881, 883 [2d Dept 2010], *lv denied* 15 NY3d 752 [2010]; *People v Lopez*, 255 AD2d 147, 148 [1st Dept 1998], *lv denied* 92 NY2d 1034 [1998]), as well as fair comment on the evidence (*see Rivera*, 133 AD3d at 1256). Even assuming, arguendo, that the prosecutor made certain inappropriate remarks, we conclude that they were "not so pervasive or egregious as to deny defendant a fair trial" (*People v Young*, 153 AD3d 1618, 1620 [4th Dept 2017], *lv denied* 30 NY3d 1065 [2017], *reconsideration denied* 31 NY3d 1123 [2018]; *see Rivera*, 133 AD3d at 1257).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

376

CAF 17-01278

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

IN THE MATTER OF GERALD JOHNSON,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

NANCY JIMERSON, RESPONDENT-APPELLANT.

IN THE MATTER OF LUANA JIMERSON AND
DANIEL JIMERSON, PETITIONERS-RESPONDENTS,

V

GERALD JOHNSON, RESPONDENT-RESPONDENT.

IN THE MATTER OF LUANA JIMERSON AND
DANIEL JIMERSON, PETITIONERS-RESPONDENTS,

V

NANCY JIMERSON, RESPONDENT-APPELLANT.

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

JENNIFER PAULINO, BUFFALO, ATTORNEY FOR THE CHILD.

Appeal from an order of the Family Court, Erie County (Margaret A. Logan, R.), entered July 10, 2017 in proceedings pursuant to Family Court Act article 6. The order, inter alia, granted sole custody of the subject child to petitioner-respondent Gerald Johnson.

It is hereby ORDERED that said appeal from the order insofar as it denied the petitions of petitioners Luana Jimerson and Daniel Jimerson is unanimously dismissed and the order is affirmed without costs.

Memorandum: Respondent mother appeals from an order that, inter alia, granted the petition of petitioner-respondent father to modify a prior custody order by awarding him sole custody of the subject child and denied the petitions of petitioners Luana Jimerson and Daniel Jimerson (maternal grandparents) for custody of the child. Initially, we conclude that the mother waived her contention that the father failed to establish a change in circumstances sufficient to warrant an inquiry into the best interests of the child inasmuch as she consented at trial to custody of the child being transferred to the maternal

grandparents (*see generally Matter of Rice v Wightman*, 167 AD3d 1529, 1530 [4th Dept 2018]). In any event, the father made the requisite showing of a change in circumstances by establishing that the mother had an alcohol addiction, and that the child had been residing primarily with the maternal grandparents for approximately two years at the time of the trial in this matter (*see Matter of John P.R. v Tracy A.R.*, 13 AD3d 1125, 1125 [4th Dept 2004]).

Finally, we dismiss the appeal from the order insofar as it denied the maternal grandparents' petitions because the mother is not aggrieved by that part of the order (*see* CPLR 5511; *Matter of Davis v Delena*, 159 AD3d 900, 901 [2d Dept 2018]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

395.1

KA 18-01593

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

BENJAMIN M. WASSELL, DEFENDANT-APPELLANT.

JAMES OSTROWSKI, BUFFALO, FOR DEFENDANT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MATTHEW B. KELLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Chautauqua County Court (Michael L. D'Amico, A.J.), rendered May 30, 2014. The judgment convicted defendant, upon a jury verdict, of criminal possession of a weapon in the third degree and criminal sale of a firearm in the third degree (two counts).

It is hereby ORDERED that the judgment so appealed from is unanimously reversed on the law, the indictment is dismissed and the matter is remitted to Chautauqua County Court for proceedings pursuant to CPL 470.45.

Memorandum: Defendant appeals from a judgment convicting him upon a jury verdict of criminal possession of a weapon in the third degree (Penal Law § 265.02 [7]) and two counts of criminal sale of a firearm in the third degree (§ 265.11 [1], [2]). The charges arose from defendant's sale of a Del-Ton AR-15 semiautomatic rifle to an undercover investigator. Pursuant to Penal Law § 265.00 (22), the rifle is classified as an "assault weapon" inasmuch as it is able to accept a detachable magazine and has a telescoping stock, a conspicuous pistol grip, a bayonet mount, and a muzzle break. The Attorney General of the State of New York obtained an indictment against defendant and prosecuted the matter through trial and sentencing.

Defendant contends that the Attorney General lacked the authority to prosecute him for the crimes charged. As an initial matter, defendant's challenge to the Attorney General's authority presents a question of jurisdiction, which defendant was not required to preserve for our review (*see generally People v Glanda*, 5 AD3d 945, 947 [3d Dept 2004], *lv denied* 3 NY3d 640 [2004], *reconsideration denied* 3 NY3d 674 [2004], *cert denied* 543 US 1093 [2005]; *People v Codina*, 297 AD2d 539, 540-541 [1st Dept 2002], *lv dismissed* 98 NY2d 767 [2002], *reconsideration denied* 99 NY2d 556 [2002]; *People v Fox*, 253 AD2d 192,

193-194 [3d Dept 1999], *lv denied* 93 NY2d 1018 [1999]).

It is well settled that the Attorney General lacks general prosecutorial authority and has the power to prosecute only where specifically permitted by statute (*see Della Pietra v State of New York*, 71 NY2d 792, 796-797 [1988]). As relevant here, Executive Law § 63 (3) grants the Attorney General prosecutorial authority "[u]pon request of . . . the *head* of any . . . department, authority, division, or agency of the state" (emphasis added). Although the People assert that the Attorney General had authority to prosecute this matter under section 63 (3) based on a request made by the State Police, such a request would confer that authority only if made by the head of the division, i.e., the Superintendent of State Police (*see People v Gilmour*, 98 NY2d 126, 133 [2002]; *see generally People v Rogers*, 157 AD3d 1001, 1002 [3d Dept 2018], *lv denied* 30 NY3d 1119 [2018]; *People v Marketing & Adv. Servs. Ctr. Corp.*, 272 AD2d 982, 982 [4th Dept 2000], *lv denied* 95 NY2d 761 [2000]). Moreover, "the State bears the burden of showing that the [division or] agency head has asked for the prosecutorial participation of the Attorney General's office" (*Gilmour*, 98 NY2d at 135).

Here, the stipulated record on appeal does not establish that the Superintendent of State Police requested that the Attorney General prosecute this case. Indeed, there is no letter from the Superintendent in the record (*see id.* at 134; *cf. Rogers*, 157 AD3d at 1002; *Marketing & Adv. Servs. Ctr. Corp.*, 272 AD2d at 982), nor is there any other showing in the record that a request came from the Superintendent himself. Because the People failed to establish that the Attorney General had authority to secure the indictment and prosecute the case, we conclude that the judgment must be reversed and the indictment dismissed (*see Gilmour*, 98 NY2d at 135).

We note that the People, for the first time through post-argument submissions, have provided this Court with a letter from the Superintendent to the Attorney General requesting assistance in this case. Nevertheless, the existence of that letter was not raised in the People's brief, and thus the argument that the letter establishes the Attorney General's authority to prosecute is not properly before us (*see generally Kingsley v Price*, 163 AD3d 157, 164-165 [4th Dept 2018]).

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

398

TP 18-02319

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

IN THE MATTER OF RICHARD RIVERA, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered December 12, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

399

KA 16-02161

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SEAN TIMMONS, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (SARA A. GOLDFARB OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Thomas J. Miller, J.), rendered October 14, 2016. The judgment convicted defendant, upon his plea of guilty, of grand larceny in the fourth degree.

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

Memorandum: On appeal from a judgment convicting him upon his plea of guilty of grand larceny in the fourth degree (Penal Law § 155.30 [1]), defendant contends that his waiver of the right to appeal is invalid and that his enhanced sentence, imposed after he was arrested for robbery during his release pending sentencing, is unduly harsh and severe. Contrary to defendant's contention, the record establishes that he validly waived his right to appeal (*see People v Curtis*, 162 AD3d 1758, 1758 [4th Dept 2018], *lv denied* 32 NY3d 1003 [2018]; *People v Lefler*, 159 AD3d 1427, 1427 [4th Dept 2018], *lv denied* 31 NY3d 1118 [2018]). "[E]ven assuming, arguendo, that defendant's challenge to the severity of his sentence is not encompassed by his valid waiver of the right to appeal" (*People v Weatherbee*, 147 AD3d 1526, 1526 [4th Dept 2017], *lv denied* 29 NY3d 1038 [2017]; *see People v Watson*, 169 AD3d 1526, 1528 [4th Dept 2019]; *People v Huggins*, 45 AD3d 1380, 1380-1381 [4th Dept 2007], *lv denied* 9 NY3d 1006 [2007]), we perceive no basis in the record to exercise our power to modify the sentence as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [b]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

401

KA 16-01833

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEONDRA WALKER, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Walter W. Hafner, Jr., A.J.), rendered September 26, 2016. The judgment convicted defendant, upon her 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 her upon her plea of guilty of robbery in the third degree (Penal Law § 160.05). As defendant contends and the People correctly concede, the waiver of the right to appeal is invalid (*see People v Jackson*, 99 AD3d 1240, 1240-1241 [4th Dept 2012], *lv denied* 20 NY3d 987 [2012]). During the plea colloquy, County Court "conflated the appeal waiver with the rights automatically waived by the guilty plea" (*People v Martin*, 88 AD3d 473, 474 [1st Dept 2011], *affd* 19 NY3d 914 [2012]; *see People v Hawkins*, 94 AD3d 1439, 1439-1440 [4th Dept 2012], *lv denied* 19 NY3d 974 [2012]; *People v Tate*, 83 AD3d 1467, 1467 [4th Dept 2011]), and thus " 'the record fails to establish that defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty' " (*People v Sanborn*, 107 AD3d 1457, 1458 [4th Dept 2013]). We nevertheless conclude that the sentence is not unduly harsh or severe.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

405

KA 16-01367

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

LUIS GONZALEZ, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Onondaga County Court (Anthony F. Aloi, J.), rendered August 1, 2016. The judgment convicted defendant, upon his plea of guilty, of assault in the first degree.

It is hereby ORDERED that the case is held, the decision is reserved and the matter is remitted to Onondaga County Court for further proceedings in accordance with the following memorandum: On appeal from a judgment convicting him upon his plea of guilty of assault in the first degree (Penal Law § 120.10 [1]), defendant contends that County Court erred in failing to determine whether he should be afforded youthful offender status. We agree. Because defendant was convicted of an armed felony offense (*see* CPL 1.20 [41]), he is ineligible for a youthful offender adjudication unless the court determines that one of two mitigating factors is present (*see* CPL 720.10 [2] [a] [ii]; [3]). If the court, in its discretion, determines that neither of the CPL 720.10 (3) factors is present and states the reasons for that determination on the record, then no further determination is required (*see People v Middlebrooks*, 25 NY3d 516, 527 [2015]; *People v Dukes*, 147 AD3d 1534, 1535 [4th Dept 2017]). If, on the other hand, the court determines that one or more of those factors are present, and therefore defendant is an eligible youth, the court then must determine whether he is a youthful offender (*see Middlebrooks*, 25 NY3d at 527; *Dukes*, 147 AD3d at 1535). Here, the court failed to follow the procedure set forth in *Middlebrooks*. We therefore hold the case, reserve decision, and remit the matter to County Court "to make and state for the record 'a determination of whether defendant is a youthful offender' " (*People v Wilson*, 151 AD3d 1836, 1837 [4th Dept 2017], quoting *People v Rudolph*, 21 NY3d 497, 503 [2013]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

406

CAF 18-02026

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

IN THE MATTER OF HAYDEN B.S.,
RESPONDENT-RESPONDENT.

STEUBEN COUNTY ATTORNEY,
PETITIONER-APPELLANT.

MEMORANDUM AND ORDER

ALAN P. REED, COUNTY ATTORNEY, BATH (CRAIG A. PATRICK OF COUNSEL), FOR PETITIONER-APPELLANT.

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

Appeal from an order of the Family Court, Steuben County (Patrick F. McAllister, A.J.), entered September 26, 2018 in a proceeding pursuant to Family Court Act article 3. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously reversed on the law without costs, the petition is reinstated, and the matter is remitted to Family Court, Steuben County, for further proceedings in accordance with the following memorandum: In this juvenile delinquency proceeding pursuant to Family Court Act article 3, petitioner appeals from an order that dismissed the petition as defective because petitioner "did not make a showing to [Family Court] that a diligent attempt to notify [r]espondent's father of the appearance had been made." Preliminarily, we note that, contrary to the contention of respondent, petitioner is, for the purposes of this appeal, aggrieved by the dismissal of the petition notwithstanding that the petition was dismissed without prejudice (*see generally Kirby v Kenmore Mercy Hosp.*, 122 AD3d 1284, 1284-1285 [4th Dept 2014]; *Allen v General Elec. Co.*, 11 AD3d 993, 994 [4th Dept 2004]). A party is aggrieved when it requests relief and that relief is denied in whole or in part (*see Benedetti v Erie County Med. Ctr. Corp.*, 126 AD3d 1322, 1323 [4th Dept 2015]; *see generally* CPLR 5511).

We agree with petitioner that the court erred in dismissing as defective the petition. Article 3 of the Family Court Act provides in relevant part that, "[a]fter a petition has been filed, the court may cause a copy thereof and a summons to be issued, requiring the respondent personally and his parent or other person legally responsible for his care . . . to appear for the initial appearance" (§ 312.1 [1]). The purpose of that provision is to facilitate the requirements that "the respondent's parent or other person responsible for his or her care . . . be present at any hearing under [that]

article and at the initial appearance" (§ 341.2 [3]) and be notified of respondent's rights (*see* § 320.3). Here, the petition included an address for respondent's mother, the custodial parent, who was served and appeared in court, thus ensuring the presence of a parent or responsible adult to help the juvenile respondent understand the proceedings and safeguard his legal rights (*see generally* § 320.3; *Matter of Myacutta A.*, 75 AD2d 774, 774-775 [1st Dept 1980]).

Contrary to the court's determination, neither *Matter of Gault* (387 US 1, 31-34 [1967]) nor any of the other cases cited by the parties require a petitioner to provide notification of a juvenile delinquency proceeding to more than one parent or guardian (*see e.g. Matter of Nikim M.*, 144 AD3d 424, 424-425 [1st Dept 2016]; *Matter of Alexander B.*, 126 AD3d 533, 534 [1st Dept 2015]; *Matter of John L.*, 125 AD2d 472, 472-473 [2d Dept 1986]; *Matter of Tracy B.*, 80 AD2d 792, 792 [1st Dept 1981]; *Myacutta A.*, 75 AD2d at 774-775; *cf.* Family Ct Act § 1035 [d]; *Matter of Felicia C.*, 178 AD2d 530, 530 [2d Dept 1991]; *Matter of Lloyd P.*, 99 AD2d 812, 813 [2d Dept 1984]) or to show that it has made "diligent attempt[s]" to notify more than one parent or guardian of respondent's need to appear in Family Court. We therefore reverse the order, reinstate the petition, and remit the matter to Family Court for further proceedings on the petition.

We have reviewed respondent's alternative grounds for affirmance (*see generally Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 545-546 [1983]) and conclude that they lack merit.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

413

CA 18-01828

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

CARLA M. VELEZ, PLAINTIFF-RESPONDENT,

V ORDER

KEVIN A. MITCHELL, II, AND CROSSETT, INC.,
DEFENDANTS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

O'BRIEN & FORD, P.C., BUFFALO (CHRISTOPHER J. O'BRIEN OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Niagara County (Ralph A. Boniello, III, J.), entered September 28, 2018. The order granted the motion of plaintiff for partial summary judgment.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties on February 14, 2019, and filed in the Niagara County Clerk's Office on March 13, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

416

CA 18-00394

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

IN THE MATTER OF THE APPLICATION FOR DISCHARGE OF JODY T., CONSECUTIVE NO. 143847, 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.

SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA (CAROLINE L. LEVITT OF COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JENNIFER L. CLARK OF COUNSEL), FOR RESPONDENTS-RESPONDENTS.

Appeal from an amended order of the Supreme Court, Oneida County (Charles C. Merrell, J.), entered December 18, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The amended order, among other things, determined that petitioner is a sex offender who suffers from a mental abnormality.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

420

TP 18-02287

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

IN THE MATTER OF FRANK CRAWLEY, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Livingston County [Robert B. Wiggins, A.J.], entered December 6, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

421

TP 18-01488

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

IN THE MATTER OF JESSICA WROBLESKI, PETITIONER,

V ORDER

S. SQUIRES, SUPERINTENDENT, ALBION CORRECTIONAL FACILITY, RESPONDENT.

JESSICA WROBLESKI, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by judgment of the Supreme Court, Orleans County [Michael M. Mohun, A.J.], entered August 16, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various inmate rules.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

423

KA 17-00564

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

TERRY L. CHAMPION, DEFENDANT-APPELLANT.

ROSEMARIE RICHARDS, GILBERTSVILLE, FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Steuben County Court (Marianne Furfure, A.J.), rendered January 17, 2017. The judgment convicted defendant, upon a jury verdict, of driving while ability impaired by drugs.

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 driving while ability impaired by drugs (Vehicle and Traffic Law § 1192 [4]). Upon our independent review of the evidence in light of the elements of the crime as charged to the jury (*see People v Kancharla*, 23 NY3d 294, 302-303 [2014]; *People v Danielson*, 9 NY3d 342, 349 [2007]; *see generally People v Sanchez*, 32 NY3d 1021, 1023 [2018]), we conclude that an acquittal would have been unreasonable (*see People v President*, 59 Misc 3d 134[A], 2018 NY Slip Op 50488[U], *1-2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2018], *lv denied* 31 NY3d 1120 [2018]; *see also People v Whitehead*, 119 AD3d 1080, 1081 [3d Dept 2014], *lv denied* 24 NY3d 1048 [2014]). The verdict is thus not against the weight of the evidence (*see generally People v Wheeler*, 159 AD3d 1138, 1140 [3d Dept 2018], *lv denied* 31 NY3d 1123 [2018]).

We reject defendant's contention that, during the traffic stop preceding his arrest, the police were not authorized under *People v De Bour* (40 NY2d 210 [1976]) to ask him whether he possessed anything dangerous or illegal, and that County Court should have therefore suppressed his incriminatory response to that question. Defendant concedes that police had at least reasonable suspicion that he was driving while intoxicated and/or ability impaired before asking the question that prompted his inculpatory admission and, "given the existence of reasonable suspicion, the [police] necessarily possessed the lesser founded suspicion of criminality, giving them the

common-law right to inquire whether defendant had anything illegal" (*People v Cavanagh*, 97 AD3d 980, 981 [3d Dept 2012], *lv denied* 19 NY3d 1101 [2012]). Contrary to defendant's further contention, the court properly refused to suppress the results of his field sobriety and chemical blood tests on *Miranda* grounds given that "*Miranda* warnings are not required to allow the results of [such] tests into evidence" (*People v Berg*, 92 NY2d 701, 703 [1999]).

Defendant's remaining contention is not preserved for our review, and we decline to exercise our power to address it as a matter of discretion in the interest of justice (*see* CPL 470.15 [6] [a]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

424

KA 16-02338

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CUESHAN ALLEN, DEFENDANT-APPELLANT.

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

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (KENNETH H. TYLER, JR., OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered July 8, 2016. The judgment convicted defendant, upon his plea of guilty, of arson 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 arson in the third degree (Penal Law § 150.10 [1]). As defendant contends and the People correctly concede, defendant did not validly waive his right to appeal. Although the record establishes that he executed a written waiver of the right to appeal, Supreme Court did not engage defendant in any colloquy regarding the waiver to ensure that it was made knowingly, voluntarily, and intelligently (*see People v Testerman*, 149 AD3d 1559, 1559 [4th Dept 2017]; *People v Carno*, 101 AD3d 1663, 1664 [4th Dept 2012], *lv denied* 20 NY3d 1060 [2013]). Nevertheless, we conclude that the sentence is not unduly harsh or severe.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

426

KA 18-00854

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARCUS A. DUBLINO, DEFENDANT-APPELLANT.

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

CAROLINE A. WOJTASZEK, DISTRICT ATTORNEY, LOCKPORT (LAURA T. JORDAN OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Niagara County (Matthew J. Murphy, III, A.J.), rendered July 26, 2017. The judgment convicted defendant, upon a nonjury verdict, of harassment in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him upon a nonjury verdict of harassment in the second degree (Penal Law § 240.26 [1]). As defendant correctly concedes, he failed to preserve for our review his contention that the conviction is not supported by legally sufficient evidence (*see People v Gray*, 86 NY2d 10, 19 [1995]). In any event, we reject that contention. "A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person . . . [h]e or she strikes, shoves, kicks or otherwise subjects such other person to physical contact or attempts or threatens to do the same" (§ 240.26 [1]). "The crux of section 240.26 (1) is the element of physical contact: actual, attempted or threatened" (*People v Bartkow*, 96 NY2d 770, 772 [2001]). It is well established that a "defendant may be presumed to intend the natural and probable consequences of his [or her] actions . . . , and [that i]ntent may be inferred from the totality of conduct of the accused" (*People v Mollaie*, 81 AD3d 1448, 1449 [4th Dept 2011] [internal quotation marks omitted]). Here, the People presented evidence that, during an argument that began when the victim discovered a text message from another woman on defendant's phone, defendant grabbed the victim by the arm, shoved her to the ground, choked her, and threatened to kill her, and that defendant repeatedly threatened to physically harm and kill the victim after the initial physical altercation. In addition, the victim's testimony and photographs established that the victim suffered bruising, scratches, and marks on her arm. Viewing the evidence in the light most

favorable to the People (*see People v Contes*, 60 NY2d 620, 621 [1983]), we conclude that the evidence is legally sufficient to establish that defendant, acting "with intent to harass, annoy or alarm [the victim,] . . . subject[ed her] . . . to physical contact, or attempt[ed] or threaten[ed]" to do so (§ 240.26 [1]; *see Mollaie*, 81 AD3d at 1449; *see generally People v Bleakley*, 69 NY2d 490, 495 [1987]).

Contrary to defendant's further contention, viewing the evidence in light of the elements of the crime 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 People v Aikey*, 153 AD3d 1603, 1603-1604 [4th Dept 2017], *lv denied* 30 NY3d 1058 [2017]; *Mollaie*, 81 AD3d at 1449; *see generally Bleakley*, 69 NY2d at 495).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

428

CA 17-01725

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

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

V ORDER

MARK M., RESPONDENT-APPELLANT.

DANIELLE C. WILD, ROCHESTER, FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ALLYSON B. LEVINE OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from an order of the Supreme Court, Orleans County (James P. Punch, A.J.), entered June 21, 2017 in a proceeding pursuant to Mental Hygiene Law article 10. The order, among other things, committed respondent to a secure treatment facility.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

450

TP 18-02158

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

IN THE MATTER OF DONOVAN SINGLETON, PETITIONER,

V ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered November 19, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated an inmate rule.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

452

KA 16-01448

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

DEVROY SEWELL, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Supreme Court, Erie County (John L. Michalski, A.J.), rendered February 10, 2016. The judgment convicted defendant, upon his plea of guilty, of attempted robbery 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 plea of guilty of attempted robbery in the first degree (Penal Law §§ 110.00, 160.15 [1]). Contrary to defendant's contention, the record establishes that he knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Lopez*, 6 NY3d 248, 256 [2006]; *People v Wisniewski*, 128 AD3d 1481, 1481 [4th Dept 2015], *lv denied* 26 NY3d 937 [2015]), and that valid waiver encompasses his contention that the sentence imposed by Supreme Court is unduly harsh and severe (*see Lopez*, 6 NY3d at 255-256; *People v Lococo*, 92 NY2d 825, 827 [1998]).

We note that the certificate of conviction misspells defendant's name and contains an incorrect indictment number and must therefore be amended to include the proper spelling of defendant's name and the correct indictment number (*see People v Young*, 74 AD3d 1864, 1865 [4th Dept 2010], *lv denied* 15 NY3d 811 [2010]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

453

KA 16-00642

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PASCUAL CRUZ, DEFENDANT-APPELLANT.

THOMAS J. EOANNOU, BUFFALO, 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 (Christopher J. Burns, J.), rendered August 30, 2012. The judgment convicted defendant, upon a jury verdict, of attempted murder in the second degree and criminal use of a firearm 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 criminal use of a firearm in the first degree (§ 265.09 [1] [a]). Upon our independent review of the evidence in light of both the elements of the crimes as charged to the jury and the justification charge (*see generally People v Danielson*, 9 NY3d 342, 349 [2007]), we conclude that the verdict is not against the weight of the evidence (*see People v Gaillard*, 162 AD3d 1205, 1206-1207 [3d Dept 2018], *lv denied* 32 NY3d 1064 [2018]; *see generally People v Sanchez*, 32 NY3d 1021, 1023 [2018]; *People v Kancharla*, 23 NY3d 294, 302-303 [2014]). Contrary to defendant's further contention, Supreme Court properly denied his *Batson* applications (*see People v Linder*, — AD3d —, —, 2019 NY Slip Op 01965, *2-3 [4th Dept 2019]; *People v Burgess*, 128 AD3d 530, 532 [1st Dept 2015], *lv denied* 26 NY3d 1086 [2015]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

454

KA 16-01938

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JENNIFER SAGE, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Thomas P. Franczyk, J.), rendered February 25, 2016. The judgment convicted defendant, upon her plea of guilty, of vehicular manslaughter in the first degree.

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

Memorandum: Defendant appeals from a judgment convicting her, upon her plea of guilty, of vehicular manslaughter in the first degree (Penal Law § 125.13 [1]). Contrary to defendant's contention, her waiver of the right to appeal is valid (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]). County Court engaged defendant in "an adequate colloquy to ensure that the waiver of the right to appeal was a knowing and voluntary choice" (*People v Hicks*, 89 AD3d 1480, 1480 [4th Dept 2011], *lv denied* 18 NY3d 924 [2012] [internal quotation marks omitted]), and the record establishes that she "understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty" (*Lopez*, 6 NY3d at 256). The valid waiver of the right to appeal encompasses defendant's challenge to the severity of her sentence (*see id.*). We note, however, that the certificate of conviction incorrectly reflects that defendant was convicted of a violation of Penal Law § 125.31 (1), and therefore it should be amended to reflect that she was convicted under Penal Law § 125.13 (1) (*see People v Morrow*, 167 AD3d 1516, 1518 [4th Dept 2018], *lv denied* — NY3d — [Mar. 19, 2019]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

457

KA 18-00359

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

KEVIN J. DAVIS, II, DEFENDANT-APPELLANT.

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

JOHN J. FLYNN, DISTRICT ATTORNEY, BUFFALO (MATTHEW B. POWERS 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 Erie County Court (Michael F. Pietruszka, J.), entered February 7, 2018. The order denied the motion of defendant to vacate a judgment of conviction pursuant to CPL 440.10.

It is hereby ORDERED that the order so appealed from is unanimously affirmed for reasons stated in the decision at County Court.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

458

KA 18-01290

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

VICTOR DIAZ, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), dated March 27, 2018. The order determined that defendant is a level two risk pursuant to the Sex Offender Registration Act.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

462

CA 18-02281

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

JEFFREY R. SMITH AND NANCY O. SMITH,
PLAINTIFFS-APPELLANTS,

V MEMORANDUM AND ORDER

MARIANNE D.S. BAILEY, INDIVIDUALLY, AND
MARIANNE D.S. BAILEY AND CONNIE M. SMITH,
AS CO-TRUSTEES OF THE SMITH LIVING TRUST
DATED DECEMBER 8, 1999 (SITUS NEW YORK),
DEFENDANTS-RESPONDENTS.

MELVIN & MELVIN, PLLC, SYRACUSE (MICHAEL R. VACCARO OF COUNSEL), FOR PLAINTIFFS-APPELLANTS.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Oswego County (Norman W. Seiter, Jr., J.), entered August 3, 2018. The order, inter alia, denied in part the motion of plaintiffs for summary judgment.

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

Memorandum: Plaintiffs appeal from an order that, inter alia, "denied without prejudice" that part of their motion for summary judgment on their first cause of action. Contrary to plaintiffs' contention, we conclude that Supreme Court properly denied that part of the motion. Defendants, in opposing plaintiffs' motion, established that facts essential to justify opposition may exist but cannot now be stated (*see Beck v City of Niagara Falls*, 169 AD3d 1528, 1529 [4th Dept 2019]; *cf. Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired* [appeal No. 2], 118 AD3d 1454, 1456 [4th Dept 2014]) and that " 'facts essential to oppose the motion were in [plaintiffs'] exclusive knowledge and possession and could be obtained by discovery' " (*Wright v Shapiro*, 16 AD3d 1042, 1043 [4th Dept 2005]). "[I]n view of the limited discovery that has been conducted," we conclude that the motion was premature and thus was properly denied without prejudice (*Coniber v Center Point Transfer Sta., Inc.*, 82 AD3d 1629, 1629 [4th Dept 2011]; *see* CPLR 3212 [f]).

Based on our determination, we do not address plaintiffs'

remaining contentions.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

467

CA 17-02104

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

SHERI SCAVONE AND MARY MAGNAN, INDIVIDUALLY,
AND ON BEHALF OF N.S. AND R.S., NEE S.S.,
AS MINORS, PLAINTIFFS-RESPONDENTS,

V ORDER

CAMPBELL MEADOWS CONDOMINIUM ASSOCIATION, INC.,
TIMOTHY HUTCHERSON, COLLEEN HUNT, TRACIE CORNELL,
TERRY ELBERSON, PAULA STRANG,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 1.)

DEMARIE & SCHOENBORN, P.C., GETZVILLE (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered September 20, 2017. The order, among other things, granted plaintiffs' motion to dismiss defendants' counterclaim and certain affirmative defenses.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 12 and 15, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

468

CA 17-02105

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

SHERI SCAVONE AND MARY MAGNAN, INDIVIDUALLY,
AND ON BEHALF OF N.S. AND R.S., NEE S.S.,
AS MINORS, PLAINTIFFS-RESPONDENTS,

V ORDER

CAMPBELL MEADOWS CONDOMINIUM ASSOCIATION, INC.,
TIMOTHY HUTCHERSON, COLLEEN HUNT, TRACIE CORNELL,
TERRY ELBERSON, PAULA STRANG,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 2.)

DEMARIE & SCHOENBORN, P.C., GETZVILLE (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Timothy J. Walker, A.J.) entered November 27, 2017. The order denied defendants' motion for an order striking plaintiffs' complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 12 and 15, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

469

CA 19-00003

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

SHERI SCAVONE AND MARY MAGNAN, INDIVIDUALLY,
AND ON BEHALF OF N.S. AND R.S., NEE S.S.,
AS MINORS, PLAINTIFFS-RESPONDENTS,

V ORDER

CAMPBELL MEADOWS CONDOMINIUM ASSOCIATION, INC.,
TIMOTHY HUTCHERSON, COLLEEN HUNT, TRACIE CORNELL,
TERRY ELBERSON, PAULA STRANG,
DEFENDANTS-APPELLANTS,
ET AL., DEFENDANT.
(APPEAL NO. 3.)

DEMARIE & SCHOENBORN, P.C., GETZVILLE (JOSEPH DEMARIE OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK & NOWAK LLP, BUFFALO (RODGER P. DOYLE, JR., OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS.

Appeal from a judgment of the Supreme Court, Erie County (E. Jeannette Ogden, J.) dated September 26, 2018. The judgment, among other things, enjoined defendants from denying plaintiffs the placement, maintenance and/or use of a portable basketball hoop.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on February 12 and 15, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

476

KA 17-00727

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

JASON OCASIO, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Erie County Court (Kenneth F. Case, J.), rendered October 7, 2016. The judgment convicted defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

482

KA 18-00538

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

KEVIN D. HINES, DEFENDANT-APPELLANT.

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

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

Appeal from an order of the Monroe County Court (John L. DeMarco, J.), dated September 19, 2017. 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*.). Contrary to defendant's contention, County Court properly assessed 15 points under risk factor 11 for a history of drug or alcohol abuse inasmuch as " '[t]he statements in the case summary and presentence report with respect to defendant's substance abuse constitute reliable hearsay supporting the court's assessment of points under [that] risk factor' " (*People v Kunz*, 150 AD3d 1696, 1696 [4th Dept 2017], *lv denied* 29 NY3d 916 [2017]; *see People v Jackson*, 134 AD3d 1580, 1580 [4th Dept 2015]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

490

CA 18-02144

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

JOSEPH SCIORTINO, PLAINTIFF-APPELLANT,

V ORDER

PAULA GLEASON, ADAM GANGI AND AMELIA GANGI,
DEFENDANTS-RESPONDENTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (TIFFANY M. KOPACZ OF COUNSEL), FOR PLAINTIFF-APPELLANT.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (AARON M. ADOFF OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Mark J. Grisanti, A.J.), entered May 11, 2018. The order granted defendants' motion for summary judgment dismissing plaintiff's complaint.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

494

CA 18-02353

PRESENT: WHALEN, P.J., PERADOTTO, DEJOSEPH, CURRAN, AND WINSLOW, JJ.

CHANEL T. MCCARTHY, ESQ., AS SUCCESSOR TRUSTEE
OF THE WORTH L. FARRINGTON TRUST #2,
PLAINTIFF-APPELLANT,

V ORDER

EDWARD J. WILLIAMS, JR., AND BRIANNE WILLIAMS,
DEFENDANTS-RESPONDENTS.

PHILLIPS LYTLE LLP, BUFFALO (JOANNA J. CHEN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

PERSONIUS MELBER LLP, BUFFALO (SCOTT R. HAPEMAN OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Erie County (Catherine R. Nugent Panepinto, J.) entered June 8, 2018. The order, among other things, granted defendants' motion for summary judgment dismissing the amended complaint.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

499

KA 17-00932

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

MARK KULCZYK, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (KRISTIN M. PREVE OF COUNSEL), 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 (Michael F. Pietruszka, J.), rendered April 20, 2017. The judgment convicted defendant, upon his plea of guilty, of burglary 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 burglary in the third degree (Penal Law § 140.20). Contrary to defendant's contention, the record establishes that he knowingly, voluntarily and intelligently waived the right to appeal with respect to all aspects of his case, including his sentence, and that he was informed of the maximum sentence that County Court could impose (*see People v Lococo*, 92 NY2d 825, 827 [1998]; *cf. People v Maracle*, 19 NY3d 925, 928 [2012]). Consequently, that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see generally Lococo*, 92 NY2d at 827; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

501

KA 17-01147

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

SAMUEL A. GOODMAN, DEFENDANT-APPELLANT.

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

JAMES B. RITTS, DISTRICT ATTORNEY, CANANDAIGUA (V. CHRISTOPHER EAGGLESTON OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County (Craig J. Doran, J.), rendered March 8, 2017. The judgment convicted defendant, upon his plea of guilty, of robbery in the first degree, robbery in the second degree (two counts), unlawful imprisonment in the first degree, assault in the second degree, criminal possession of a weapon in the third degree, grand larceny in the third degree, grand larceny in the fourth degree, identity theft in the second degree and criminal possession of stolen property in the fourth degree.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

502

KA 17-01507

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

ROGER CORNELL, DEFENDANT-APPELLANT.

THE LEGAL AID BUREAU OF BUFFALO, INC., BUFFALO (ALAN WILLIAMS OF COUNSEL), FOR DEFENDANT-APPELLANT.

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

Appeal from a judgment of the Supreme Court, Erie County (Russell P. Buscaglia, A.J.), rendered July 24, 2017. The judgment convicted defendant, upon his plea of guilty, of attempted arson in the second degree.

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

Memorandum: Defendant appeals from a judgment convicting him, upon his plea of guilty, of attempted arson in the second degree (Penal Law §§ 110.00, 150.15). Contrary to defendant's contention, the sentence is not unduly harsh or severe. We note that the uniform sentence and commitment form incorrectly states that defendant was indicted on one count of arson in the second degree and a separate count of attempted arson in the second degree, and that he only pleaded guilty to the latter count. The form must therefore be amended to correctly state that defendant was indicted on a single count of arson in the second degree, and that he pleaded guilty to attempted arson in the second degree as a lesser included offense of the sole count of the indictment (*see generally People v Alexander*, 160 AD3d 1370, 1372 [4th Dept 2018], *lv denied* 32 NY3d 1001 [2018]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

506

KA 18-01284

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

JAMES BADGLEY, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (BRITTNEY N. CLARK OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (BRADLEY W. OASTLER OF COUNSEL), FOR RESPONDENT.

Appeal from an order of the Onondaga County Court (Matthew J. Doran, J.), entered April 4, 2018. 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 County Court abused its discretion in granting the People's request for an upward departure to a level three risk. "It is well settled that a court may grant an upward departure from a sex offender's presumptive risk level when the People establish, by clear and convincing evidence . . . , the existence of an aggravating . . . factor of a kind, or to a degree, that is otherwise not adequately taken into account by the [risk assessment] guidelines" (*People v Cardinale*, 160 AD3d 1490, 1490-1491 [4th Dept 2018] [internal quotation marks omitted]). Here, we conclude that the court properly granted the People's request for an upward departure based on clear and convincing evidence of certain aggravating factors, including, inter alia, the lengthy period of time in which defendant viewed child pornography (*see People v Eiss*, 158 AD3d 905, 906 [3d Dept 2018], *lv denied* 31 NY3d 907 [2018]; *People v Varin*, 158 AD3d 1311, 1311-1312 [4th Dept 2018], *lv denied* 31 NY3d 905 [2018]), the fact that he actively searched and traded child pornography with others online (*see People v Houck*, — AD3d —, —, 2019 NY Slip Op 02223, *2 [4th Dept 2019]), his "crossover between both molesting children and masturbating to child pornography" (*see generally People v Agarwal*, 96 AD3d 1450, 1451 [4th Dept 2012]), and his underlying mental health issues (*see People v McCollum*, 41 AD3d 1187, 1188 [4th Dept 2007], *lv*

denied 9 NY3d 807 [2007]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

518

CA 18-02280

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

STATE FARM FIRE & CASUALTY COMPANY, AS SUBROGEE OF CHRISTINE JONES, PLAINTIFF-RESPONDENT-APPELLANT,

V ORDER

SCOTT PENNOCK, DOING BUSINESS AS CHIM-CHIMNEE SWEEPS, DEFENDANT-APPELLANT-RESPONDENT.

KNYCH & WHRITENOUR, LLC, SYRACUSE (MATTHEW E. WHRITENOUR OF COUNSEL), FOR DEFENDANT-APPELLANT-RESPONDENT.

LAW OFFICES OF STUART D. MARKOWITZ, P.C., JERICHO (STUART D. MARKOWITZ OF COUNSEL), FOR PLAINTIFF-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Oswego County (James W. McCarthy, J.), entered May 31, 2018. The order denied the respective motions of the parties for summary judgment.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

528

KA 17-01806

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

SHAKUR BYRD, DEFENDANT-APPELLANT.

TIMOTHY P. DONAHER, PUBLIC DEFENDER, ROCHESTER (TIMOTHY S. DAVIS 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 (Alex R. Renzi, J.), entered October 10, 2017. The order determined that defendant is a level three risk pursuant to the Sex Offender Registration Act.

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

Memorandum: On appeal from an order determining that he is a level three risk pursuant to the Sex Offender Registration Act (Correction Law § 168 *et seq.*), defendant contends that Supreme Court failed to consider his request for a downward departure from his presumptive risk level, requiring remittal. We reject that contention. "[T]he court's findings of fact rendered in conjunction with its oral decision are clear, supported by the record and sufficiently detailed to permit intelligent appellate review" (*People v Young*, 108 AD3d 1232, 1233 [4th Dept 2013], *lv denied* 22 NY3d 853 [2013], *rearg denied* 22 NY3d 1036 [2013] [internal quotation marks omitted]; *cf. People v Filkins*, 107 AD3d 1069, 1070 [3d Dept 2013]). Here, defendant advanced a single ground in support of his request for a downward departure, and the court explicitly denied that request on the record. To the extent that defendant contends that the court erred in denying his request, we conclude that he "failed to meet his burden of demonstrating by a preponderance of the evidence how th[e] alleged mitigating factor would tend to reduce the risk of his own recidivism or danger to the community" (*People v Loughlin*, 145 AD3d 1426, 1428 [4th Dept 2016], *lv denied* 29 NY3d 906 [2017]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

540

CA 18-01774

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

BUILDING SCIENCE SERVICES, LLC,
PLAINTIFF-RESPONDENT,

V ORDER

THOMAS FOSS AND ACCESSIBILITY SERVICES/UNITED
SPINAL ASSOCIATION, INC., DEFENDANTS-APPELLANTS.

WEBSTER SZANYI LLP, BUFFALO (ANDREW O. MILLER OF COUNSEL), FOR DEFENDANTS-APPELLANTS.

KENNEY SHELTON LIPTAK NOWAK LLP, BUFFALO (JEFFREY A. CARLINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Frank A. Sedita, III, J.), entered March 23, 2018. The order, inter alia, granted the motion of plaintiff for leave to amend its complaint.

Now, upon reading and filing the stipulation of discontinuance signed by the attorneys for the parties on April 8, 2019,

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

541

CA 18-01736

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

RICHARD INFARINATO,
PLAINTIFF-APPELLANT-RESPONDENT,

V ORDER

ROCHESTER TELEPHONE CORPORATION, ET AL.,
DEFENDANTS,
AND FRONTIER TELEPHONE OF ROCHESTER, INC., AS
SUCCESSOR IN INTEREST TO ROCHESTER TELEPHONE
CORPORATION, DEFENDANT-RESPONDENT-APPELLANT.

CHENEY & BLAIR, LLP, GENEVA (DAVID D. BENZ OF COUNSEL), FOR PLAINTIFF-APPELLANT-RESPONDENT.

THE GLENNON LAW FIRM, P.C., ROCHESTER (CRAIG D. PETERSON OF COUNSEL), FOR DEFENDANT-RESPONDENT-APPELLANT.

Appeal and cross appeal from an order of the Supreme Court, Monroe County (Matthew A. Rosenbaum, J.), entered February 8, 2018. The order, among other things, denied the motion of plaintiff for partial summary judgment and denied the cross motion of defendant Frontier Telephone of Rochester, Inc., as successor in interest to Rochester Telephone Corporation, for summary judgment.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

546

KA 17-01330

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

CHERI BURTMAN, DEFENDANT-APPELLANT.

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

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

Appeal from a judgment of the Cattaraugus County Court (Ronald D. Ploetz, J.), rendered April 3, 2017. The judgment convicted defendant, upon her plea of guilty, of attempted criminal sale of a controlled substance in the fourth degree.

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

Memorandum: Defendant appeals from a judgment convicting her upon her plea of guilty of attempted criminal sale of a controlled substance in the fourth degree (Penal Law §§ 110.00, 220.34 [1]). Contrary to defendant's contention, the record establishes that she knowingly, voluntarily, and intelligently waived the right to appeal (*see generally People v Lopez*, 6 NY3d 248, 256 [2006]), and that valid waiver forecloses any challenge by defendant to the severity of the sentence (*see id.* at 255; *see generally People v Lococo*, 92 NY2d 825, 827 [1998]; *People v Hidalgo*, 91 NY2d 733, 737 [1998]).

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

553

CAF 17-01644

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

IN THE MATTER OF ALLEN H. MORIN,
PETITIONER-RESPONDENT,

V ORDER

JENNIFER M. MORIN, RESPONDENT-APPELLANT.

IN THE MATTER OF JENNIFER M. MORIN,
PETITIONER-APPELLANT,

V

ALLEN H. MORIN, RESPONDENT-RESPONDENT.

HEIDI S. CONNOLLY, SKANEATELES, FOR RESPONDENT-APPELLANT AND PETITIONER-APPELLANT.

WILLIAMS HEINL MOODY BUSCHMAN, P.C., AUBURN (MARIO J. GUTIERREZ OF COUNSEL), FOR PETITIONER-RESPONDENT AND RESPONDENT-RESPONDENT.

CYNTHIA B. BRENNAN, AUBURN, ATTORNEY FOR THE CHILDREN.

Appeal from an order of the Family Court, Cayuga County (Stephen D. Aronson, A.J.), entered September 5, 2017 in proceedings pursuant to Family Court Act article 6. The order, among other things, awarded sole custody of the subject children to petitioner-respondent Allen H. Morin.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

569

CA 18-01685

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

NAOMI J. ELLISON, AS ADMINISTRATOR OF THE ESTATE OF RICHARD ELLISON, DECEASED, PLAINTIFF-APPELLANT,

V ORDER

ROCHESTER GENERAL HEALTH SYSTEM, ALSO KNOWN AS ROCHESTER GENERAL HOSPITAL, THENDRIX H. ESTRELLA, M.D., DOUGLAS BOPP, ALAN LANGTON, BRIAN SHONITSKY, PATRICK GLENDE AND NICHOLAS TORRES, DEFENDANTS-RESPONDENTS.

ELLIOTT STERN CALABRESE, LLP, ROCHESTER (DAVID S. STERN OF COUNSEL), FOR PLAINTIFF-APPELLANT.

HARRIS BEACH PLLC, PITTSFORD (SVETLANA K. IVY OF COUNSEL), FOR DEFENDANTS-RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (William K. Taylor, J.), entered December 22, 2017. The order granted the motion of defendants for summary judgment and dismissed the amended complaint.

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

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

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

570

KA 17-00639

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

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V ORDER

CHARLES A. LEDGER, DEFENDANT-APPELLANT.

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

JOSEPH V. CARDONE, DISTRICT ATTORNEY, ALBION (SUSAN M. HOWARD OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Orleans County Court (James P. Punch, J.), rendered January 17, 2017. The judgment convicted defendant, upon his plea of guilty, of rape in the third degree (two counts).

Now, upon reading and filing the stipulation of discontinuance signed by defendant on January 29, 2019, and by the attorneys for the parties on February 12 and 14, 2019, and the letter signed by defendant's attorney on March 28, 2019,

It is hereby ORDERED that said appeal is unanimously dismissed upon stipulation.

Entered: April 26, 2019

Mark W. Bennett
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MATTER OF BARBARA G. TRAUB, AN ATTORNEY, RESIGNOR. -- Application to resign for non-disciplinary reasons accepted and name removed from roll of attorneys. PRESENT: SMITH, J.P., CARNI, DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 11, 2019.)

MOTION NO. (1116/99) KA 99-00063. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V SAMUEL MCNEAR, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (607/08) KA 05-01064. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JARROD A. BREWER, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., LINDLEY, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1451/08) KA 06-01104. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V REGGIE D. CASWELL, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., DEJOSEPH, NEMOYER, AND TROUTMAN, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (358/10) KA 07-01557. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CHAD T. HOLLOWAY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., PERADOTTO, LINDLEY, AND NEMOYER, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1088/11) KA 08-01131. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V JONATHAN J. MEEK, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CARNI, J.P., LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (97/12) KA 09-01250. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V CARL CAREY, DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, AND LINDLEY, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1012/17) KA 14-00582. -- THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, V ANTONIO ORTIZ, JR., DEFENDANT-APPELLANT. -- Motion for writ of error coram nobis denied. PRESENT: CENTRA, J.P., CARNI, LINDLEY, TROUTMAN, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1093/18) CA 18-00648. -- IN THE MATTER OF SIERRA CLUB, COMMITTEE TO PRESERVE THE FINGER LAKES BY AND IN THE NAME OF PETER GAMBA, ITS PRESIDENT, AND COALITION TO PROTECT NEW YORK, BY AND IN THE NAME OF KATHRYN BARTHOLOMEW, ITS TREASURER, PETITIONERS-APPELLANTS, V NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, BASIL SEGGOS, COMMISSIONER, GREENIDGE GENERATION, LLC, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION AND LOCKWOOD HILLS, LLC, RESPONDENTS-RESPONDENTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, PERADOTTO, DEJOSEPH, AND TROUTMAN, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1108/18) CA 18-00261. -- DAVID FLOWERS, PLAINTIFF-RESPONDENT, V HARBORCENTER DEVELOPMENT, LLC, AND M.A. MORTENSON COMPANY, DEFENDANTS-APPELLANTS. -- Motion for reargument or leave to appeal to the Court

of Appeals denied. PRESENT: CENTRA, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1208/18) CA 18-00260. -- DONNA POWELL, CLAIMANT-APPELLANT, V CENTRAL NEW YORK REGIONAL TRANSPORTATION AUTHORITY, RESPONDENT-RESPONDENT, ET AL., RESPONDENT. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., SMITH, CENTRA, NEMOYER, AND CURRAN, JJ. (Filed Apr. 26, 2019.)

MOTION NOS. (1300-1301/18) CAF 17-00796. -- IN THE MATTER OF JAIME D. AND JACOB D. OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JAMES N., RESPONDENT, AND JACQUELINA D., RESPONDENT-APPELLANT. (APPEAL NO. 1.) CAF 17-02042. -- IN THE MATTER OF JAIME D. AND JACOB D. OSWEGO COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER-RESPONDENT; JAMES N., RESPONDENT, AND JACQUELINA D., RESPONDENT-APPELLANT. (APPEAL NO. 2.) -- Motion for reargument denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NOS. (1302-1303/18) CA 18-00604. -- IN THE MATTER OF M. B., PETITIONER-APPELLANT, V NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL, AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 1.) CA 18-00605. -- IN THE MATTER OF MICHAEL BRUNETTO, PETITIONER-APPELLANT, V

NEW YORK STATE OFFICE OF MENTAL HEALTH, ERIE COUNTY MEDICAL CENTER, SUICIDE PREVENTION AND CRISIS SERVICES, INC., BRYLIN HOSPITAL AND LAKESHORE BEHAVIORAL HEALTH, RESPONDENTS-RESPONDENTS. (APPEAL NO. 2.) -- Motion for clarification denied. PRESENT: WHALEN, P.J., PERADOTTO, CARNI, NEMOYER, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1327/18) CA 18-01020. -- NANCY BURKHART, AS ADMINISTRATOR OF THE ESTATE OF BRIAN BURKHART, DECEASED, PLAINTIFF-APPELLANT, V PEOPLE, INC., ELISA SMITH, KATELYNNE COLEMAN, AMY MAZURKIEWICZ, DEFENDANTS-RESPONDENTS, LUCIAN VISONE, AND LAKEFRONT CONSTRUCTION, INC., DEFENDANTS. -- Motion for reargument or leave to appeal to the Court of Appeals denied. PRESENT: SMITH, J.P., LINDLEY, DEJOSEPH, NEMOYER, AND CURRAN, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (1461/18) CA 18-01324. -- DANIEL J. BECK AND DEBRA BECK, PLAINTIFFS-RESPONDENTS, V CITY OF NIAGARA FALLS, ET AL., DEFENDANTS, AND NIAGARA FALLS WATER BOARD, DEFENDANT-APPELLANT. -- Motion for reargument be and the same hereby is granted to the extent that, upon reargument, the memorandum and order entered February 8, 2019 (169 AD3d 1528) is amended by deleting the third sentence of the memorandum and substituting the following sentence: "Plaintiffs allege that the Niagara Falls Water Board (defendant) was responsible for the care and maintenance of the area on Simmons Avenue where the incident is alleged to have occurred." PRESENT: WHALEN, P.J., CENTRA, PERADOTTO, CURRAN, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)

MOTION NO. (17/19) CA 18-01465. -- IN THE MATTER OF JOHN LIPSITZ, PETITIONER-APPELLANT, V UBF FACULTY-STUDENT HOUSING CORP., RESPONDENT-RESPONDENT. -- Motion for leave to appeal to the Court of Appeals denied. PRESENT: WHALEN, P.J., CENTRA, NEMOYER, CURRAN, AND WINSLOW, JJ. (Filed Apr. 26, 2019.)